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June 26, 2013

AGENDA ITEM

MEMORANDUM

For Meeting of 6-27-13

TO: The Commission Secretary

FROM: Anthony Herman
General Counsel

SUBMITTED LATE

SUBJECT: Information Sharing with the Department of Justice

Attached is the June 17, 2013 memo from Anthony Herman to the Commission regarding Information Sharing with the Department of Justice. The Commission has requested the document be placed on the agenda for June 27, 2013.

Attachment

FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

June 17, 2013

MEMORANDUM

To: The Commission

From: Anthony Herman
General Counsel

Daniel A. Petalas
Associate General Counsel for Enforcement

Subject: Information Sharing with the Department of Justice

For more than 20 years, the Federal Election Commission ("FEC" or "Commission") has freely shared enforcement information and records with the Department of Justice ("DOJ") 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 ("FECA" or "Act").

The Commission should continue freely cooperating with DOJ. The Commission benefits greatly from that sharing. Information received from DOJ saves the Commission valuable time and resources in its enforcement efforts; allows it to obtain evidence quickly; and helps OGC make more accurate recommendations to the Commission. Members of the regulated community also benefit, as the Commission's legal advice and records help DOJ avoid unnecessary investigations and prosecutions of public officials, candidates, and other political actors. Any new requirement that DOJ requests be accompanied by a subpoena or be approved by a Commission vote would put these benefits at risk. It would also increase administrative burden and legal risk for the Commission by requiring it to respond to subpoenas. Perhaps most troubling, such an approach — which seems to be unprecedented — would expose the Commission to allegations that politics and partisanship motivate its case-by-case decisions whether to release records to DOJ.

The Commission's sharing of enforcement information with DOJ is consistent with the practices of other independent federal agencies. In fact, we know of *no* agency that requires a subpoena or an agency vote each time it shares information or documents with DOJ. The

Commission's sharing with DOJ is also consistent with the requirements of the Constitution, FECA, and the Commission's regulations.

The Commission's sharing with DOJ is also fully consistent with the Commission's status as an independent agency. Congress created the Commission as an independent agency, in part, to vigorously enforce the Act in light of DOJ's then-failure to do so. To the extent information sharing promotes enforcement of FECA — by both DOJ *and* the FEC — it furthers this core congressional goal.

I. The 20-Plus Year History of the Commission Freely Sharing Information and Documents Relating to Enforcement Matters with the Department of Justice Upon Request

The Commission, through the Office of General Counsel ("OGC"), has adhered to a policy spanning at least two decades of freely cooperating with DOJ requests for information and documents associated with FECA enforcement matters. That policy can be simply stated: *when, in connection with a criminal investigation, DOJ has requested information on a pending Commission enforcement matter, OGC has provided that information.* This neutral policy, we believe, has never before been questioned by the Commission.

A. The Commission's History of Cooperating with DOJ

From 1987 to 2000, during Larry Noble's tenure as general counsel, OGC freely provided information and documents to DOJ. Commission staff members frequently testified at DOJ's request in criminal FECA matters. And during that time, Noble can recall no instance in which the Commission required a vote before OGC could respond to a DOJ request for information.

Although OGC's core policy was cooperation with DOJ, during this period OGC required DOJ to issue a "friendly" subpoena to the Commission before sharing enforcement records. OGC routinely complied with DOJ's requests and did so without questioning the basis for DOJ's request or seeking Commission approval. The subpoenas were required only because, for a time, Noble's office interpreted the Act's confidentiality provisions to require them.[1]

Towards the end of Noble's tenure, however, and at the start of Larry Norton's time as General Counsel in 2001, OGC reevaluated its interpretation of the Act's confidentiality provisions. OGC concluded — in our view correctly — that sharing enforcement information with DOJ and other law enforcement agencies does not make that information "public" and therefore does not violate the Act.[2] As a result of this analytical shift, Norton ended the formality of requiring "friendly" subpoenas from DOJ. Norton recalls that, shortly after

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[1] *See* 2 U.S.C. § 437g(a)(4)(B)(i), (12) (barring certain enforcement information from being "made public").

[2] This assessment that the confidentiality provision does not bar information sharing with DOJ during the pendency of an enforcement matter has been ratified and acknowledged by the Commission publicly. *See* Federal Election Commission, Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions), 72 Fed. Reg. 16695, 16698 (Apr. 5, 2007).

becoming general counsel, he informed the Commission at an executive session that OGC would no longer require DOJ to issue the "friendly" subpoenas. And Norton recalls that no Commissioner raised an objection.

The Commission has cooperated with DOJ and other state and local law enforcement agencies with increasing frequency. DOJ has sought responses, deposition transcripts, and General Counsel's Reports,[3] among other things. OGC has provided the requested documents to DOJ upon written request. *See, e.g.*, [redacted] MUR 6054 (Buchanan) (Mar. 26, 2010, Apr. 8-9, 2010, and July 13, 2011); MUR 5924 (Nguyen) (Aug. 20, 2010); [redacted] MUR 5187 (Mattel, Inc.) (early 2003); MURs 5069/5132 (Acevedo-Vila) (Sept. 7, 2007); and [redacted]

Often, but not always, OGC notified the Commission about DOJ's requests for enforcement information, either through email, *see, e.g.*, [redacted], in a First General Counsel's Report, *see, e.g.*, [redacted] or by circulating an informational memorandum, *see, e.g.*, [redacted] In fact, until recently, the practice of formally notifying the Commission in advance of sharing documents was mixed.[4]

Recently, current General Counsel Anthony Herman formalized the practice of notifying the Commission of all DOJ requests for documents prior to providing them, at the suggestion of Commissioner Walther.[5] But even prior to this formalization, there were numerous ways in which the Commission was frequently made aware that OGC was informally cooperating with DOJ on a regular basis.

For instance, in 2008, then-Associate General Counsel for Enforcement Ann Marie Terzaken made this clear to the Commission in a memorandum detailing the relationship between the Commission and DOJ:

> [A]t times, we have reached out to DOJ to discuss cases of mutual interest or to determine whether they have a parallel proceeding relating to a respondent in one of our cases. Our collaboration and information sharing

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[3] The sharing of General Counsel's Reports with DOJ does not raise issues regarding waiver of the attorney-client privilege given that the Commission has concluded that "all First General Counsel's Reports [will be placed] on the public record" once they are no longer confidential at the conclusion of a matter. *See* Federal Election Commission. Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). In addition, any privilege would remain intact because, as discussed below, providing such documents to DOJ is not in any way tantamount to making them public.

