FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 7889
SIG SAUER, Inc., *et al.*	)	
	)	

STATEMENT OF REASONS OF VICE CHAIRMAN SEAN J. COOKSEY AND COMMISSIONERS ALLEN DICKERSON AND JAMES E. "TREY" TRAINOR, III

The Complaint in this matter was straightforward. It named one respondent—SIG SAUER, Inc.—and alleged that the firearms manufacturer made a prohibited federal-contractor contribution to an independent expenditure-only political committee ("IEOPC").[1] SIG SAUER admitted to an inadvertent violation and sought a refund, and the Commission unanimously agreed to conciliate the offense with SIG SAUER, consistent with the Office of General Counsel's ("OGC") recommendations.[2]

We could not, however, legitimize OGC's attempt to go further. Based on this Complaint solely against SIG SAUER, OGC not only engaged in an *ultra vires* investigation of other companies without Commission approval, but it further proposed a broader investigation of the IEOPC based upon unsubstantiated speculation about parties' personal knowledge. We rejected that course of action, and we provide this statement to explain why.[3]

I. Factual and Legal Background

Gun Owners Action Fund ("GOAF") is an IEOPC founded on December 10, 2020, formed for the apparent purpose of making independent expenditures in the then-impending runoff elections for the U.S. Senate in Georgia less than one month later.[4] In that short period, GOAF reported $1,951,302 in independent expenditures supporting and opposing candidates in

[1] Complaint at 1 (Mar. 17, 2021), MUR 7889 (SIG SAUER, Inc.).

[2] Response of SIG SAUER, Inc. at 1 (April 27, 2021), MUR 7889 (SIG SAUER, Inc.); Certification (Jan. 11, 2022), MUR 7889 (SIG SAUER, Inc.).

[3] Certification (Jan. 11, 2022), MUR 7889 (SIG SAUER, Inc.); Certification (Dec. 15, 2022), MUR 7889 (SIG SAUER, Inc.).

[4] First General Counsel's Report at 5 (Nov. 16, 2021), MUR 7889 (SIG SAUER, Inc.). *See also Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (establishing the requirement that "[t]he Commission or the individual Commissioners" provide a statement of reasons why the agency "rejected or failed to follow the General Counsel's recommendation").

the two Georgia runoffs.[5] GOAF's activities were funded by nine contributions from another IEOPC and from firms in the firearms industry.[6]

SIG SAUER was one such contributor, giving GOAF $100,000 on December 31, 2020.[7] At that time, SIG SAUER also held at least two contracts with the federal government for firearm sales.[8] Federal contractors are prohibited from making political contributions under 52 U.S.C. § 30119(a)(1), and the Commission has enforced that prohibition with respect to IEOPC contributions.[9] Those facts formed the basis of the Complaint filed against SIG SAUER.

When confronted with the Complaint, SIG SAUER pleaded ignorance and pointed the finger at GOAF, saying it relied on GOAF's expertise and attaching to its response an email solicitation for GOAF from the owners of Daniel Defense—another firearms manufacturer and GOAF contributor.[10] GOAF, for its part, denied having any knowledge of SIG SAUER's federal-contractor status.[11] The matter appeared set for routine Commission enforcement and conciliation.

But issues arose when OGC did not limit itself to the allegations and the facts presented and instead, while preparing its First General Counsel's Report, broadened the matter's scope beyond the Complaint. OGC not only recommended conciliation with SIG SAUER, but also proposed an investigation against GOAF for supposedly knowingly soliciting a federal contractor.[12] What's more, OGC undertook its own investigation of Daniel Defense—who was not named in the Complaint—and proceeded to name it as a respondent without Commission authorization.[13]

Because of the factual and legal infirmities underlying OGC's recommendations as to GOAF and Daniel Defense, the Commission did not adopt those recommendations. Instead, the Commission voted to conciliate with SIG SAUER and to close the file.[14]

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5 *Id.*

6 *Id.* at 5–6.

7 *Id.* at 6.

8 *Id.* at 3–4.

9 *See*, *e.g.*, MUR 7843 (Marathon Petroleum Co.); MUR 7842 (TonerQuest, Inc.). SIG SAUER did not raise any constitutional objection to the statute's enforcement. We nonetheless continue to harbor doubts about the constitutionality of the federal-contractor prohibition as applied to IEOPC contributions. *See* Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor at 6 (Oct. 13, 2021), MUR 7180 (GEO Corrections Holdings, Inc.).

