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AGENDA ITEM

For Meeting of 7-25-13

July 25, 2013

MEMORANDUM

TO: The Commission

SUBMITTED LATE

FROM: Donald F. McGahn 
Vice Chairman

SUBJECT: Background Information Regarding Proposed Enforcement Manual

Attached is a memorandum that provides additional background information and support for adoption of Agenda Item No. 13-21-A. This document is intended to assist the Commission and the public in understanding more fully the basis for the differences between the proposed enforcement manuals currently on the agenda. I therefore request that this document be placed on the agenda for July 25, 2013 as Agenda Document No. 13-21-K.

Attachment

BACKGROUND INFORMATION REGARDING PROPOSED ENFORCEMENT MANUAL

Currently before the Commission for consideration are two proposed draft enforcement manuals that would govern the conduct of the Commission's Office of General Counsel ("OGC") in connection with the Commission's enforcement functions. This is the next step of an ongoing effort to correct what many have complained of for years,¹ and what I encountered first hand when first appointed five years ago: that much of the FEC's business was being conducted in secret, on an ad hoc basis, and that the agency lacked publicly-available procedures that governed both the Commission and its staff.² Due process was a foreign concept, and the idea of ensuring that those accused of wrongdoing had a meaningful opportunity to be heard by the Commission was anathema to many. Commission history and precedent was difficult and at times impossible to uncover. Most of the FEC's closed enforcement cases were not available on-line. Even the Commission's own procedures, codified in what are called Directives, were not readily available to the public. Most troubling, the staff viewed the Commission as an obstacle to be overcome, and not the deliberative body vested with decision-making authority that the Act contemplates.

Given the ad hoc nature of the internal workings of the FEC, several Commissioners believe that it is incumbent upon the Commission to adopt formal, publicly-available policies. The contemplated enforcement manual is yet another example of this long process, which has resulted in the Commission publishing a multitude of new policies and procedures to achieve two shared goals: (1) increase transparency of agency operations, and (2) provide much needed due process for those accused of wrongdoing. Now, there is a meaningful opportunity to be heard during the audit process,³ the reports analysis process,⁴ the advisory opinion process,⁵ and throughout OGC's enforcement process.⁶ Such change, although at times contentious,⁷ was achieved in a bi-partisan manner.⁸

¹ See generally FEC Enforcement Procedures Hearing (June 11, 2003), available at <http://www.fec.gov/law/policy.shtml#guidance>.

² See generally Public Hearing on Agency Procedures (Jan. 14-15, 2009), available at <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>.

³ See Procedural Rules for Audit Hearings, 74 Fed. Reg. 33,140 (July 10, 2009) available at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-12.pdf.

⁴ See, e.g., Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45,798 (August 1, 2011) available at http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-11.pdf.

⁵ See Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 Fed. Reg. 32,160 (July 7, 2009) available at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-11.pdf.

⁶ See, e.g., Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34,986 (June 15, 2011) available at http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-06.pdf; Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55,443 (Oct. 28, 2009) available at

As is inevitable with any deliberative body, there remain a few areas of disagreement with respect to the manual: (1) the staff's desire to investigate without Commission approval, and (2) the staff's desire to be the sole decision-maker with respect to providing information with other law enforcement authorities. With respect to the first point, the Act does not permit an investigation to occur until the Commission, through an affirmative vote of at least four of its members, finds that there is a reason to believe ("RTB") that a violation has occurred or is about to occur.⁹ With respect to the second point, staff wants a radical change: that they make the decisions regarding the sensitive issue of dealing with other law enforcement, removing the Commissioners from the decision-making process. The statute says otherwise, vests ultimate decision making with the Commission, and precludes the delegation of that power.

Staff, in an effort to justify their policy preference, has issued a twenty page policy polemic that barely references the statute.¹⁰ OGC spills much ink on a

http://www.fec.gov/law/cfr/ej_compilation_2009/notice_2009-24.pdf; *Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters*, 74 Fed. Reg. 38,617 (Aug. 4, 2009) available at http://www.fec.gov/law/cfr/ej_compilation_2009/notice_2009-18.pdf.

⁷ In fact, during the deliberation of one request for feedback from the public, the Chair declared that it was "a waste of time." Open Meeting Dec. 20, 2012, Discussion of Request for Comment on the Enforcement Process, available at <http://www.fec.gov/agenda/2012/agenda20121220.shtml>.

⁸ *See, e.g.*, Notice of Request for Comment on the Enforcement Process, Certification dated Dec. 20, 2012 (approved by a vote of 4-2); Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, Certification dated July 21, 2011 (Commission voted 6-0 to approve the policy); Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel, Certification dated Oct. 6, 2011 (Commission voted 5-0 to approve the procedure); Directive 68 (Enforcement Procedure), Certification dated Dec. 17, 2009 (approved by a vote of 6-0); Consideration of Policy to Place First General Counsel's Report on the Public Record, Certification dated Nov. 19, 2009 (approved by a vote of 6-0); Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, Certification July 16, 2009 (approved by a vote of 6-0); Procedures for Audit Hearings, Certification dated June 26, 2009 (approved 6-0).

⁹ 2 U.S.C. § 437g(a)(2). *See also* 11 CFR § 111.10(a).

¹⁰ *See* Memorandum from Anthony Herman, General Counsel, and Daniel A. Petalas, Associate General Counsel for Enforcement to The Commission, on Information Sharing with the Department of Justice (June 17, 2013), available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-d.pdf. Tellingly, staff does not begin to confront the Act or Commission regulations until page 18 of a 21-page document. *Id.* By way of background, several Commissioners across the political spectrum had asked OGC several questions related to their dealings with law enforcement. In lieu of answering those questions – which to date remain unanswered – OGC on its own chose to issue its own policy document, with the full intent that it made public. Given that OGC does not vote, it is odd that staff feel entitled to weigh in on a Commission-level policy decision with their own views, after having then implement those views unilaterally. Even more bizarre is the idea of lawyers thinking they exist separate and apart from their client, and that somehow their own personal views can take precedence of those of the client. This illustrates the much deeper problem with OGC: when convenient, they claim to be the counsel for the Commission, the self-proclaimed "non-partisan" purveyor of objective, dispassionate legal advice; but other times, when it suits their needs, they act as if they are their own independent branch of the government, with their own policy-making inherent authority. The Act could not be clearer: OGC is hired by the Commission, and it is the Commission that is vested with decision-making authority.

