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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 19-17-A
AGENDA ITEM
For the meeting of May 9, 2019

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther
Commissioner *STW*

RE: Motion to Amend Directive 68 to Establish Deadlines for the Timely Processing of Enforcement Matters

DATE: May 1, 2019

I intend to move, at the open meeting of May 9, 2019, that the Commission approve amendments to Directive 68 (“Enforcement Procedures”) that establish deadlines for the timely processing of enforcement matters before the Commission. *See* Attachment 1.

The main purpose of Directive 68 is to provide written guidelines on status reports to respondents, and on quarterly reports to the Commission that include information regarding the Commission’s enforcement caseload, including a procedure to accelerate the processing of statute-of-limitations imperiled matters.

Directive 68 was last amended by the Commission on December 14, 2017, pursuant to a motion I made to improve the transparency of the enforcement process. *See* Attachment 2.¹ My intention at that time was to supplement the information contained in the Commission’s quarterly Status of Enforcement reports (“SOE reports”) and, to the extent possible, make the information in those reports available to the public. Pursuant to those amendments, each SOE report is now placed on the Commission’s website in redacted form within 15 days of circulation of the report to the Commission.² The versions made available to the public include a wealth of informative statistics, including information regarding the Commission’s enforcement caseload and charts showing the number of cases at each stage of the enforcement process.

¹ Directive 68 is also available on the Commission’s website at https://www.fec.gov/resources/cms-content/documents/directive_68.pdf.

² *See* <https://transition.fec.gov/em/enfpro/EnforcementProfile.shtml>.

There is, however, more that can be done to improve the efficiency of the process, given the current backlog of enforcement matters before the Commission. As indicated in the most recent SOE report placed on the Commission's website, there are 75 reports with recommendations from the Office of General Counsel that were awaiting Commission action as of March 12, 2019.³

The proposed amendments (Attachment 1), labeled as Section VI to follow current Section V of Directive 68 (Attachment 2), are intended to speed up the entire enforcement process, starting from the time a complaint or other enforcement matter is first received through formal action being taken by the Commission.

There have been previous proposals to increase the Commission's efficiency in this regard, but so far none have garnered the support of at least four Commissioners. For example, several memoranda I have made public over the past few years have included charts containing categories of data relevant to the Commission's prioritization of its enforcement docket.⁴ The proposed amendments attached herein would serve to further promote efficiency and accountability regarding the Commission's performance on enforcement matters.

Attachments (2)

³ See https://www.fec.gov/resources/cms-content/documents/Status_of_Enforcement__FY2019_1stQtr.pdf.

⁴ The dates on which these memoranda were made public are as follows: Priorities Motion I: July 14, 2015 (https://www.fec.gov/resources/updates/agendas/2015/mtgdoc_15-41-a.pdf); Priorities Motion II: Sept. 15, 2015 (https://www.fec.gov/resources/updates/agendas/2015/mtgdoc_15-48-a.pdf); Priorities Motion III: Nov. 9, 2015 (https://www.fec.gov/resources/updates/agendas/2015/mtgdoc_15-63-a.pdf); Priorities Motion IV: Aug. 12, 2016 (https://www.fec.gov/resources/updates/agendas/2016/mtgdoc_16-33-a.pdf); Assessment of Commission Action: Nov. 15, 2017 (https://www.fec.gov/resources/cms-content/documents/mtgdoc_17-52-a.pdf). The motions I made in connection with those memoranda were not approved by the Commission. In addition, Chair Weintraub offered a proposal in 2015 that would have improved the timely resolution of enforcement reports circulated to the Commission by the Office of General Counsel. On September 17, 2015, the vote to adopt that proposal failed 3-3 (https://www.fec.gov/resources/updates/agendas/2015/mtgdoc_15-25-b.pdf).

MOTION TO AMEND DIRECTIVE 68 TO ESTABLISH DEADLINES FOR THE TIMELY PROCESSING OF ENFORCEMENT MATTERS

I hereby move that the Commission amend Directive No. 68 – which addresses “Enforcement Procedures” – to include new Section VI, as follows:

VI. TIMING OF COMMISSION ACTION ON ENFORCEMENT MATTERS

- A. Circulation of Recommendations to the Commission by the Office of General Counsel: Regardless of whether an enforcement matter is statute of limitations-sensitive (and therefore subject to the procedures set forth in Sections III and IV of this Directive), the Office of General Counsel will circulate substantive recommendations to the Commission on all matters within nine (9) months of the date that a matter is received by the Office of General Counsel. General Counsel’s Reports containing such recommendations will be submitted to the Commission’s Secretary for circulation consistent with Section II of Commission Directive 52 (Circulation Vote Procedures).

