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FEDERAL ELECTION COMMISSION  
AUG 4 2003



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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**MEMORANDUM**

AUG 04 2003

**TO:** The Commission

**THROUGH:** James A. Pehrkon  
Staff Director

**FROM:** Lawrence H. Norton  
General Counsel

Rhonda J. Vosdigh  
Associate General Counsel  
for Enforcement

Lawrence L. Calvert Jr.  
Deputy Associate General Counsel  
for Enforcement

Tracy Robinson  
Legal Intern

**AGENDA ITEM**  
For Meeting of: 08-14-03

**RE:** Proposed Policy Statement on Deposition Transcripts in Nonpublic Investigations

**I. INTRODUCTION**

The Office of General Counsel has prepared a draft statement of policy regarding deponent access to transcripts of enforcement depositions. This memorandum discusses the Commission's authority to issue general statements of policy without utilizing notice-and-comment rulemaking procedures. The memorandum then summarizes the scope and impact of the draft statement of policy and makes recommendations regarding issuance of the policy.

**II. AUTHORITY TO ISSUE A POLICY STATEMENT**

This Office has previously provided to the Commission a memorandum outlining the distinctions between "substantive" or "legislative" rules and general statements of policy. See "Proposed Statement of Policy Regarding Party Committee Transfers of Nonfederal Funds for Payment of Allocable Expenses," Commission Agenda Document 01-56. That memorandum

ultimately concluded that the Commission possesses the authority to issue statements of policy, and noted that non-binding statements regarding future enforcement policies are generally not subject to judicial review. *See id.* at 10.<sup>1</sup> In addition, the memorandum identified two significant practical differences between a policy statement and a legislative rule: (1) policy statements may be issued without the notice and comment process required for legislative rules; and (2) legislative rules carry the binding force of law, which statements of policy cannot.<sup>2</sup> The Commission has previously issued a policy statement regarding the method in which it would apply a substantive provision of the Federal Election Campaign Act of 1971, as amended (“the Act”) while the constitutionality of that provision was under review by the United States Supreme Court. *See* Notice 2000-14, 65 *Fed. Reg.* 42,365 (July 10, 2000).

The Commission may announce changes to the current practice regarding enforcement deposition transcripts by issuing a policy statement in the *Federal Register* because the announcement would serve “to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” *See Attorney General’s Manual on the Administrative Procedure Act* at 30 n.3 (1947). This new policy would “genuinely leave[] the agency and its decisionmakers free to exercise discretion” as to whether to apply the good-cause exception, which is discussed further below, when a request for a deponent transcript is received by the Commission. *See Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987).

### III. BACKGROUND ON THE CURRENT TRANSCRIPT POLICY

A deponent giving sworn testimony at an enforcement deposition authorized by 2 U.S.C. § 437d(a)(4) has the right to review and sign the transcript. 11 C.F.R. § 111.12 (c) (applying Fed. R. Civ. P. 30(e) to Commission enforcement depositions). However, as a matter of this Office’s historic practice, a deponent who is also a respondent is not allowed to take notes when inspecting his or her own transcript and is not permitted to obtain a copy of the transcript unless and until this Office has transmitted a probable cause brief pursuant to 2 U.S.C. § 437g(a)(3). This Office does not currently offer other deponents an opportunity to obtain their transcripts; once the entire matter has been closed, other deponents can copy the transcript at their own expense if the transcript is made part of the public record, which rarely occurs.

The Commission recently invited the public to comment on various aspects of the agency’s enforcement practices, including whether and when transcripts of depositions should be released and to whom. *See* Notice 2003-9, 68 *Fed. Reg.* 23,311 (May 1, 2003). One possible change in practice included in the notice was for the Office of General Counsel to routinely

<sup>1</sup> A statement of policy may be subject to judicial review, however, if an agency attempts to rely on the statement as if it were binding law. *See Hudson v. FAA*, 192 F.3d 1031, 1034 (D.C. Cir. 1999).

