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September 4, 2013

MEMORANDUM

TO: The Commission

THROUGH: Alec Palmer *AP*
Staff Director

FROM: **Compliance Office** *PCO*
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Chief Compliance Officer

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Audit Division

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

I. INTRODUCTION

As part of the written report submitted to the Commission on June 28, 2013 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 address and clarify timeliness issues due to delays in the processing and receipt of outside requests for consideration mailed to the Commission. *See Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission*, 76 Fed. Reg. 45,798, 45,799 (August 1, 2011). This memorandum constitutes our recommendation to the Commission of proposed modifications to the Program.

The basis for our recommendation, below, to modify the program, originated from the Elizabeth Crowley for Congress (“the Committee”) matter. In that matter, the Committee technically did not meet the 15 business day submission deadline, but we recommended, under the circumstances, that the Commission consider the request as if it were timely. The request was postmarked one day before the 15 day deadline. The federal processing center received the Committee’s request 2 days after the postmark date. The Commission Secretary, however, did

not receive the request until six days later, or eight days after the postmark. The Program states that “[a]ll requests, including any extension requests, should be directed to the Commission Secretary, Federal Election Commission, 999 E. Street, NW., Washington, DC 20463, **and must be received within 15 business days of the determination of corrective action.**” 76 Fed. Reg. 45798, 45799 (Aug. 1, 2011) (emphasis added).

II. DISCUSSION

To address and clarify timeliness issues due to delays in the processing and receipt of requests mailed to the Commission, the Program can be modified in essentially one of two ways: basing the deadline to submit a request on the postmark, or by encouraging alternative means of filing the request, such as electronically, with the Commission.

We are not recommending that the Commission base the deadline on the postmark date because of the uncertainties in the length of time it takes for documents to be processed by the federal processing center. For example, if the Commission were to base the deadline to file a request under the Program on when a request is postmarked, there could be significant delays, under the recent suspended delivery service, before the request would arrive. See “First Class and Parcel Mail Delivery Suspended,” FEC Record, July 2013, <http://www.fec.gov/pages/fecrecord/2013/july/mailedeliverysuspended.shtml> (last visited Aug 1, 2013). Such a delay would create uncertainties for the Audit Division and the Reports Analysis Division when determining whether to proceed in the audit process or report review process. Additionally, if the Audit Division or Reports Analysis Division did not know that a person or entity had filed a request, due to such a delay, the Audit Division or Reports Analysis Division might inadvertently proceed with the audit process or report review process. Finally, such a delay would not serve to provide the requestor with a timely response from the Commission.

Instead, we recommend that the Commission modify the Program to encourage requests to be filed electronically by email, consistent with other situations in which persons or entities make electronic submissions to the Commission.¹ We make this recommendation because, as we have seen in the Elizabeth Crowley for Congress matter, 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.

The Commission encourages alternative methods of filing requests in other situations where persons or entities make submissions to the Commission, including the filing of comments on draft advisory opinions,² comments on proposed rulemaking documents,³ and other requests

¹ Alternatively, the Commission may wish to consider allowing submissions to be made electronically via the Commission’s Website, similar to the method of submitting comments to the Commission’s Advance Notice of Proposed Rulemaking on Technological Modernization. See *Advanced Notice of Proposed Rulemaking on Technological Modernization*, 78 Fed. Reg. 25635 (May 2, 2013).

² The Commission’s procedures regarding public comments on draft advisory opinions provides for submission via email and in paper form. See <http://www.fec.gov/law/draftaos.shtml>.

for comment on Commission policies, practices and procedures.⁴ In light of the potential for processing delays in receiving a request for legal consideration, we recommend that the Commission do the same for this program.

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*, 76 Fed. Reg. 45,798, 45,799 (August 1, 2011), as follows:

- Delete “All requests, including any extension requests, should be directed to the Commission Secretary, Federal Election Commission, 999 E. Street, NW., Washington DC 20463, and must be received within 15 business days of the determination of corrective action.” and
- Insert in its place: “All requests, including any extension requests, must be received by the Commission within 15 business days of the determination of corrective action. All requests should be directed to the attention of the Commission Secretary. Requestors may submit requests electronically via email 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, 999 E Street, NW., Washington, DC, 20463.”

III. 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

³ The Commission’s procedure regarding public comments on rulemaking documents provides for submission electronically via the Commission’s Web site and in paper form. The procedure encourages the submission of comments electronically to ensure timely receipt and consideration.

⁴ The Commission’s procedures regarding a recent Request for comments provides for submission via email, and in paper form. The procedures specifically encourage the submission of comments electronically to ensure timely receipt and consideration. See *Request for Comment on Enforcement Process*, 78 Fed. Reg. 4081 (Jan. 18, 2013).

1 **FEDERAL ELECTION COMMISSION**

2 [Notice 2013-XX]

3 **Policy Statement Regarding a Program**

4 **for Requesting Consideration of Legal**

5 **Questions by the Commission**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Policy Statement.

