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AGENDA DOCUMENT NO. 23-10-C

AGENDA ITEM

For the meeting of May 4, 2023

3 **FEDERAL ELECTION COMMISSION**

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5 **[Notice 2023-__]**

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Reports Analysis Division Legal Question Resolution Program8 **AGENCY:** Federal Election Commission9 **ACTION:** Agency Procedure10 **SUMMARY:** The Federal Election Commission (“Commission”) adopted a program in

11 2011, which was last revised in 2019, providing for a means by which persons may have a

12 legal question considered by the Commission earlier in both the report review process and

13 the audit process. Because the Commission is separately adopting a new audit process, it is

14 revising the policy for the legal question program to narrow its scope to encompass only

15 legal questions arising from requests for corrective action made by the Commission’s

16 Reports Analysis Division.

17 **FOR FURTHER INFORMATION CONTACT:** Jessica Selinkoff, Assistant General

18 Counsel, Policy Division, or Joshua Blume, Attorney, 1050 First Street NE, Washington, DC

19 20463, (202) 694-1650 or (800) 424-9530.

20 **SUPPLEMENTARY INFORMATION:**

21 On August 1, 2011, the Commission adopted a program providing for a means by which

22 persons may have a legal question considered by the Commission earlier in both the

23 report review process and the audit process (“Legal Question Resolution Program”).¹

24 Because the Commission is separately adopting a new audit process for committees that

¹ 76 FR 45798 (Aug. 1, 2011). The Commission has revised the program three times since 2011, as explained in the last revision. See Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 84 FR. 36602 (July 29, 2019).

1 do not receive public funds, effective June 1, 2024, for audits that begin after that date,
2 the Commission will be terminating the Legal Question Resolution Program for legal
3 questions arising in the course of audits. The Legal Question Resolution Program will
4 remain in full effect with respect to audits commenced before June 1, 2024. At the
5 conclusion of the last audit to be commenced before June 1, 2024, the Legal Question
6 Resolution Program will no longer apply for any purpose. The program announced here
7 and set forth below (“RAD Legal Question Resolution Program”) will take effect on
8 June 1, 2024, and will apply only to legal questions arising from the Reports Analysis
9 Division’s (“RAD”) review process.²

10 **I. Procedures**

11 Within 15 business days of a determination by RAD that a person remains
12 obligated to take corrective action to resolve an issue that has arisen during the report
13 review process, the person may seek Commission consideration if a material dispute on a
14 question of law exists with respect to the recommended corrective action.³ A
15 “determination” for purposes of triggering the 15 business days is the notification to the
16 person of legal guidance prepared by the Office of General Counsel (“OGC”) at the
17 request of RAD recommending the corrective action.

18 Any request for consideration by a person during the report review process shall
19 be limited to questions of law on material issues, when: (1) the legal issue is novel,
20 complex, or pertains to an unsettled question of law; (2) there has been intervening

² This superseding RAD Legal Request Program will not be available in the course of audits of committees that receive public funding. Audits of such committees are governed by extensive regulations set forth in 11 CFR, subchapters E and F that, in the Commission’s judgment, provide sufficient opportunity to present legal questions to the Commission.

³ 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 legislation, rulemaking, or litigation since the Commission last considered the issue; or
2 (3) the request to take corrective action is contrary to or otherwise inconsistent with prior
3 Commission matters dealing with the same issue. The request must specify the question of
4 law at issue and why it is subject to Commission consideration. It should discuss, when
5 appropriate, prior Commission matters raising the same issue, relevant court decisions, and
6 any other analysis of the issue that may assist the Commission in its decision making. The
7 Commission will not consider factual disputes under this procedure, and any requests for
8 consideration other than on questions of law on material issues will not be granted.

9 All requests, including any extension requests, must be received by the Commission
10 within 15 business days of the determination of corrective action. All requests must be
11 directed to the attention of the Commission Secretary via email at
12 LegalRequestProgram@fec.gov.⁴ Upon receipt of a request, the Commission Secretary shall
13 forward a copy of any request to each Commissioner, the General Counsel, and the Staff
14 Director.

15 Any request for an extension of time to file a RAD Legal Question Resolution
16 Program request will be considered on a case-by-case basis and will only be granted if good
17 cause is shown, and the Commission approves the extension request by four or more
18 affirmative votes within five business days of receipt of the extension request. Within five
19 business days of notification to the Commissioners of a request for consideration of a legal
20 question, if two or more Commissioners agree that the Commission should consider the
21 request, OGC may, at that time, attempt to resolve the matter informally over the course of
22 five business days. Within 15 business days from the date upon which RAD and OGC

⁴ Requestors are advised that if they submit a request, electronically or otherwise, to a different address than designated in this Procedure, the processing of the request may be delayed.

1 conclude that the matter cannot be resolved informally, or from the expiration of the five-
2 business day period, whichever occurs first, OGC will prepare and circulate a
3 recommendation in accordance with all applicable Commission Directives. If the matter is
4 resolved informally, RAD and OGC will notify the Commission that the matter has been
5 resolved, and notify the Requestor in writing of the notification to the Commission. Informal
6 resolution of a matter does not prevent the Requestor from seeking Commission
7 consideration, in an additional or subsequent determination, subject to the requirements of
8 this program.

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 in 11 CFR,
12 part 2. However, if within 60 business days of the filing of a request for consideration, the
13 Commission has not resolved the issue or provided guidance on how to proceed with the
14 matter by the affirmative vote of four or more Commissioners, RAD may proceed with the
15 matter. After the 60 business days have elapsed, any requestor will be provided a copy of
16 OGC's recommendation memorandum and an accompanying vote certification, or if no such
17 certification exists, a cover page stating the disposition of the memorandum. Confidential
18 information will be redacted as necessary.

19 After the request review process has concluded, a copy of the request for
20 consideration, as well as the recommendation memorandum and accompanying vote
21 certification or disposition memorandum, will be placed with the Committee's filings on the
22 Commission's website within 30 days. These materials will also be placed on the
23 Commission's web page dedicated to legal questions considered by the Commission under
24 this program.

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

5 **II. Annual Review**

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

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19 Dara Lindenbaum
20 Chair, Federal Election Commission