noncontroversial proposition: that the FEC ought to provide information requested by DOJ in connection with an ongoing criminal probe. No one questions this. The Republican proposal does not preclude this, and, despite OGC's arguing against insisting on a formal grand jury subpoena, suggests a return to that practice. OGC then conflates this with the separate issue of the FEC providing information to DOJ in the first instance. OGC seeks to centralize that decision-making power in itself, despite the Act unambiguously vesting such power with the Commission. Unfortunately, OGC's tome has caused much of the recent oversimplified news coverage, and has created the misimpression that we have proposed ending FEC cooperation with the Department of Justice. This is wrong – the FEC has cooperated with the Department of Justice and nothing in our proposal will change that. In fact, as DOJ has already publicly stated, the FEC's ability to work with DOJ has improved significantly over the past several years.¹¹ And pursuing matters that involve so-called giving in the name of another has been one of the few areas where the Commissioners have found substantive bipartisan agreement.¹²

The issue that ties together both points of our disagreement with OGC concerns the internal relationship between FEC Commissioners and their staff. FEC staff has functioned under what they have themselves called an “organic” process (meaning evolving and ad hoc), and as they recently admitted, staff practice has “not been uniform.”¹³ Several Commissioners, myself included, find this unacceptable, and believe that there must be written, Commission-approved policies that governs staff conduct, so as to assure the public that staff are operating under a set policy, and are not tempted to act in either a partisan or political manner. One need look no further than recent revelations regarding the Internal Revenue Service to appreciate what can occur in the absence of such standards.¹⁴ Not surprisingly, staff has resisted, and in some instances,

¹¹ See, e.g. Letter from Sheldon Whitehouse, Jeanne Shaheen, Al Franken, Charles Schumer, Jeff Merkley, and Tom Udall to The Honorable Ellen Weintraub, Chair, and The Honorable Donald F. McGahn II, Vice Chairman, Federal Election Commission at 1 (July 15, 2013) (“In written testimony prepared for a hearing before the Senate Judiciary Committee Subcommittee on Crime and Terrorism on April 9 of this year, Acting Assistant Attorney General for the Criminal Division of the Department of Justice Mythili Raman described several major campaign finance prosecutions, many if not all of them assisted by information sharing from the FEC.”).

¹² See, e.g., MUR 5758 (Pierce O'Donnell) (\$272,000 contingent penalty); MUR 5784 (Morton Grove Pharmaceuticals, Inc.) (\$9,000 in penalties); MUR 5818 (Feiger, Fieger, Kenney, and Johnson, P.C.) (\$131,000 in penalties); MUR 5849 (Kathleen Cannon) (\$15,000 in penalties); MUR 5871 (Thomas W. Noe, et al.) (\$65,000 in penalties); MUR 5927 (Joseph A. Solomon) (\$6,400 in penalties); MUR 5955 (Dr. Jose Valdez) (\$30,000 in penalties); MUR 6184 (Skyway Concession Company, LLC) (\$4,000 in penalties); MUR 6186 (Mark Leggio) (\$6,000 in penalties); MUR 6463 (Jack Antaramian, et al.) (\$31,000 in penalties); MUR 6234 (Arlen B. Cenac, Jr. et al) (\$170,000 in penalties).

¹³ Email from Anthony Herman to the Commissioner's Offices (Apr. 15, 2013), available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-e.pdf.

¹⁴ See, e.g., David Sherfinski and Stephen Dinan, *IRS Auditor Reaffirms That Conservatives, Not Liberals, Were Targeted*, Wash. Times (June 27, 2013) available at <http://www.washingtontimes.com/news/2013/jun/27/irs-auditor-reaffirms-conservatives-not-liberals->

has outright refused to acknowledge that the Act vests decision making authority with the Commissioners. Congress has already made the policy choice: the Commissioners make the decisions, not the staff.

A. House Administration and the Enforcement Manual

In many ways, the genesis of this debate was an oversight hearing held by a subcommittee of the House Committee on Administration in November of 2011.¹⁵ There, it was confirmed that the Commission lacked a current, publicly available, comprehensive manual governing OGC's conduct during the processing of enforcement matters. OGC had something that purported to be an old enforcement manual, but it had never received Commission approval, and included a compilation of additional policies. Troublingly, this compilation was not consistently followed by OGC, nor did it address the whole of the Commission's enforcement process, leaving many important parts vulnerable to the *ad hoc* decision-making of staff.

Not surprisingly, House Administration expected better, and insisted that the Commission (1) make public OGC's hodge-podge of enforcement procedures, and (2) adopt a comprehensive enforcement manual to govern its future process. In response, the Commission tasked OGC with drafting a new manual for Commission consideration. The Commission also began the process of seeking public comment on its enforcement procedures.¹⁶ A number of helpful comments were received, many of which stressed the statutory limitations placed upon the Commission – and, in particular, the Office of General Counsel – in its enforcement role.¹⁷

OGC's initial work on the draft manual was completed more than one year after the House Administration hearing, in January of 2013. Several Commissioners set to work to incorporate a number of the helpful suggestions received by experts and practitioners in the field into OGC's draft. For the most part, it is those changes that differentiate the competing manuals. A number of Commissioners asked for the consideration of the manual to be placed on the Commission's agenda. Despite the Chair's initial refusal and delay, and after House Administration repeatedly inquired as to

[w/?page=all](http://www.cbsnews.com/8301-250_162-57591358_irs-progressive-groups-flagged-but-tea-party-bigger-target/); Stephanie Condon, *IRS: Progressive groups flagged, but tea party bigger target*, CBS News (June 27, 2013) available at http://www.cbsnews.com/8301-250_162-57591358_irs-progressive-groups-flagged-but-tea-party-bigger-target/; Mark Hemingway, *IRS's Lerner Had History of Harassment, Inappropriate Religious Inquiries at FEC*, May 20, 2013, Weekly Standard, http://www.weeklystandard.com/blogs/irss-lerner-had-history-harassment-inappropriate-religious-inquiries-fec_725004.html?page=1.

¹⁵ *Federal Election Commission: Reviewing Policies, Processes and Procedures: Hearing Before the Subcomm. On Elections of the Comm. On H. Admin.*, 112th Congress 2 (Nov. 3, 2011).

¹⁶ See Notice 2013-01: Request for Comment on Enforcement Process, 78 Fed. Reg. 4081 (Jan. 18, 2013).

¹⁷ See Comments Received on Enforcement Process (2013), available at <http://www.fec.gov/law/policy/enforcement/2013/2013commentsreceived.shtml>

its status, the manual is – at long last – before the Commission for consideration and approval.

As the Chair explained during the FEC’s public meeting of June 27, 2013, there is a tremendous amount of agreement among Commissioners as to most of the manual; indeed, the vast majority of the competing proposals are identical.¹⁸ The disagreement over the remaining portion is substantial and covers two important topics: (1) who can authorize Commission investigations, and (2) who is empowered to refer, report, or otherwise provide information and records regarding enforcement matters to the Department of Justice and other law enforcement authorities?