[4] *See* Email from Anthony Herman to the Commissioners' Office (Apr. 15, 2013); *but cf.* MUR 5924 (Nguyen) (documents provided by OGC to DOJ without notice to Commission).

[5] *See* Email from Anthony Herman to the Commissioners' Office (Apr. 15, 2013).

> with DOJ has been an evolving process. . . . In at least the last two years, there has been an increase in communication and cooperation between our two agencies . . . . [W]e have consulted with DOJ with much more frequency in the last couple years, and often contact them before we circulate to the Commission our First General Counsel's Reports in cases potentially involving knowing and willful violations to determine whether DOJ has a parallel criminal matter. When they do, we attempt to cooperate with them.[6]

Additionally, the Commission has frequently received General Counsel Reports, memoranda, and e-mails from OGC making unmistakably clear that OGC is regularly cooperating with DOJ. For example:

- **Reports to the Commission Citing FBI 302s**. OGC frequently circulates reports to the Commission that cite information obtained from FBI 302s. [redacted]

- **General Counsel Reports to the Commission Expressly Noting OGC Cooperation with DOJ**. The first page of each General Counsel's Report states the "FEDERAL AGENCIES CHECKED," and lists, "Department of Justice," where appropriate. *See, e.g.*, MUR 5814 (Lamutt for Congress) (Aug. 9, 2006); MUR 5818 (Fieger) (Aug. 10, 2006); [redacted] Also, General Counsel Reports to the Commission often state when OGC has interacted with DOJ in some way relevant to the matter's history. *See, e.g.*, [redacted] ("DOJ requested a copy of the complaint and response, and we have provided those documents subject to the restrictions on public dissemination at 2 U.S.C. § 437g(12)."); Second General Counsel's Report at 3, MUR 5903 (PBS&J Corp.) (Sept. 22, 2009) ("From September 2007 through June 2008, we held this case in abeyance at the request of the Department of Justice.").

- **Memoranda to the Commission Regarding Abatement**. Where DOJ has asked OGC to hold a matter in abeyance, OGC has circulated a memorandum to the Commission informing it of such a request. *See, e.g.*, [redacted] (stating that "DOJ informed us that, at this stage of its investigation, it can share with the Commission only limited information regarding this matter. At the appropriate time, DOJ has expressed its willingness to share information with the Commission. DOJ also informs us that its investigation would benefit if the Commission held these matters in abeyance until the criminal proceedings had advanced further.").

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[6] E-mail from Ann Marie Terzaken to the Commissioners' Office (Aug. 7, 2008).

- **E-mails from OGC to the Commission Regarding DOJ Trial Witness Requests.** OGC routinely informs the Commission via e-mail that DOJ has requested that OGC staff serve as trial witnesses in its criminal matters. Most recently, OGC has informed the Commission that staff would testify in the trials of Robert Braddock, former U.S. Representative Rick Renzi, William Danielczyk, and Harvey Whittemore.

Despite this clear notice, we believe that no Commissioner, past or present, has previously raised an objection to OGC's policy of freely cooperating with DOJ. To the contrary, in 2007, the Commission stated publicly that it is aware of OGC's practice of sharing information with DOJ and other law enforcement agencies. On April 5, 2007, the Commission issued a policy statement regarding *sua sponte* submissions in which it discussed issues that may arise "in connection with parallel criminal proceedings." In that public statement, the Commission acknowledged that "it can and does share information on a confidential basis with other law enforcement agencies," and that it does not negotiate with respondents "whether it refers, reports, or otherwise discusses information with other law enforcement agencies."[7]

B. OGC's Current Guidance to Enforcement Staff Concerning Providing Information and Records to DOJ and Other Law Enforcement Agencies

In 2012, OGC issued guidance to Enforcement Division staff on its protocols for responding to DOJ requests for information and records relating to FEC enforcement matters. Those protocols reflect the Commission's historical practice of freely cooperating with DOJ, while also instituting procedures for tracking, memorializing, and approving DOJ requests, protecting the confidentiality of shared enforcement records, and informing the Commission of certain types of requests.

1. Categories of Enforcement Information and Records Shared

In response to requests from DOJ, OGC shares the following categories of information:

(1) information about the existence or current status of enforcement matters, including the identity of the complainants and respondents, the state of the proceeding, and the anticipated timeline for any remaining steps in the matter (hereinafter, "existence or status of enforcement matters");

(2) non-public documents from closed enforcement matters, including investigative materials (hereinafter, "non-public documents");

(3) pre-RTB pleadings in open enforcement matters; *i.e.*, complaints, responses, and *sua sponte* submissions (hereinafter, "pre-RTB pleadings"); and

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[7] Federal Election Commission, Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions), 72 Fed. Reg. 16695, 16698 (Apr. 5, 2007).

(4) other information or records relating to enforcement matters not specifically included in the above three categories (hereinafter, "miscellaneous information or records").

Unless the Associate General Counsel for Enforcement decides otherwise, staff are instructed not to provide DOJ with information regarding OGC's anticipated recommendations to the Commission.

2. Procedures for Sharing Enforcement Information and Records

OGC's procedures for responding to requests from DOJ vary depending upon the category of information requested.

Form of Request Required from DOJ. OGC staff may provide information on the existence or status of enforcement matters in response to an oral request for such information from DOJ. Requests for any other type of information — non-public documents, pre-RTB pleadings, or other miscellaneous information or records — must be submitted by DOJ in writing before OGC will respond.

Notice to or Approval from Associate General Counsel. Staff must provide notice to the Associate General Counsel for Enforcement at least 24 hours before providing any non-public documents or pre-RTB pleadings to DOJ. Requests for miscellaneous information or records also require approval from the Associate General Counsel. For DOJ requests for information on the existence or status of enforcement matters, staff need not notify the Associate General Counsel before responding.

