



## 11 CFR Part 112

[NOTICE 2023-16]

### Advisory Opinion Comment Procedures

**AGENCY:** Federal Election Commission.

**ACTION:** Notification of disposition of Petition for Rulemaking.

**SUMMARY:** The Commission announces its disposition of a Petition for Rulemaking.

The Petition asked the Commission to modify its regulation on written comments on advisory opinion requests to provide time for the public to comment on drafts of advisory opinions before the Commission votes on the drafts. For the reasons described in detail below, the Commission is not initiating a rulemaking at this time.

**DATES:** [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Robert M. Knop, Assistant General Counsel, or Mr. Evan R. Christopher, Attorney, 1050 First Street, NE., Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act (the “Act”), 52 U.S.C. 30101–45, authorizes the Commission to issue advisory opinions on written questions about the applicability of the Act or Commission regulations to a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future.<sup>1</sup> The persons involved in the specific activity described in the request, as well as any person involved in an activity “which is indistinguishable in all its material aspects” from the specific activity described in the request, may rely on the advisory opinion to avoid sanction by the Commission for engaging in that activity.<sup>2</sup>

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<sup>1</sup> See 52 U.S.C. 30108(a); see also 11 CFR part 112.

<sup>2</sup> 11 CFR 112.5.

The Act and Commission regulations require the Commission to respond to all requests for advisory opinions.<sup>3</sup> The Commission must respond to any advisory opinion request (“AOR”) that is complete and qualified under 11 CFR 112.1(b)<sup>4</sup> with either a formal advisory opinion (“AO”) or notice that the Commission was unable to issue an AO with the required minimum of four affirmative votes.<sup>5</sup> The Commission must publicize receipt of a complete and qualified AOR and formally respond within 20 or 60 days of receiving a complete AOR.<sup>6</sup>

Requestors and interested persons are provided several opportunities to participate in the Commission’s AOR process. First, the Act requires that the Commission provide a 10-day window for public comment on complete, qualified, AORs before the Commission issues a formal response.<sup>7</sup> Second, beginning provisionally in 1993 and adopted formally in 2009, it is the Commission’s policy to seek comments on drafts of advisory opinions, which it endeavors to release at least one week before the meeting at which it will consider the AOR and any draft AOs.<sup>8</sup> Third, the Commission allows an AOR requestor to ask to appear before the Commission to answer questions about the

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<sup>3</sup> See 52 U.S.C. 30108(a); 11 CFR 112.4(a) and (b).

<sup>4</sup> The Commission must respond to a person who submits an incomplete AOR or one that does not qualify under 11 CFR 112.1(b) within 10 days to “specify the deficiencies in the request.” 11 CFR 112.1(d).

<sup>5</sup> See 52 U.S.C. 30108(a); 11 CFR 112.4(a) and (b).

<sup>6</sup> *Id.* Candidates are entitled to receive a response to a AOR within 20 days if the request is made within 60 days of an election in which the candidate is participating and it presents a specific transaction or activity related to the election that may invoke the 20 day period if the connection is explained in the request. See 52 U.S.C. 30108(a)(2); 11 CFR 112.4(b). Further, the Commission has an informal process under which it may, upon request, issue an opinion within 30 days under certain circumstances. See Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 FR 32160 (July 7, 2009).

<sup>7</sup> See 52 U.S.C. 30108(d); *see also* 11 CFR 112.3.

<sup>8</sup> See Revision to Advisory Opinion Comment Procedure, 58 FR 62259 (Nov. 26, 1993); Notice of Advisory Opinion Procedure, 74 FR 32160 (July 7, 2009). The Commission endeavors to release at least one draft AO at least one week in advance. Drafts that are not available by the one-week deadline are required to be identified as “late submitt[ed]” and subject to additional procedural requirements before the Commission may consider them. See Comm’n Dir. No. 17 (effective date May 6, 2021), available at [https://www.fec.gov/resources/cms-content/documents/directive\\_17.pdf](https://www.fec.gov/resources/cms-content/documents/directive_17.pdf).

