AGENDA DOCUMENT NO. 13-21-C

FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

June 26, 2013

MEMORANDUM

For Meeting of 6-27-13

SUBMITTED LATE

TO: The Commission Secretary

FROM: Anthony Herman
General Counsel

SUBJECT: The General Counsel's Authority to Recommend Reason to Believe to the Commission Under Section 111.8

Attached is the April 8, 2013 memo from Anthony Herman to the Commission regarding the General Counsel's Authority to Recommend Reason to Believe to the Commission Under Section 111.8. The Commission has requested the document be placed on the agenda for June 27, 2013.

Attachment

FEDERAL ELECTION COMMISSION
Washington, DC 20463

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April 8, 2013

MEMORANDUM

SENSITIVE

TO: The Commission

FROM: Anthony Herman
General Counsel

Daniel Petalas
Associate General Counsel for Enforcement

Subject: The General Counsel's Authority to Recommend Reason to Believe to the Commission Under Section 111.8

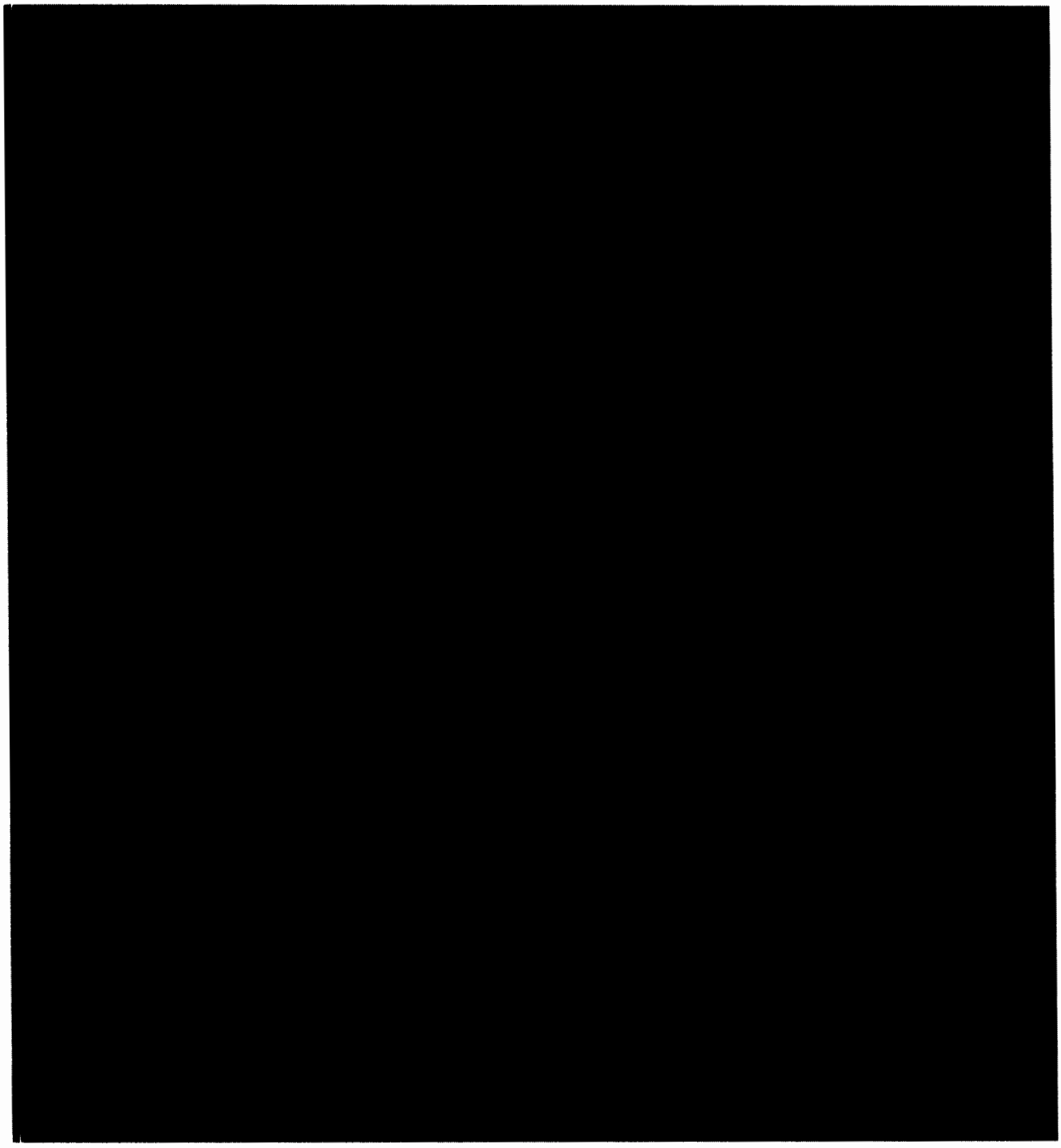
[redacted] We were asked to provide the Commission with a memorandum on the issue. This memorandum confirms our view that the General Counsel may internally generate a matter and make a reason to believe recommendation to the Commission on that matter under the plain language of section 111.8. [redacted]