Documentation of DOJ's Request. Staff must document all requests by DOJ in a memorandum to file. The memorandum must describe the contact, nature of the request, and any action taken in response. This memorandum must be provided to (1) the Associate General Counsel and (2) CELA for inclusion in (a) the Voting Ballot Matters folder[8] and (b) the relevant matter's permanent file.

Transfer of Records to DOJ. Each page of any records the Commission provides to DOJ must bear a unique Bates number and a confidentiality disclaimer, unless the record is from a closed matter file and does not relate to conciliation negotiations under 2 U.S.C. § 437g(a)(4)(B)(i). Records produced must be accompanied by a cover letter that specifically identifies each record provided and that details the relevant confidentiality obligations under U.S.C. § 437g(a)(4)(B)(i) or 2 U.S.C. § 437g(a)(12), if applicable. The records can be delivered to DOJ in PDF format via email, or hard copies may be provided. If hard copies are provided, OGC staff must arrange for DOJ to return a signed acknowledgment upon receipt. That form must then be provided to CELA, where it will be included in the Voting Ballot Matters folder and the permanent record for the relevant matter.

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[8] Memoranda describing requests for information about the existence or status of an enforcement matter need not be included in the Voting Ballot Matters folder.

Notice to the Commission. As noted above, the General Counsel recently instituted a policy that OGC will notify the Commission of all requests received for records prior to providing them to DOJ.[9] In the past, OGC had at times notified the Commission that it received a request or that it provided documents to DOJ at various points of the enforcement process. As discussed above, this notice was sometimes provided by e-mail, general counsel's report, or by informational memorandum circulated to the Commission.

No Notification to Respondents. OGC does not notify respondents that DOJ has requested information regarding their enforcement matters or that OGC has provided information or records to DOJ in response to that request. Nor would it be proper to do so, as it could impede or obstruct an ongoing criminal investigation.[10]

3. Other Forms of Cooperation with DOJ

In addition to sharing information and records with DOJ, OGC cooperates with DOJ by responding to grand jury subpoenas, considering requests to hold matters in abeyance, and considering requests for Commission staff to testify in DOJ criminal matters. In response to such requests, OGC follows the below procedures.

Grand Jury Subpoenas. In response to a grand jury subpoena, staff must prepare a formal memorandum to the Commission with appropriate recommendations. The memorandum is circulated on a one-week tally vote basis.

Requests to Hold Matters in Abeyance. OGC requires that DOJ provide any request that the Commission hold an investigation in abeyance in writing. OGC then prepares an informational memorandum that notifies the Commission of the abeyance request.

Requests for Testimony of Commission Staff. Requests from DOJ that Commission staff testify (or otherwise provide information as part of an investigation), must be approved by the Associate General Counsel. If the request is approved, an informational memorandum is then prepared informing the Commission of the request, identifying the substance of the testimony sought, and alerting the Commission of the date and location during which the testimony will be given.

II. The History of DOJ Sharing Information with the Commission

Over the past two decades, OGC has increased its efforts to work closely and efficiently with DOJ — and the Commission has benefited greatly from those efforts. DOJ historically had been reluctant to share information with the Commission. Recently, however, DOJ has become more willing to share information collected during its investigations. That information has not

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[9] *See* Email from Anthony Herman to the Commissioners' Office (Apr. 15, 2013).

[10] Congress recognizes the importance and sensitivity of DOJ and grand jury criminal investigations, and indeed has deemed it a felony offense to endeavor, with corrupt intent, to impede or obstruct the due administration of such investigations. *See generally* 18 U.S.C. § 1503 (obstruction of grand jury proceedings); *id.* § 1505 (obstruction of proceedings "before any department or agency of the United States").

only made OGC's enforcement efforts less expensive and more efficient in many cases, but it has also helped OGC make better-informed recommendations to the Commission.

A. DOJ's Current Willingness to Assist the Commission

Over the past year, encouraged by Commissioners – [redacted][11] — OGC has worked to cement the Commission's improved relationship with DOJ. In 2012, OGC negotiated a draft Memorandum of Understanding with DOJ (currently pending before the Commission) that reflects a willingness by both agencies to share information in order to promote the enforcement of the Federal Election Campaign Act ("FECA" or "Act"), while at the same time respecting each agency's exclusive areas of jurisdiction over that enforcement.

In recent years, DOJ has shared with the Commission valuable information and records collected during DOJ investigations. Those materials include FBI summaries of witness interview (known as "FBI 302s") and non-grand jury records. Additionally, DOJ has referred matters directly to the Commission for possible civil enforcement if appropriate, such as the [redacted].

These materials from DOJ have bolstered the Commission's enforcement efforts. They save the Commission valuable time, money, and other resources by eliminating the need for OGC to collect evidence that DOJ already possesses. Information and records from DOJ have also helped OGC make more accurate recommendations to the Commission — recommendations not only to prosecute but also to dismiss. [redacted], the FBI shared information with OGC indicating that the respondent had not committed fraud. That information allowed OGC to recommend dismissal to the Commission — and to avoid conducting an unnecessary investigation.

Information from DOJ is particularly valuable because DOJ can sometimes be more effective at gaining admissions from respondents and other witnesses. For instance, FBI 302s contain summaries of interviews that are conducted under the federal false statement statute, 18 U.S.C. § 1001. [redacted] DOJ quickly provided those FBI 302s upon request, and the interviews contained admissions that OGC was not provided in the responses it received from the relevant respondents and would have been unaware of had DOJ been unwilling to provide its records upon our request.

DOJ assistance has also been crucial to recent Commission enforcement efforts in the [redacted]. In [redacted], DOJ provided FBI 302s and substantial oral information through discussions with the assigned prosecutor concerning a [redacted] scheme that spanned decades, [redacted]

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11 [redacted]

[redacted]. The investigative resources required to assemble more than a cursory understanding of the details of the scheme would have been enormous. But as a result of the FBI's prior investigative activity [redacted], the need for such a burdensome and resource-intensive Commission investigation was averted. In [redacted] DOJ shared with the Commission a significant part of its substantial investigative file, including an internal report of counsel hired by the respondents to investigate the matter, numbering in excess of 24,000 pages. As a result of DOJ's willingness to provide us access to those records, OGC was able to confirm its understanding of the matter's underlying facts, which are outlined in the conciliation agreements that have either been approved or are still pending before the Commission.