10 Response of SIG SAUER, Inc. at 1–2 & Attach. A (April 27, 2021), MUR 7889 (SIG SAUER, Inc.).

11 Response of GOAF at 2 (April 23, 2021), MUR 7889 (SIG SAUER, Inc.) ("[T]o be abundantly clear, GOAF did not have knowledge of SSI's federal contractor status until after this Complaint was filed.").

12 First General Counsel's Report at 12–13, 15 (Nov. 16, 2021), MUR 7889 (SIG SAUER, Inc.).

13 *Id.* at 13–14.

14 Certification (Dec. 15, 2022), MUR 7889 (SIG SAUER, Inc.).

II. Legal Analysis

OGC's recommendations against GOAF and Daniel Defense failed for separate and distinct reasons. While the former substituted speculation for evidence of personal knowledge required under the law, the latter was legally tainted by OGC's *ultra vires* conduct. We address each in turn.

A. OGC's Allegations against GOAF Were Unfounded

First, we rejected OGC's recommended reason-to-believe finding and proposed investigation against GOAF for knowingly soliciting a contribution from a federal government contractor. We did so because, under the proper legal standard, we could find reason to believe only if GOAF acted with actual knowledge of SIG SAUER's contractor status. OGC speculated that GOAF nevertheless was aware of these facts, but GOAF explicitly denied such knowledge and OGC lacked credible information suggesting that this denial was false.

The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits federal government contractors from engaging in certain kinds of political speech. The statute not only bans federal contractors from making political contributions, but also prohibits anyone from knowingly soliciting such a contribution.[15] The adverb in the solicitation offense—*knowingly*—is critical. It establishes a *mens rea* element that is required to show a solicitation offense, which need not be present when pursuing the contributor. The *mens rea* requirement applies to each *actus reus* element of the offense: (1) a solicitation, (2) of a contribution, (3) from a federal government contractor. An offender must have knowledge of all three elements, but the scienter requirement will most often be at issue with respect to the solicitee's federal-contractor status.

The Commission has promulgated no regulations elucidating the *mens rea* element for a federal-contractor solicitation offense.[16] Indeed, we have not found a single previous enforcement matter in which the Commission has applied the solicitation prohibition for federal contractors.

Congress's decision to require that an unlawful solicitation be "knowing" is not routine. The immediately preceding text of the Act places no such requirement on violations of the contractor contribution ban itself. But solicitations are speech of a most direct kind, as the Supreme Court has recognized in applying strict scrutiny to such solicitations while declining to do so for political contributions.[17] We accordingly have a special responsibility to give effect to the limited scope of the Act's prohibition. In our view, in the absence of contrary regulatory language, and with solicitude for the constitutional equities involved, we believe the best interpretation of "knowing" in the context of unlawful solicitation of a federal contractor is just

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15 52 U.S.C. § 30119(a)(1)–(2).

16 *Compare* 11 C.F.R. § 115.2, *with* 11 C.F.R. § 110.20(a)(4) (providing regulatory definitions for "knowingly" with respect to the foreign-national prohibition).

17 *Compare Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 791–92 (1988), *with Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam).

that—knowledge of the relevant facts that make a particular solicitation illegal, including the prohibited status of the person solicited.

Under this standard, it is apparent from the record that OGC lacked any information—beyond speculation and conjecture—that any agent of GOAF had actual knowledge of SIG SAUER's status as a federal contractor. At the outset, GOAF unequivocally denied that it had actual knowledge of any contributor's federal-contractor status. And GOAF correctly points out that the Complaint itself provides no such indication—indeed, it does not even make the accusation that OGC claims the Commission should pursue.

Instead, OGC relies on what it could gather of its own accord to establish the solicitor's knowledge, which is generally lacking. In its attempt to establish GOAF's agents' specific knowledge of SIG SAUER's federal-contractor status, OGC points to publicity around SIG SAUER's contracts to furnish the federal government with firearms.[18] OGC goes on to suggest that GOAF's founder, Chris Cox, must have been aware of that fact because he had previously worked for the National Rifle Association of America, and it was therefore "improbable," in OGC's estimation, that Cox "could be unaware that the fourth largest firearms manufacturer in America … was a government contractor." [19]

As for the owners of Daniel Defense—whom OGC concludes were acting as agents of GOAF—OGC ventures that it must have been "common knowledge" in the firearms industry that SIG SAUER was, on that date, a federal contractor.[20] OGC then goes on to argue, tellingly, that "[e]ven if the [Daniel Defense owners] were not aware of this or other specific contracts, they were certainly aware of a substantial probability that SIG was a federal contractor and, at a minimum, should have reasonably inquired whether SIG was a federal contractor."[21] That latter point, of course, would not constitute "knowledge" of SIG SAUER's federal contractor status, even if it were true.

