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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 21-18-A
AGENDA ITEM
For the meeting of March 25, 2021

March 16, 2021

MEMORANDUM

TO: The Commission

THROUGH: Alec Palmer *AP*
Staff Director

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

Dayna C. Brown *PCO for DCB*
Acting Assistant Staff Director
Audit Division

Debbie Chacona *DC*
Assistant Staff Director
Reports Analysis Division

Office of General Counsel
Neven F. Stipanovic *NFS*
Associate General Counsel
Policy Division

Lorenzo Holloway *LH*
Assistant General Counsel
Compliance Advice

Joshua Blume *jb*
Attorney

Danita C. Alberico *jb for DCA*
Attorney

Jennifer Waldman *JW*
Attorney

SUBJECT: Resubmission – Proposed Modifications to Program for Requesting Consideration of Legal Questions by the Commission (LRA 1129)

The Office of General Counsel and Office of Compliance are resubmitting their memorandum entitled “Proposed Modifications to Program for Requesting Consideration of Legal Questions by the Commission (LRA 1129).” This memorandum was circulated for a tally vote on February 5, 2021. At the request of the Office of General Counsel, the Chair directed that the document be placed on the Commission’s open meeting agenda for March 11, 2021. However, the memorandum in footnote 4 contains references to the names of two committees that had submitted requests for consideration of legal questions for which information is not listed on the Commission’s public website. We therefore determined that it would be appropriate to redact these references to the names of the committees in footnote 4.

Accordingly, on March 10, 2021, we withdrew the memorandum from circulation in order to make this change.

We are now resubmitting the memorandum, with the references to the committee names in footnote 4 redacted, for placement on the Commission's next available open meeting agenda. Apart from this change, the memorandum is exactly as it was before.

Attachment

Proposed Modifications to Program for Requesting Consideration of Legal Questions by the Commission (LRA 1129) (Feb. 5, 2021) (redacted).



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 5, 2021

MEMORANDUM

TO: The Commission

THROUGH: Alec Palmer *AP*
Staff Director

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

Dayna C. Brown *DCB*
Acting Assistant Staff Director
Audit Division

Debbie Chacona *DC*
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Danita C. Alberico *DA*
Attorney

Jennifer Waldman *JW*
Attorney

SUBJECT: Proposed Modifications to Program for Requesting Consideration of Legal Questions by the Commission — LRA 1129

I. INTRODUCTION

On June 30, 2020, we submitted an annual report to the Commission as required by its policy on considering legal questions in the report review process and audit process. Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 84 Fed. Reg. 36602 (July 29, 2019) (“Program”). In the annual report, we informed you that we expected to propose several amendments to the Program to: (1) require requestors to submit their requests by email; (2) clarify that OGC may determine whether a

submission qualifies as a “request” and reject those that do not; (3) allow OGC to pursue informal resolution of a request immediately after it is received and before the Commission, by a vote of at least two Commissioners, must decide whether to consider the request; and (4) specify how the Program would operate if the Commission becomes unable to consider a request that it previously agreed to consider due to circumstances beyond its control.

On further consideration, we have decided to recommend that the Commission adopt only proposals (3) and (4), above.¹ Regarding proposal (1), the vast majority of committees already have been filing their submissions electronically and we thus do not believe a requirement to file by email is necessary. We also determined that proposal (2) is not necessary based on our recent experience in handling two requests that did not meet the Program criteria.²

II. THE FIVE BUSINESS DAY INFORMAL RESOLUTION PERIOD SHOULD BEGIN IMMEDIATELY AFTER A REQUEST IS RECEIVED.

We recommend that the Commission amend the Program to allow the five business day informal resolution period to begin immediately after a request is received.³ Currently, two or more Commissioners must agree to consider a request before OGC may try to resolve it informally. *See* Program, 84 Fed. Reg. 36602 (July 29, 2019).

The Commission originally included the five business day informal resolution period in the Program primarily to reduce the number of requests that the Commission would need to resolve formally, thereby promoting a more efficient use of its resources. *See* Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 81 Fed. Reg. 29861 (May 13, 2016) (“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. . . This informal resolution process would allow for a more efficient use of Commission resources.”). OGC successfully resolved two requests under this informal program, one presented by Kasich

¹ In addition to these substantive changes, we have made some technical and conforming edits to language in the Program in order to simplify sentences or eliminate redundancy. We also rearranged language without making either substantive or technical changes to it in order to improve the document’s readability.