I. Procedural Background

A. [redacted]

[redacted]

[redacted]



[redacted]

B. Legal Background

1. The Act and Section 111.8

The Federal Election Campaign Act of 1971, as amended, ("the Act") contemplates that the Commission may pursue an enforcement action "upon receiving a complaint . . . or on the basis of *information ascertained in the normal course of carrying out its supervisory responsibilities*[.]" To initiate an investigation, the Act requires that the Commission "determine[], by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed . . . a violation of the Act." 2 U.S.C. § 437g(a)(2) (emphasis added).

In 1980, following the 1979 Amendments to the Act, Pub. L. 96-187, 93 Stat. 1339-69, the Commission revised its compliance regulations at part 111. Reiterating the Act, the Commission regulation at section 111.3 states that "compliance matters may be initiated by a complaint or on the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities." 11 C.F.R. § 111.3. Section 111.3 makes clear that complaint-generated matters "are subject to" the procedures established by sections 111.4-.7 and that section 111.8 governs internally generated matters.

Section 111.8(a) provides in full:

> On the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities, or on the basis of a referral from an agency of the United States or of any state, the General Counsel may recommend in writing that the Commission find reason to believe that a person or entity has

[redacted]

committed or is about to commit a violation of statutes or regulations over which the Commission has jurisdiction.

11 C.F.R. § 111.8(a).[4]

Finally, section 111.9 provides that the Commission may determine whether there is reason to believe "after reviewing a complaint-generated recommendation . . . or after reviewing an internally generated recommendation." 11 C.F.R. § 111.9.

2. FEC Directive 6

On April 21, 1978, prior to the adoption of section 111.8, the Commission approved Directive 6. Directive 6 notes that complaints may be generated "through information obtained by the Commission in the normal course of its supervisory duties." Directive 6 at 1. The Directive then points out that "the Commission has the authority to determine its own procedures and set clear standards for generating internal compliance matters." *Id.* at 2. *See generally* 2 U.S.C. § 437c(e). Directive 6 finally explains that the procedures it establishes are "uniform guidelines for the internal generation of MURs." *Id.*[5]

Directive 6 provides that an internally generated enforcement matter "will be assigned a MUR number once the General Counsel determines that the [internal] complaint is sufficient." *Id.* at 2. An internal complaint is sufficient if it includes: (1) "a clear and concise statement of the Commission policy or authority under which the matter is generated;" (2) a statement of the complaint's "source of generation (which Division) and the generating person or officer;" and (3) a "clear and concise summary of the alleged violation." *Id.*

Directive 6 then outlines specific procedures based on how information indicating a potential violation of the Act is obtained:

- First, when the Reports Analysis Division ("RAD"), in the course of its "regular report review procedures," and when Audit and Public Disclosure learn information "in the course of carrying out [their] duties," those divisions "shall . . . forward such information to the Office of the General Counsel." *Id.* at 2-3. Directive 6 then instructs *OGC* (and not the Commission) to "determine whether or not to open a MUR on matters referred" by RAD, Audit, and Public Disclosure. *Id.* If OGC decides not to open a MUR, Directive 6 requires it to provide a written explanation to the *referring division* (and, again, not to the Commission). *Id.* at 3.