The Commission cannot authorize an investigation based upon "[u]nwarranted legal conclusions from asserted facts or mere speculation."[22] Nor will it find reason-to-believe when a complaint "consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint."[23] OGC's analysis as to the solicitation offense gives short shrift to GOAF's denial, which it sets aside based upon conjecture about what, in OGC's view, Respondents must have known at the time, based on assumptions about the parties' industry knowledge and awareness of particular news articles. Weighed against explicit denials, that is simply insufficient to support reason to believe that these parties solicited SIG SAUER while having actual knowledge of SIG SAUER's federal contract.

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18 First General Counsel's Report at 3–4, 12–13 (Nov. 16, 2021), MUR 7889 (SIG SAUER, Inc.).

19 *Id*. at 12–13.

20 *Id*.

21 *Id*. at 12.

22 Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas at 2 (Dec. 21, 2000), MUR 4960 (Clinton) (citations omitted).

23 *Id*.

"Plainly, mere 'official curiosity' will not suffice as the basis for FEC investigations, as it might in others."[24] The Supreme Court has warned that "the power of compulsory process [must] be carefully circumscribed when the investigative process tends to impinge on such highly sensitive areas of freedom of speech or press, freedom of political association, and freedom of communication of ideas."[25] Considering those standards, and considering the dearth of facts supporting OGC's proposed findings and investigation with respect to GOAF, we voted to find no reason to believe GOAF violated 52 U.S.C. § 30119(a)(2) by knowingly soliciting a contribution from a federal contractor.

B. OGC's Ultra Vires *Investigation of Daniel Defense Was Unauthorized*

We next turn to OGC's recommendation to pursue enforcement against Daniel Defense for making a prohibited federal-contractor contribution. Daniel Defense is not a named party in the Complaint, nor even mentioned.[26] Yet while reviewing GOAF's reports filed with the Commission that included SIG SAUER's contribution, OGC made the unilateral decision to engage in an investigation of GOAF's other contributors, to check their federal-contractor status, and to name one as an additional Respondent in the matter. All of this was done without Commission authorization and outside of established Commission procedures.

First, OGC told the Commission that the allegations against Daniel Defense arose "in the normal course of analyzing the Complaint."[27] But we can conceive of no reason—and OGC provides none—why OGC would need to investigate *other* contributors' federal-contractor status in order to assess the merits of a Complaint against SIG SAUER. Nor would other contributors' federal-contractor status have been found in plain view from OGC's review of the Complaint's allegations or Commission reports. Rather, it was only through extracurricular and unauthorized snooping into unnamed parties that Daniel Defense was included in this matter.[28]

Strikingly, in its notification letter, OGC did not tell Daniel Defense that the allegations arose from review of the Complaint or provide Daniel Defense with a copy,[29] but instead represented that OGC "ascertained information in the normal course of carrying out its supervisory responsibilities."[30] Of course, that is different from what it told the Commission, but even if it were true, OGC would still have violated Commission procedures.

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24 *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981).

25 *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957).

26 Complaint (Mar. 17, 2021), MUR 7889 (SIG SAUER, Inc.).

27 First General Counsel's Report at 3–4, 12–13 (Nov. 16, 2021), MUR 7889 (SIG SAUER, Inc.).

28 *See* Statement of Reasons of Vice Chairman McGahn at 7 (September 16, 2013), MUR 6576 (Wright McCleod for Congress) (citing "instances in the past … where OGC has taken information obtained during the course of a pre-RTB investigation and used it to name respondents not included in the original complaint").

29 It is understandable why OGC would not acknowledge to Daniel Defense that the Complaint was the origin of the allegations or provide a copy—the Complaint did not actually contain any allegations against Daniel Defense.

30 Notification to Daniel Defense (Feb. 16, 2022), MUR 7889 (SIG SAUER, Inc.).

Relevant here, the Act provides two distinct avenues for the Commission to pursue enforcement, each with its own substantive and procedural safeguards. One path is complaint-driven, while the other arises from "information ascertained in the normal course of carrying out [the Commission's] supervisory responsibilities."[31] As past Commissioners have observed, OGC has conflated these two processes,[32] and this matter represents another example.