Fortunately, the Act answers both questions clearly and unequivocally: the Presidentially appointed, Senate-confirmed Commissioners must make these decisions. The Act imposes this responsibility with good reason – the Commission is an independent body specifically created by Congress to interpret and enforce the nation’s campaign finance laws in a bipartisan manner. To remove from the Commissioners the discretion to carry out two of the Commission’s most important and most sensitive duties would fundamentally alter the system of campaign regulation enacted by Congress nearly 40 years ago.

1. The Act Does Not Permit Staff Pre-RTB Investigations

The first area of disagreement concerns pre-RTB investigative activities by OGC in connection with an FEC Matter Under Review (“MUR”). OGC’s version of the manual permits staff, prior to a Commission finding of RTB, to conduct limitless searches of a broad range of materials not included in a complaint or response.¹⁹ Unfortunately, and in the face of nearly five years of objections from several Commissioners, staff has been conducting such ad hoc pre-RTB investigations, and lately their scope has expanded significantly. When asked to justify their authority to conduct such pre-RTB investigations, OGC has been unable to point to either a statutory grant of power or a Commission vote that gave them the free reign they now claim, and instead rely on their own “organic,” “evolving” processes.

¹⁸ Open Meeting June 27, 2013, Discussion of the OGC Enforcement Manual, available at <http://www.fec.gov/agenda/2013/agenda20130627.shtml> (“There’s a great, great deal of overlap among these documents. I think it’s fair to say that in the areas of overlap, the public can assume that there’s general agreement on the topics that are considered therein.”).

¹⁹ Memorandum from Anthony Herman, General Counsel, to The Commission on OGC Enforcement Manual (“OGC Proposal”) (June 12, 2013), available at http://www.fec.gov/agenda/2013/mtgdoc_13-21.pdf; ; *see also* Memorandum from Anthony Herman, General Counsel, to The Commission Secretary on OGC Enforcement Manual (“OGC Proposal II”) (June 26, 2013), available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-b.pdf.

Nor could OGC point to any authority, since pre-RTB investigations are contrary to the Act. The Act is clear that an investigation is to begin only after the Commission votes to find reason to believe:

If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, *by an affirmative vote of four of its members*, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act . . . the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall *make an investigation* of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.²⁰

As recently explained by the Perkins Coie political law group in comments filed with the Commission, this is by design: “Congress wrote FECA to place limits on what the Commission may do at the pre-reason to believe, or ‘pre-RTB’ phase.”²¹

Indeed, the legislative history of the Act demonstrates that Congress specifically decided to have investigations arise out of – and not inform or otherwise provide a basis for – a reason to believe finding. Early versions of S. 3065, which President Ford ultimately signed into law as the Presidential Election Campaign Act Amendments of 1976, contained language that expressly allowed pre-RTB investigations. As reported initially by the Senate Rules Committee, the bill provided:

The Commission, *upon receiving a complaint under paragraph 1, or if it has reason to believe that any person has committed a violation of this Act or of chapter 95 or 96 of the Internal Revenue Code of 1954*, shall notify the person involved of such alleged violation and *shall make an investigation* of such alleged violation in accordance with the provision of this subsection.²²

The legislation that Congress eventually passed, however, was significantly different:

The Commission, *upon receiving a complaint under paragraph 1, and if it has reason to believe that any person has committed a violation of this Act, or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or, if the Commission, on the basis of information ascertained in the*

²⁰ 2 U.S.C. § 437g(a)(2) (emphasis added). See also 11 CFR § 111.10(a).

²¹ Comment from Perkins Coie, LLP Political Law Group, on Request for Comment on Enforcement Process (April 19, 2013), available at http://www.fec.gov/law_policy/enforcement/2013_perkinscoie.pdf.

²² S. 3065, 94th Cong. § 108 (1976), available at, Federal Election Commission, Legislative History of the Federal Election Campaign Act Amendments of 1976, at 236 (1977) (emphasis added).

normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred, shall notify the person involved of such alleged violation and *shall make an investigation* of such alleged violation in accordance with the provisions of this section.²³

This evolution shows that Congress did not intend for the Commission to conduct an investigation before finding RTB. The Senate committee bill would have allowed the Commission to “make an investigation” without such finding, but the final bill required the Commission to find RTB before it could do so. This was true whether the RTB finding was premised on a complaint or upon information ascertained in the normal course of carrying out its supervisory responsibilities. Thus, in either case, a Commission finding of RTB became a condition precedent for a Commission investigation.²⁴ This remained true even when Congress amended the provision again in 1979 into its substantially current form.

This is not a new understanding of the limitations imposed by the statute, or even one shared only by Democratic lawyers. Jan Baran of Wiley Rein submitted similar comments to the Commission in connection with a 2003 hearing on its enforcement procedures.²⁵ Included as part of those comments was a 1982 report and resolution from the American Bar Association’s Section of Administrative Law regarding the Commission’s enforcement procedures, which stated in relevant part: “Under the procedures presently in effect, however, *the General Counsel is prohibited from requesting information from the Respondent prior to a finding of Reason To Believe*. The Commission has concluded that any such communication with Respondents prior to a finding of Reason To Believe is not authorized by the Act.”²⁶

In addition to being contrary to the Act, the pre-RTB investigative activities authorized under OGC’s proposed manual also pose serious due process concerns. Specifically, the OGC manual describes an *ad hoc* process whereby staff attorneys are provided a non-exhaustive list of hearsay materials that “may” be consulted (including

²³ Federal Election Campaign Act Amendments of 1976, § 109, 90 Stat. 475, 483 (1976) (emphasis added) (current version at 2 U.S.C. § 437g(a)(2)).

²⁴ See Comment from Perkins Coie, LLP Political Law Group, on Request for Comment on Enforcement Process (April 19, 2013) (“In either case, a Commission reason to believe finding became a condition precedent for Commission investigation.”), available at http://www.fec.gov/law/policy/enforcement/2013_perkinscoie.pdf.

²⁵ Comment from Jan Baran, Wiley Rein & Feilding LLP, on Enforcement Proceedings (May 30, 2003) available at http://www.fec.gov/agenda-agendas2003_notice2003-09_epdf_baran1.pdf.

²⁶ *Annual Report of Committees: Report on the Reform of the FEC’s Enforcement Procedures*, vol. 19 at 230 (Amer. Bar. Ass’n. Section of Admin. Law 1982). Importantly, the report noted that in some cases a respondent’s “written submission may raise minor questions which the General Counsel and the Commission might wish to pursue prior to dismissing the complaint,” but the report recommended only that “*the Commission* [and not the General Counsel] should have the authority to request additional information from the respondent.” *Id.* (emphasis added).