[4] The explanation and justification adds little, except that the rule "sets forth the procedure for handling compliance matters initiated on the basis of information ascertained by the Commission in the normal course of its supervisory responsibilities." Amendments to Federal Election Campaign Act of 1971, 45 Fed. Reg. 15,080, 15,088 (Mar. 7, 1980). The approved regulation is not materially different from the proposed language. *See* Draft Regulations to Implement 1979 Amendments to FECA, 45 Fed. Reg. 5,546, 5,566 (Jan. 23, 1980).

[5] At an open session on March 23, 1978, the Commission considered a draft of Directive 6 to address what was characterized as the Commission's "less than tidy" handling of internally generated matters.

- Second, Directive 6 provides that when a matter is referred to the Commission by another government agency, the matter is "reviewed by the General Counsel who determines whether or not a compliance action is warranted." *Id.* In contrast to internally generated matters, these matters are circulated to the Commission, "including the General Counsel's disposition of such matters in the event a MUR has not been opened." *Id.* The same procedure is followed for matters "arising out of government documents made available to the public or the Commission." *Id.* at 4.

- Third, Directive 6 instructs staff that "non-routine reviews of reports or other documents" must be approved "upon specific request" by the Commission and be guided by "a uniform policy of review of a particular category of candidates or other reporting entities or a review of a category of reports for specific types of information." *Id.* Information gathered in the course of such a project is to be referred to the General Counsel, who "determine[s] whether or not to open a MUR." *Id.*

- Finally, Directive 6 states that internally generated matters may stem from "[n]ews articles and similar published accounts." *Id.* Again, in contrast to internally generated matters that originate in Commission operating divisions, in the case of news articles, the Commission "ultimately [takes] responsibility for determining whether or not to open a MUR. *Id.* at 5. A staff member must obtain the signature of the Staff Director, General Counsel, or a Commissioner and send a memorandum to the General Counsel explaining the potential violation; the General Counsel then attaches the original memorandum and news article to the recommendation as to whether a MUR should be opened. *Id.*

Recently, the Commission explained that Directive 6 "specified . . . *non-exhaustive* sources as falling within the scope of 2 U.S.C. § 437g(a)(2)." Request for Comment on the Enforcement Process, 78 Fed. Reg. 4,081, 4,085 (Jan. 18, 2013) (emphasis added).

II. Analysis

A. The Plain Language of 11 C.F.R. Part 111 Makes Clear that the Commission has Expressly Delegated to the General Counsel the Authority to Recommend Reason to Believe Based on Information Learned by Commission Staff

Section 111.8 provides that, "[o]n the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities . . . the General Counsel may recommend in writing that the Commission find reason to believe that a person or entity has committed a violation of [the Act]."[6] 11 C.F.R. § 111.8. The plain language of the

[6] Section 111.8 also contains two limiting principles. Most obviously, the General Counsel may only make recommendations as to violations of statutes over which the Commission has jurisdiction. *See* 11 C.F.R. § 111.8(a). More significantly, however, the General Counsel may only generate such matters and present recommendations upon information learned "in the normal course." 11 C.F.R. § 111.8. That regulatory language incorporates a limitation Congress imposed on the Commission's authority to internally generate MURs. *See* 2 U.S.C. § 437g(a)(2).

regulation therefore empowers the General Counsel to make reason to believe recommendations based on information ascertained by the Commission "in the normal course of carrying out its supervisory responsibilities." *Id.*

That section 111.8 refers to information learned by the "Commission"—and not the General Counsel—does not undermine the General Counsel's authority to generate a matter. First, if the drafters of the rule intended to prohibit OGC from generating a matter and recommending reason to believe on it, the drafters could have articulated that intent directly. In fact, the Commission knew how to place limits on the use of section 111.8. Section 111.8(c), which relates to certain failure to file violations, expressly limits the use of the regulation's process for enforcement as to violations of "any action pursuant to this section."