AOR at the open meeting at which the Commission considers the AOR and any draft AOs; if the Commission does not release a copy of all draft AOs under consideration at least one week before the open meeting at which the draft AOs are to be considered, the requestor is automatically entitled to appear before the Commission at that meeting.<sup>9</sup>

On February 10, 2016, the Commission received a Petition for Rulemaking from Make Your Laws PAC, Inc., Make Your Laws Advocacy, Inc., Make Your Laws, Inc., and Dan Backer, Esq. (“Petition”). The Petition asked the Commission to amend 11 CFR 112.3 to provide a right to the public to comment on draft AOs with a fixed comment period and a requirement that the Commission publish “redlines”—copies of documents showing the differences between drafts—when releasing multiple draft AOs.<sup>10</sup> The Petition argued that the “spirit of the rule is to encourage the public to participate in the Commission’s decision-making process. However, without the corresponding draft opinions, requests alone may not enable the public to fully appreciate the impact of such requests or to make fully informed comments.”<sup>11</sup>

The Commission published a Notification of Availability (“NOA”) on December 3, 2018, asking for public comment on the Petition.<sup>12</sup> The Commission received one comment in response to the NOA. The comment supported the Petition for several reasons. The comment argued that amending the regulation as proposed by the Petition would bring greater “transparency to the Commission’s advisory opinion process and to ensure the public has a meaningful opportunity to weigh in” before the Commission votes on the drafts.<sup>13</sup> The comment further stated that allowing comments on AO drafts is

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<sup>9</sup> See Notice of Advisory Opinion Procedure, 74 FR 32160.

<sup>10</sup> Petition at 4.

<sup>11</sup> *Id.* at 1.

<sup>12</sup> Rulemaking Petition: Advisory Opinion Procedures, 83 FR 62283 (Dec. 3, 2018).

<sup>13</sup> Comment from Campaign Legal Center at 2.

important because AOs, “in practice, often provide general answers to unresolved legal questions in a manner that affects broad categories of individuals and entities.”<sup>14</sup>

After considering the Petition and the comment, the Commission has decided not to initiate a rulemaking at this time. As outlined here, the Act and existing regulations provide for a meaningful opportunity for public comment on AORs; adding to that, the Commission has substantially expanded opportunities for public comment by committing to releasing draft AOs in advance, soliciting comments on those drafts, and allowing AOR requestors to appear before the Commission when their AOR and any draft AOs are being considered.

Neither the Act nor existing Commission regulations require the Commission to accommodate this level of public participation in the AO drafting process. However, the Act and accompanying regulations do impose strict timing requirements on when the Commission must respond to AORs: as soon as 20 days and in no event later than 60 days after receiving a complete AOR. These are binding, bright-line requirements; the Commission cannot bend or break them. As a result, the Commission must balance its strict obligations under Federal law with any desire it may have to encourage participation by requestors and the public. To date, the Commission has done so by adopting policies that expand opportunities for public participation wherever possible while still retaining the flexibility the Commission requires to meet its obligations under Federal law. Those obligations are not insignificant; the Commission notes that 10 of the 20 or 60 days it is allotted to respond to a typical AOR are devoted to receiving public comments, each of which the Commission must consider in addition to analyzing the facts and materials submitted with the AOR, researching relevant legal authority,

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<sup>14</sup>

*Id.*

developing a legal theory and draft response, circulating drafts, and building a majority consensus behind a final opinion the Commission can approve.

For that reason, the Commission believes that creating additional, expanded, and strictly defined rights to public comment on draft AOs is not necessary and would likely prove unworkable within the Commission's short deadlines for issuing AOs. Requiring the Commission to devote resources to marking up and circulating one or multiple draft AOs within a fixed timeframe, as proposed by the Petition, would unduly constrain the Commission in ways that could impair its ability to timely and effectively respond to AORs. The potential adverse effects of this constraint outweigh any prospective benefit to public input or transparency, particularly in light of the Commission's existing policies ensuring robust public engagement.

For the above reasons, the Commission therefore declines to commence a rulemaking to amend its regulation at 11 CFR 112.3 to provide a right to comment on one or multiple advisory opinion drafts a certain amount of time in advance of the Commission meeting at which those drafts will be discussed and to require the Commission to release "redlines" showing edits among multiple drafts.

Copies of the Comments and the Petition are available on the Commission's website, <https://www.fec.gov/fosers/> (REG 2016-01 Advisory Opinion Procedures) and at the Commission's Public Records Office, 1050 First Street NE., Washington, DC, Monday through Friday between the hours of 9 a.m. and 5 p.m.

Dated: October 16, 2023.

On behalf of the Commission,

**Dara Lindenbaum,**

*Chair,*

*Federal Election Commission.*

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