<sup>2</sup> While it remains difficult to ensure that a court will agree with an agency’s own characterization of a purported policy statement, the courts have identified certain traits of true policy statements. A true policy statement does not announce an agency’s intent to bind itself to a legal position, nor can it “impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat – typically enforce – the legal governing norm.” *See Syncor International Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997); *see also Pacific Gas & Elec. Co.*, 506 F.2d 33, 38 (D.C. Cir. 1974). Moreover, it should be evident from the language of the statement that the agency does not intend to bind itself. *See Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537-38 (D.C. Cir. 1986) (noting the distinction between “will” and “may”).

allow deponents who are also respondents to procure immediately a copy of their own transcripts unless, on a case-by-case basis, the General Counsel concluded (or the Commission concluded, on the recommendation of the General Counsel) that it was necessary to the successful completion of the investigation to withhold the transcript until completion of the investigation.

On June 11, 2003, the Commission held a public hearing on its enforcement practices. At the hearing, counsel for the regulated community suggested changes to the agency's enforcement procedures, including its deposition policy. Some of those testifying suggested that deponents be allowed to obtain copies of their own depositions immediately after the deposition, contrary to the historic practice. Several of these commenters also noted that the Commission's practice regarding depositions contrasts with that of some other civil law enforcement agencies during the investigative stage of their proceedings.

The Commission is governed, in part, by the Administrative Procedure Act (APA). Under the APA, "[a] person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony." 5 U.S.C. § 555(c). One example of "good cause" recognized by courts is a concern that witnesses still to be examined might be coached. See *Commercial Capital Corp. v. SEC*, 360 F.2d 856, 858 (7th Cir. 1966). In the past, all open investigations have been considered to fall within the APA's good-cause exception based on the potential for deponents to share their testimony with third parties. The Commission and this Office have also been mindful of the Act's requirement that ongoing investigations be kept confidential.<sup>3</sup>

Other federal agencies that conduct nonpublic investigations have adopted policies that interpret the APA's good-cause exception more narrowly. For example, in 1964 the Federal Communications Commission adopted a policy whereby:

In any matter pending before the Commission, any person submitting data or evidence, whether acting under compulsion or voluntarily, shall have the right to retain a copy thereof, or to procure a copy...of any transcript made of his testimony, upon payment of the charges therefor to the person furnishing the same, which person may be designated by the Commission. The Commission itself shall not be responsible for furnishing the copies.

47 C.F.R. § 1.10. In 1972, the Securities and Exchange Commission adopted its current rule on this subject, which is similar to the FCC's. See 17 C.F.R. § 203.6. Likewise, the practice of the

<sup>3</sup> Under 2 U.S.C. § 437g(a)(12):

Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made. Any member or employee of the Commission, or any other person, who violates the provisions...shall be fined not more than \$2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions...shall be fined not more than \$5,000.

Commodity Futures Trading Commission is governed by 17 C.F.R. § 11.7(b), which states: "A person compelled to submit data or evidence in the course of an investigatory proceeding is entitled to retain or, upon payment of appropriate fees...procure a copy or transcript thereof, except that the witness may for good cause be limited to inspection of the official transcript of his testimony." Furthermore, staff in this Office who have previously been employed by the SEC, the CFTC, and the Federal Trade Commission report that those agencies routinely make transcripts of deponents' testimony available to them on request with no detrimental effect on those agencies' investigations.

#### IV. PROPOSED CHANGE FOR POLICY ON DEPOSITION TRANSCRIPTS

In light of the comments submitted in the public hearing and the experience of other federal agencies regarding deposition transcripts in nonpublic investigations, the Office of General Counsel recommends altering current practice with respect to deposition transcripts so as to generally permit deponents in enforcement matters to obtain a copy of the transcript of their own deposition. This Office has determined that it can maintain the integrity of its investigations even if the policy is altered, so long as access to transcripts may still be denied upon determination that good cause exists for doing so and so long as third-party witnesses (or deponents who are also respondents in matters with multiple respondents) are granted access to their transcripts subject to the Act's confidentiality requirements.