Second, the term "Commission" in section 111.8 does not refer to the six voting members of the Commission. The term "Commission" is not used consistently throughout subchapters A, B, C, E, and F of 11 C.F.R., negating any argument that the term "Commission" has a single, objective meaning throughout the regulations. In some provisions, the term refers to an institution; in others, it refers to voting members; and in still others, the term is used in both senses. For example, section 100.9 defines Commission to mean "the Federal Election Commission, 999 E Street, NW, Washington, DC 20463." This definition implies that "Commission" refers to an institution that encompasses the presidentially-appointed voting members and staff. This definition can be applied to section 102.1(c), which states that separate segregated funds must file statements of organization "with the Federal Election Commission." In other provisions, however, "Commission" can only be read as the six-member body appointed by the president. For example, section 111.9 refers to a vote by "members of the Commission." And at least one provision, 11 C.F.R. § 112, uses the term in both meanings: Advisory opinion requests are made public "at the Commission" and require that "[b]efore it issues an advisory opinion the Commission shall . . . ." *See* 11 C.F.R. §§ 112(b), (e), 112.4(f) (prohibiting an advisory opinion from issuing by means other than an affirmative vote of four Commissioners). Thus, the term "Commission" in a given provision is dependent upon the immediate context in which it is deployed and not an objective definition.

Section 111.8 uses the term "Commission" in the institutional sense. Section 111.8 does not *only* refer to matters generated upon information learned "in the normal course" by the voting members of the Commission. Rather, "Commission" encompasses information learned by OGC, RAD, and Audit staff, for instance, "in the normal course" of their operations. In fact, virtually all information in the possession of the Commission relating to potential violations is ascertained, at least in the first instance, by Commission staff. Consequently, to read section 111.8 to exclude information gathered by staff would be to read 111.8 virtually out of existence, which is contrary to canons of regulatory construction. *Secretary of Labor v. Twentymile Coal Co.*, 441 F.3d 256, 260-61 (D.C. Cir. 2005) ("[I]nterpretation of the regulation is particularly untenable because it would render the pertinent regulation a *nullity* . . . . This Court will not adopt an interpretation of a statute or regulation when such an interpretation would render the particular law meaningless.") Furthermore, the subsequent reference to the General Counsel in

the same sentence serves to make clear that the General Counsel is responsible for evaluating information learned by staff and making any reason to believe recommendation.[7]

In addition, similarities and differences between sections 111.7 and 111.8 further support the conclusion that section 111.8 authorizes the General Counsel to recommend reason to believe absent prior Commission approval. Commission regulations provide parallel tracks for processing complaint-generated and internally generated matters. *See* 11 C.F.R. § 111.3(a), (b) (stating that complaint-generated matters are subject to 11 C.F.R. §§ 111.4-.7 and internally generated matters are subject to § 111.8). Both section 111.7(a) and 111.8(a) authorize the General Counsel to recommend reason to believe to the Commission, and neither section 111.7(a) nor section 111.8(a) mandates that the General Counsel obtain prior approval from the Commission before submitting reason to believe recommendations. *See also* 11 C.F.R. § 111.7(b) (providing that the General Counsel may also recommend no reason to believe or dismissal). Indeed, the similar structures of sections 111.7 and 111.8 suggest that the two provisions reflect a common delegated authority.[8]

Moreover, as to complaint-generated matters, section 111.7(a) states that the General Counsel may recommend reason to believe as to "a respondent." *See also* 11 C.F.R. § 111.4(d)(1) (providing that complaints should "identify as a respondent each person . . . alleged to have committed a violation). Section 111.8 states that the General Counsel may recommend reason to believe as to "a person or entity." 11 C.F.R. § 111.8(a). The different terminology suggests that, under section 111.8, the General Counsel may recommend reason to believe as to violations by a broader class of persons—that is, persons not necessarily identified in a complaint—than in recommendations made under section 111.7.

In short, through revisions to part 111—including section 111.8—the Commission has delegated to the General Counsel the authority to internally generate matters and make recommendations to the Commission. And that authority was properly exercised here.

