

January 14, 2016

Daniel A. Petalas
Acting General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 6509/Failure to Issue a Statement of Reasons

Dear Mr. Petalas:

I write to protest the failure of the Commissioners of the Federal Election Commission (“FEC” or “Commission”) to issue a statement of reasons explaining their dismissal of Citizens for Responsibility and Ethics in Washington’s (“CREW”) complaint against Friends of Herman Cain, Inc. and Mark Block.

According to the public record, on October 1, 2015, the FEC deadlocked by a vote of three-to-three on the question of whether to proceed with CREW’s complaint. That deadlock barred any further action on the complaint. Accordingly, on that same day, the FEC chose to dismiss the complaint. CREW received notice of the dismissal on October 13, 2015 and was promised that “[a] Statement of Reasons providing the basis for the Commission’s decision [would] follow.” To date, however, the FEC has not yet released a statement of reasons explaining the vote of the three Commissioners who chose to deadlock the Commission and bar any further action on CREW’s complaint. As you know, the Commissioners’ statement of reasons is essential to satisfy the FEC’s legal obligation to adequately justify its actions and demonstrate it was not acting “contrary to law.” The FEC’s failure to issue a statement of reasons is highly prejudicial to CREW because CREW must determine whether to seek judicial relief within an extremely tight window of time after the FEC’s decides to dismiss its complaint.

Under the Federal Election Campaign Act (“FECA”), a complainant may seek judicial review of the FEC’s decision to dismiss its complaint. 52 U.S.C. § 30109(a)(8)(A). A court may then declare the dismissal was “contrary to law” and order the matter reinstated. *Id.* § 30109(a)(8)(C). “Absent an explanation by the Commissioners for the FEC’s stance,” however, neither courts nor the complainant can “intelligibly determine whether the Commission [was] acting ‘contrary to law.’” *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987) (Ginsburg, J.); *see also Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) (“A statement of reasons . . . is necessary to allow meaningful judicial review of the Commission’s decision not to proceed.”).

Moreover, FECA provides an extremely narrow window in which a complainant may seek judicial review. The complainant must determine whether to seek judicial relief within sixty (60) days of the dismissal of its complaint. 52 U.S.C. § 30109(a)(8)(B); *see also Jordan v.*

FEC, 68 F.3d 518, 519 (D.C. Cir. 1995) (finding lawsuit filed sixty-three days after FEC dismissal must be dismissed for lack of jurisdiction). By failing to issue a statement of reasons within sixty days of its dismissal of CREW's complaint, the FEC effectively precluded CREW from considering whether to seek the judicial relief afforded to it by FECA.

A statement of reasons is all the more necessary in a matter such as this where the Commission's dismissal inexplicably contravened the recommendations of the FEC's own Office of General Counsel ("OGC") and reversed course from its prior decisions in this matter. The Commission previously voted six to zero to find reason to believe that Friends of Herman Cain and Mark Block violated multiple sections of FECA. The subsequent investigation by the OGC confirmed that the two defendants had indeed violated FECA and led the OGC to recommend the FEC enter into a conciliation agreement with them. The Commission's subsequent reversal, stalemating, and dismissal of CREW's complaint is therefore a mystery demanding explanation.

Unfortunately, the FEC's delay in providing a statement of reasons in this matter is only yet another example of the Commission's lack of diligence in fulfilling its statutory obligation to "expeditious[ly]" decide complaints brought before it, an obligation made imperative by the need to remedy violations before the next election cycle. *Rose v. FEC*, 608 F. Supp. 1, 6 (D.D.C. 1985) ("It is inconceivable that Congress could have anticipated that a complaint by a presidential candidate running for re-election four years later, or a complaint by a senatorial candidate running for re-election six years later, would remain unresolved by the time of the next election."); *Democratic Senatorial Campaign Comm. v. FEC*, No. 95-cv-0349 (JHG), 1996 U.S. Dist. LEXIS 22849, at *8, *25 (D.D.C. 1996) ("The deterrent value of [FECA's] enforcement provisions are substantially undermined, if not completely eviscerated, by the FEC's failure to process administrative complaints in a meaningful time frame.").

CREW filed its complaint against Friends of Herman Cain and Mark Block on November 3, 2011, almost *four years* before the FEC rendered a final decision on the complaint (albeit a decision to dismiss in light of a deadlock). Unfortunately, such significant delay appears to be common. *See, e.g.*, MUR 6471 (Commission on Hope, Growth, and Opportunity) (decision issued more than four years after complaint was filed); MUR 6612 (Crossroads GPS) (decision issued more than three years after complaint was filed); MUR 6696 (Crossroads GPS) (same). Moreover, even after finally reaching a decision, the FEC has failed to diligently notify complainants such as CREW of the dismissal, risking the closing of the sixty-day window for judicial review without even notice to the aggrieved party that the time period to seek relief is running. *See, e.g., CREW v. FEC*, 799 F. Supp. 2d 78, 89–90 (D.D.C. 2011) (discussing FEC's failure to provide timely notice).

The FEC's failure to issue a statement of reasons for its dismissal within the sixty-day window is inexcusable and highly prejudicial to CREW and the voters who rely on the adequate enforcement of FECA. Accordingly, CREW demands that the Commissioners promptly release a statement of reasons explaining their vote. CREW further reserves the right to seek judicial

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review of the dismissal and equitable tolling of the sixty-day statutory window to allow CREW adequate time to assess the statement to determine whether the dismissal was contrary to law.

Sincerely,



Noah Bookbinder
Executive Director
Citizens for Responsibility and Ethics
in Washington

cc: Chairman Matthew S. Petersen
Vice Chairman Steven T. Walther
Commissioner Ann M. Ravel
Commissioner Lee E. Goodman
Commissioner Caroline C. Hunter
Commissioner Ellen L. Weintraub