

July 12, 2013

By Email

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

**Re: Comments on Agenda Document No. 13-21: Proposed
Amendments to the OGC Enforcement Manual**

Dear Commissioners:

We are writing to inform you of our strong objections to the changes to the agency's Enforcement Manual that have been proposed by Commissioners McGahn, Hunter and Petersen.

These proposed changes must be rejected by the Commission because they will prevent the free exchange of information between the professional staff of the agency and the Justice Department, United States Attorneys and other agencies, at the expense of enforcing the nation's campaign finance laws.

These changes will also prevent the Commission's professional staff from considering information that is already public information without the voting approval of four Commissioners, thereby forcing the professional staff to act as if they are blind to information that is on the public record and that is available to everyone outside the agency.

The proposed changes are nothing less than a gag rule for the professional staff of the agency. They would have the predictable effect of seriously undercutting not just the FEC's ability to effectively enforce the campaign finance laws, but the ability of the rest of the federal government to do so as well.

Any Commissioner who votes for these proposed changes is voting to sabotage the enforcement of the nation's campaign finance laws by the FEC, the Justice Department and

United States Attorneys. Any Commissioner who votes for these changes will be doing a great disservice to the American people.

For an agency that is riven by ideological and partisan dysfunctionality, and that has already lost public credibility as competent to administer and enforce the campaign finance laws, the FEC should not further damage itself by imposing artificial and indefensible constraints on its staff's ability to investigate potential violations of the law. Such constraints have not been viewed as necessary or appropriate since the agency's creation in 1974. They are neither necessary nor appropriate today.

We also want to express our strong objection to the consideration of these major changes to the agency's Enforcement Manual at a time when there is less than a full complement of six Commissioners on the agency. Although it is not entirely clear what procedures the Commission may attempt to use to vote on the changes proposed by the Republican Commissioners, it would be highly inappropriate, and potentially contrary to law, for the three Republican Commissioners to purport to adopt such changes without a fourth vote, *i.e.*, without the vote of at least one Democratic Commissioner.¹

To the extent there is an effort to decide this matter now it would be simply illegitimate for the three Republican Commissioners to take advantage of a temporary vacancy in a Democratic seat to adopt, by themselves, major changes to agency policy and practice. Indeed, once adopted by three Republican votes, these changes to the Enforcement Manual then could not be reversed by fewer than four votes after the agency again has its full complement of six members. In other words, the Republican Commissioners by acting now and acting alone can, as a practical matter, ensure these changes are indefinitely locked in.

The central purpose of the structure of the FEC is that significant decisions by the agency must be made on a bipartisan basis, *i.e.*, with the vote of at least one member of each party. Adopting major changes to the agency's Enforcement Manual now, acting solely on the basis of three Republican votes, is contrary both to the underlying purpose of the Commission's structure and to the agency's traditions.

This situation is all the more egregious given that nominees for the vacant Democratic seat and for Commissioner McGahn's holdover seat have been named by President Obama.

¹ The statute expressly requires "the affirmative vote of 4 members of the Commission" to adopt "any action in accordance with," *inter alia*, the Commission's authority "to conduct investigations" set out in § 437(d)(a)(9). See 2 U.S.C. § 434c(c). Voting on significant changes to the Manual setting forth the Commission's enforcement procedures certainly can be viewed as an action "in accordance with" the "Commission's power . . . to conduct investigations." Further, the proposed changes to the Manual appear to be so extensive as to have the effect of countermanding Commission regulations, *e.g.*, 11 C.F.R. § 111.8—an action that cannot be done without the vote of four Commissioners after notice-and-comment rulemaking.

According to published reports, the Senate Rules and Administration Committee will conduct a confirmation hearing on the two pending nominees on July 24 and the nominees could move to the full Senate for confirmation before the August recess.²

There is no reason to believe the Commission will not be at full strength in the near future, and no action should be taken by the FEC on this matter until then.

While Commissioner McGahn has a right to vote on normal Commission business until his successor takes office, his effort to force through major changes to the Enforcement Manual is not normal agency business, but rather a lame duck power play designed to exploit a temporary vacancy in a Democratic seat before this window of partisan advantage closes.

There is certainly no exigency that requires the Commission to act now on the Enforcement Manual. That alone makes the rush to amend the Manual appear as little more than an opportunistic partisan exercise by the Republican Commissioners to further undermine the agency's enforcement procedures. Any such effort is tainted at the core.

We strongly urge that the Commission not consider the Enforcement Manual until the two new nominees to the Commission are seated, which should happen in the near future.

While many of the policy changes proposed by the Republican Commissioners will unreasonably limit the investigative authority of OGC, two of the proposed new constraints are particularly unwarranted—and appear unprecedented—for an enforcement agency that is serious about its task. These changes, which we discuss below, seem intended only to serve the interests of the regulated community and the defense bar, not the American people, by requiring OGC to willfully blind itself to readily available information, both from public sources and from sister enforcement agencies, that may be highly germane to developing enforcement cases.