Facebook, Twitter and other social media). Whether staff is to review all, some, or none of these materials is seemingly left to the discretion of the staff attorney assigned to the matter.²⁷ It is precisely this sort of standardless sweep that courts have time and time again chastised. As Justice O'Connor has explained, the law "must not permit policemen, prosecutors, and juries to conduct a standardless sweep . . . to pursue their personal predilections."²⁸

Unfortunately, since OGC has already chosen to go it alone, my criticisms are not merely theoretical. I have seen it result in disparate treatment of similarly situated respondents. In some matters, no materials are reviewed. In others, materials are reviewed and inform OGC's recommendation to the Commission, but they are not provided to the respondent for a response. In still others, extensive research is performed and provided to the respondent for comment - sometimes without any sort of context and other times accompanied by specific questions. In some matters, the materials can total in excess of 80 pages, and even include openly-biased blog posts.²⁹ Staff informs the respondent that any response is voluntary, and that no negative inference will be drawn – but in actual fact, if a respondent fails to respond, the articles and other investigative materials are deemed true. Rarely, if ever, will OGC seek out or rely on exculpatory informative uncovered during their rump investigation. It seems as if OGC only conducts a pre-RTB inquiry to confirm their pre-ordained theory of the case.

Contrary to what some have said and reported, the Republican proposal does not in any way preclude OGC from conducting investigations – but a condition predicate to any such investigation is a Commission RTB determination. Nor am I turning a blind eye to illegal activity reported in the news that cries out for action. On the contrary, the Commission has already spoken to the issue in its Directive 6, which expressly instructs the staff on what to do with newspaper articles and the like.³⁰ Under the Directive, the staff is to bring such issues to the Commission, who then decide whether OGC ought to pursue the matter in a MUR.³¹ In fact, in the past, even Commissioners felt bound by the mandates of Directive 6, and would formally present troublesome news articles to their

²⁷ Memorandum from Anthony Herman, General Counsel, to The Commission on OGC Enforcement Manual ("OGC Proposal") (June 12, 2013), available at http://www.fec.gov/agenda/2013/mtgdoc_13-21.pdf.

²⁸ *City of Chicago v. Morales* 527 U.S. 41, 65 (1999) (internal quotations and citations omitted) (O'Connor, J., concurring).

²⁹ MUR 6540 (Santorum for President), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioner Caroline C. Hunter (providing fuller explanation of problems with pre-RTB investigations in the context of an actual case).

³⁰ Directive 6 at 4 (available at http://www.fec.gov/directives/directive_06.pdf).

³¹ *Id.* at 5. If anything, Directive 6 goes beyond the Act in that it declares material obtained *via* non-routine review to somehow be information obtained in the Commission's normal course of carrying out its supervisory powers. By definition, "non-routine" is not "normal."

colleagues before staff was empowered to act.³² The proposal is consistent with this long-standing process, and allows the staff to bring such material to the Commission, and if the Commission agrees it is worth pursuing, it will open a separate matter, which can subsequently be merged with the complaint-generated case.³³

Ultimately, I – along with Perkins, Coie, Wiley Rein and the American Bar Association – disagree with the staff's proposal.

2. The FEC and DOJ

a. Legal background

It should come as no surprise that the FEC shares information with DOJ, and that the Republican proposal does not alter that. The Act sets forth areas of exclusive and overlapping jurisdiction. On the one hand, the FEC administers the Act, says what the law is in the first instance, and handles civil enforcement.³⁴ On the other hand, DOJ handles criminal violations; certain knowing and willful violations can be handled by either the FEC or DOJ.³⁵

The Act explicitly sets forth the procedure for the Commission to report unlawful conduct to law enforcement generally, and for referring a matter to DOJ specifically. It states that it takes the affirmative votes of at least four Commissioners to make the report or referral. Regarding referrals, the Act states in pertinent part:

If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitation set forth in paragraph (4)(A).³⁶

Regarding reporting wrongdoing, the Act states in pertinent part:

³² See, e.g., MUR 3540 (Prudential Securities, Inc.)

³³ Memorandum from Vice Chairman Donald F. McGahn, Commissioner Caroline C. Hunter, and Commissioner Matthew S. Petersen, on OGC Enforcement Manual (“Republican Proposal”) at 3.4.1.2 (June 12, 2013), available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-a.pdf.

³⁴ 2 U.S.C. 437c(b)(1).

³⁵ Compare 2 U.S.C. 437g(a)(5)(B) with 2 U.S.C. 437g(d).

³⁶ 2 U.S.C. 437g(a)(5)(C).

The Commission has the power . . . to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.³⁷

The reporting provision is listed as one of the Commission's powers that require four affirmative votes, and that cannot be delegated:

All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote on any decision making authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 437d(a) of this title or with chapter 95 or chapter 96 of title 26.³⁸

In addition to the Act, there has been a publicly available Memorandum of Understanding (“MOU”) between DOJ and the FEC that was adopted in 1977. This MOU makes clear that only the more egregious knowing and willful cases would be sent to DOJ. In the MOU, the Commission and DOJ recognize that “all violations of the Federal Election Campaign Act and the antifraud provisions of Chapters 95 and 96 of the Internal Revenue Code, even those committed knowingly and willfully, *may not be proper subjects for prosecution as crimes.*”³⁹ The two agencies agreed that the Commission would refer to DOJ “those knowing and willful violations which are *significant and substantial* and which may be described as *aggravated* in the intent in which they were committed, or in the monetary amount involved.”⁴⁰ It lists a number of factors that the Commission is to consider in determining whether to send a matter to DOJ or not.⁴¹

b. The problem: Hostility toward the Act

i. OGC's Secret Policy

³⁷ 2 U.S.C. 437d(a)(9).

³⁸ 2 U.S.C. 437c(e).

³⁹ Memorandum of Understanding with Department of Justice, 43 Fed. Reg. 5441 (Feb. 8, 1978).

⁴⁰ *Id.*

⁴¹ Such factors include “the repetitive nature of the acts, the existence of a practice or pattern, prior notice, and the extent of the conduct in terms of geographic area, persons, and monetary amounts, among many other proper considerations.” *Id.*

Unfortunately, despite the clear language of the Act and MOU, how the FEC has internally handled its dealings with DOJ has been far from consistent. FEC staff has functioned under what they have themselves called an “organic” process (which as a practical matter means evolving, *ad hoc* decision-making),⁴² and as OGC recently admitted, their practice has “not been uniform.”⁴³ To avoid such confusion, and so as to ensure some much-needed consistency, and after OGC confirmed that there existed no written policy, in August of 2011 the Commission asked OGC to prepare a draft policy to govern such internal workings for Commission consideration. At that time, all Commissioners agreed that, at a minimum, OGC was to inform the Commission of requests for information from law enforcement and any contemplated OGC response, and several Commissioners desired an even more active role.