A “substantive” recommendation means a recommendation of whether to find reason to believe with respect to one or more respondents related to one or more potential violations, or otherwise whether to close the file with respect to a respondent through dismissal or other action.

The date an enforcement matter is received means the date of receipt of the complaint, referral from another government agency, or referral to the Office of General Counsel or the Office of Alternative Dispute Resolution from the Reports Analysis Division or the Audit Division.

Any enforcement matter in which the Office of General Counsel is unable to meet the nine (9) month deadline shall be automatically tabled for discussion on the agenda for the next regularly scheduled Executive Session.

- B. Enforcement Matters Circulated to the Commission with Recommendations by the Office of General Counsel. Regardless of whether an enforcement matter is statute of limitations-sensitive (and therefore subject to the procedures listed in Sections III and IV of this Directive), the Commission shall take substantive action on all substantive recommendations circulated to the Commission by the Office of General within three (3) months of the date of circulation, unless four or more Commissioners vote to extend the date for taking such action to a specific future date. “Substantive action” means a Commission vote on whether or not to proceed with enforcement action with respect to one or more respondents in a particular enforcement matter regarding the main allegations or legal issues.
- C. Enforcement Matters Pending for 12 (Twelve) Months Without A Substantive Recommendation. Regardless of whether the Office of General Counsel has circulated substantive recommendations, the Commission shall take substantive

action on all enforcement matters within twelve (12) months of the date of receipt of a complaint, referral from another government agency, or referral to the Office of General Counsel or the Office of Alternative Dispute Resolution from the Reports Analysis Division or the Audit Division. The date of the vote may be extended if four or more Commissioners vote to extend the date for taking such action to a specific future date.

- D. Commissioner Requests to Hold Over Enforcement Matters Tabled for Discussion at Executive Session. For any enforcement matter item scheduled for discussion at an Executive Session, a Commissioner may move to hold the item over until the next regularly scheduled Executive Session, or to any closed session that occurs prior to the next regularly scheduled Executive Session. Notwithstanding Directive 10, Section E.7(e) (“A motion to lay a matter over”), four or more Commissioners must approve such a motion, and no more than two such motions shall be entertained per item circulated.
- E. Commissioner Proposals to Revise Documents Circulated by the Office of General Counsel. For any documents recommended for the Commission’s approval by the Office General Counsel (e.g., Factual & Legal Analyses and Conciliation Agreements), Commissioners shall circulate by email any proposed changes to such documents at least 24 hours before the start of any Executive Session at which such documents are scheduled for vote.
- F. Matters in Abeyance. The deadlines set forth in this section shall be suspended pursuant to the terms of any abeyance request approved by the Commission, as follows:
- 1) Only the Commission may approve a request from a law enforcement agency or other entity to hold all or a portion of a pending enforcement or compliance matter or investigation in abeyance. All such abeyances must be limited to a specified period of time.
 - 2) The grant of a request for abeyance will be conditioned on the requesting agency or entity providing the Commission with regular status updates and, if legally permissible, appropriate sharing of information in the requesting agency’s or entity’s possession.
 - 3) A request for an abeyance lasting for more than six months will not be granted, except in unusual circumstances. However, upon expiration of any abeyance period, a requesting agency or entity may seek to extend the abeyance by renewing its request for an additional period of time.
 - 4) All abeyance requests must be in writing, must be directed to the Associate General Counsel for Enforcement, and must be limited to a specified period of time. If appropriate, the Associate General Counsel for Enforcement will seek to limit the scope of a request for abeyance in an effort to allow the Office of General Counsel to

continue working on portions of a matter that may be unrelated or merely tangential to the underlying reason supporting the request for abeyance.

- 5) The Associate General Counsel for Enforcement or his or her designee, in consultation with the General Counsel, will prepare a formal memorandum, and within five business days of receipt of the written request or as soon as practicable thereafter, the General Counsel will circulate the memorandum with appropriate recommendations in accordance with Section 2.A of Directive 52.
- 6) The memorandum will, at a minimum, describe: (a) the requesting law enforcement agency or entity; (b) the date the request was made; (c) the nature and scope of the request; (d) the reason given by the requesting agency or entity for the request; (e) the likely time during which the matter is expected to remain in abeyance; (f) what effect, if any, the proposed abeyance would have with respect to the applicable statute of limitations; and (g) the course of action recommended by General Counsel.
- 7) Pending Commission resolution of the abeyance request, if the matter is at a stage prior to the Commission making a reason to believe finding, or if the matter is “statute of limitations-sensitive” as defined in this Directive, the Office of General Counsel will continue to proceed with the matter as if no request for abeyance had been made. However, if the Commission has already made a reason to believe finding, the Office of General Counsel will, on a preliminary basis, but in no event for longer than 30 days, hold a matter in abeyance pending a decision from the Commission regarding the abeyance request.
- 8) If any Commissioner objects to a recommendation regarding a request for abeyance, the matter will be calendared for the next scheduled Executive Session, and, if not resolved, for each subsequent Executive Session until a resolution is achieved.