At times, DOJ requests that OGC abate its efforts to investigate a particular respondent that is also the subject of a DOJ investigation. In return for the Commission's cooperation, DOJ has agreed that it will keep OGC informed of the status of its prosecution and will provide OGC with relevant records after the completion of the investigation. These reciprocal exchanges may lead to a global resolution of both criminal and civil violations of the Act, which would benefit the Commission's enforcement efforts.

B. DOJ's Prior Reluctance to Assist the Commission

The Commission has not always benefited from such a reciprocal relationship with DOJ. As Commissioners have complained, in the past the relationship was more of a "one way street." In the 1990s, as a general rule, DOJ was unwilling to share information with the Commission. After becoming General Counsel in 2001, Larry Norton increased OGC's level of cooperation with DOJ, in part, to encourage DOJ to reciprocate and share its materials with the Commission. At first, results were mixed. In some isolated matters in the 2000s, DOJ provided FBI 302s and other materials to the Commission relating to enforcement matters. But in most cases, DOJ did not do so.

DOJ's largely one-sided approach to document and information sharing continued until the late 2000s. From approximately 2003 to 2006, the Commission attempted to reach agreement with DOJ on a Memorandum of Understanding governing the sharing of information on enforcement matters. DOJ, however, adhered to its one-sided position with regard to information sharing between the two agencies. DOJ argued, at least with regard to section 441f cases, that the Commission should be required to refer suspected violations to DOJ and hold matters in abeyance automatically whenever requested by DOJ. Generally, DOJ sought complete authority to direct the course and timing of Commission enforcement efforts. The Commission disagreed with DOJ's hard-line positions and these negotiations ultimately failed.

In 2006, DOJ sent letters to the Speaker of the House of Representatives and the President of the Senate proposing amendments to FECA that would have eliminated any Commission discretion in reporting enforcement information to DOJ.[12] DOJ advocated replacing the Act's discretionary referral provisions, 2 U.S.C. §§ 437d(a)(9), 437g(a)(5)(C), with

[12] *See* Letter from William E. Moschella, Assistant Attorney General, DOJ Office of Legislative Affairs to The Honorable J. Dennis Hastert, Speaker, U.S. House of Representatives (Jun. 23, 2006).

a mandatory requirement that the Commission "report information suggesting that a criminal violation of the Act has occurred" to DOJ.[13] DOJ also urged amendment of the Act's confidentiality provision, claiming that, because of the FEC's construction of that provision, it was "an obstacle to effective communications" between the two agencies.[14] DOJ noted, however, that "[d]uring the past several years the FEC has begun to adopt a more fluid interpretation of th[at] provision and on occasion has shared information with us," and that "[t]his trend should be recognized and encouraged."

DOJ's legislative proposals never came to fruition. And as cooperation between the Commission and DOJ has increased since 2006, DOJ has retreated from its legislative position that the Commission should have no discretion regarding whether to release information to DOJ. As a result, OGC and DOJ were able to complete negotiations in 2012 on a new and more balanced draft Memorandum of Understanding ("MOU") — contingent on Commission approval. That draft MOU reflects the current relationship between the Commission and DOJ: one in which both agencies recognize and respect the other's authority and agree to work together "to assist each other in fulfilling their respective statutory responsibilities and to cooperate, consistent with all legal restrictions, to further their respective enforcement activities."[15] To that end, the draft MOU states, among other things, that:

- The Commission "may share information with [DOJ] regarding any Commission enforcement proceeding at any point in that process, and will endeavor to do so either upon the request of the Department" or when OGC concludes appropriate.[16]

- DOJ "may share with the Commission information obtained during a criminal investigation or prosecution relating to possible violations of the Act," and where DOJ "concludes that it will not pursue criminal prosecution of a matter that may involve a violation of the Act," it will consult with DOJ "concerning any further action that may be appropriate."[17]

- The Commission and DOJ will enter into global settlements with a subject or defendant where appropriate, and where no global settlement is reached, DOJ will seek to include in any plea agreement a provision acknowledging that nothing in the agreement waives or limits the Commission's authority to seek civil remedies for violations of the Act.

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[13] *Id.* at 13-16.

[14] *Id.* at 5. DOJ's letter claimed that at that time, in 2006, the Commission continued to interpret the confidentiality provision's ban on making enforcement information "public" as preventing sharing with DOJ. *Id.* But as noted above, OGC no longer interpreted 2 U.S.C. § 437g(a)(12)(B) in this manner towards the end of Larry Noble's tenure of as General Counsel in 2000 and upon the start of Larry Norton's tenure in 2001.

[15] Draft Memorandum of Understanding Between the Federal Election Commission and the United States Department of Justice Regarding Enforcement of the Federal Campaign Finance Laws ¶ 5.

[16] *Id.* ¶ 6.

[17] *Id.* ¶ 7.

OGC submitted the MOU to the Commission last January. At least three Commissioners have informally voiced disapproval.

III. The Commission Should Continue Freely Cooperating With DOJ

The Commission should continue its 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 the law. *Fourth*, sharing information with DOJ promotes the enforcement of FECA — a major reason why Congress constituted the Commission as an independent agency.

A. The Commission Benefits From Cooperating With DOJ

As discussed above, the Commission's current, strong relationship with DOJ has resulted in DOJ sharing information with the Commission. That information has saved the Commission valuable time and resources; helped OGC make more accurate recommendations to the Commission; and helped OGC obtain evidence on respondents that it might not have obtained otherwise.

There are additional benefits that arise from the Commission's current ability to informally communicate and share information with DOJ — not only for the Commission, but also the regulated community.

- **The Commission is able to obtain important information from DOJ quickly**. The informal give and take that occurs now between OGC and DOJ allows the Commission to obtain information from DOJ quickly. [redacted]

- **Fewer unnecessary criminal investigations and indictments involving members of the regulated community**. By informally advising DOJ on the application of FECA and by sharing potentially exculpatory evidence on respondents, OGC is currently able to guide DOJ away from potentially misguided prosecutorial decisions that would lead to members of the regulated community being unnecessarily investigated and indicted.