Apparently, such a policy was developed soon thereafter by several within OGC, but not shared with the Commission until recently.⁴⁴ That draft policy, while not perfect, would at least have required OGC to inform the Commission of general, oral requests for information from DOJ and, seemingly, would have given the Commission the ability to review in advance any disclosure of specific information or records to DOJ.⁴⁵ That policy was not, however, circulated to the Commissioners for review, comment, or ratification. Instead, after some staff turnover,⁴⁶ staff jettisoned that draft policy in favor of a new policy much different than that requested by the Commission. Under this OGC policy, Commissioners were kept in the dark regarding OGC’s interactions with DOJ and were afforded an opportunity to affirmatively weigh in on such matters only in the rarest of circumstances.⁴⁷ This secret OGC policy was not circulated to the Commission for

⁴² In some past instances, FEC employees were interviewed by the FBI, not as fact witnesses, but as quasi-legal experts. Those employees did not alert anyone (not even their supervisors) of their interviews. The Commission was unaware, and senior management did not learn of such activity until FEC employee names surfaced in FBI reports produced in connection with a criminal trial.

⁴³ Email from Anthony Herman, General Counsel, to Commissioners on DOJ Requests for Documents – Notice to Commission (April 15, 2013) available at http://www.fec.gov/agenda/2013_mtgdoc_13-21-e.pdf.

⁴⁴ See Memorandum from Kathleen Guith, Acting Associate General Counsel for Enforcement to Enforcement Staff Regarding Enforcement Procedure 2011-XX: Requests for Information from the Department of Justice and other Criminal Law Enforcement Agencies at 3, available at http://www.fec.gov/agenda/2013_mtgdoc_13-21-g.pdf (hereinafter “Guith Memo”). We have also learned that, despite the memo purporting to come from Ms. Guith, it was a draft prepared by subordinates for her review and approval, and was not authored by her.

⁴⁵ *Id.*

⁴⁶ A new General Counsel and head of enforcement began after the Commission had tasked OGC with drafting a policy for Commission consideration.

⁴⁷ See Memorandum from Daniel A. Petalas, Associate General Counsel for Enforcement, to Enforcement Staff on Requests for Records of Information from Federal, State, and Local Government Entities (2012), available at http://www.fec.gov/agenda/2013_mtgdoc_13-21-f.pdf. This secret policy, on its face, instructed staff to act in a manner contrary to the Act, since it empowered the staff to report matters to law enforcement, a non-delegable power specifically entrusted to the Commissioners. On its face, this policy requires staff attorneys to notify Commissioners of communications with DOJ after the fact by placing a

review, comment, or ratification; however, email records indicate that it was circulated to OGC enforcement staff (and, presumably, went into effect) on June 14, 2012.

Keeping the secret OGC policy from the Commission does not appear to have been an accident. For example, the General Counsel made no mention of this secret policy in his April 15, 2013 email to the Commission announcing “a uniform policy” regarding OGC’s efforts to inform the Commission of requests from DOJ for documents – an email which, it seems, effectively amended but did not acknowledge the secret OGC policy.⁴⁸ Even more remarkable, despite spending over a year drafting what was supposed to be a comprehensive manual that would govern OGC’s enforcement activity, staff’s draft manual did not originally include their own secret OGC policy.⁴⁹ And it was not as if dealing with law enforcement was beyond the scope of the manual, as the initial drafts reference dealing with DOJ generally.⁵⁰ But the details of how that was to be carried out were nowhere to be found. In other words, *although House Administration insisted and the Commissioners had agreed to cease and desist from maintaining secret policies, OGC had a secret policy that was not included in what was supposed to be a comprehensive public manual.*

The Commission eventually learned the contents of this secret policy through a chain of events. A few weeks after OGC’s April 15, 2013 email announcing a “uniform” policy to correct OGC’s failure to keep the Commission informed, OGC informed the Commission that it would be producing documents to DOJ. Several Commissioners questioned this, particularly regarding from where OGC derived its authority to unilaterally make such a decision, and whether the Commissioners had any say in such a decision. When asked for additional information regarding OGC’s dealings with DOJ, OGC was, to put it kindly, not a paradigm of cooperation. After some stonewalling by OGC, the Commission eventually received from OGC on May 22, 2013 over 25,000 pages of emails between OGC and DOJ from just 2013 alone, oddly called a “document production,” complete with OGC bates labels. For reasons that still remain unclear, OGC did not include its secret policy in this litigation-style document dump. Indeed, Commissioners were not shown this policy until June 4, 2013.

memorandum in an electronic case file (Voting Ballot Matters). This practice is followed sporadically, at best. *Infra* at 14.

⁴⁸ Email from Anthony Herman, General Counsel, to Commissioners on DOJ Requests for Documents – Notice to Commission (April 15, 2013) available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-e.pdf.

⁴⁹ *See* After the truly comprehensive Republican proposal was released for public review, *see* Republican Proposal at 2.11, OGC amended their proposed manual to cross reference the secret OGC policy on sharing information and other documents with law enforcement agencies. *Compare* OGC Proposal with OGC Proposal II at ¶ 3.4.1.4.

⁵⁰ Memorandum from Anthony Herman, General Counsel, to The Commission on OGC Enforcement Manual (“OGC Proposal”) (June 12, 2013), available at http://www.fec.gov/agenda/2013/mtgdoc_13-21.pdf. [I.2.5; 4.4.14; 7.6.3.4; 7.6.3.5]

Fortunately, many of the documents constituted the sort of information sharing that all would consider appropriate. However, some gave me pause, as there were several examples that were out of the norm:

- In one now-closed matter, prior to the file becoming public, OGC referred a matter to DOJ. OGC did not recommend that the Commission refer the matter (which under the Act required a vote), but apparently chose to do so on its own. A Commission Directive precludes staff from sharing a matter outside the confines of the agency until after the matter is made public⁵¹ – here, OGC’s report came prior to that time. Most frustrating about this matter is that, at least according to the respondent, OGC agreed as part of settling the matter that it would not be referred to DOJ. Shockingly, when asked, OGC denied that they communicated with DOJ during the “pendency” of the matter, even though they did so prior to the matter becoming public. To justify their antics, OGC claimed: (1) that the Commission did not refer the matter, since they never voted to do so (which is circular, and does not answer the question as to whether *OGC* referred the matter on its own), (2) that nothing in the Act precludes OGC from sharing information with DOJ (and that supposed lack of prohibition confers that power on OGC), and (3) that although OGC may have represented that the matter would not be *referred* to DOJ, OGC never said they were not going to *confer* with DOJ. Such semantics are wholly. Ultimately, this case is precisely the sort of matter that the Commission might have referred in lieu of pursuing it through civil enforcement, had OGC made such a recommendation. Instead, OGC took matters into their own hands, in contravention of the statute and apparently in contravention of the settlement agreement.⁵²
- In another matter,⁵³ OGC shared with DOJ its First General Counsel report, regarding whether or not OGC recommended that the Commission find reason to believe in a matter, prior to the Commission considering the merits. This does not seem to have happened before, and OGC has not been able to point to another similar example where it shared this sort of confidential, attorney-client document

⁵¹ Directive 31 at 1 (“The Federal Election Campaign Act specifically prohibits all employees from making public information concerning any compliance action pending before the Commission. . . . Staff members must be particularly careful not to communicate with *any person outside the agency* concerning compliance matters during both working and non-working hours.” (emphasis added)).

