AGENDA DOCUMENT NO. 13-21-H

FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 26, 2013

AGENDA ITEM

MEMORANDUM

For Meeting of 6-27-13

TO: The Commission Secretary

FROM: Anthony Herman
General Counsel

SUBMITTED LATE

SUBJECT: Relationship between the FEC and DOJ

Attached is the August 7, 2008 email from Ann Marie Terzaken to the Commissioner regarding the relationship between the FEC and DOJ. The Commission has requested the document be placed on the agenda for June 27, 2013.

Attachment

Fw: Relationship between the FEC and DOJ

From:	Ann Marie Terzaken/FEC/US
To:	Commissioners Office,
Cc:	Thomasenia Duncan/FEC/US@FEC, Christopher Hughey/FEC/US@FEC, Kathleen Guith/FEC/US@FEC, Gregory Baker/FEC/US@FEC
Date:	08/07/2008 02:26 PM
Subject:	Relationship between the FEC and DOJ

In connection with the first round of Enforcement recommendations circulated for Commission consideration, which included matters with parallel criminal proceedings, questions have been asked about our relationship with the Department of Justice, including how and when we work with one another on matters within our overlapping jurisdictions. We thought it might be helpful to briefly summarize some of the historical background and key points about our relationship with DOJ. We understand that our relationship with DOJ may be discussed at the next Executive Session in the context of specific matters, and we, of course, remain available to discuss this topic at any time.

As a preliminary matter, I should note that the FECA violations within DOJ's jurisdiction are a small subset of the violations within the jurisdiction of the Commission. Whereas the Commission has exclusive civil jurisdiction over all FECA violations, DOJ only has criminal jurisdiction over knowing and willful FECA violations. DOJ's jurisdiction in this regard is not exclusive, however. Knowing and willful violations can be addressed both civilly by the FEC and criminally by DOJ.

The cases we most often see with criminal and civil overlap are (1) Section 441f reimbursement schemes, (2) embezzlement schemes, (3) Section 441h fraudulent representation/solicitation schemes, and (4) intentional misreporting to the FEC. Since Congress enhanced the criminal and civil penalties for knowing and willful reimbursement schemes in its enactment of BCRA, 441f violations have been DOJ's top priority in terms of criminal prosecution of FECA violations.

With respect to our relationship with DOJ, the FECA is largely silent. It gives the Commission the authority to refer knowing and willful violations of the FECA to DOJ after a finding of probable cause, but these referrals are not required. The statute merely states that the Commission "may" refer such matters. *See* 2 U.S.C. § 437g(a)(5)(C).
According to our records, the Commission has made four referrals to DOJ since 2001 pursuant to this provision. After a referral has been made, the statute requires that DOJ send the Commission status reports within the first 60 days and then 30 days thereafter until final disposition. (In practice, we do not receive these status reports from DOJ with any consistency.) The statute also gives the Commission the authority to report non-FECA crimes to the appropriate authorities. *See* 2 U.S.C. § 437d(a)(9). We most often use this provision to report apparent violations of 18 U.S.C. § 1001 (false statements) to DOJ and sometimes apparent violations of the Internal Revenue Code to the I.R.S.

Following the enactment of the FECA, the Commission and DOJ entered into a Memorandum of Understanding (MOU). This brief agreement, which dates back to 1977, acknowledges the Commission's exclusive jurisdiction in the civil enforcement of the FECA, establishes a framework for the two agencies with respect to the discharge of their respective responsibilities, and outlines circumstances warranting referral of matters between the two agencies. The MOU does not, however, dictate the nature of the working relationship between the agencies in each matter that has civil and criminal implications and has, therefore, become largely outdated and irrelevant. A dialogue between the two agencies about negotiating a new MOU that would better explain each agency's responsibilities and facilitate more cooperation began in the latter part of 2003 and has had a number of starts and stops since then. Most recently, we sent a revised draft MOU to DOJ in the Spring of 2006 and have not received a substantive

response.

In the 1977 MOU, the Commission and DOJ acknowledged that not all knowing and willful violations may be proper subjects for criminal prosecution and agreed that only knowing and willful violations "which are significant and substantial and which may be described as aggravated in the intent in which they were committed, or in the monetary amount involved" should be referred to DOJ. In those cases, the MOU contemplates that the Commission will complete its investigation and find probable cause before referring the matter to DOJ and will attempt to do so expeditiously. The 1977 MOU also states that if DOJ obtains information indicating a probable violation of the FECA, it shall apprise the Commission "at the earliest opportunity" and refer all knowing and willful violations that it does not deem significant and substantial to the Commission for civil enforcement.