² In one case, a committee sought Commission review of the Commission’s original vote to authorize an audit under 52 U.S.C. § 30111(b). In another, a committee asked the Commission to determine whether the committee would be properly named as a respondent and subject to a monetary penalty in a prospective enforcement action that might arise out of the conduct of an ongoing audit. In both instances, OGC, without objection from any Commissioner, notified the committees that their submissions would not be considered because they did not qualify as requests under the Program.

³ Proper requests must be submitted within 15 business days of a Commission determination to require a committee to take corrective action, and must raise one or more questions of law dealing with material issues connected with the corrective action that is requested by the Reports Analysis Division or the Audit Division. *See* Program, 84 Fed. Reg. 36602 (July 29, 2019). If we find that the submission is not a proper request, we will apprise the Commission of this conclusion informally and dismiss the submission if no Commissioners object.

for America and another by Kelly for Congress. *See* Memorandum from Patricia C. Orrock and Lisa Stevenson to Commission on Annual Review of Program for Requesting Consideration of Legal Questions by the Commission (June 20, 2017), at 2-3; Memorandum from Patricia C. Orrock and Erin Chlopak to Commission on Annual Review of Program for Requesting Consideration of Legal Questions by the Commission (June 27, 2018), at 2.⁴ In our judgment, the informal resolution process has proven to be successful, and we accordingly recommend that the Commission expand it by allowing OGC to pursue informal resolution earlier in the process, before the Commission decides whether to consider a request. Doing so would be more efficient because it would allow matters ripe for the informal resolution process to be resolved before Commissioners would need to engage with the issue, thus conserving Commission time and resources.

III. THE COMMISSION SHOULD PROVIDE FOR THE POSSIBILITY THAT THE OCCURRENCE OF AN EVENT BEYOND ITS CONTROL WILL IMPAIR ITS CAPACITY TO CONSIDER AND RESOLVE A REQUEST WITHIN THE 60 BUSINESS DAY PERIOD AFFORDED IT UNDER THE POLICY.

Under the current Program, once a request has been initiated — *i.e.*, two or more Commissioners have agreed to consider it — the Commission has 60 business days from the date the request was filed to resolve the issue or furnish guidance on how to proceed. If the Commission fails to do so with an affirmative vote of at least four Commissioners, the Office of Compliance (“OC”) may proceed with the matter. Program, 84 Fed. Reg. at 36603.

The Program currently does not provide for the possibility that an event or circumstance beyond the Commission’s control, such as a loss of a quorum or a government shutdown, may affect the Commission’s consideration of an initiated request. We do not believe the intent of the Program was to allow OC to proceed with the matter if the Commission is unable to act on the request within 60 business days due to such extraordinary circumstances. Consequently, we propose to amend the Program to provide that the 60 business day period will be suspended or tolled for the duration of the disabling event.

A related issue concerns the number of days the 60-day period should be extended once the disabling event ends. We propose that once the disabling event ends, the Commission may resume deliberations with the remaining number of days of the 60-day period that the Commission had when the emergency occurred. For example, if the disabling event began on the 25th day of the 60-day period, then the Commission would have the remaining 35 days of the 60-day period to deliberate once the event ends. Because the circumstances of individual cases may from time to time require a departure from this default rule, however, the Commission may

⁴ OGC also informally resolved two requests, presented by the [REDACTED] and the [REDACTED], between July 1, 2014 and June 30, 2015 — before the Commission formalized and announced the informal resolution process. *See* Memorandum from Patricia C. Orrock and Lisa J. Stevenson to Commission on Annual Review of Program for Requesting Legal Consideration of Legal Questions by the Commission (June 24, 2015), at 2-3.

exercise its discretion to hold the matter over for up to an additional 20 business days if it considers such action necessary.⁵

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

⁵ The Program currently provides that after the 60 business day period has elapsed, the requestor will be given a copy of OGC's recommendation memorandum and a copy of the Commission's vote certification or a cover page stating the disposition of the memorandum if no vote certification exists. Program, at 36603. If the Commission chooses to hold a request over for up to an additional 20 business days beyond the 60 business day period after a disabling event ends, however, then the time at which the Commission must provide a copy of OGC's memorandum and a vote certification to the requestor must be correspondingly extended. We therefore also propose a conforming change to this effect in the Program.