⁵² OGC cannot point to a previous example of a matter that was either reported or referred without a Commission vote, and since September of 2011, has made no such recommendations.

⁵³ Because the matter is still pending, the Act’s confidentiality protection prevents me from identifying the MUR with specificity. However, the confidentiality protection does not preclude discussing matters in more general terms, as long as the respondent cannot be identified. *See* MUR 298 (In Re Unknown Respondents), Letter from Benjamin R. Civiletti, Assistant Attorney General, Criminal Division to Vice Chairman Thomas E. Harris, Federal Election Commission (May 20, 1977) (a violation of the confidentiality provision requires “at the very least, that the disclosure in question be such that the identity of the subject of a compliance action undertaken by the Commission and the nature of the charges being investigated by the Commission are apparent from the words spoken.”).

at such an early stage of a proceeding.⁵⁴ One obvious concern is that it could create the appearance that DOJ is influencing what should otherwise be the independent administration of the Act by the FEC. More troubling is that it concerns a novel legal issue in a high-profile, politically-charged case, and despite the Chair's prior urgency to resolve the matter, it had disappeared from the Commission's agenda. Despite numerous requests by us to place it back on the Commission agenda, the Chair has refused, and the matter remains pending.

We have also learned that staff has not complied with their own secret policy, particularly with respect to, as one set of comments described it, "tracking, memorializing, and approving DOJ requests, protecting the confidentiality of shared enforcement records, and informing the Commission of certain types of requests."⁵⁵ For example, per the secret OGC policy, one would assume that there would be some sort of log that would track any requests from and responses to DOJ. Not so – in fact, contrary to its own secret policy, OGC had in several instances failed to include materials in what is called Voting Ballot Matters, which is the computer system that gives Commissioners partial access to OGC files.

ii. Proposed MOU

OGC's secret policy was not the only instance of them inappropriately hiding the ball. When the General Counsel undertook negotiations with DOJ in an effort to modernize the MOU, he did not provide the draft MOU to the Commissioners until after DOJ had approved it, despite requests from a number of Commissioners across the political spectrum to see the document.⁵⁶ How it was handled differed radically from past efforts, where a past General Counsel kept the Commission fully informed and sought significant input into MOU negotiations.⁵⁷ And when the Commission was finally provided a copy of the proposed MOU, it was unacceptable to most Commissioners.

Taking issue with draft MOUs is nothing new, and OGC ought not have been surprised that Commissioners would have wanted to be involved in MOU negotiations. After all, over the years, because both DOJ and a number of Commissioners have not

⁵⁴ Under OGC's secret policy at III.B, the handing over of FGCRs should have triggered an informational memo to the Commission. It did not.

⁵⁵ Letter from Sheldon Whitehouse, Jeanne Shaheen, Al Franken, Charles Schumer, Jeff Merkley, and Tom Udall to The Honorable Ellen Weintraub, Chair, and The Honorable Donald F. McGahn II, Vice Chairman, Federal Election Commission at 2 (July 15, 2013).

⁵⁶ See Draft Memorandum of Understanding Between the Federal Election Commission and the United States Department of Justice Regarding Enforcement of the Federal Campaign Finance Laws.

⁵⁷ See, e.g., See Memorandum from Lawrence H. Norton, General Counsel, James A. Kahl, Deputy General Counsel, and Rhonda J. Vosdingh, Associate General Counsel for Enforcement, on the Proposed MOU Between the Commission and DOJ ("Norton Memo") (March 3, 2006) available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-j.pdf.

been entirely pleased with dealings between the FEC and DOJ, the FEC and DOJ have periodically attempted to update and revisit the current MOU. Often times, in particular enforcement matters, DOJ would not involve the Commission until either shortly before a plea agreement, or in the event they chose not to prosecute, refer the matter on the eve of the running of the statute of limitations. Moreover, in those past MOU negotiations, DOJ had consistently sought to diminish the role the Commissioners have in the decision-making process.⁵⁸ Both the Commissioners and prior General Counsels had consistently rebuffed such efforts. The more recent proposed MOU took the opposite approach, and made the staff the prime decision-maker.

There are other problems with the OGC MOU. For example, it requires OGC to report all matters that concern potential knowing and willful conduct, at any stage of the proceeding.⁵⁹ This has the potential to escalate the trivial to the criminal. Everyone knows that some complaints are written to garnish politically charged headlines on the eve of an election, and brandish about knowing and willful accusations without much in the way of substantive support. But under OGC's approach, all one needs to do is simply allege knowing and willful conduct to ensure that OGC reports the matter the DOJ. Under such an approach, the Commission would be removed from the process, and cede much of its enforcement responsibility to DOJ. Under such circumstances, why would anyone deal with the FEC on a matter that could possibly include a knowing and willful violation?

This is the opposite of the system created by Congress. As Congressman Frenzel artfully noted during Congress's deliberation over the 1974 Amendments to the Act:

If [the Department of] Justice wanted to, it could prosecute most of the candidates (including most of the incumbents) than ran in the 1972 election. In the aftermath of Watergate, the Justice Department could seriously embarrass and end the political careers of many candidates and incumbents by simply prosecuting them for minor violations. *The Commission would have the power and authority to prevent such unfair prosecutions.*⁶⁰

⁵⁸ Compare *id.* Attachment C (Proposed MOU from Noel L. Hillman, Public Integrity Section to Larry Norton, General Counsel (May 19, 2004)) at ¶ 7(a)–(b) (“If the Commission or its staff develops or receives evidence that a knowing and willful violation of the federal campaign financing laws above the criminal jurisdiction amount may have occurred, or that a related offense may have occurred, *the Commission's Office of the General Counsel* shall refer the matter to the attention of the Public Integrity Section . . .” and “[i]f, during a review of a violation of the federal campaign financing laws, the Commission or its staff is uncertain whether sufficient evidence suggesting a knowing and willful violation of these laws has been developed or received, *the Commission's Office of the General Counsel* shall consult informally with the Department's Public Integrity Section on this issue.” (emphasis added)) with *id.* at Attachment B (Proposed MOU from Lawrence H. Norton, General Counsel to Christopher Wray, Assistant Attorney General) at ¶ 15 (“*The Commission* may refer apparent knowing and willful violations of the FECA to the Department . . .” (emphasis added)).