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[7] Even if the use of "Commission" in section 111.8 were confined to the voting members of the Commission, here the information was in fact "ascertained" by the Commissioners "in the normal course of carrying out [the Commission's] supervisory responsibilities." The members of the Commission have been well aware of the facts giving rise to this issue for some time. A member of the Audit Division staff informed a Commissioner and the General Counsel of the issue, and, as noted above, the General Counsel and members of his staff promptly shared the information with all Commissioners in November and early December 2012. Thus, however "Commission" is defined in this context, there can be no doubt that the Commission had and has in its possession "information ascertained in the normal course of carrying out its supervisory responsibilities" that provided and provide the General Counsel with a proper basis "to recommend in writing that the Commission find reason to believe" under section 111.8.

[8] The General Counsel's authority to recommend reason to believe on matters he or she generates falls within a much broader delegation: The Commission makes its reason to believe determinations "after reviewing" a recommendation from the General Counsel, regardless of whether the matter was generated by complaint or internally. The delegation of power to the General Counsel is not unique to sections 111.7 and 111.8. At section 112.1(d), the Commission delegated to OGC the ability to screen advisory opinion requests.

B. Section 111.8 is Not a Mere Reiteration of Directive 6

Section 111.8 is a result of notice-and-comment rulemaking and legally binds the Commission. The regulation is additive and covers matters not within the scope of Directive 6; it does not repeat what is in Directive 6. Directive 6 spells out the mechanics as to how Commission staff process certain categories of internally generated matters. For example, Directive 6 covers how referrals are made from RAD, Audit, and Public Disclosure to the General Counsel. Directive 6 at 2-3. It also explains how Commissioners may refer news articles to the General Counsel for evaluation. *Id.* at 4-5. Directive 6, however, does not address how the General Counsel processes matters—such as this one—not within the scope of the Directive.

Directive 6 also details how internally generated matters are presented to the Commission. Along with the allegation, such matters must cite to the "policy or authority under which the matter is generated" and identify the "source of generation" and "the generating person or officer. *Id.* at 2. And while this information aids the Commission's considerations, there is no need to codify these instructions into the Code of Federal Regulations.

Further, Directive 6 clarifies that "in the normal course" includes typical Commission operations (*e.g.*, RAD reviews of reports, OGC reviews of advisory opinion requests, etc.) but excludes affirmative, *ad hoc* searches for violations of the Act. Directive 6 prohibits Commission staff from engaging in certain activity unless that activity is conducted pursuant to a "uniform policy of review of a particular category of candidates or other reporting entities or a review of a category of reports for specific types of information." *Id.* This language implements the rule that the Commission may only internally generate matters based on information it ascertains "in the normal course." Directive 6 makes clear that information learned in the course of typical Commission operations may be used to internally generate a matter. But information learned through activities not typically performed by Commission staff cannot be used to internally generate a matter. Said differently, Directive 6 discourages fishing expeditions. [10]

The terms of Directive 6 are consonant with a broad delegation of authority to the General Counsel under section 111.8. Under Directive 6, the General Counsel may decline to open a MUR referred to the Commission or to OGC by another division. *Id.* at 3. Similarly, if another agency refers a matter to the Commission, Directive 6 provides that "[t]hese matters are reviewed by the General Counsel who determines whether or not to open a MUR." *Id.* If the General Counsel declines to open a MUR, the General Counsel need only circulate the referral and the determination to the Commission. *Id.* It would be incongruous to require the General Counsel to obtain Commission approval to generate matters and recommend reason to believe

[10] As discussed at the March 23, 1978, meeting when the Commission considered a draft of Directive 6, any Commissioner, executive assistant, or Commission staff, could cull through reports "and almost inevitably find an irregularity or a possible violation." Because the Commission was concerned about "arbitrary selection" of violations, the Commission made clear that such information could not lead to a MUR. But Directive 6 also makes clear that the Commission may approve prospectively certain reviews and, in effect, make them part of the normal course. In fact, as explained at the April 13, 1978, meeting, the reason that special review proposals must be approved by both the General Counsel and Staff Director is to ensure that a new proposal does not result in duplicative and inefficient use of resources.

while simultaneously conferring upon the General Counsel the power to screen referrals from other divisions and agencies.