First, the Republican Commissioners propose to strip OGC of the ability to accept information from, or give information to, any local, state or federal law enforcement agency, including the Department of Justice, without the vote of four Commissioners. Thus, the Republican Commissioners propose to add to the Enforcement Manual a new provision that states:

[I]t is the Commission's policy that non-public information or records may only be provided to law enforcement agencies or other government entities pursuant to a written request and upon the affirmative vote of at least four members of the Commission. . . .

Such non-public information and records subject to this requirement include: inquiries regarding the existence of a complaint . . . ; information on the status of a complaint or matter, including the nature of allegations included in a complaint, the stage of proceeding, and the anticipated timeline for any remaining steps in the matter; any document related to an open or pending matter, including

² See Dave Levinthal, *FEC Nominations Moving Forward*, Center for Public Integrity (July 11, 2013), at <http://www.publicintegrity.org/2013/07/11/12948/fec-nominations-moving-forward>.

complaints, responses, *sua sponte* submissions, and counsel reports; and any non-public document related to a closed matter, including investigative materials and deposition transcripts.

Enforcement Manual (Republican Commissioners' Draft) ("Rep. Enf. Man.") (June 12, 2013), sec. 2.11.2.³

Conversely, the Republican Commissioners propose to delete a section of the current Enforcement Manual that authorizes OGC to seek information from other law enforcement agencies as part of the fact development in an enforcement matter. The section proposed to be deleted from the list of sources that should be used for "fact development" in enforcement matters, states:

At times, another agency may have a pending or closed matter involving the same respondent as in a pending Commission matter. For example, DOJ or the Office of Congressional Ethics ("OCE") may be investigating an entity or individual that is also a respondent in an FEC matter. . . . Similarly, state or local entities may be prosecuting a respondent who is also the subject of an FEC matter and may have relevant information or documents, such as news about an impending plea agreement or the plea agreement itself.

Rep. Enf. Man., sec. 3.4.1.4 (proposed deletion). By the proposed deletion, it is plain that the intent of the Republican Commissioners is to prohibit OGC, without a majority vote of the

³ Sec. 2.11.1.1 provides an exception to this rule so that, "in response to an inquiry from a law enforcement agency about a specific person or entity," an OGC attorney may, without prior Commission approval, "confirm that the Commission is in receipt of a complaint or has pending before it a matter involving that person or entity," but may not "provide to a law enforcement agency any other non-public information or records about a Commission enforcement action, whether open or closed."

The proposed change appears to rest on an interpretation of a statutory provision stating that "the affirmative vote of 4 members of the Commission" is required "to report apparent violations to the appropriate law enforcement authorities." 2 U.S.C. §§ 437c(c); 437d(a)(9); Rep. Enf. Man. at Sec. 2.10 ("Providing information or records to another law enforcement agency, even in response to a request, is a report under the Act and must be authorized by the Commission."). This reasoning is plainly wrong. The Commission can respond to requests for information from another law enforcement agency without taking the position that there is, or is not, an "apparent violation" of the Act to report. That is an entirely separate determination that is not necessary to reach in sharing investigative information with another agency.

Nor does the confidentiality provision of FECA, 2 U.S.C. § 437g(a)(12)(A), provide a basis for the proposed change, since that provision mandates only that an investigation "shall not be made public by the Commission." The existing Enforcement Manual correctly states, "The confidentiality provisions of the Act do not preclude providing information or records relating to the enforcement or conciliation process to federal law enforcement agencies such as the DOJ," a statement the Republican Commissioners propose to delete. Rep. Enf. Man. sec. 2.8.2.3 (proposed deletion). It would be a strange interpretation of the statutory language to assume that providing confidential information to the Department of Justice is equivalent to making information "public."

Commission, from seeking information from other law enforcement sources where such information may be useful in developing the facts about a matter under investigation by OGC.

Overall, the effect of these changes is to require OGC, absent specific prior approval by the vote of four Commissioners, to isolate itself from other law enforcement agencies and to disdain any coordination or cooperation with other agencies—including the Department of Justice—that may assist the Commission or other law enforcement authorities with the enforcement of the campaign finance laws.

As a matter of first principles, one would assume that coordination with other agencies would be an effective and efficient way for the Commission to discharge its duty to enforce the law. Such coordination could be useful in avoiding duplication among agencies in investigative efforts and in expediting OGC's development of facts, by taking advantage of (or at least informing itself of) facts that may have already been developed in parallel investigations by other state or federal agencies. Indeed, it is hard to imagine what purpose is served by deleting OGC's authority to obtain "relevant information or documents" from other law enforcement agencies, other than to handicap OGC's ability to develop enforcement matters under review.