⁵⁹ See *id.*

⁶⁰ H.R. Rep. No. 93-1239, Supplemental Views of Rep. Bill Frenzel, at 139. (pg 773 of '74 Green Book).

Consistent with this intent, the Act provides for a referral occurring only at the end of the Commission's investigation and after it votes probable cause. In the past, the Commission had sought to change this, but to no avail. For example, in its Annual Report from 1996, the Commission recommended that the Act be changed to grant the Commission "the ability to refer appropriate matters to the Justice Department for criminal prosecution at any stage of a Commission proceeding."⁶¹ In support, the Commission noted:

- The Act provides for "referral only after the Commission has found probable cause to believe that a criminal violation of the Act has taken place."⁶²
- "[E]ven if it is apparent at an early stage that a case merits criminal referral, the Commission must pursue the matter to the probable cause stage before referring it to the Department [of Justice] for criminal prosecution."⁶³
- "The Commission has the general authority to report apparent violations to the appropriate law enforcement authority (see 2 U.S.C. § 437d(a)(9)), but read together with § 437g, § 437d(a)(9) has been interpreted by the Commission to refer to violations of law unrelated to the Commission's FECA jurisdiction."⁶⁴

Perhaps if OGC would have sought input from its client, the Commissioners could have shared with them this history that makes clear that staff cannot refer matters whenever they want. Unfortunately, they did not, and by choosing to go it alone, have acted contrary to the Act.

c. The solution: Follow the statute

For most of the FEC's history, and despite OGC's recent efforts to justify their rogue activities by claiming twenty years of consistent staff-driven practice, the Commission took the Act seriously. It made formal referrals, only after it had found probable cause. Staff did not take matters into their own hands and deal with DOJ on their own. OGC's attempt to recast this history is unavailing, and is contradicted by both prior OGC and DOJ writings:

- Much to the consternation of DOJ, the FEC viewed the confidentiality protections of the statute as precluding it from sharing information with DOJ absent a Commission vote. In other words, the referral provision was

⁶¹ Federal Election Commission Annual Report (1996) at 44, available at <http://www.fec.gov/pdf/ar96.pdf>.

⁶² *Id.* at 45.

⁶³ *Id.*

⁶⁴ *Id.* at 45, n.2.

an exception to the confidentiality protection. DOJ confirmed this in its 2006 legislative recommendations to Congress.⁶⁵ OGC now claims that the Commission abandoned this broad reading of the confidentiality provision long, long ago; as recently as 2006 however, DOJ claimed it remained the view of the Commission.⁶⁶

- Similarly, as recently as 2006, DOJ told Congress that the FEC would not provide information to DOJ absent a grand jury subpoena.⁶⁷ This stands in stark contrast with OGC's current claim that the FEC abandoned this position long before that time.⁶⁸ Relatedly, a 1993 policy document from OGC states that four Commissioners must approve any response to a Grand Jury subpoena.⁶⁹
- Contrary to OGC's claim that FEC staff has been sending material to DOJ without a Commission vote for some time, a previous General Counsel informed the Commission in writing in 2006 that he might recommend changing the Commission's "longstanding interpretation that Section 437g and 437d(a)(9) do not allow referral of FECA violations prior to a finding of reason to believe."⁷⁰ In other words, at least as recently as 2006, staff did not think they were empowered to refer matters on their own.

In addition to the historical record, we know from our own first-hand experience that much of what OGC now says is either incomplete or wrong. A former Commissioner has already said as much, stating OGC's memo is "wrong on the law" and

⁶⁵ Letter from William E. Moschella, Assistant Attorney General, DOJ Office of Legislative Affairs, to The Honorable Dennis J. Hastert, Speaker, U.S. House of Representatives at 2 (Jun. 23, 2006) available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-i.pdf.

⁶⁶ *Id.*

⁶⁷ Letter from William E. Moschella, Assistant Attorney General, DOJ Office of Legislative Affairs, to The Honorable Dennis J. Hastert, Speaker, U.S. House of Representatives at 2 (Jun. 23, 2006) available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-i.pdf.

⁶⁸ Memorandum from Anthony Herman, General Counsel, and Daniel A. Petalas, Associate General Counsel for Enforcement to The Commission, on Information Sharing with the Department of Justice at 2 (June 17, 2013), available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-d.pdf.

⁶⁹ Memorandum from Lois G. Lerner, Associate General Counsel, to Enforcement Staff on Supplying Commission Documents to a Grand Jury (1993), available at http://www.fec.gov/pdf/Additional_Enforcement_Materials.pdf.

⁷⁰ *See, e.g., See* Memorandum from Lawrence H. Norton, General Counsel, James A. Kahl, Deputy General Counsel, and Rhonda J. Vosdingh, Associate General Counsel for Enforcement, on the Proposed MOU Between the Commission and DOJ ("Norton Memo") at 2 (March 3, 2006) available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-j.pdf.

is “flat wrong.”⁷¹ He also said that during his tenure (2006-2007), the Commissioners made the decisions.⁷² Similarly, the idea the no Commissioner had ever questioned staff practice previously is incorrect -- why then would a number of past Commissioners attempt to negotiate a new MOU? Why would OGC’s enforcement head send an email to Commissioners responding to their questions, if they had not asked questions in the first instance?⁷³ Why would the Commission – all the Commission – instruct OGC to draft a policy for consideration on this very topic? And why did OGC hide their own policy, and not include it in their draft enforcement manual? OGC’s reliance on anecdotal folklore does not answer these questions.⁷⁴

By contrast, our current proposal is based upon the FEC’s written history, and not anecdotal folklore. Our proposal is based upon what had been longstanding FEC practice, which apparently worked quite well and without the parade of horrors now imagined by OGC. It is not formalistic, and does not require a subpoena (OGC has spilled much ink attacking the idea of mandating a subpoena, which no one has proposed).⁷⁵ But where it does differ from the staff’s preference is that it includes the Commissioners in the decision-making process. Since I find it hard to imagine a situation where the Commission would not provide information to DOJ in response to a legitimate request (the one exception is perhaps when a special counsel is appointed),⁷⁶ our proposal is not intended to slow down ongoing criminal probes.⁷⁷ Instead, its purpose is twofold: (1) provide the public with assurances that staff operate pursuant to Commission policies and oversight, and not their own whim, and (2) ensure that those tasked with the running the agency – the Commissioners themselves – are responsible and accountable for activity at the agency. As recent IRS issues demonstrate, it is not an

⁷¹ Voice of America, Interview of Hans von Spakovsky, available at http://voicercussia.com/radio_broadcast/70924886/118023791.html.

