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FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 23-13-A
AGENDA ITEM
For meeting of June 22, 2023

TO: The Commission
The Office of the Commission Secretary

FROM: Allen Dickerson *AD*
Commissioner

DATE: June 15, 2023

RE: Agency Procedure Regarding Litigation Brought Pursuant to 52 U.S.C.
30109(a)(8)

The Federal Election Campaign Act of 1971, as amended, requires four affirmative votes of the Commission to “defend” a civil action brought pursuant to 52 U.S.C. 30109(a)(8). While there is little doubt that the Office of General Counsel may not appear to defend the merits of Commission action or inaction without such a vote, recent litigation has raised an unforeseen issue requiring the Commission’s attention.

In certain recent cases, the Commission chose not to defend Sec. 30109(a)(8) lawsuits alleging a failure to act upon complaints. But it also declined to inform courts of this decision or to provide basic information, such as the existence of Commission action on the complaints underlying those lawsuits. More than one federal judge has been required to reverse decisions made in this factual vacuum and some have expressed frustration with the Commission’s actions concealing important context from the judiciary.

Accordingly, I propose a procedure requiring the Office of General Counsel to apprise courts of future Commission decisions not to defend Sec. 30109(a)(8) lawsuits, and to provide copies of all relevant vote certifications. Nothing in this procedure would require, or permit, the Office of General Counsel to defend any action or inaction of the Commission absent the prior approval of four affirmative votes of the Commission.

I ask that this matter be placed on the Commission’s agenda for the Open Meeting of June 22, 2023.

FEDERAL ELECTION COMMISSION

[Notice 2023-]

Agency Procedure Regarding Litigation Brought Pursuant to 52 U.S.C. 30109(a)(8)

AGENCY: Federal Election Commission.

ACTION: Agency Procedure.

SUMMARY: The Federal Election Commission is adopting a procedure governing its actions in litigation brought pursuant to 52 U.S.C. 30109(a)(8).

DATES: Effective on [Date], 2023.

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act provides a cause of action for “any party aggrieved by an order of the Commission dismissing a complaint filed by such party... or by a failure of the Commission to act on such complaint.” 52 U.S.C. 30109(a)(8). The procedure in this notice applies to actions to be taken by the Commission and its Office of General Counsel in such cases.

Whenever a suit is commenced against the Commission pursuant to 52 U.S.C. 30109(a)(8), the Commission will, within forty-five (45) days of the service of such suit upon the Commission, vote in executive session, or by tally, as to whether it will defend the action. The certification of such vote, regardless of outcome, will be published on the Commission’s public website. Publication of the vote certification, subject to appropriate redactions, will be accomplished as quickly as practicable. The Office of General Counsel may not file any responsive pleading except upon the affirmative votes of four or more commissioners authorizing defense of the Commission pursuant to 52 U.S.C. 30107(a)(6).

Notwithstanding the foregoing, in any case where the Commission does not agree, by four or more affirmative votes, to defend an action under 52 U.S.C. 30109(a)(8) alleging a failure of the Commission to act, or where the lack of a quorum prevents Commission action, the Office of General Counsel will:

1. Apprise the court that the Commission has not voted to defend the action;
2. Inform the United States Assistant Attorney General for the Civil Division that the Commission has not voted to defend the action; and
3. File, under seal, a copy of each vote certification, subject to appropriate redactions, concerning the underlying administrative complaint giving rise to the lawsuit. The Office of General Counsel will continue to file each such vote certification until the conclusion of the lawsuit.

In addition to the foregoing, the Office of General Counsel will notify each respondent to any relevant Matters Under Review that a lawsuit has been filed and provide each such respondent with a copy of this notice.

This notice represents a general statement announcing the general course of action that the Commission intends to follow. This agency procedure does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay in effective date under 5 U.S.C. 553 of the Administrative Procedures Act (“APA”). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.

Dated: _____

On behalf of the Commission,

Dara Lindenbaum,

Chair,

Federal Election Commission.

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