Under the proposed new policy, a deponent could, in writing, request a copy of his or her own deposition transcript at any time after the deposition concludes. This Office would review the request. If the Associate General Counsel for Enforcement or her deputy determined that there was no reason to invoke the APA's good cause exemption, this Office would then notify the deponent and the court reporter in writing that the deponent could obtain a copy of the transcript at his or her own cost from the court reporter. If the Associate General Counsel or her deputy determined that there was reason to invoke the good-cause exception, this Office would notify the deponent and the Commission.

This change in Commission policy would affect all matters open and pending before the Commission on or after the date of publication of this notice in the *Federal Register*. This change would not in any way affect 11 C.F.R. § 111.12(c).

#### V. RECOMMENDATIONS

1. Approve the attached Statement of Policy for publication in the *Federal Register*.
2. Direct the Office of General Counsel to submit the Statement of Policy to Congress in accordance with the Congressional Review Act, 5 U.S.C. § 801 *et seq.*

Attachment  
Statement of Policy

1 **FEDERAL ELECTION COMMISSION**

2  
3 **11 CFR Part 111**

4  
5 **[NOTICE 2003- ]**

6  
7 **STATEMENT OF POLICY REGARDING DEPOSITION TRANSCRIPTS**  
8 **IN NONPUBLIC INVESTIGATIONS**

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10  
11 **AGENCY:** Federal Election Commission.

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13 **ACTION:** Statement of Policy.

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15 **SUMMARY:** The Federal Election Commission announces an alteration to its historic  
16 practice with regard to transcripts of depositions in enforcement matters to  
17 permit deponents to obtain a copy of the transcript of their own deposition  
18 so long as there is no good cause to limit the deponent to an opportunity to  
19 review and sign the transcript.

20 **EFFECTIVE**  
21 **DATE:** [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]

22  
23 **FOR FURTHER**  
24 **INFORMATION**

25 **CONTACT:** Lawrence L. Calvert, Deputy Associate General Counsel for Enforcement,  
26 Federal Election Commission, 999 E Street N.W., Washington, D.C.  
27 20463, (202) 694-1650 or (800) 424-9530.

28 **SUPPLEMENTARY**

29 **INFORMATION:** When Federal Election Commission attorneys take a deponent's sworn  
30 testimony at an enforcement deposition authorized by 2 U.S.C. § 437d(a)(4), only the deponent  
31 and his or her counsel may attend. Under historic practice, the deponent has the right to review  
32 and sign the transcript. 11 CFR 111.12(c) (applying Fed. R. Civ. P. 30(e) to Commission  
33 enforcement depositions). However, a deponent who is also a respondent is not currently

1 allowed to obtain a copy of, or take notes when reviewing, his or her own transcript unless and  
2 until the General Counsel has transmitted, pursuant to 2 U.S.C. § 437g(a)(3), a brief  
3 recommending that the Commission find probable cause to believe that the respondent has  
4 violated or is about to violate the Federal Election Campaign Act of 1971, as amended ("the  
5 Act"), or Chapters 95 or 96 of Title 26, U.S. Code. The Office of General Counsel does not  
6 currently offer other deponents an opportunity to obtain their transcripts; once the entire matter  
7 has been closed, other deponents can copy the transcript at their own expense if the transcript is  
8 made part of the public record.

9 The Commission recently invited the public to comment on various aspects of the  
10 agency's enforcement practices, including whether and when transcripts of depositions should be  
11 released and to whom. See "Enforcement Procedures," Notice 2003-9, 68 FR 23311 (May 1,  
12 2003). One possible change in practice included in the notice was for the Office of General  
13 Counsel to routinely allow deponents who are also respondents to procure immediately a copy of  
14 their own transcripts unless, on a case-by-case basis, the General Counsel concluded (or the  
15 Commission concluded, on the recommendation of the General Counsel) that it was necessary to  
16 the successful completion of the investigation to withhold the transcript until completion of the  
17 investigation.

18 On June 11, 2003, the Commission held a public hearing on its enforcement practices. At  
19 the hearing, counsel for the regulated community suggested changes to the agency's enforcement  
20 procedures, including its deposition policy. Some of those testifying suggested that deponents be  
21 allowed to obtain copies of their own depositions immediately after the deposition, contrary to  
22 the historic practice. Several of these commenters also noted that the Commission's practice

1 regarding depositions contrasts with that of some other civil law enforcement agencies during the  
2 investigative stage of their proceedings.

