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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: David M. Mason
Commissioner

From: Lawrence M. Noble
General Counsel

Subject: Response to "Additional Statement" in MUR 4766 (In the Matter of Philip Morris Companies, Inc., et. al.)

Date: May 18, 2000

On May 5, 2000, you issued an "Additional Statement" regarding MUR 4766 which criticized the handling of that MUR. I am responding to clarify what I believe are misunderstandings or disagreements regarding the procedures used in the handling of enforcement matters.

I fully agree with you that the Commission needs to move to a more streamlined process which would allow for the speedier handling of cases. While I also agree that the statutorily mandated enforcement procedures, as well as internal issues, often cause delays, I disagree that the manner in which OGC (and the Commission) reads the Commission's "jurisdiction" has been misguided or has needlessly contributed to our problems. When a complaint comes in the door, we have five days to make a judgment about whether it raises an issue within our jurisdiction, identify the respondents and send out appropriate notifications. 2 U.S.C. §437g(a). While OGC does reject complaints that do not allege violations within our jurisdiction, it is a responsibility we exercise judiciously, since our rejection of a complaint deprives the Commission of the ability to review the matter. [1]

In this regard, it is important to understand the difference between a complaint we would reject because it does not allege a violation of a statute within our jurisdiction and one we would accept because it alleges a violation of a statute under our jurisdiction even though it may not allege facts that give rise to a violation of that statute. This distinction is easiest to see if you compare a complaint alleging a violation of the Voting Rights Act with one alleging that someone violated the contribution limits when they gave a $1000

[1] Where there is a question as to whether the Commission has jurisdiction, the Commission may find reason to believe and investigate in order to determine whether it does have jurisdiction. *Reader's Digest v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981)

contribution to a federal candidate. OGC would reject the Voting Rights Act complaint because the FEC does not have jurisdiction over that statute. However, we do have jurisdiction over the allegation of an excessive contribution. The fact that a $1000 contribution is legal only means that there is no reason to believe the violation has occurred. The Office of General Counsel has never been delegated the authority to "draw such obvious conclusions"[2] that a violation did not occur and just dismiss a complaint. Only the Commission, by four affirmative votes, can make such a decision. 2 U.S.C. §437g(a)(2). In MUR 4766, the complaint did allege a violation within our jurisdiction. However, the facts alleged did not provide reason to believe a violation had occurred, or was about to occur, but only the Commission could make that finding.[3]

You also argue that MUR 4766 should have been dismissed by OGC (and thus not have been reviewed by the Commission) because it only alleged that a violation was going to occur in the future. Citing 2 U.S.C.§437g(a)(1), you argue that a complainant cannot file a valid complaint about a future violation. You read only 2 U.S.C §437g(a)(2) as granting the Commission the authority to act if a person "is about to commit" a violation.

While section (a)(1) does refer to a complainant believing "a violation...has occurred," section (a)(2) states that if "the Commission, *upon receiving a complaint under paragraph (1)* or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines...that it has reason to believe that a person has committed, *or is about to commit, a violation*" it shall so notify that person. While these two sections, taken together, may not be a model of consistency, it is at least equally fair to read section (a)(2) as authorizing the Commission to consider a complaint and find reason to believe if it believes a complaint has alleged that a violation is about to occur.

Which interpretation is correct, however, is irrelevant to OGC's present responsibility in reviewing a complaint because, as you note, the Commission *has* promulgated a regulation specifically providing for complaints alleging that a violation "is about to occur." 11 C.F.R. §111.4(a). The Office of General Counsel would be acting contrary to that regulation if it dismissed a complaint on the grounds that it only alleged that a violation was about to occur.

Next, you argue that OGC should not have listed Senator Mitch McConnell as a respondent, nor sent him notification of the complaint in MUR 4766. You base your

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[2] Even when it appears at first glance that a complaint does not state facts giving rise to reason to believe a violation has occurred, a closer review sometimes shows the situation not to be as obvious as it first seemed. See, e.g. Pre-MUR 383.

[3] It is for the same reason that we did not handle MUR 4869 (American Postal Workers Union) in the manner you suggest. The complainant in that matter did allege a violation of a statute within our jurisdiction, even though the facts set forth in the complaint did not constitute a violation of that statute.

argument on your belief that there was no theory under which the complaint set forth a potential violation by Senator McConnell. As noted, the Commission has only five days to notify the respondents of a complaint. The notification process is handled by staff in the Central Enforcement Docket and involves a quick review of the complaint and a decision about who to notify. Obviously, some judgment is called for, but we do not, at this stage, give the complaint a detailed substantive legal review. At this stage, one of our major concerns is to ensure that all relevant persons be given their due process notification, as required by statute. In doing so, we are mindful that the Commission has not limited notification to just those people who the complainant specifically identifies as respondents. Nor is notification based on a judgment that there is a reason to believe the person did violate the law. Rather, we notify everyone who may be possibly implicated by the complaint, believing they have a right to an opportunity to respond.[4] In this case, a judgment was made that the allegations were sufficient to warrant Senator McConnell being notified of the complaint and given an opportunity to respond. I understand your disagreement with that judgment and we will review the standards used for notification.