- **The Commission is insulated from allegations of partisan decision-making.** Under the current practice, where OGC — through its non-partisan, career leadership — shares information with DOJ upon request in *all cases* without examination, the Commission is insulated from any allegations that partisan considerations affect whether it releases that information. If, instead, a Commission vote were required in each case, the question necessarily arises whether documents should be released in some cases, but not others. That process gives rise — *at the least* — to an appearance of partisanship. *And it will open the Commission up to claims that it is deciding whether to assist DOJ criminal prosecutions on a case-by-case basis premised, at least in part, on political considerations. Conversely, it will permit an argument to be advanced that, motivated by partisanship, Commissioners obstructed an active DOJ criminal investigation.*

- **Fewer unnecessary grand jury investigations involving members of the regulated community.** If the Commission returns to requiring subpoenas, DOJ will be forced to empanel a grand jury to issue those subpoenas each time it seeks information from the Commission. Aside from DOJ's internal approval requirements, opening a grand jury investigation is a ministerial matter for a federal prosecutor and requires no evidentiary showing to accomplish. While this step may be a mere formality for DOJ and the Commission, it nonetheless carries real consequences — political and otherwise — for the candidates and others who may unnecessarily be deemed a subject, or target, of a grand-jury investigation as a result.

- **Less administrative burden and legal risk for the Commission.** In response to a subpoena — in sharp contrast to an informal document request — the Commission would be under a legal duty to conduct a full review for all responsive documents that may be in the Commission's possession, and to certify the adequacy of that review under the threat of legal penalty. Indeed, were DOJ to insist, it could require a relevant custodian to appear before a grand jury to present the responsive records, describe the nature of the search, and certify under oath the completeness of the response.

To the extent it becomes more difficult for OGC to cooperate with DOJ, the Commission's relationship with DOJ will suffer. Returning to the 1990s-era practice of unnecessarily requiring subpoenas or instituting a new requirement that each instance of information sharing be passed on by Commission vote, whether affirmatively or by non-objection, would create difficulties and delays that would likely deter DOJ from seeking assistance from the Commission in many cases. And as a result, DOJ will likely be less inclined to assist the Commission — and the Commission would lose the many benefits it currently enjoys as a result of its improved relationship with DOJ.

B. Other Independent Agencies Freely Cooperate With DOJ

OGC's long practice of freely exchanging enforcement information and records with DOJ -- without subpoena or Commission vote — is consistent with the policies and practices of other independent regulatory agencies.[18] Indeed, OGC was unable to identify *any* federal

[18] *See, e.g.*, Mikah K. Story Thompson, *To Speak or Not to Speak? Navigating the Treacherous Waters of Parallel Investigations Following the Amendment of Federal Rule of Evidence 408*, 76 U. Cin. L. Rev. 939, 975

agency, independent or otherwise, that requires DOJ to issue a subpoena or that provides documents only following a vote by commissioners in each case before sharing any enforcement information or records.

1. Securities and Exchange Commission

Like the Commission, the Securities and Exchange Commission ("SEC") is an independent regulatory agency.[19] Also like the Commission, the SEC has jurisdiction over civil enforcement of the federal securities laws, while DOJ prosecutes criminal violations of those laws.

According to the SEC, "[c]ooperating with criminal authorities is an important component of the SEC's enforcement mission."[20] And its civil enforcement authority is "not compromised" when DOJ conducts a parallel criminal investigation.[21] To the contrary, the SEC cooperates with DOJ in such cases and fields requests from DOJ for access to its investigatory files. The SEC employs procedures similar those used by OGC — DOJ requests must be made in writing; are tracked by the SEC internally; and need only be approved by senior SEC staff.[22] Additionally, SEC staff considers requests from DOJ to "refrain from taking actions that would harm [a] criminal investigation" and makes similar requests of DOJ.[23]

Where the SEC is asked by counsel or an individual whether there is a parallel criminal investigation, SEC staff is instructed not to comment on any DOJ investigations and to direct the individual to an SEC form detailing the SEC's "Routine Uses of Information."[24] One of those routine uses is that the SEC "often makes its files available to other governmental agencies."[25]

(2008) ("Regulatory agencies and the DOJ routinely share information about the subjects of parallel investigations."); Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 Vand. L. Rev. 573, 601 n.116 (1994) ("It is clear that agencies routinely share information with a prosecuting authority when a violation of law is suspected.").

19 *See, e.g., Mistretta v. United States*, 488 U.S. 361, 387 (1989).

20 Securities and Exchange Commission, Division of Enforcement, Enforcement Manual at 106 (Nov. 1, 2012), http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

21 *Id.*

22 *Id.* at 104-05.

23 *Id.* at 107.

24 *Id.*

25 Securities and Exchange Commission, Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena, at 3, http://www.sec.gov/about/forms/sec1662.pdf.

2. Federal Trade Commission

The Federal Trade Commission ("FTC") also is an independent agency, charged with protecting consumers and maintaining competition.[26] The FTC is a civil law enforcement agency with general jurisdiction over consumer fraud cases, and thus it may bring civil actions in federal district court seeking injunctive relief.[27] Criminal authority, however, lies with DOJ.

According to the FTC's Assistant General Counsel for Legal Counsel, William P. Golden, FTC attorneys share otherwise confidential enforcement information with DOJ "on a regular basis," especially in its consumer protection cases — and approval from FTC commissioners is not required for such sharing.

In fact, in 2003, the FTC created a "Criminal Liaison Unit," specifically dedicated to "spur[ring] an increase in consumer fraud prosecutions by means of more systematic coordination between the FTC and criminal law enforcement authorities."[28] The FTC shares the evidence it obtains in its investigations with criminal prosecutors, who often report that the evidence obtained from the FTC is sufficient to obtain an indictment and procure a guilty plea.[29] The FTC has described this unit to Congress as a "dramatic illustration of the FTC's efforts to bring the collective powers of different government agencies to bear upon serious misconduct in many consumer protection areas."[30] Indeed, the FTC even presents an annual award to an Assistant United States Attorney it has coordinated with for his or her commitment to prosecuting consumer fraud cases.[31]

FTC staff members are permitted to disclose to other law enforcement agencies the existence of a nonpublic investigation, the identities of the parties under investigation, and the general nature of the practices involved simply "[w]hen necessitated by an investigation."[32]

As a general rule, authority for granting DOJ requests for FTC nonpublic enforcement information lies with the FTC's General Counsel. The FTC requires only that DOJ provide a

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[26] Semiannual Report to Congress, October 1, 2010 – March 31, 2010, Federal Trade Commission, Office of the Inspector General, Report No. 45, at 2, http://www.ftc.gov/oig/reports/semi1145.pdf

[27] Frank Gorman, *How the FTC Can Help Local Prosecutors with Cases of Criminal Fraud*, Prosecutor, Oct-Nov-Dec 2008, at 28.