3         The Commission is governed, in part, by the Administrative Procedure Act (APA).  
4 Under the APA, “[a] person compelled to submit data or evidence is entitled to retain or, on  
5 payment of lawfully proscribed costs, procure a copy or transcript thereof, except that in a  
6 nonpublic investigatory proceeding the witness may for good cause be limited to inspection of  
7 the official transcript of his testimony.” 5 U.S.C. § 555(c). One example of “good cause”  
8 recognized by courts is a concern that witnesses still to be examined might be coached. See  
9 Commercial Capital Corp. v. SEC, 360 F.2d 856, 858 (7th Cir. 1966). In the past, all open  
10 investigations have been considered as falling within the APA’s good-cause exception based on  
11 the potential for deponents to share their testimony with third parties. The Commission and its  
12 Office of General Counsel have also been mindful of the Federal Election Campaign Act’s  
13 requirement that ongoing investigations be kept confidential.<sup>1</sup>

14         Other federal agencies that conduct nonpublic investigations have adopted policies that  
15 interpret the APA’s good-cause exception more narrowly. For example, in 1964 the Federal  
16 Communications Commission adopted a policy whereby: “In any matter pending before the  
17 Commission, any person submitting data or evidence, whether acting under compulsion or  
18 voluntarily, shall have the right to retain a copy thereof, or to procure a copy...of any transcript  
19 made of his testimony, upon payment of the charges therefor to the person furnishing the same,

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<sup>1</sup> Under 2 U.S.C. § 437g(a)(12): “Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made. Any member or employee of the Commission, or any other person, who violates the provisions...shall be fined not more than \$2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions...shall be fined not more than \$5,000.”

1 which person may be designated by the Commission. The Commission itself shall not be  
2 responsible for furnishing the copies." 47 CFR 1.10. In 1972, the Securities and Exchange  
3 Commission adopted its current rule on this subject, which is similar to the FCC's. See  
4 17 CFR 203.6. Likewise, the practice of the Commodity Futures Trading Commission is  
5 governed by 17 CFR 11.7(b), which states: "A person compelled to submit data or evidence in  
6 the course of an investigatory proceeding shall be entitled to retain or, upon payment of  
7 appropriate fees...procure a copy or transcript thereof, except that the witness may for good  
8 cause be limited to inspection of the official transcript of his testimony."

9 After carefully reviewing the comments submitted to it on this matter and considering the  
10 experience of other federal agencies regarding deposition transcripts in nonpublic investigations,  
11 the Commission hereby announces that, from the date of publication of this notice, it will permit  
12 deponents in enforcement matters to obtain, upon request to the Office of General Counsel, a  
13 copy of the transcript of their own deposition. The Commission has determined that it can  
14 maintain the integrity of its investigations even if current practice is altered, so long as access to  
15 transcripts may still be denied upon determination that good cause exists for doing so, and so  
16 long as third-party witnesses (or deponents who are also respondents in matters with multiple  
17 respondents) are granted access to their transcripts subject to the confidentiality requirements of  
18 the Act.

19 Accordingly, in all matters open and pending before the Commission on or after the date  
20 of publication of this notice, a deponent may, in writing, request a copy of his or her own  
21 deposition transcript. The request may be made at any time after the deposition concludes. The  
22 Office of General Counsel will review the request and, absent good cause to the contrary, it will  
23 notify the deponent and the court reporter in writing that the deponent may obtain a copy of the



1 transcript, at his or her own cost, from the court reporter. If the Associate General Counsel or  
2 her deputy determined that there was reason to invoke the good-cause exception, this Office  
3 would notify the deponent and the Commission. This change would not in any way affect 11  
4 CFR 111.12(c).

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8 Ellen L. Weintraub  
9 Chair  
10 Federal Election Commission  
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13 DATED: \_\_\_\_\_  
14 BILLING CODE: 6715-01-U