What Directive 6 cannot do is apply internal procedures to preempt the language of published regulations. *See Gen. Care Corp. v. Mid-S. Found. for Med. Care, Inc.*, 778 F. Supp. 405, 417 n.11 (W.D. Tenn. 1991). But Directive 6 does not limit the General Counsel's ability to internally generate matters to the four categories of information discussed. Indeed, the categories of information are "non-exhaustive sources." Request for Comment on the Enforcement Process, 78 Fed. Reg. 4,081, 4,085 (Jan. 18, 2013). Implicit in Directive 6 is the understanding that the General Counsel may internally generate matters and recommend reason to believe on those matters. Section 111.8 makes explicit the General Counsel's power.

C. Prior Use of Directive 6 Does Not Render Section 111.8 Meaningless

At the March 12, 2013, Executive Session, reference was made to a few prior uses of Directive 6 to suggest that section 111.8 was not used properly here. In fact, Directive 6—without express citation—is used *routinely* when RAD and Audit refer so-called "Pre-MURS" to OGC. And in any event, how Directive 6 may have been applied in the past as to certain categories of internally generated matters does not speak to the scope of the General Counsel's authority under section 111.8—which has been long relied on by the Office of General Counsel albeit (like Directive 6) without express citation.

MUR 2219 (Ferraro) began with an advisory opinion request. In 1986, Geraldine Ferraro asked whether she could transfer funds with her 1984 authorized committee to a 1986 exploratory committee. *See* FGCR at 1, MUR 2219 (Ferraro). During OGC's review of Ferraro's submission, it found potential discrepancies in reports filed by her 1984 committee. *Id.* at 2; *see also* March 25, 1986, Memo from N. Bradley Litchfield, Assistant General Counsel, to Charles N. Steele, General Counsel (providing General Counsel information to help him decide "whether to open an internally generated MUR pursuant to Directive No. 6"). In a Memo to File dated March 27, 1986, the General Counsel writes that he "approved the opening of a Pre-MUR so that an analysis and recommendations may be made with regard to whether a MUR should be opened in this matter. This matter should be handled accordingly pursuant to FEC Directive 6." March 27, 1986, Memo from Charles N. Steele, General Counsel, to File. The Secretary's office's then circulated the relevant documents to the Commission as a "complaint" in Pre-MUR 158. March 28, 1986, Memo from Marjorie W. Emmons, Secretary, to Commission. Subsequently, OGC circulated an FGCR. Nothing in the file indicates the General Counsel requested Commission approval prior to making these determinations. *See also* FGCR at 1, MUR 3007 (Kopko) (generating a matter in 1989 upon learning of potential violation from advisory opinion request).

MURs 3540 (Prudential) and 3672 (Bush-Quayle, et al) are not contrary examples. In those matters, Commissioners circulated news articles that identified potential violations. *See* March 6, 1992, Memo from Trevor Potter, Commissioner, to Commission; April 23, 1992, Memo from Vice Chairman Thomas and Commissioner Potter, to Commission. In MUR 3540, Commissioner Potter, though "aware of Directive 6," was "uncertain about the wisdom of proceeding down that course." March 6 Potter Memo. In MUR 3672, the Commissioners

"recommend that the Commission refer the attached accounts . . . to [OGC]."[11] April 23 Thomas & Potter Memo. The language of Directive 6, of course, empowered the Commissioners to send the article directly to the General Counsel to begin a Pre-MUR. Directive 6 at 4-5. Commissioner Potter, however, sought to initiate a discussion with the rest of the Commission "to seek advice on how such matters should be handled." March 6 Potter Memo. These MURs only show that Commissioners preferred to discuss with their colleagues whether to refer the matters to OGC prior to doing so—not that the General Counsel lacked the Commission-delegated authority to recommend reason to believe on those same facts absent Commission direction.