[28] *Id.*

[29] *Id.*

[30] 2007 WL 1405452 (F.T.C.), 13 (Prepared Stmt of the FTC to the Subcommittee on Financial Services and General Gov't of the Committee on Appropriations US House of Reps.)

[31] FTC News Release, FTC Presents Criminal Liaison Unit Award to Assistant U.S. Attorney Jennifer Arbittier Williams, http://www.ftc.gov/opa/2011/09/cluaward.shtm.

[32] FTC Operating Manual, Chapter 14, at 1, http://www.ftc.gov/foia/ch14liaison.pdf.

certification that the information shared will be maintained in confidence and used for law enforcement purposes only. [33]

According to Golden, the FTC typically does not inform its respondents that a criminal agency has requested information regarding his or her case. Though the FTC has a default rule that respondents are to be notified, a requesting agency can simply opt out of that rule by asking the FTC not to inform the respondent, and that occurs often in cases of FTC information sharing, according to Golden.[34]

Finally, the FTC has observed that "[i]n *virtually every instance*, other federal agencies are willing to cooperate with the [FTC] in its investigational and enforcement activities," and it resorts to subpoenas "only in situations where the needed information or testimony cannot be obtained by voluntary means."[35]

3. Commodity Futures Trading Commission

Congress created the Commodity Futures Trading Commission ("CFTC") in 1974 as an independent agency with the mandate to regulate commodity futures and option markets in the United States. The Division of Enforcement investigates and prosecutes alleged civil violations of the Commodity Exchange Act and Commission regulations. Potential violations include fraud, manipulation and other abuses concerning commodity derivatives and swaps that threaten market integrity, market participants and the general public. Criminal authority lies with DOJ.

According to the Assistant General Counsel in the Office of the General Counsel at CFTC, John Dunfee, CFTC attorneys share nonpublic confidential information with DOJ on a regular basis. Approval from CFTC Commissioners is not required for such sharing.

As a general rule, the authority for granting DOJ requests for CFTC nonpublic information lies with the Director of the Division of Enforcement with CFTC. The CFTC requires that a letter of request for assistance be provided by DOJ, and that DOJ confirm in writing that it will comply with certain requirements regarding confidentiality of the documents and the manner in which the documents will be used for law enforcement purposes.

4. Nuclear Regulatory Commission

The Nuclear Regulatory Commission ("NRC") is an independent agency created to regulate the civil use of nuclear materials.[36] The NRC has authority to civilly enforce the

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[33] FTC Rules of Practice, Rule 4.11(c), http://www ftc.gov/os/rules/4sec11 htm.

[34] *See also* FTC Rules of Practice, Rule 4.11(c), http://www.ftc.gov/os/rules/4sec11.htm (explaining that respondents are notified "unless the agency requests that the submitter not be notified").

[35] FTC Operating Manual, Chapter 14, at 1, http://www.ftc.gov/foia/ch14liaison.pdf (emphasis added).

[36] *See* http://www nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1350/v22/sr1350v22-sec-1.pdf.

Atomic Energy Act of 1954 and its regulations, while DOJ has jurisdiction over willful violations of NRC requirements.[37]

The NRC and DOJ agreed to a Memorandum of Understanding to "[p]rovide for coordination of matters that could lead both to enforcement action by the NRC as well as criminal prosecution by DOJ," and "to facilitate the exchange of information relating to matters within their respective jurisdictions." In that memorandum, NRC and DOJ agree that "NRC will provide [civil enforcement] information to DOJ, upon its request, no matters being considered by DOJ," and that in turn, when a criminal proceeding has concluded, "DOJ will provide NRC, upon its request, information not protected from disclosure [*i.e.*, non-grand jury materials] relevant to the associated civil case."[38]

5. Other Examples

The cooperation between independent agencies and DOJ cited above are not isolated examples. Coordination of investigations and other efforts among federal agencies with overlapping jurisdiction is common place throughout the government. For example:

- The Department of Labor and DOJ have agreed, in a Memorandum of Understanding, that "[w]henever either Department learns or is informed of any matter coming within the instigative jurisdiction of the other Department . . . it will notify such other Department in writing and furnish all information in its possession regarding the matter."[39]

- The NRC entered into a Memorandum of Understanding with the Department of Labor, where the NRC agreed to "cooperate with [the Department of Labor] and make available information, agency positions, and agency witnesses as necessary to assist" the Department of Labor. In turn, the Department of Labor agreed to "promptly provide NRC a copy of all complaints, decisions made prior to a hearing, investigation reports, and orders associated with any hearing or administrative appeal on the complaint" in cases involving the Energy Reorganization Act of 1974.[40]

- The Internal Revenue Service ("IRS") advises its agents that "[s]haring information between revenue officers and [DOJ] attorneys assigned to the case is a key ingredient in developing civil and criminal cases simultaneously and efficiently."[41] The IRS's

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[37] Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Justice, 53 Fed. Reg. 50317-05, 50319 (Dec. 14, 1988).

[38] *Id.*

[39] Notice of Signing of a Memorandum of Understanding Between the Departments of Justice and Labor Relating to the Investigation and Prosecution of Crimes and Civil Enforcement Actions Under the Labor-Management Reporting and Disclosure Act of 1959, 70 Fed. Reg. 20601-01, 20602 (Apr. 20, 2005).

[40] Notice of Signing of a Revised Memorandum of Understanding Between the NRC and the Department of Labor (DOL), 63 Fed. Reg. 57324, 57325 (Oct. 27, 1998).