FEDERAL ELECTION COMMISSION		
MANUAL OF DIRECTIVES	COMMISSION DIRECTIVE:	
	REVOKES: (revises Section II.B and II.C)	NO. 68
	EFFECTIVE DATE: December 14, 2017	
SUBJECT: Enforcement Procedures		

The purpose of this directive is to provide written guidelines on providing status reports to respondents and the Commission in enforcement matters, providing the Status of Enforcement to the Commission, and accelerating the processing of enforcement matters and compliance matters that have the potential of not being completed before the expiration of the statute of limitations.

I. STATUS REPORTS TO RESPONDENTS

A. General.

1. Before the Commission Finds Reason to Believe (“RTB”) or Otherwise Closes a Matter. The Office of General Counsel and the Office of Alternative Dispute Resolution will provide a status report to respondents and the Commission if the Commission has not voted to find reason to believe, no reason to believe, or to dismiss the matter within twelve (12) months from receipt of the complaint, referral from another government agency, referral to the Office of General Counsel or the Office of Alternative Dispute Resolution from the Reports Analysis Division or the Audit Division, or *sua sponte* submission, and at every twelve (12) month interval thereafter.
2. After the Commission Finds RTB. The Office of General Counsel and the Office of Alternative Dispute Resolution will provide respondents and the Commission with a status report if the Commission has not voted on the matter within twelve (12) months of the reason to believe finding and at every twelve (12) month interval thereafter.

B. Content. The status report shall include the following information:

- 1) The matter number and date of receipt of a complaint, *sua sponte* submission or referral;
- 2) Whether the matter is pending with the Office of General Counsel, the Office of Alternative Dispute Resolution, or the Commission; and
- 3) A reasonable estimate as to the date by which the Commission is expected to vote on the matter.

C. Timing. The Office of General Counsel will provide the status report within five (5) business days of the matter reaching twelve (12) months from receipt and twelve (12)

months from a reason to believe finding. The Office of General Counsel will also circulate the status report to the Commission on an informational basis.

II. STATUS OF ENFORCEMENT REPORTS TO THE COMMISSION

A. General. The Office of General Counsel will circulate the Status of Enforcement on a quarterly basis to the Commission as an automatic agenda item for the next regularly scheduled Executive Session. The Status of Enforcement shall be based on information that shall be made readily accessible to the Commissioners electronically.

B. Content. The Status of Enforcement shall include the following information:

- 1) Statistical information measuring the enforcement program's performance with respect to critical stages of the enforcement process (initial case processing, First General Counsel's Reports, pre-probable cause conciliation, post-probable cause conciliation, investigation, and case closings) and statistical information on civil penalties;
- 2) For all enforcement matters for which there is a pending First General Counsel's Report ("FGCR") before the Commission, a list that includes, for each matter:
 - a. the date of receipt of a complaint or referral;
 - b. the date of assignment of an enforcement matter to the staff attorney;
 - c. the date of OGC's recommendations to the Commission;
 - d. the number of days between the date of receipt of a complaint or referral and date of submission of the FGCR to the Commission;
 - e. the number of days between date of assignment to staff and date of submission of the FGCR to the Commission;
 - f. the number of days between date of receipt of a complaint or referral and Commission inaction calculated by the close of the quarter;
 - g. the number of days between date of assignment to staff and Commission inaction calculated by the close of the quarter;
 - h. the number of days between the date of submission of the FGCR and Commission inaction calculated by the close of the quarter;
 - i. all dates that a matter was requested to be held over; and
 - j. the name(s) of the requestor(s) and any pertinent information provided by the person holding the matter over.

The enforcement matters identified in this subsection shall be listed according to the date of submission of the FGCR.

- 3) A list of all enforcement matters that have been pending for more than twelve (12) months from the date of receipt of a complaint or referral without a Commission vote on whether to find reason to believe, no reason to believe, or to dismiss the matter, and the date the recommendations of the Office of General Counsel circulated or are expected to circulate to the Commission. This list shall also indicate the date of receipt of the complaint or referral, the number of days between the date of receipt of the complaint or referral and Commission inaction calculated by the close of the quarter, and the date upon which each

respondent was sent a status report in accordance with Section I, above. The enforcement matters identified in this subsection shall be listed according to the date of receipt of the complaint or referral.

