



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

June 21, 2023

The Honorable Dara Lindenbaum
Chair
Federal Election Commission
1050 First Street, N.E.
Washington, DC 20463

**By electronic mail (AO@fec.gov; CommissionerLindenbaum@fec.gov;
CommissionerCooksey@fec.gov; CommissionerWeintraub@fec.gov; CommissionerTrainor@fec.gov;
CommissionerBroussard@fec.gov; CommissionerDickerson@fec.gov)**

Re: Comments Regarding Agenda Document No. 23-13-A: Agency Procedure Regarding Litigation
Brought Pursuant to 52 U.S.C. § 30109(a)(8)

Dear Chair Lindenbaum:

Citizens for Responsibility and Ethics in Washington (“CREW”) submits the following comment in regard to Agenda Document No. 23-13-A: Agency Procedure Regarding Litigation Brought Pursuant to 52 U.S.C. § 30109(a)(8) (the “Proposal”). CREW submits this comment to inform the FEC about the implications of its Proposal and to request an amendment to ensure the Proposal adequately addresses the “factual vacuum” created by the agency’s choice not to defend a lawsuit.

The Proposal seeks to alter the Commission’s practice in the event there are not four votes to defend a lawsuit brought under 52 U.S.C. § 30109(a)(8), which support is needed for the FEC to defend such a suit pursuant to 52 U.S.C. § 30107(a)(6). The Proposal would require the FEC to publish on its website the certification of the vote to defend regardless of outcome, inform the relevant court and other officials of the decision not to defend the suit, and to provide to the court “under seal... each vote certification, subject to appropriate redactions, concerning the underlying administrative complaint giving rise to the lawsuit.” The Proposal states that it seeks to ensure courts are properly informed of agency proceedings notwithstanding the agency’s default, and notwithstanding the fact the agency is precluded from filing any “responsive pleading” or otherwise avoiding default judgment.

CREW supports informing the public, the courts, and the parties in litigation of relevant materials and agency proceedings. CREW notes, of course, that under the terms of the FECA, any respondent concerned about the lack of disclosure is free to consent to lifting the confidentiality provisions of the FECA and publishing the investigation, including any unreleased vote certifications. 52 U.S.C. § 30109(a)(4)(B) (“No action by the Commission ... in connection with any conciliation ... may be made public ... *without the written consent of the respondent and the Commission.*” (emphasis added)); *id.* at § 30109(a)(12)(A) (“Any notification or investigation ... shall not be made public ... *without the written consent of the person receiving such notification or the person with response to whom such investigation is made.*” (emphasis added)). Accordingly, the simplest solution is to encourage

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respondents to consent to waiving the confidentiality provisions in the event of a suit, and to understand the existence of any “factual vacuum” is thus a creation of the respondents’ choosing.

Nevertheless, if the Commission believes a change in practice is still required, CREW believes the Proposal must be amended to be consistent with the Rules of United States District Court for the District of Columbia and to ensure due process is afforded all parties, including complainants.

First, CREW supports the publication of the FEC’s votes on whether to defend lawsuits against the agency. Where, for example, the FEC defends a frivolous legal position, publication of such votes would help ensure public accountability for the commissioners who choose to waste agency and court resources on a position that, for example, “blinks reality.” *CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016).

Second, with respect to filing vote certifications with the court under seal, the Commission is no doubt aware that the Rules of the United States District Court in the District of Columbia (in which relevant lawsuits will be brought, *see* 52 U.S.C. § 30109(a)(8)(A)) prohibit the filing of sealed materials “[a]bsent statutory authority” except by “order from the Court,” D.D.C. L. Civ. R. 5.1(h). The Proposal would contravene that rule, particularly where the FEC is not appearing as a party and thus may not request an order from the court permitting material to be filed under seal. Further, the confidentiality of documents is a matter of negotiation among the parties and typically handled through, and limited by, a joint motion for a protective order. Where the agency has defaulted, however, there is no opportunity to negotiate such a protective order.

To bring the proposal into accord with the Rules of Court, CREW suggests the Proposal be amended to permit FEC counsel to produce to the plaintiff in the action a copy of the vote certifications, with the production in those matters that have not yet been closed by the consent of four commissioners subject to the terms of a confidentiality agreement agreeable to the parties that would permit the FEC to comply with the terms of 52 U.S.C. § 30109(a)(4)(B) and 12(A). This would have the further benefit of clarifying an ambiguity in the Proposal which, as written, appears to contemplate an *ex parte* communication with the court. The plaintiff could then apprise the court of any relevant materials it received in accordance with ethical duties of candor.

Nevertheless, while this minimal production would shed some light on the FEC’s actions, it would still risk producing a “factual vacuum” that is likely to be abused through, for example, false representations to courts that a failed reason to believe vote closed a file and dismissed a matter. To ensure the parties and courts are fully apprised of the proceedings at the FEC and permit them to accurately assess the agency’s actions when the Commission believes its actions are indefensible, CREW further requests that the Proposal be expanded.

To start, the Proposal should permit, for those matters where four Commissioners have voted to close the file and thus not subject to 52 U.S.C. § 30109(a)(4)(B) and (12)(A), FEC counsel to produce to the plaintiff the entire administrative record of the matter on review, including vote certifications, reports by the FEC’s General Counsel, responses or other communications from parties, records of Commission meetings, materials gathered in any investigation, and any other material related to the underlying administrative proceedings giving rise to the lawsuit. The FEC’s duty to produce relevant materials in litigation is far broader than what it publishes on its website at the close of a matter, and the FEC’s decision to not defend a suit should not deprive plaintiffs and a reviewing court of the full understanding of the proceedings before the agency.

Additionally, for matters for which four Commissioners have not voted to close the file, and thus remain open and subject to the terms of 52 U.S.C. § 30109(a)(4)(B) and (12)(A), the Proposal should permit FEC counsel to provide to the plaintiffs, subject to a negotiated confidentiality agreement, a full accounting of activities undertaken by the Commission, including reports by the General Counsel, responses and other communications from parties, records of Commission meetings, materials gathered in any investigation, and any other material related to underlying administrative proceedings giving rise to the lawsuit. A fulsome production, and much more than a series of certifications of votes that may or may not have failed to secure majority support for any course of action, including majority support for closing the file as required by law to dismiss a matter, 52 U.S.C. § 30106(c); *End Citizens United v. FEC*, No. 22-5176, 2023 WL 3909350, at *3 (D.C. Cir. June 9, 2023), is necessary to dispel the factual vacuum and permit courts to determine if the FEC has acted “expeditiously,” 52 U.S.C. § 30107(a)(9).

Lastly, in order to avoid wasting judicial resources, the Proposal should require the FEC to disclose to complainants the vote certifications in the matter arising from their complaints shortly after the respective vote and without waiting to be sued. If necessary to comply with 52 U.S.C. § 30109(a)(4)(B) and (12)(A), the production could be made contingent on the complainants’ agreement to keep the votes in confidence, with notice to them of the confidentiality obligations imposed by the FECA. To the extent such votes show the FEC is not failing to act, such production would prevent the waste of judicial resources caused by the current practice of only disclosing to plaintiffs the agency’s progress in the proceedings once a lawsuit has been filed.

We respectfully request the Commission amend Agenda Document No. 23-13-A to bring it into conformity with the Rules of the United States District Court for the District of Columbia, and to address the full “factual vacuum” created where a respondent refuses to consent to disclosure.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stuart McPhail', written over a faint rectangular box.

Stuart McPhail
Director of Campaign Finance Litigation