1 **FEDERAL ELECTION COMMISSION**

2 **[Notice 2021-XX]**

3 **Policy Statement Regarding a Program for Requesting Consideration of Legal Questions**
4 **by the Commission**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Policy Statement.

7 **SUMMARY:** The Federal Election Commission adopted a program on August 1, 2011,
8 providing for a means by which persons and entities may have a legal question considered by the
9 Commission earlier in both the report review process and the audit process. On October 23,
10 2013, the Commission revised this policy to provide an alternative electronic means to file a
11 request with the Commission. On May 13, 2016, the Commission further revised this policy to
12 clarify that requests for consideration be sent to the Commission Secretary to ensure that such
13 requests are processed in timely manner, and to build five business days into the program to
14 allow time for informal resolution of matters. On July 29, 2019, the Commission republished
15 this policy to reflect the Commission's new mailing address, but did not otherwise revise it. The
16 Commission now makes two modifications to the existing policy: (1) the five business day
17 informal resolution period will begin immediately after the Commission's receipt of a request
18 (previously, the informal resolution period would begin only after the Commission decided by a
19 vote of at least two Commissioners to consider the request); and (2) the 60 business day period
20 for considering a request will be suspended in the event the Commission is unable to act due to a
21 lack of a quorum, government shutdown, or other disabling event beyond its control. Once the
22 disabling event ends, the matter will be scheduled for the next Commission meeting agenda

1 following the date on which the disabling event ends, unless the Commission in its discretion
2 decides to do otherwise.

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

4 **FOR FURTHER INFORMATION CONTACT:** Lorenzo Holloway, Assistant General
5 Counsel, or Joshua Blume, Attorney, 1050 First Street NE, Washington, DC 20463, (202) 694-
6 1650 or (800) 424-9530.

7 **SUPPLEMENTARY INFORMATION:** On August 1, 2011, the Commission adopted a
8 program providing for a means by which persons and entities may have a legal question
9 considered by the Commission earlier in both the report review process and the audit process.
10 Specifically, when the Office of Compliance (“OC”), which includes the Reports Analysis
11 Division and the Audit Division, requests that a person or entity take corrective action during the
12 report review or audit process, if the person or entity disagrees with the request based upon a
13 material dispute on a question of law, the person or entity may seek Commission consideration
14 of the issue pursuant to this procedure. The Commission revised the program on October 23,
15 2013 to encourage requests to be filed electronically by email. *See* Policy Statement Regarding a
16 Program for Requesting Consideration of Legal Questions by the Commission, 78 Fed. Reg.
17 63203 (Oct. 23, 2013). The Commission further modified the program in two respects on May
18 13, 2016: (1) by requiring that requests be submitted to the Commission Secretary, and (2) by
19 allowing five business days for informal resolution of requests. *See* Policy Statement Regarding
20 a Program for Requesting Consideration of Legal Questions by the Commission, 81 Fed. Reg.
21 29861 (May 13, 2016). The Commission deemed that allowing the Office of the General
22 Counsel (“OGC”) and OC an amount of time dedicated exclusively to pursuing informal
23 resolution would promote a more efficient use of Commission resources. *Id.* Finally, on July 29,

1 2019, the Commission updated its current mailing address without making any substantive
2 changes. *See* Policy Statement Regarding a Program for Requesting Consideration of Legal
3 Questions by the Commission, 84 Fed. Reg. 36602 (July 29, 2019). The Commission now
4 modifies the program in two ways that build upon the previous changes, further enhancing the
5 timely administration of the program and conserving Commission resources.

6 A. Informal Resolution Period

7 Previously, once a requestor had submitted a request, the Commission Secretary would
8 notify the Commission of receipt and the Commission would then determine whether to consider
9 the request. The Commission would consider the request if two or more Commissioners agreed
10 to consider it. Then, OGC had five business days to pursue an informal resolution. If informal
11 resolution was unsuccessful, OGC would prepare a recommendation memorandum for the
12 Commission's consideration.

13 Under the current modification of the Program, OGC may pursue informal resolution of a
14 request over a period of five business days beginning immediately after the Commission receives
15 the request, provided that the request meets the threshold requirements for being a proper request
16 under the Program.⁶ Since 2016, when the informal resolution period was first introduced, OGC
17 has resolved a number of matters informally, allowing the Commission to conserve its resources
18 for the more intractable legal issues with which it was presented. Given the success of the
19 informal resolution program, the Commission has decided to expand it by allowing OGC to
20 pursue informal resolution earlier in the process. Doing so would allow OGC to resolve matters

⁶ A request must be filed within 15 business days of the Reports Analysis Division's or the Audit Division's issuance of a "determination" and the request must not raise issues of pure fact, but rather must raise one or more issues of law, in which: "(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." *See, infra*. A submission that fails to meet these criteria will not be considered.