- 4) A list of all enforcement matters that are statute of limitations-sensitive, which includes all enforcement matters for which part or all of the violations will fall outside the five year statute of limitations within the next twelve (12) months, and as to each matter, the date a matter was received by OGC, the date(s) upon which violation(s) will fall outside the statute of limitations, whether the respondent has signed an agreement to toll the statute of limitations, and the Office of General Counsel's proposed plan for completing each remaining enforcement stage, including a proposed schedule and plan for bringing the matter to the Commission for a vote on probable cause at least six (6) months prior to any violation falling outside the statute of limitations.
- 5) A list of all open enforcement matters that are beyond the "reason to believe" stage (investigation, pre-probable cause conciliation, probable cause, and post-probable cause conciliation) with a brief update as to the status of each matter and a reasonable estimate as to the date upon which the matter will next circulate to the Commission.

- C. Timing. The Office of General Counsel will circulate the Status of Enforcement, including a proposed plan for each matter that is statute of limitations-sensitive, by the end of the month following the end of each quarter in the fiscal year, namely January 31, April 30, July 31, and October 31. An appropriately redacted version of the quarterly report shall be publicly disclosed in an easily accessible manner on the Commission's website within fifteen (15) days of circulation of the unredacted report to the Commission.

III. REPORT TO THE COMMISSION ON STATUTE OF LIMITATIONS-SENSITIVE COMPLIANCE MATTERS

- A. General. Representatives of the Office of General Counsel, the Alternative Dispute Resolution Office, the Reports Analysis Division and the Audit Division will work cooperatively as a committee (the "Case Management Committee") to prepare and circulate to the Commission on a quarterly basis a report of all statute of limitations-sensitive compliance matters. The report shall be based on information that shall be made readily accessible to the Commissioners electronically.
- B. Content. The report of all statute of limitations-sensitive compliance matters shall include the following information:
- 1) A list of all compliance matters that are statute of limitations-sensitive, which includes all compliance matters for which part or all of any reasonably foreseen violation that is eligible for referral to the Office of General Counsel for enforcement will fall outside the five year statute of limitations within the next twenty-four (24) months), and as to each matter, the date(s) upon which the reasonably foreseen and referable violation(s) will fall outside the statute of limitations; and

- 2) the proposed plan for completing the remaining compliance and enforcement stages, including a proposed schedule and plan for bringing the matter to the Commission for a vote on probable cause at least six (6) months prior to any reasonably foreseen violation falling outside the statute of limitations.

- C. Timing. The Office of General Counsel, the Alternative Dispute Resolution Office, the Reports Analysis Division and the Audit Division will jointly circulate the report of all statute of limitations-sensitive compliance matters, including a proposed plan for each matter that is statute of limitations-sensitive, by the end of the month following the end of each quarter in the fiscal year, namely January 31, April 30, July 31, and October 31.

IV. ACCELERATED PROCESSING OF STATUTE OF LIMITATIONS-SENSITIVE ENFORCEMENT MATTERS

- A. General. In accordance with the procedures outlined in sections II.B.3, above, the Office of General Counsel and Commission will accelerate the processing of all open enforcement matters that are statute of limitations-sensitive. For enforcement matters, “statute of limitations-sensitive” includes all matters in which part or all of the violations will fall outside the five year statute of limitations within twelve (12) months. All accelerated processing under this section must include a plan for bringing each matter to the Commission for a vote on probable cause at least six (6) months prior to any violation falling outside the statute of limitations
- B. Initial Case Processing. The Office of General Counsel will activate (assign to an Enforcement attorney) statute of limitations-sensitive matters within fifteen (15) days of the last response to the complaint or referral or within fifteen (15) days of receipt of a *sua sponte* submission.
- C. First General Counsel’s Reports. In statute of limitations-sensitive matters, the Office of General Counsel will assign 30-day deadlines to the circulation of the First General Counsel’s Report to the Commission, and the Office of General Counsel will submit the First General Counsel’s Report to the Commission’s Secretary for circulation consistent with Section II of Commission Directive 52 (Circulation Vote Procedures).

V. AGREEMENTS TO TOLL THE STATUTE OF LIMITATIONS

Any agreement to toll the statute of limitations must be in writing and must be signed either by the party entering into the agreement with the Commission or by the party’s legal representative.

The Commission approved Directive Number 68 on December 14, 2017.



Alec Palmer
Staff Director