Under the Act, complaint-generated matters must be based on sworn allegations from a third party, must be transmitted to the respondent within five days, and must allow a respondent fifteen days to file a response.[33] Federal courts have observed that the Commission does not have legal authority to name whomever it likes as a respondent to a complaint—the statute does not provide that discretion.[34] After considering the complaint and responses, the Commission "may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of [the Act]."[35] If it finds reason to believe by four affirmative votes, it is then up to the Commission to authorize an investigation, pursue conciliation, or proceed with some other course of action authorized by law.[36]

By contrast, matters generated from the exercise of the Commission's supervisory responsibilities are governed by Commission Directive 6.[37] That Directive sets forth the circumstances under which internally generated matters may be initiated and the procedures to bring them before the Commission for consideration. Critically, Directive 6 mandates that "[n]o non-routine reviews of reports or other documents shall be conducted by Commission staff members without specific prior approval of the Commission."[38] Instead, the Directive provides a specific process for how OGC should undertake non-routine reviews of reports, subject to Commission approval, and how it must handle referrals or documents from other government agencies.[39] But OGC did not follow those procedures here.

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31 52 U.S.C. § 30109(a)(2).

32 Statement of Reasons of Vice Chairman McGahn and Commissioner Hunter at 4–6 (Sept. 18, 2013), MUR 6462 (Donald J. Trump, *et al.*).

33 52 U.S.C. § 30109(a)(1) (setting forth the requirements for proper filing and handling of a complaint with the Commission).

34 *Nader v. FEC*, 823 F. Supp. 2d 53, 67 (D.D.C. 2011) ("The FEC has not identified any statutory or other authority for the proposition that, despite the Act's clear language, it has discretion to notify whomever it wants as "respondents" to the administrative complaint. The statute clearly strips the agency of that discretion.").

35 Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas at 1 (Dec. 21, 2000), MUR 4960 (Clinton).

36 *See* 52 U.S.C. §§ 30107(a), 30109(a).

37 *See* FEC Directive 6, Handling of Internally Generated Matters (April 21, 1978), *available at* https://www.fec.gov/resources/cms-content/documents/directive_06.pdf. *See also* 52 U.S.C. § 30109(a)(2) (providing two distinct bases for an enforcement action: a properly filed complaint or information ascertained in the normal course of carrying out [the Commission's] supervisory responsibilities").

38 *Id.* at 4.

39 *Id.* at 4–5.

OGC tries to have it both ways. By conflating two distinct methods for generating enforcement matters, it complied with the procedural safeguards of neither. The result is a roving, standardless, and extra-legal investigation prior to any reason-to-believe finding, unmoored from Commission rules and oversight.[40] Past Commissioners have consistently criticized these *ad hoc* practices, which undermine the statutory scheme and lack appropriate guardrails.[41]

OGC's investigation of other outside parties, conducted without Commission approval, was *ultra vires*. The inclusion of Daniel Defense in this matter is fruit from that poisonous tree. Because OGC's naming of Daniel Defense as a respondent resulted from an *ultra vires* investigation, we declined to consider it in this matter and voted to dismiss Daniel Defense as a respondent, consistent with past Commissioners' practice.[42]

* * *

The Commission unanimously agreed to pursue enforcement based upon the allegations actually raised in the Complaint. But for the foregoing reasons, we could not agree with OGC's proposal to launch a sweeping investigation into other parties. We therefore rejected OGC's recommendations as to GOAF and Daniel Defense in this matter, and the Commission closed the file.[43]

Sean J. Cooksey
Vice Chairman

January 20, 2023
Date

Allen Dickerson
Commissioner

January 20, 2023
Date

James E. "Trey" Trainor, III
Commissioner

January 20, 2023
Date

[40] Statement of Reasons of Vice Chairman McGahn and Commissioner Hunter at 3–6 (Sept. 18, 2013), MUR 6462 (Donald J. Trump, *et al.*).

[41] *See, e.g.*, Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn (June 1, 2009), MUR 6056 (Protect Colorado Jobs); Statement of Reasons of Vice Chairman McGahn and Commissioner Hunter at 6–16 (July 25, 2013), MUR 6540 (Rick Santorum for President).

[42] Statement of Reasons of Vice Chairman McGahn and Commissioner Hunter at 16 (July 25, 2013), MUR 6540 (Rick Santorum for President) ("The news articles OGC discovered in its pre-RTB investigation were not properly before the Commission, and have thus been excluded from our analysis of this matter.").

[43] Certification (Dec. 15, 2022), MUR 7889 (SIG SAUER, Inc.).