[41] Internal Revenue Manual, § 5.1.5.8, available at http://www.irs.gov/irm/part5/irm_05-001-005 html.

manual advises that information sharing between civil and criminal functions is appropriate" unless it involves grand jury materials protected under Federal Rule of Criminal Procedure 6(e).[42]

- The FTC, DOJ, and the Government of India reached a Memorandum of Understanding that "when they are investigating related competition matters, it may be in their common interest to cooperate in appropriate cases, consistent with their respective enforcement interests, legal constraints, and available resources."[43]

- The Food and Drug Administration and Federal Aviation Administration have a Memorandum of Understanding stating that they will coordinate their efforts to investigate incidents involving aircraft illuminations.[44]

- In 2002, President George W. Bush created the "Corporate Fraud Task Force," and charged it with investigating and prosecuting corporate fraud. The task force is composed of senior DOJ officials, seven U.S. Attorneys, and leaders of several federal agencies, including independent agencies such as the SEC, CFTC, and FCC. The task force counts as one of its successes that it "has increased cooperation among federal agencies" in order to fight corporate fraud.[45]

C. Sharing Information With DOJ is Consistent with the Law

There is no statute or common law requirement that prevents the Commission from freely sharing enforcement information and records with DOJ, just as other agencies do. The Supreme Court has held that cooperation between federal agencies conducting parallel investigations and proceedings is constitutional. And while some other agencies have statutes that specifically bar them from sharing certain types of information with other federal agencies,[46] nothing in FECA or the Commission's regulations or directives bars the Commission from sharing information without a subpoena.

1. The Constitution

Courts have repeatedly endorsed the use of parallel civil and criminal proceedings as effective means to enforce federal law, and have stated that, as a general rule, such parallel

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42 *Id.*

43 FTC and DOJ Sign Memorandum of Understanding With Indian Competition Authorities, http://www.ftc.gov/opa/2012/09/indiamou.shtm.

44 Memorandum of Understanding Between the Food and Drug Administration and the Federal Aviation Administration, 64 Fed. Reg. 40603, 40608-10 (Jul. 27, 1999).

45 Department of Justice, Fact Sheet: President's Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity, http://www.justice.gov/opa/pr/2007/July/07_odag_507.html.

46 *See, e.g.*, 21 U.S.C. 331(j) (barring the Food and Drug Administration from disclosing trade secrets to other federal agencies).

proceedings do not violate the Constitution. *United States v. Kordel*, 397 U.S. 1, 11 (1970) (a constitutional rule against parallel civil and criminal proceedings "would stultify enforcement of federal law"); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912) (holding that there is no per se rule against parallel proceedings); *United States v. Stringer*, 535 F.3d 929, 933 (9th Cir. 2008) ("There is nothing improper about the government undertaking simultaneous criminal and civil investigations."); *SEC v. First Financial Group Texas*, 659 F.2d 660, 666 (5th Cir. 1981) ("There is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions."); *SEC v. Dresser*, 628 F.2d 1368, 1377 (D.C. Cir. 1980) ("[E]ffective enforcement of the securities laws require that the SEC and [DOJ] be able to investigate possible violations simultaneously.").

Parallel proceedings do not offend the 4th and 5th Amendments to the Constitution so long as (1) the civil action was not brought solely for the purpose of obtaining evidence in a criminal prosecution; (2) the defendant is put on notice that the civil proceeding contemplates his or her criminal prosecution, and (3) the government does not affirmatively misrepresent to the subjects of the civil investigation that their statements cannot be used in a criminal proceeding. *See Kordel*, 397 U.S. at 11; *Stringer*, 535 F.3d 936-41.

The Commission does not bring civil actions for the purpose of obtaining evidence for a criminal prosecution, nor does it misrepresent to respondents that their statements will not be used in a criminal proceeding. Not only are respondents expressly advised that a response is entirely voluntary and, thus, not compelled — and indeed, the Commission discloses all such responses on the public record upon closure of a matter — but, the public is on notice that the Commission may disclose enforcement documents to DOJ. In January 2008, the Commission put on the public record a notice of new and revised systems of records pursuant to the Privacy Act of 1974. That statute generally prohibits the disclosure of any individual's "record" contained in a "system of records" to a third party without the individual's consent. *Id.* § 552a(b). Nevertheless, the Privacy Act permits nonconsensual disclosure for a "routine use," that is, a use compatible with the purposes for which the record was collected. 5 U.S.C. § 552a(b)(3). The Commission has specified that it is routine for it to disclose enforcement documents to DOJ where the FEC has an interest in litigation and the use of FEC records by DOJ is determined to be "relevant and necessary" to that litigation, and the use is compatible with the purpose for which the records were collected.[47] In addition, in its policy statement on *sua sponte* submissions, the Commission again notified the public that the Commission shares enforcement information with DOJ concerning parallel matters.[48]

2. FECA and Commission Regulations

Nothing in FECA or the Commission's regulations bars OGC from cooperating with DOJ requests for enforcement records and information or requires that the Commission approve the sharing of enforcement records with DOJ as a general rule. To the contrary, the Act directs that,

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[47] Privacy Act of 1974; Systems of Records, 73 Fed. Reg. 336-01, 341 (Jan. 2, 2008).

[48] Federal Election Commission, Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions), 72 Fed. Reg. 16695, 16698 (Apr. 5, 2007).

"[i]n carrying out its responsibilities under this Act, the Commission *shall* . . . avail itself of the assistance . . . of other agencies and departments of the United States."[49]

a. Referral Provision

FECA authorizes the Commission to refer apparent violations of the Act to the Attorney General where the Commission has found probable cause to believe that a knowing and willful violation has occurred or is about to occur. 2 U.S.C. § 437g(a)(5)(A). There is nothing in the referral provision that could be read to prevent the Commission from responding to a DOJ initiated inquiry regarding a criminal investigation or proceeding that DOJ has already initiated.

DOJ, of course, has exclusive criminal jurisdiction over certain FECA violations, and need not wait for a Commission referral to pursue a criminal action.[50] Therefore, the referral provision does not prevent the Commission from assisting DOJ with a criminal FECA matter that would exist regardless of that assistance.[51]

b. Confidentiality Provisions

FECA and Commission regulations bar any records or information created in the Commission's enforcement process from being "made public" by anyone at the Commission without consent. 2 U.S.C. § 437g(a)(12); 11 C.F.R. § 111.21(a).[52] Sharing enforcement records with DOJ, however, does make not make such records "public," and therefore does not violate the confidentiality provisions.