Subsequently, in MUR 4167 (Republican National Committee, *et al.*), OGC litigators learned from opposing counsel that three national committees were "not complying with the Commission's 'best efforts' regulation." *See* June 13, 1994, Memo from Stephen E. Hershkowitz, Assistant General Counsel, to Lawrence M. Noble, General Counsel, at 2-3. The attorneys presented this information to the General Counsel, who recommended that the Commission open a MUR and find reason to believe. FGCR at 10, MUR (Republican National Committee, *et al.*). Nothing in the file indicates that the General Counsel requested or received prior approval from the Commission to submit a recommendation. In this MUR, like in the Ferraro MUR, OGC learned information in the ordinary course of carrying out its duties. *See also* MUR 3721 (Perot) (recommending in October 1992 to the Commission that it open a MUR and find RTB upon a referral from staff in Public Disclosure). These files do not include any suggestion that OGC circulated further documents to the Commission before circulating the FGCR, which each recommended that the Commission open a MUR and find reason to believe.

Finally, MUR 4320 (D.H. Blair) commenced when a staffer in the Public Disclosure Division suspected that contributor information was being used for commercial purposes. She submitted, through the Staff Director, a memo to the General Counsel. *See* April 26, 1995, Memo from John Surina, Staff Director, to Larry Noble, General Counsel. The General Counsel submitted a "preliminary report" to the Commission recommending that the Commission direct the General Counsel to open a Pre-MUR. *See* May 24, 1995, Memo from Lawrence M. Noble, General Counsel, to Commission. The memo explained that the report was made "[p]ursuant to discussion during an Executive Session, [at which] the Commission requested that the Office of the General Counsel submit a preliminary report regarding Directive 6 referrals made to OGC by other divisions prior to opening a Pre-MUR."[12] *Id.* at 1. This language appears to indicate that the General Counsel had begun a practice of submitting preliminary reports to the Commission when it received a referral from "other divisions." But it is highly unlikely that the evolved

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[11] In the same memo, the Commissioners note that they "do not take this step lightly, and . . . have chosen not to wait until the Commission has considered revising the Directive Six procedures." April 23 Thomas & Potter Memo. The language on revising Directive 6 likely refers to a Commission vote at the April 7, 1992, Executive Session at which it was agreed that recommendations to revise Directive 6 would be presented at a May 1992 Open Session. No relevant item, however, appears on an agenda between April and December 1992.

[12] The memorandum does not identify the relevant executive session at which the request referred to was made. This Office continues to seek to identify the relevant discussion. Discussion on the memo at the June 6, 1995, Executive Session was focused on the substance of the referral and whether it was appropriate for Public Disclosure staffers to refer matters to the General Counsel in response to public inquiries.

practice was as broad as the language in the preliminary report implies—"other divisions" would include referrals from RAD and Audit. And, of course, it has never, to our knowledge, been OGC's practice to request Commission approval to open a Pre-MUR upon receipt of a referral from RAD or Audit.

In addition, the best evidence Directive 6's procedures being altered, of course, would be a revised version of Directive 6. And there is no such modification. As far as we know, Pre-MUR 550 marks the first occasion upon which the General Counsel *expressly* made a reason to believe recommendation to the Commission on the basis of information the Commission ascertained in the normal course of carrying out its supervisory duties. But OGC *routinely* makes use of its Commission-granted powers under section 111.8 by, for example, naming respondents and making reason to believe recommendations against parties not expressly named as respondents in complaints. Indeed, when the Office of General Counsel adds parties to a matter, the notification letter sent to those parties states that the Commission, "[i]n the course of exercising its supervisory responsibilities, [has] found information indicating that you may have violated [the Act.]" Likewise, OGC makes use of such implied authority when it makes recommendations on violations of the Act and Commission regulations not made expressly in complaints. And OGC has done so—largely until recently without question or challenge—for many years. Similarly, Audit and RAD make referrals to OGC without citing Directive 6 expressly, but that is the only basis for such formal referrals.

III. Conclusion

The use of section 111.8 here results from an anomaly—the Commission's error definitions failed to encompass the violation of the Act at issue. As a result, the Audit Division could not refer the violation to OGC using Directive 6. But when the violation was brought to the attention of the General Counsel by the Audit Division, the General Counsel was not only empowered to make a recommendation to the Commission under section 111.8, but would have been remiss had he failed to do so.

Section 111.8 authorizes the General Counsel, "[o]n the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities" to "recommend in writing that the Commission find reason to believe that [an] . . . entity has committed . . . a violation." [redacted]