

September 18, 2017

By Electronic Mail

Dayna C. Brown
Secretary and Clerk of the Commission
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Advisory Opinion 2017-06 (Stein)

Dear Madam Secretary,

At its meeting of September 14, 2017, the Commission voted to approve a modified draft of Advisory Opinion 2017-06 that was “circulated by Commissioner Weintraub’s office at 12:10 p.m.” on that day (“Weintraub Draft”).¹

The Weintraub Draft was not properly before the Commission. Pursuant to Commission Directive 17.II.A, a document may not be placed on the agenda of a Commission meeting unless the document is either provided to the Commission Secretary one week before the meeting or the Commission “vote[s] . . . to accept the late submission.”² The Weintraub Draft was not placed on the agenda one week before the meeting, and the Commission did not vote to accept the late submission. The Commission’s consideration of the Weintraub Draft was therefore unauthorized by Directive 17 and in violation of the Federal Election Campaign Act. *See* 52 U.S.C. § 30106(c), (d) (providing that Commission cannot change “written rules for the conduct of its activities” without “a majority vote of the members of the Commission”).

As you know, the Commission has a well-established procedure for adding late-submitted documents to its agenda. At the beginning of each meeting, in accordance with Directive 17, a Commissioner makes a motion to waive the rules on the timely submission of documents so that the Commission may consider each late-submitted document. The Commission then votes on that motion.³ This has been the Commission’s procedure for many years, if not decades. And yet, at the September 14 meeting, no Commissioner made any such motion. Nor did any Commissioner explain why the Commission was deviating from its established process.

To compound this impropriety, it appears that the Weintraub Draft was provided to the requestors’ counsel — and only the requestors’ counsel — on the morning of the meeting.⁴ In

¹ *See* Audio Recording of FEC Meeting at 11:02-11:23 (Sept. 14, 2017), <https://www.fec.gov/resources/cms-content/documents/2017091400.mp3>.

² https://www.fec.gov/documents/15/directive_17.pdf.

³ *See, e.g.*, Audio Recording of FEC Meeting at 00:35-1:40 (Aug. 17, 2017); Audio Recording of FEC Meeting at 00:36-01:11 (June 22, 2017).

⁴ *See* Audio Recording of FEC Meeting at 07:35-07:45 (Sept. 14, 2017).

other words, the requestors' counsel were given an opportunity to discuss the Weintraub Draft directly with Commissioners, yet neither the Campaign Legal Center nor any other potential commenter was even allowed to see it. Given that CLC had commented on both prior drafts of the advisory opinion,⁵ we were significantly prejudiced by this discussion and vote on a draft that we did not know existed (a draft that, interestingly, still has not been made public). One of the main reasons that sunshine rules exist is to prevent such cherry-picked disclosure of government information to influential private entities.

The Commission violated its own rules for ensuring public awareness of its actions, and therefore its vote to approve the Weintraub Draft was unlawful under FECA. To avoid giving the public the incorrect impression that Advisory Opinion 2017-06 can be relied upon, the Commission should formally rescind its illegal vote, *see* 11 C.F.R. § 112.6, and take any steps necessary to make the Weintraub Draft available for public review and comment prior to any vote on it. *See* Audio Recording of FEC Meeting at 1:08:12-1:08:30 (Sept. 14, 2017) (statement of Commissioner Weintraub) (“I think we're the last people in the world to say we don't want people to . . . express their view at the Federal Election Commission for heaven's sakes.”).

Sincerely,

/s/ Lawrence M. Noble

Lawrence M. Noble
Senior Director & General Counsel

/s/ Adav Noti

Adav Noti
Senior Director, Trial Litigation & Strategy

/s/ Brendan M. Fischer

Brendan M. Fischer
Director, Federal & FEC Reform Program

cc: Lisa J. Stevenson, Esq.
Acting General Counsel

Erin Chlopak, Esq.
Acting Associate General Counsel

⁵ <https://www.fec.gov/files/legal/aos/83468.pdf>; <https://www.fec.gov/files/legal/aos/83466.pdf>.