The term "public" in section 437g(a) cannot be interpreted to preclude giving enforcement information to the "Attorney General of the United States." Otherwise, the confidentiality provisions would nullify the Act's referral provision. The referral provision, 2 U.S.C. § 437g(a)(5)(C), authorizes the Commission to refer apparent violations of the Act to the Attorney General after the Commission has found probable cause to believe that a knowing and willful violation of the Act has occurred. At that point, however, the existence of enforcement matter is *not* public; nevertheless, section 437g(a)(5)(C) authorizes the Commission to refer the matter to the Attorney General. Thus, reading "public" in the confidentiality provisions to include DOJ would render the referral provision useless.[53]

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[49] 2 U.S.C. § 437(c)(f)(3) (emphasis added).

[50] 28 U.S.C. § 516; *Fieger v. U.S. Att'y Gen.*, 542 F.3d. 1111, 1116-21 (6th Cir. 2008); *Bialek v. Mukasey*, 529 F.3d 1267, 1271-72 (10th Cir. 2008).

[51] This kind of Commission assistance to DOJ also does not constitute a "report [of an] apparent violation[]" under 2 U.S.C. § 437d(a)(9).

[52] FECA also bars the Commission from making "public," without consent, any actions taken or information derived in connection with any Commission attempts to reach a conciliation agreement. 2 U.S.C. § 437g(a)(4)(B)(i).

[53] For the same reason, sharing enforcement records with DOJ cannot be interpreted to violate Commission Directive 31. That directive "bars FEC employees from communicating with any person outside the agency concerning compliance matters during both working and nonworking hours." But just as with the term "public" in section 437g(a), if "any person" were interpreted to include the Attorney General or DOJ, Directive 31 would nullify

Moreover, Commission records and information shared with DOJ are not, in fact, released to the general public. When the Commission transfers records to DOJ, the records bear a disclaimer informing DOJ that the records cannot be released to the public under 2 U.S.C. §§ 437g(a)(4)(B), 437g(a)(12). There has never been an instance of which we are aware, where Commission enforcement documents transferred to DOJ have subsequently become public in violation of 2 U.S.C. § 437g(a)(4)(B) or § 437g(a)(12).

The Commission has stated publicly that it agrees that sharing records with DOJ does not make such records "public." In the policy statement it issued on April 5, 2007, regarding *sua sponte* submissions, the Commission addressed issues that may arise "in connection with parallel criminal investigations."[54] In that discussion, the Commission advised that "[a]lthough the Commission cannot disclose information regarding an investigation to the public, *it can and does share information on a confidential basis with other law enforcement agencies.*"[55]

D. Sharing Information With DOJ Promotes the Enforcement of FECA, Which is a Core Purpose Underlying the Commission's Independence

Assisting DOJ in its efforts to criminally enforce FECA is consistent with, and not contrary to, the Commission's status as an independent agency.

The Commission has exclusive jurisdiction over civil enforcement of the Act. 2 U.S.C. §§ 437c(b)(1), 437d(e). The legislative history for the 1974 Amendments makes clear that a key purpose behind the Commission's creation and independence was to promote vigorous enforcement of the Act in light of DOJ's failure to enforce FECA and previous federal campaign finance statutes. As Representative Patricia Schroeder explained in the 1974 floor debates that resulted in FECA's enactment, DOJ "rarely initiated action in this politically sensitive area for the past 50 years," and at that time, there were "approximately 5,000 unenforced violations presently pending" as a result. The only solution, Representative Schroeder said, would be "an independent full-time commission [that would] provide for effective policing of reform provisions."[56]

Just days prior to the passage of the 1974 Amendments, that sentiment was echoed in the Senate by Senator Richard Clark, who explained that the Commission's independence was designed to help make up for the lack of FECA enforcement by DOJ:

Congress's command in 2 U.S.C. § 437g(a)(5)(C) that the Commission may refer apparent violations for criminal enforcement. Moreover, the Commission's use of the word "person" in this instance should be understood to be consistent with the definition of "person" in the Act, which "does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. § 431(11).

[54] Federal Election Commission, Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions), 72 Fed. Reg. 16695, 16698 (Apr. 5, 2007).

[55] *Id.* (emphasis added).

[56] 120 Cong. Rec. H7939 (Aug. 8, 1974); *see also* Legislative History of the Federal Election Campaign Act Amendments of 1974 at 911.

> Another major accomplishment of [the 1974 Amendments] is the establishment of an independent, bipartisan Federal Election Commission. This Commission . . . will have broad administrative and supervisory powers. Of special significance is the Commission's civil enforcement authority, which will help insure that correction of election law violations will not depend entirely on action by a Department of Justice that has traditionally ignored such abuses.[57]

Today, DOJ has embraced its role of prosecuting criminal FECA violations. And to the extent the Commission helps DOJ by sharing valuable records and information, the Commission acts consistently with the very reason for its own independence — the vigorous and effective enforcement of the Act.

Record and information sharing with DOJ not only promotes DOJ's enforcement of the Act, but the Commission's enforcement as well. As discussed above, as the Commission increased its efforts to freely and openly cooperate with DOJ in the 1990s and 2000s, DOJ has responded in kind and provided the Commission with valuable information that has helped the Commission fulfill its independent role as the prosecutor of civil violations of the Act.

IV. Conclusion

The Commission and OGC have worked for years to achieve the mutually beneficial relationship the Commission enjoys with DOJ today. Those efforts — and the multiple benefits that have accrued to the Commission and the regulated community as a result — should not be wasted with unnecessary impediments to information sharing between the Commission and DOJ. Any steps that would make it more difficult for the Commission to share with DOJ would put the Commission out of step with other independent federal agencies, while resulting in no offsetting benefits to the Commission or to the political community. It would open up the Commission to charges of obstruction based on rank partisanship. The Commission should therefore continue its long established practice of freely cooperating with DOJ — as it has for more than 20 years.

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[57] 120 Cong. Rec. S18529 (Oct. 8, 1974) *see also* Legislative History of the Federal Election Campaign Act Amendments of 1974 at 1083.