

June 22, 2020

VIA EMAIL

Federal Election Commission
1050 First Street, NE
Washington, District of Columbia 20436

MURs 6917 & 6929: Supplemental Response of OAR to General Counsel's Brief

Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R. Telegraphers v. Railway Express Agency, Inc.,
321 U.S. 342, 348-49 (1944)

Dear Commissioners:

In the time since Our American Revival submitted its response to the General Counsel's Brief in the above-referenced matters, the Commission has returned to quorum, but the statute of limitations has effectively expired. *FEC v. Williams*, 104 F.3d 237, 241 (9th Cir. 1996) (due to the Act's mandatory notice and conciliation requirements, the statute of limitations on FECA violations effectively expires prior to the end of the five-year limitations period). In light of the continuing frantic efforts of the Commission's Office of General Counsel to push this matter through the administrative process despite the obvious expiration of the statute, OAR submits this Supplemental Response to OGC's Probable Cause Brief and again urges the Commission to close its files in these stale, time-barred matters.

As we hope you are aware, OAR requested a hearing to address OGC's probable cause recommendation. As we understand the Commission's procedures, the determination to grant or deny a hearing rests not with agency staff, but rather with the Commissioners, as any two Commissioners may grant such a request. 72 F.R. 64919, 64919 (Nov. 19, 2007). Additionally, the Commission, in its procedures, has expressly "reserve[d] the right to request" tolling as a

MURs 6917 & 6929

Supplemental Response of OAR to General Counsel's Brief

Page 2 of 3

condition of granting a hearing. *Id.* at 64920. *The Commission's procedures do not require a respondent to offer tolling as a condition of having its hearing request considered by the Commission.* In response to OAR's hearing request in these matters, however, OGC repeatedly has told OAR that "the Commission does not support" granting a hearing without tolling—which of course is not the same thing as telling us that two Commissioners have offered to grant a hearing conditioned upon tolling—and has steadfastly refused to tell us whether two Commissioners have voted to grant our hearing request and to provide us with a copy of the vote certification. In our last exchange on this matter, OGC even threatened to advise the Commission that OAR does not agree to tolling, which is false. As OAR has stated to OGC several times now, the Commission having "reserve[d] the right to request" tolling as a condition of granting a hearing, if two Commissioners see fit to grant OAR's hearing request but do so conditioned upon an agreement by OAR to toll, OAR will consider the Commission's request and the proposed tolling agreement at the time it is presented. A full copy of my correspondence with OGC on this issue is included with this letter.

Of course, a hearing at this point may be of limited utility—not only because the statute of limitations has effectively expired in these matters—but also because OGC just this afternoon is preparing to provide relevant documents obtained in the course of its investigation, as required by the Commission's procedures. Indeed, those procedures require OGC to provide OAR with "all relevant documents gathered by the Office of General Counsel in its investigation, not publicly available and not already in the possession of respondent, in connection with its investigation of the allegations against the respondent," including "any documents that contain exculpatory information." 76 Fed. Reg. 34986, 34990 (June 15, 2011). OGC must provide the documents in response to a request made "within 15 days of . . . the date of the General Counsel's notification to a respondent of a recommendation to the Commission to proceed to a vote on probable cause." *Id.* at 34991.

In these matters, OAR timely requested documents on May 18, 2020. On May 26, 2020, we raised the issue again in our initial Response to the General Counsel's Brief, surprised that OGC—with awareness of the impending expiration of the statute of limitations, with knowledge of the Commission's procedures and deadlines, and with a year to prepare for this moment—did not provide the documents to OAR nearly immediately, given its frenzied efforts to ram this matter through to probable cause in the last year of the five-year SOL. And yet, as of the date of this letter, June 22, 2020, OGC just now is preparing to provide documents to OAR.¹ OAR needs a fair and reasonable opportunity to review these documents prior to any hearing, so that the hearing can fully serve the interests that undergird the Commission's hearing procedures. *See* 72 F.R. at 64919 (identifying "increased transparency" and "expanded opportunities to contest allegations" as reasons for the Commission's hearing process). Without yet having seen the documents—how many there are, what form they are in, the issues they implicate—the Commission cannot possibly expect OAR to schedule a hearing, let alone participate in one. OGC should not be permitted to parlay its failure to timely provide OAR with relevant documents into an agreement by OAR to toll the statute of limitations and continue these matters beyond the expiration of the five-year limitations period.

¹ At noon ET today, OGC advised OAR by email that it was "finalizing our production" and that "our plan" is to transmit the documents "later today."

MURs 6917 & 6929
Supplemental Response of OAR to General Counsel's Brief
Page 3 of 3

Lastly, in reliance on its rights under the applicable statute of limitations, as well as on the Commission's procedures, OAR dutifully has maintained its existence for several years now. It has done so, at considerable personal and professional burden to those still involved, in recognition of its legal obligations and out of respect for the Commission and its enforcement process. However, OAR's work long has been substantially complete and, but for the pendency of these matters, any other organization in OAR's position would have terminated by now. With the effective expiration of the statute of limitations, the time has come for OAR to do the same. Accordingly, over the next few weeks, OAR will begin winding down and preparing for termination. Once that process is complete, OAR no longer will be available to participate in these proceedings. I will maintain OAR's documents and other information until further notice.

Because the statute of limitations has effectively expired, OAR urges the Commission to close its files in these matters immediately. Alternatively, OAR renews its request for a hearing, and reiterates that it will consider tolling if the Commission grants a hearing and requests it as a condition of the hearing. OAR will not be in position to schedule or participate in any such hearing, however, until it has had a fair and reasonable opportunity to review the documents that OGC has previewed that it intends to produce later today. In the meantime, the Commission should not require OAR to surrender its substantive legal right to be free from further involvement in these stale claims on account of OGC's delay—delay in the investigation of this matter, delay in its recommendations to the Commission, and delay in the provision of relevant documents to OAR.

Sincerely,

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cc: Lisa J. Stevenson, Acting General Counsel
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