The Commission has not established specific internal thresholds for referring knowing and willful violations to DOJ. When deciding whether to recommend that the Commission refer such violations to DOJ, OGC has historically considered a number of factors, including the nature and extent of the violations, whether DOJ or another agency has already pursued or is pursuing the same violations or players, and whether the statute of limitations on the criminal violations has passed or is imminent. Historically, very few referrals have been made to DOJ in large part because few cases progress to the probable cause stage, most of the ones that do reach the probable cause stage do not involve knowing and willful violations, and the few knowing and willful violations that do reach the probable cause stage often have parallel criminal proceedings that are already ongoing or have been concluded. [redacted]

While the statute only contemplates formal referrals after a finding of probable cause, there is nothing preventing the Commission and DOJ from collaborating with one another on parallel proceedings at any stage in the enforcement process, and, at times, we have reached out to DOJ to discuss cases of mutual interest or to determine whether they have a parallel proceeding relating to a respondent in one of our cases. Our collaboration and information sharing with DOJ has been an evolving process. For a long time, our two agencies did not work together very often on cases within our overlapping jurisdictions. On our end, this was due in large part to the fact that DOJ historically took the position that the Commission should drop or hold any matter in abeyance whenever so requested by DOJ. On DOJ's end, disincentives included concern that we might interfere with their investigations and the fact that conciliation agreements reached between the Commission and a respondent may, under FECA, be introduced in a criminal proceeding as evidence of a lack of knowledge or intent to commit the violation, and the fact that FECA requires a court to take a conciliation agreement with the FEC into account when determining the appropriate criminal sentence. *See* 2 U.S.C. § 437g(d)(2) and (3). DOJ has also cited to the grand jury secrecy requirements ("Rule 6"), and its interpretation of ethical rules that DOJ cannot raise the possibility of a global settlement with a defendant, and, instead, the subject of a global settlement must originate from the defendant.

In at least the last two years, there has been an increase in communication and cooperation between our two agencies, though additional improvement in these areas would be helpful. The players we usually deal with at DOJ are the campaign finance specialists within the Public Integrity Section of the Criminal Division - [redacted] is responsible for overseeing the criminal investigations and prosecution of election crimes by trial attorneys in the Public Integrity Section as well as about 200 Assistant United States Attorneys who serve as "District Election Officers" in the 93 federal judicial districts across the country.

As with formal referrals after a finding of probable cause, the Commission has not established specific internal thresholds or guidelines for determining whether and when we should reach out to DOJ at early stages in the enforcement process. In addition, the issue of early notice to DOJ had been a big part of the MOU renegotiations, with no resolution to date. Nevertheless, we have consulted with DOJ with much more frequency in the last couple years, and often contact them before we circulate to the Commission our First General Counsel's Reports in cases potentially involving knowing and willful violations to determine whether DOJ has a parallel criminal matter. When they do, we attempt to cooperate with them.

The level of cooperation ultimately achieved, however, often depends upon the trial attorney handling the criminal matter and the extent to which that person takes an open approach with us. It also depends upon the specific circumstances in each case, including the priority that DOJ places on the matter, the extent to which the FBI is actively involved, the stage or progress of DOJ's case as compared to the Commission's, whether a grand jury has been impaneled, and any other special circumstance that may be present. As a result, a one-size-fits-all approach to determine how much cooperation should be achieved, and when, has not been feasible; exercising a great deal of flexibility is usually necessary.

When we believe we have a case with knowing and willful violations, the factors we consider when determining whether to contact DOJ before a finding of probable cause include whether the violations are of the type DOJ traditionally pursues [redacted] and the amount in violation. Of course, if we have information that DOJ already has a parallel proceeding underway, we will contact them. If we have information that a parallel proceeding is being handled by a US Attorney's Office instead of Public Integrity, we may contact the USAO directly. If we don't have information that a matter is already being handled by DOJ or a USAO, we will look to see whether the violations are currently being prosecuted at the state level. If they are, I don't believe we have routinely consulted DOJ. We work instead with the state prosecutor's office to the extent possible and appropriate. Again, this has been an evolving process, and we contact DOJ much more routinely now than we did just 3 to 4 years ago.

One final note is that while the Commission and DOJ sometimes pursue the same perpetrators on parallel tracks, the overlap is usually not complete. [redacted] For these practical reasons, and not just because the statute clearly contemplated dual enforcement, *see* 2 U.S.C. § 437g(d)(2) and (3), we have always maintained that DOJ involvement should not preclude parallel civil enforcement. Another reason for this view is that sometimes DOJ holds a matter open indefinitely because they have an interest in the case but they do not pursue it aggressively because it is either not a high priority case for them or they don't have the present resources to pursue the matter, or both. In these cases, we have taken the lead in building the evidence, sometimes finding respondents or witnesses that the FBI had not located for DOJ. In cases that are high priorities for DOJ, however, we have cooperated with them to ensure that we do not frustrate their prosecutions, and, in appropriate cases, we have held our investigations in abeyance pending the criminal matter in exchange for DOJ's promise to share evidence once the criminal matter has concluded. *See, e.g.*, MUR 5818 (Fieger) and MUR 5903 (PBS&J).

I hope this information is helpful. Cooperation in carrying out our respective responsibilities benefits both agencies. It saves resources, avoids unnecessary duplication, and generally helps us enforce the law in a cohesive fashion. The results can be very positive, particularly when they lead to evidence sharing and, when possible, global settlement agreements.