You also believe that OGC should not have named Senator McConnell as a respondent because of the possible application of the Speech and Debate Clause to this matter. In my view, notifying Senator McConnell and giving him an opportunity to respond and raise the Speech and Debate Clause was not "an initial error." The application of the Speech and Debate Clause is often complicated and it would not be appropriate for CED staff to make a legal judgment about its application based on a complaint. See, e.g. FEC v. Wright, 777 F.Supp. 525 (N.D. Tex. 1991).

Your statement also takes issue with the First General Counsel's Report not analyzing the Speech and Debate Clause or other jurisdictional issues and recommending dismissal of the matter on those grounds. As we felt it appropriate to recommend no reason to believe based on the merits of the allegations and responses, we did not believe it necessary to get into the Speech and Debate Clause or other jurisdictional issues and whether they applied, and, if they did, whether they required dismissal of the action or just limited the activities that could be investigated. This is not at all an unusual manner

[4] You note our reliance on a 1988 enforcement procedures memo as the basis for our policy, but state that it was "apparently never approved by the Commission." As you know, OGC regularly circulates policy and procedure memos to the Commission. Many of these memos are brought up for discussion at a Commission meeting by a Commissioner or Commissioners and we are often directed to make changes without a formal vote being taken. As any Commissioner, at any time, can ask that a policy memo or procedure be discussed and can ask that the Commission, formally or informally, direct that changes be made to that policy or procedure, we have worked from the assumption that the procedures not changed have met with Commission approval. However, if the lack of formal approval will leave a question as to whether the procedures do reflect Commission policy, we will recommend that the Commission take a formal vote on such procedures in the future.

in which to proceed. The Commission, as well as courts, routinely pass on a difficult issue when there are other clearer grounds upon which to dismiss a matter.[5]

I do share your concern that our procedures (waiting for responses, rating the complaint, holding the matter in CED and assigning it to an attorney, and then having to deactivate and reactivate the case because of other pressing workload issues) are part of the reason some matters take too long to resolve.[6] I do not, however, agree that application of our normal procedures was "simply unsatisfactory" in this case because of its high profile nature and because, in your view, the complaint "was plainly intended to influence elections." The motive behind the filing of the complaint should have limited impact on how a matter is handled, other than as it relates to credibility issues. We assume that many complaints are filed for "political" reasons; however, that probability does not undermine the public's interest in the resolution of the case on its merits and according to normal procedures. In fact, Congress was well aware that the complaint process it enacted would give rise to "politically motivated" complaints and assumed that those complaints would serve as part of the mechanism for ensuring compliance with the law. (The confidentiality provision was put into place because Congress assumed many of the complaints would be filed before an election for political reasons.)

In any event, Commissioners receive regular reports on the status of MURs, including those which are activated or deactivated. When Commissioners are concerned about the activation or deactivation of a MUR, they can (and do) ask that the matter be discussed at a Commission meeting. At that time, they can ask that OGC be directed to activate or deactivate a matter, as the situation warrants. While you did speak to the Associate General Counsel for Enforcement about this MUR, to the best of my knowledge, neither you nor the Commission as a whole objected to the fact that the case was being deactivated.

Finally, I must comment on your statement that comparing the handling of the complaint in this matter with the handling of the complaints in MUR 4924 and 4926 against Hillary Clinton "opens the Commission to criticism." I completely reject any implication that the dismissals of MUR 4924 and 4926 in a shorter period of time than MUR 4766 was due to anything improper. Other than the fact that both of these MURs were, in your words, "high profile," these cases had little in common. MURs 4924 and 4926 complained about one transaction which never occurred. The activity alleged to be a

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[5] Any Commissioner could have asked OGC to analyze any of the jurisdictional issues. However, since you share my concern about the length of general counsel's reports, I will note that requiring OGC to deal with all defenses raised when there are other grounds upon which to dismiss a case will just further lengthen reports and the time taken for them to be prepared.

[6] In this regard, the Commission may want to reexamine its decision to not ask for more enforcement resources. The speed with which cases are activated, as well as the need to deactivate cases, is directly impacted by the resources available.

violation in MUR 4766 involved a series of ads taken out in numerous states over a period of several months. These differences, alone, allowed MURs 4924 and 4926 to be handled in a speedier fashion than MUR 4766.

As always, I am available to discuss these issues with you at your convenience.

cc: Commissioners
MUR 4766 File