

July 19, 2013

Commissioner Ellen L. Weintraub, Chair  
Commissioner Donald F. McGahn, Vice Chair  
Commissioner Caroline C. Hunter  
Commissioner Matthew S. Petersen  
Commissioner Steven T. Walther  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

Dear Commissioners:

Our organizations strongly urge Commissioners to take no action regarding the FEC Enforcement Manual until the two nominees who have been appointed to serve on the Commission are confirmed and take office.

Our organizations include Americans for Campaign Reform, the Brennan Center for Justice, the Campaign Legal Center, Citizens for Responsibility and Ethics in Washington, Common Cause, Democracy 21, Demos, the League of Women Voters, Public Citizen, Sunlight Foundation and U.S. PIRG.

According to published reports, the Senate Rules Committee is scheduled to hold a hearing on the two FEC nominees on July 24, 2013 and the nominees could be confirmed by the Senate before the August recess begins.

We strongly urge you not to hold any Commission meeting on the Enforcement Manual until the full complement of six Commissioners is sitting on the agency. The two new Commissioners who will have to live with the results of any changes in the Enforcement Manual are entitled to participate in any deliberations on this matter. There is no urgency or need for immediate consideration of changes to an Enforcement Manual that has served the FEC well for many years in its current form.

Our organizations are strongly opposed to the proposed changes to the Enforcement Manual that have been offered by Commissioners McGahn, Hunter and Peterson. These changes have no legitimate justification, will seriously undermine enforcement of the nation's campaign finance laws by the FEC, the Justice Department and US Attorneys' offices and should be withdrawn. If the proposed changes are considered, we strongly urge Commissioners to vote against the changes.

Under the proposed changes to the Enforcement Manual, the professional staff of the Commission would be prohibited from accepting and using information from, or providing

information to, any local, state or federal law enforcement agency, including the Department of Justice and U.S Attorneys offices, without the vote of four Commissioners.

This unprecedented gag rule makes no sense unless you are trying to undermine and minimize the ability of enforcement agencies to bring enforcement actions against individuals and entities that have violated the campaign finance laws. This was made clear to the FEC by a memorandum sent to the Commissioners by its then General Counsel, Anthony Herman on July 17, 2013. The memorandum stated:

For more than 20 years, the Federal Election Commission has freely shared enforcement information and records with the Department of Justice upon request. As a result of this information sharing, the Commission currently enjoys a strong relationship with DOJ. DOJ now reciprocates by freely sharing its enforcement information and documents with the Commission to the extent possible, and that information has greatly benefited the Commission's efforts to enforce the Federal Election Campaign Act.

The memorandum further stated:

[U]nimpeded information sharing is the norm among federal agencies—OGC has been unable to identify a single federal agency that requires subpoenas or Commissioner approval in every case, as members of the Commission have proposed here.

There is no legitimate basis for ending the longstanding practice of the Justice Department and the FEC professional staff freely exchanging information to determine whether violations have occurred of the campaign finance laws and to hold violators accountable.

The proposed changes to the Enforcement Manual would also prohibit the professional staff from considering information that is publicly available in determining whether to recommend to the Commissioners that an investigation be undertaken. The votes of four Commissioners would be required to proceed with any such investigation.

Under the proposed changes, the FEC staff would be required to ignore information that is publicly available to everyone outside the agency and that could be relevant to reaching a conclusion to recommend that the Commission *proceed or not proceed* with an investigation.

The absurd nature of this proposed change can be seen by the sources the professional staff would be *prohibited* from consulting in determining recommendations to the Commissioners. Thus the professional staff would be prohibited from consulting the following resources that have long been listed in the Enforcement Manual as permissible sources to consult:

- The use of Westlaw “to search for news articles and to find public information about corporations and individuals;
- Dun & Bradstreet which provides “comprehensive information on most U.S. businesses”;

- Commercial search engines (presumably such as Google) that “can generate a list of potential information sources relevant to the facts of a matter,”
- YouTube “to locate video advertisements that might be at issue in a complaint”;
- Candidate, Party or Political Committee Websites; and
- “News articles” which “may provide useful background information or reports of recent developments in a matter.”

The proposed changes go so far as to remove the following sentence from the Enforcement Manual: “Often, publicly available information will provide facts that are important in making a correct recommendation to the Commission.”

As Kenneth Gross, a former head of the FEC’s enforcement division, said about these proposed new restrictions on the FEC staff in a *Washington Post* article (July 14, 2013):

That’s just ridiculous,” said campaign finance lawyer Kenneth Gross, a former FEC associate general counsel. “To hamstring staff from taking into account information out there in the public arena makes no sense. I’ve never heard of such a thing.”

*The Washington Post* noted in a recent editorial (July 14, 2013), “[T]he commission should not be changing its rules. The proposed manual is wrong in substance — it would further stifle the agency’s efforts to enforce the law and seek out violators.”

In reviewing the proposed changes, we can only reach the conclusion that they constitute an indefensible effort led by a lame duck Commissioner to further cripple the enforcement of the campaign finance laws by the FEC and to seriously undermine and damage the ability of any other enforcement agency to enforce the laws.

Our organizations strongly urge that you not take any action regarding the Enforcement Manual until the two new nominees to the FEC take office and six Commissioners are available to act on the matter. We also strongly urge that if the proposed changes to the Enforcement Manual are considered you vote against these changes.

Americans for Campaign Reform  
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 Campaign Legal Center  
 Citizens for Responsibility and  
 Ethics in Washington  
 Common Cause

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