For these reasons we strongly agree with the objections stated by the General Counsel to the policy changes proposed by the Republican Commissioners. In a recent memorandum to the Commission, the General Counsel 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.

Memorandum of June 17, 2013 from Anthony Herman to the Commission, "Information Sharing with the Department of Justice," at 1. He further stated:

The Commission should continue the practice of freely cooperating with DOJ—including by sharing nonpublic enforcement information without a subpoena and without taking the unprecedented step of requiring case-by-case Commission approval. *First*, the Commission reaps many benefits from its relationship with DOJ, which OGC has worked for many years to foster. Those benefits would likely be lost if the Commission changes course now. *Second*, unimpeded 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.* *Third*, sharing enforcement information with DOJ is consistent with law. *Fourth*, sharing information with DOJ promotes the enforcement of FECA—a major reason why Congress constituted the Commission as an independent agency.

Id. at 11 (emphasis in original).

We urge the Commission to follow this sound recommendation and to reject the proposed changes that would eliminate the free exchange of information between OGC and other law enforcement authorities.

The second objectionable policy change proposed by the Republican Commissioners would impose artificial blinders on staff attorneys by sharply restricting the publicly available information they could use to develop enforcement investigations.

Under its longstanding practices, OGC has consulted “news articles and similar published accounts” in recommending whether the Commission should find “reason to believe” a violation has occurred and thus whether to open an enforcement investigation. But the revisions to the Enforcement Manual proposed by the Republican Commissioners would eliminate the ability of FEC lawyers to consult publicly available information, such as news stories, in deciding whether to recommend that the Commission open an investigation.

Thus, for instance, the Republican Commissioners propose to delete the following sources of information from consideration by OGC: (1) the use of Westlaw “to search for news articles and to find public information about corporations and individuals,” (2) Dun & Bradstreet (which provides “comprehensive information on most U.S. businesses”), (3) Commercial search engines (presumably such as Google, that “can generate a list of potential information sources relevant to the facts of a matter,” (4) YouTube (“to locate video advertisements that might be at issue in a complaint”); (5) Candidate, Party or Political Committee Websites, and (6) “news articles” (which “may provide useful background information or reports of recent developments in a matter.”). Rep. Enf. Man., sec. 3.4.1.2 (proposed deletions).⁴

Instead, according to the Republican Commissioners, OGC should consult only (1) any complaint that has been filed, (2) the response to the complaint, (3) “information already in the Commission’s possession,” and (4) “official government websites that are publicly available.” *Id.*

This policy proposed by the Republican Commissioners is inexplicable and without any legitimate justification. It seeks to ensure that OGC will make recommendations that are untainted by readily available facts as if the agency’s wanton past use of Google has served to undermine the due process rights of respondents. Of course, the use of readily available public facts can assist OGC in verifying (or casting doubt on) facts asserted in a complaint and in understanding the context of events, both of which serve the goals of making better recommendations to the Commission and better decision making by the Commission. Indeed, the Republican Commissioners propose to delete from the Enforcement Manual the statement,

⁴ In addition, as noted above, the Republican Commissioners also would delete the existing authority for OGC to obtain information from other law enforcement agencies, such as DOJ or the Office of Congressional Ethics.

“Often, publicly available information will provide facts that are important in making a correct recommendation to the Commission.” Rep. Enf. Man., sec. 3.4 (proposed deletion).⁵

The proposals made by the Republican Commissioners to isolate OGC from other law enforcement agencies, and from publicly available factual information, bespeak of hostility by these Commissioners to effective enforcement of the campaign finance laws. Indeed, the larger message of these proposals is to restrict and undermine OGC’s authority as much as possible in conducting enforcement investigations. To be sure, weak and ineffectual law enforcement has been the hallmark of the Commission in recent years. But it would further discredit the Commission and would undermine the interests of the public to impose even further constraints on its enforcement staff.

The changes to the agency’s Enforcement Manual proposed by the Republican Commissioners will seriously undermine the ability of the federal government to enforce the campaign finance laws and should be rejected. Furthermore, no changes to the Enforcement Manual should be considered by the FEC until the two new nominees to the agency have been seated and a full complement of six Commissioners is available to make such decisions.

Sincerely,

/s/ Lawrence M. Noble

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⁵ In addition to being terrible policy, the proposal to willfully ignore publicly available information may also be contrary to law. *See In re FECA Litigation*, 474 F.Supp. 1044, 1046 (D.D.C. 1979) (“The Commission must take into consideration *all available information* concerning the alleged wrongdoing. In other words, the Commission may not rely solely on the facts presented in the complaint.”) (emphasis added); *Antosh v. FEC*, 599 F. Supp. 850 (D.D.C. 1984); *see generally* Comments of Campaign Legal Center and Democracy 21 on Notice 2013-01 (Enforcement Process) (April 19, 2013) at 2-3.

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Copy to: Ms. Shawn Woodhead Werth, Secretary & Clerk of the Commission
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