



COMMISSIONER ELLEN L. WEINTRAUB  
FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C.

**STATEMENT OF COMMISSIONER ELLEN L. WEINTRAUB  
REGARDING THE COMMISSION’S NEWLY ADOPTED DIRECTIVE CONCERNING  
INVESTIGATIONS CONDUCTED BY THE OFFICE OF GENERAL COUNSEL**

Last week, the Commission adopted a directive that will establish new constraints on how the FEC’s Office of General Counsel (“OGC”) conducts investigations, subjecting them to onerous new restrictions.<sup>1</sup> I could not support the adoption of this directive and I write to explain why.

My views about the enforcement process, investigations, and the work of our nonpartisan career staff are informed by years of observation of the work of OGC and the efforts of various commissioners to support or stymie that work. Let me say upfront that OGC is staffed by talented lawyers dedicated to the important mission of this agency. Their commitment to “following the money” has not always been appreciated by all commissioners. I acknowledge the improvements that were made to the original version of the directive. Some of the provisions I fully support, such as the codification of the Enforcement Division’s common-sense practice of consulting publicly available information.

I remain concerned, however, that overall, the directive will hamper the ability of the nonpartisan professional staff to conduct investigations and follow the evidence where it leads. The Federal Election Campaign Act requires four votes to commence an investigation.<sup>2</sup> But nothing in the Act requires the outcome mandated by this new directive. The crux of the directive will ensure that commissioners are micromanaging every step of every investigation, which I fear will not enhance the agency’s ability to enforce the law.

I am not the only one concerned with this development. We received five comments on the directive. *Four of the five* comments recommended against adoption. Committee on House Administration Ranking Member Joseph D. Morelle wrote to express his concern with the “unnecessary” proposed directive and observed that it represented a “dramatic shift in the enforcement practice of the agency, [and] would exacerbate—rather than ameliorate—the burden of scarce resources available for the Office of the General Counsel.”<sup>3</sup> Likewise, the Campaign

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<sup>1</sup> See Directive Concerning Investigations Conducted by the Office of General Counsel (adopted Nov. 2, 2023).

<sup>2</sup> 52 U.S.C. § 30109a(2).

<sup>3</sup> Ranking Member Joseph D. Morelle, Committee on House Administration, Comment Letter on Agenda Document No. 23-21-A (Proposed Directive Regarding Investigations Conducted by the Office of General Counsel) (Aug. 28, 2023), <https://www.fec.gov/resources/cms-content/documents/comment-from-Representative-Joseph-D-Morelle-dated-8-28-23.pdf> (comments addressed draft not adopted by commission, but substance of comments reflect adopted policy in the directive).

Legal Center “respectfully urge[d] the Commission not to adopt this directive,” and encouraged the Commission to “let the dedicated professionals in OGC do their jobs, and not to make OGC’s investigative duties more difficult and burdensome than they already are.”<sup>4</sup> I agree with those views. I hope to be proven wrong about the impact of this new directive, but in my experience, commissioner involvement in investigations has not resulted in more efficient or effective investigations. Indeed, even before this directive was adopted, there have been cases that languished for months while staff awaited decisions from commissioners.

It is rare that the Commission musters four votes to even start an investigation, due to the extremely high evidentiary bar super-imposed on the statute by some commissioners. There are currently approximately 200 matters pending in our enforcement division, and exactly 7 have active investigations. And what will happen under the new directive if staff ask a question that a commissioner deems outside the bounds of the granted permission? Will this become a new excuse for invoking the Commission’s unreviewable prosecutorial discretion and dismissing cases, even after a violation has been proven?

To justify this new policy, some of my colleagues have paraded out a list of purported grievances with OGC.<sup>5</sup> The truth is that OGC has soldiered on through commissioner infighting, lack of quorum, pandemic, and changing Commission priorities, and has only recently been able to replace numerous staff persons lost through attrition. Our attorneys have been whipsawed from one group of commissioners to whom subpoenas were anathema and who wanted any information-gathering to be done using informal, voluntary methods and a subsequent group of commissioners to whom informal methods are anathema and who want all investigations to proceed by means of Commission-approved subpoenas.

Commissioners absolutely are responsible for ensuring that the agency performs its mission. It is not clear that this directive will enhance our ability to do so. Commissioners must set agency priorities and should support our staff with adequate resources, training, and personnel. And we should let them do their jobs. Given the political sensitivity of our investigations, having political appointees at the top of the agency substitute their judgment on investigatory decisions for that of the nonpartisan professional staff does not seem to me to lend itself to neutral

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<sup>4</sup> Campaign Legal Center, Comment Letter on Proposed Directive on Investigations (Oct. 3, 2023), <https://www.fec.gov/resources/cms-content/documents/CLC-Comment-FEC-Directive-re-OGC-Investigations.pdf> (comments addressed draft not adopted by commission, but substance of comments reflect adopted policy in the directive).

<sup>5</sup> See Stmt. of Comm’rs Allen J. Dickerson & James E. “Trey” Trainor, III Regarding the Commission’s Newly Adopted Directive Concerning Investigations Conducted by the Office General Counsel (Nov. 2, 2023), <https://www.fec.gov/resources/cms-content/documents/statement-on-investigations-policy-2nov2023-redacted.pdf>. It is difficult to credit the argument that a new directive was required because OGC missed a designation-of-counsel form that was faxed to the office at a time when, as noted on the Commission website, staff were not *in* the office due to a global pandemic. It is similarly misleading to describe one investigation as “without Commission approval” when OGC repeatedly notified the Commission by memoranda of their plans for that investigation, and not a single commissioner raised any concerns at the time.

enforcement of the law or greater public confidence in the work of the Commission. Given the partisan valence of some Commission decisions, one might even describe it as the weaponization of government.<sup>6</sup> Based on Commission history, my greatest concern is that commissioner-driven investigations risk being so constrained that they will fail to uncover key facts, leaving the public in the dark.

Again, I hope to be proven wrong about the effect of this new directive. But my concerns were such that I could not support it.

November 9, 2023

Date



Ellen L. Weintraub  
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Commissioner

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<sup>6</sup> See, e.g., MUR 7784 (Make American Great Again PAC), Statement of Reasons of Commissioners Shana M. Broussard and Ellen L. Weintraub.