1 ripe for informal resolution before the Commission would need to decide whether to consider the
2 matter, which would further promote the efficient use of Commission resources.

3 B. Suspension of the 60-day Consideration Period due to Disabling Events Beyond its
4 Control

5 Once it agrees to consider a request, the Commission has 60 business days from the date
6 of filing either to resolve the request or to provide further guidance. If the Commission fails to
7 do so, OC may proceed on the matter. Previously, the Program did not address situations in
8 which the Commission was unable to consider the matter due to disabling events beyond its
9 control, such as a government shutdown that results in a furlough of Commission employees, the
10 loss of a quorum, a natural disaster, or other emergency. The Commission has experienced both
11 a government shutdown and a loss of a quorum in recent years, necessitating further guidance on
12 how the Commission would handle requests in such circumstances. Under the current Program,
13 the 60 business day period will be suspended if the Commission is unable to act on a request due
14 to a government shutdown, loss of a quorum, or other disabling event. OC will not proceed on
15 the matter during the period the Commission is unable to act. Once the disabling event ends, the
16 Commission will have a number of business days equal to the number of business days it had
17 remaining to consider the matter when the disabling event began. Because the circumstances of
18 each disabling event will vary, the Commission may elect to hold the matter over for up to an
19 additional 20 business days if it deems such action necessary.

20 The policy statement regarding this program is reprinted in its entirety, below, with
21 altered language based upon the two changes discussed above. The changed language appears in
22 the third, fourth and fifth paragraphs of the “Procedures” section, below.

23

1 **I. Procedures**

2 Within 15 business days of a determination by the Reports Analysis Division or Audit
3 Division that a person or entity remains obligated to take corrective action to resolve an issue
4 that has arisen during the report review or audit process, the person or entity may seek
5 Commission consideration if a material dispute on a question of law exists with respect to the
6 recommended corrective action.⁷ A “determination” for purposes of triggering the 15 business
7 days is either: (1) Notification to the person or entity of legal guidance prepared by the Office of
8 General Counsel (“OGC”) at the request of the Reports Analysis Division recommending the
9 corrective action; or (2) the end of the Committee’s Audit Exit Conference response period.

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

⁷ Many disputes involving corrective action requests hinge on questions of fact rather than questions of law, and thus are not appropriate for this procedure.

1 All requests, including any extension requests, must be received by the Commission
2 within 15 business days of the determination of corrective action. Any request for an extension
3 of time to file will be considered on a case by case basis and will only be granted if good cause is
4 shown, and the Commission approves the extension request by four affirmative votes within five
5 business days of receipt of the extension request. All requests must be directed to the attention
6 of the Commission Secretary. Requestors ~~may~~ are encouraged to submit requests electronically
7 via email to ensure timely receipt and consideration. If a Requestor chooses to submit a request
8 electronically via email, the email must be sent to LegalRequestProgram@fec.gov. Requestors
9 ~~are encouraged to submit requests electronically to ensure timely receipt and consideration.~~
10 Alternatively, requests may be submitted in paper form. Paper requests must be sent to the
11 Federal Election Commission, Attn.: Commission Secretary, 1050 First Street, NE, Washington,
12 DC, 20463. Requestors are advised that if they submit a request, electronically or otherwise, to a
13 different address than designated in this Policy, the processing of the request may be delayed.
14 Upon receipt of a request, the Commission Secretary shall forward a copy of any request to each
15 Commissioner, the General Counsel, and the Staff Director.