8 **SUMMARY:** The Federal Election Commission (“Commission”) adopted a program on
9 August 1, 2011, providing for a means by which persons and entities may have a legal
10 question considered by the Commission earlier in both the report review process and the
11 audit process. This new policy is identical to that August 1, 2011, program, except that it
12 provides an alternative electronic means to file a request with the Commission.

13 **DATES:** Effective [insert date of publication in the Federal Register].

14 **FOR FURTHER INFORMATION CONTACT:** Mr. Lorenzo Holloway, Assistant
15 General Counsel, or Margaret Forman, Attorney, 999 E Street NW., Washington, DC
16 20463, (202) 694-1650 or (800) 424-9530.

17 **SUPPLEMENTARY INFORMATION:** On August 1, 2011, the Commission adopted
18 a program providing for a means by which persons and entities may have a legal question
19 considered by the Commission earlier in both the report review process and the audit
20 process. Specifically, when the Office of Compliance (“OC”) (which includes the
21 Reports Analysis Division and the Audit Division) requests that a person or entity take
22 corrective action during the report review or audit process, if the person or entity
23 disagrees with the request based upon a material dispute on a question of law, the person

1 or entity may seek Commission consideration of the issue pursuant to this procedure.
2 This Commission is now revising this program. As revised, the program is identical to
3 that August 1, 2011, program, except that it provides alternative means to file a request
4 with the Commission. This change was made to address and clarify timeliness issues due
5 to delays in the processing and receipt of requests mailed to the Commission, by
6 encouraging requests to be filed electronically by email. Processing delays can result in
7 an untimely submission of a request under the program. Persons and entities making
8 such a request may not be aware that these processing delays can occur when documents
9 are sent via first class mail to a federal government agency. The policy statement
10 regarding this program is reprinted in its entirety, below. It includes the revisions
11 outlined above, which appear in the third paragraph of the “Procedures” section, below.

12 **I. Procedures**

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

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.

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

13 All requests, including any extension requests, must be received by the
14 Commission within 15 business days of the determination of corrective action. All
15 requests should be directed to the attention of the Commission Secretary. Requestors
16 may submit requests electronically via email to LegalRequestProgram@fec.gov.
17 Requestors are encouraged to submit comments electronically to ensure timely receipt
18 and consideration. Alternatively, requests may be submitted in paper form. Paper
19 requests must be sent to the Federal Election Commission, Attn.: Commission Secretary,
20 999 E Street, NW., Washington, DC, 20463. Upon receipt of a request, the Commission
21 Secretary shall forward a copy of any request to each Commissioner, the General
22 Counsel, and the Staff Director.

1 Any request for an extension of time to file will be considered on a case-by-case
2 basis and will only be granted if good cause is shown, and the Commission approves the
3 extension request by four affirmative votes within five business days of receipt of the
4 extension request. Within five business days of notification to the Commissioners of a
5 request for consideration of a legal question, if two or more Commissioners agree that the
6 Commission should consider the request, OGC will prepare a recommendation and,
7 within 15 business days thereafter, circulate the recommendation in accordance with all
8 applicable Commission directives.

9 After the recommendation is circulated for a Commission vote, in the event of an
10 objection, the matter shall be automatically placed on the next meeting agenda consistent
11 with the Sunshine Act, 5 U.S.C. 552b(g), and applicable Commission regulations, 11
12 CFR part 2. However, if within 60 business days of the filing of a request for
13 consideration, the Commission has not resolved the issue or provided guidance on how to
14 proceed with the matter by the affirmative vote of four or more Commissioners, the OC
15 may proceed with the matter. After the 60 business days has elapsed, any requestor will
16 be provided a copy of OGC's recommendation memorandum and an accompanying vote
17 certification, or if no such certification exists, a cover page stating the disposition of the
18 memoranda. Confidential information will be redacted as necessary.

19 After the request review process has concluded, or a Final Audit Report has been
20 approved, a copy of the request for consideration, as well as the recommendation
21 memorandum and accompanying vote certification or disposition memorandum, will be
22 placed with the Committee's filings or audit documents on the Commission's website

1 within 30 days. These materials will also be placed a Commission webpage dedicated to
2 legal questions considered by the Commission under this program.

3 This procedure is not intended to circumvent or supplant the Advisory Opinion
4 process provided under 2 U.S.C. 437f and 11 CFR part 112. Accordingly, any legal
5 issues that qualify for consideration under the Advisory Opinion process are not
6 appropriate for consideration under this new procedure. Additionally, this policy
7 statement does not supersede the procedures regarding eligibility and entitlement to
8 public funds set forth in Commission Directive 24 and 11 CFR 9005.1, 9033.4, 9033.6 or
9 9033.10.

10 **II. Annual Review**

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

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

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On behalf of the Commission,

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DATED: _____
BILLING CODE: 6715-01-P

Ellen L. Weintraub
Chair
Federal Election Commission