16 ~~Any request for an extension of time to file will be considered on a case by case basis~~
17 ~~and will only be granted if good cause is shown, and the Commission approves the extension~~
18 ~~request by four affirmative votes within five business days of receipt of the extension request.~~
19 Within five business days of receiving a qualified request, OGC may attempt to resolve the
20 matter informally. If successful, OC and OGC will notify the Commission that the matter has
21 been resolved and notify the requestor in writing of the notification to the Commission. Informal
22 resolution of a matter does not prevent the requestor from filing another request under this
23 program. If unsuccessful, or if OGC declines to pursue informal resolution, OC and OGC will

1 notify the Commission that the informal resolution period has concluded. For the Commission
2 to consider the request, two or more Commissioners must agree to do so within five business
3 days of being notified that the informal resolution period has concluded. If two or more
4 Commissioners agree to consider the request, OGC will make a recommendation on how to
5 resolve the legal issues raised in the request. OGC will circulate the recommendation for a
6 Commission vote within 15 business days from the date upon which the second Commissioner
7 agrees to consider the request. ~~Within five business days of notification to the Commissioners~~
8 ~~of a request for consideration of a legal question, if two or more Commissioners agree that the~~
9 ~~Commission should consider the request, OGC may, at that time, attempt to resolve the matter~~
10 ~~informally over the course of five business days. Within 15 business days from the date upon~~
11 ~~which OC and OGC conclude that the matter cannot be resolved informally, or from the~~
12 ~~expiration of the five business day period, whichever occurs first, OGC will prepare and circulate~~
13 ~~a recommendation in accordance with all applicable Commission Directives. If the matter is~~
14 ~~resolved informally, OC and OGC will notify the Commission that the matter has been resolved,~~
15 ~~and notify the Requestor in writing of the notification to the Commission. Informal resolution of~~
16 ~~a matter does not prevent the Requestor from seeking Commission consideration, in an~~
17 ~~additional or subsequent determination, subject to the requirements of this program.~~

18 After the recommendation is circulated for a Commission vote, in the event of an
19 objection, the matter shall be automatically placed on the next meeting agenda consistent with
20 the Sunshine Act, 5 U.S.C. 552b(g), and applicable Commission regulations, 11 CFR part 2.

21 However, if within 60 business days of the filing of a request for consideration, the Commission
22 has not resolved the legal issue or provided guidance on how to proceed with the matter by the
23 affirmative vote of four or more Commissioners, the OC may proceed with the matter. However,

1 if the Commission is unable to act at any point after agreeing to consider the matter due to the
2 occurrence of a disabling event beyond its control, then the 60 business day period will be
3 suspended as of the date upon which the Commission became unable to act. Examples of such
4 disabling events include a government shutdown, loss of a Commission quorum, a natural
5 disaster, or other emergency. Once the disabling event ends, the Commission will have a
6 number of business days to continue deliberating equal to the number of business days of the 60
7 business day period that remained when the disabling event began. The Commission may hold
8 the matter over for up to 20 additional business days from the date on which the disabling event
9 ends to resolve the matter if it deems such action necessary. After the 60 business days, or the
10 extended period of time the Commission has taken due to the occurrence of a disabling event
11 beyond the Commission's control, as described above, has elapsed, any requestor will be
12 provided a copy of OGC's recommendation memorandum and an accompanying vote
13 certification, or if no such certification exists, a cover page stating the disposition of the
14 memoranda. Confidential information will be redacted as necessary.

15 After the request review process has concluded, or a Final Audit Report has been
16 approved, a copy of the request for consideration, as well as the recommendation memorandum
17 and accompanying vote certification or disposition memorandum, will be placed with the
18 Committee's filings or audit documents on the Commission's website within 30 days. These
19 materials will also be placed on the Commission's webpage dedicated to legal questions
20 considered by the Commission under this program.

21 This procedure is not intended to circumvent or supplant the Advisory Opinion process
22 provided under 52 U.S.C. 30108 and 11 CFR part 112. Accordingly, any legal issues that
23 qualify for consideration under the Advisory Opinion process are not appropriate for

1 consideration under this new procedure. Additionally, this policy statement does not supersede
2 the procedures regarding eligibility and entitlement to public funds set forth in Commission
3 Directive 24 and 11 CFR 9005.1, 9033.4, 9033.6 or 9033.10.

4 **II. Annual Review**

5 No later than July 1 of each year, the OC and OGC shall jointly prepare and distribute to
6 the Commission a written report containing a summary of the requests made under the program
7 over the previous year and a summary of the Commission's consideration of those requests and
8 any action taken thereon. The annual report shall also include the Chief Compliance Officer's
9 and the General Counsel's assessment of whether, and to what extent, the program has promoted
10 efficiency and fairness in both the Commission's report review process and in the audit process,
11 as well as their recommendations, if any, for modifications to the program.

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

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On behalf of the Commission,

Shana M. Broussard,
Chair,
Federal Election Commission.

DATED: _____
BILLING CODE: 6715-01-P