⁷² *Id.*

⁷³ See Email from Ann Marie Terzaken to the Commissioner’s Offices (Aug. 7, 2008), available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-h.pdf.

⁷⁴ OGC only relies on anecdotal folklore from a few select former General Counsels (some of which is contradicted by contemporaneous written memos from the General Counsel). Curiously, OGC did not choose to include any history as told by past Commissioners. Tellingly, not a single past Commissioner has publicly stated that OGC’s recounting of FEC history is accurate and complete.

⁷⁵ Memorandum from Vice Chairman Donald F. McGahn, Commissioner Caroline C. Hunter, and Commissioner Matthew S. Petersen, on OGC Enforcement Manual (“Republican Proposal”) at § 2.11 (June 12, 2013), available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-a.pdf (For example, § 2.11.2.1 provides “[r]equests by law enforcement agencies for non-public information and records relating to Commission enforcement matters must be made in writing (*though not necessarily by subpoena*).” (emphasis added)).

⁷⁶ The Commission has declined to provide information to state and local law enforcement in the past.

⁷⁷ Most Commission votes are taken by ballot, not in a formal meeting, with tight due dates. See generally Directive 52 (Circulation Vote Procedure), available at http://www.fec.gov/directives/directive_52.pdf.

acceptable answer for an agency head to say “I didn’t know” when something goes wrong.⁷⁸

And what could go wrong? Plenty. For example, prosecutors are held to much higher standards than the FEC when it comes to maintaining evidence, and are obligated to disclose exculpatory information. FEC staff, when left to their own devices, has not risen to that challenge. In one matter (from which I was recused), OGC conducted a far-reaching investigation, apparently years after it had received exculpatory information that the target of the investigation was not responsible for the underlying criminal scheme. Only at the probable cause stage of the proceeding did the Commission learn this and put an end to it.⁷⁹ Imagine a situation where OGC provided some information to DOJ, but it did not provide exculpatory information to DOJ. This is not far fetched, given that (1) the staff has already been caught not providing exculpatory information to both a respondent and the Commission, in contravention of OGC own internal policy,⁸⁰ and (2) until recently, OGC lacked a consistent filing system, and instead, each enforcement team kept their own hodge-podge files (and even now OGC still appears unable to follow even their own secret policy with respect to keeping records). If DOJ then brought a criminal case, there would have been exculpatory information in the possession of the government that would not have been disclosed, placing DOJ in a precarious position. Given the tragedy of the Ted Stevens trial, and DOJ's failure to produce such information in that case, it is not unreasonable to say that such sensitive issues need some oversight. At the FEC, the statute vests that oversight obligation with the Commissioners.

A second problem with OGC’s proposal is it would cause the Commission to stand idly by even if DOJ pursued novel questions of law prior to the FEC resolving the underlying legal issue. I am not referring simply to the misguided prosecution of John Edwards on a dubious legal theory.⁸¹ Although ancient history to some, it was not all that long ago that DOJ launched a probe after the 1996 presidential election regarding supposed coordination of issue ads.⁸² In fact, the probe began after DOJ subpoenaed a preliminary audit report of FEC staff that had not yet been considered by the Commission. Today, in light of subsequent FEC action and judicial decisions such as

⁷⁸ I have been assured by senior OGC staff that OGC does not communicate with the IRS regarding pending enforcement matters.

⁷⁹ MUR (6054) (Vern Buchanan for Congress), Probable Cause Hearing Transcript at 40-41 (one Commissioner apologizing for exculpatory information being provided to respondents “at the last minute.”).

⁸⁰ Enforcement Procedure 2007-4: Exculpatory Evidence (Jan. 9, 2007), available at http://www.fec.gov/pdf/Additional_Enforcement_Materials.pdf.

⁸¹ See Open Meeting July 21, 2011, Discussion of Audit Division Recommendation Memorandum on John Edwards for President.

⁸² FEC Audit Led to New Clinton Probe, Sept. 4, 1998 p. A01, Washington Post <http://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/reno090498.htm>

FEC v. Christian Coalition,⁸³ we know that there was nothing illegal about the 1996 advertisements in question. The post-1996 investigations serve as a reminder as to why the Commission must not shirk its duties and responsibilities under the Act.

B. Future Votes, Commission Process and the 3-2 Split

Clearly, the Republican proposal is a reaction to staff not keeping the Commission informed and not honoring the Act. Certainly, the Republican proposal of requiring a formal Commission vote in each instance is probably not the only way to achieve the goal of ensuring Commission accountability. I note the proposal is just that: a proposal, and I hope other Commissioners will put forth alternatives so that any other options are considered. Perhaps a formal vote is not required to provide information in response to a request by DOJ; perhaps OGC can live by a formal policy that keeps the Commission informed, and provides the Commissioners an opportunity to weigh in when appropriate. Thus far, however, the staff has been unable to police themselves, and therefore leaving them to their own devices is not a viable option. Certainly, the statute cannot be ignored.

As for how the Commission is to go about adopting an enforcement manual and resolving these issues, it is a process that has been ongoing for some time, and contrary to hyperbolic headlines, it is not some 11th hour partisan power grab. Quite the contrary – much of our proposal almost mirrors the comments filed by Democratic powerhouse Perkins Coie. And there is nothing last minute about this – House Administration had its hearing in November of 2011, and OGC submitted a draft manual to the Commission in January of 2013. Unfortunately, three open meetings have come and gone since the various proposals were first publicized. Apparently, the Chair has already decided to hold over the matter yet again – after initially attempting to not even include it on the agenda. That the Republican Commissioners are now being denied the opportunity to deliberate the various proposals in public is bad enough. That the delay has continued to allow the staff to run wild, reverse-engineer pre-determined conclusions, and conduct pre-RTB investigations unchecked by the Commission, is unforgivable. By causing this delay, the staff gets what they want, and Commissioners who dare question it have been silenced.

Yet the reform lobbyists and media sympathizers cry foul that there is a vacant seat at the FEC, and the Republicans enjoy a 3-2 majority (incidentally, OGC has previously opined that a number of things, including hiring a General Counsel, can be decided by a simple majority). Tellingly, the reformers and media sympathizers did not cry foul when the shoe was on the other foot, and Democrats enjoyed the majority.⁸⁴ Nor

⁸³ 52 F. Supp.2d 45 (D.D.C. 1999).

⁸⁴ There have been a number of times when the Commission had less than six members, and in those instances, no one claimed that the Commission ought not act. At least in the modern history of the Commission, it has occurred three times: (1) between 1995 and 1998, after Commissioner Potter resigned; in 2002 for about 5 months, after Commissioner Smith resigned; and (3) in 2007 and 2008, for almost two years, after Commissioner Toner resigned. The only difference between these situations and now is that this is the first time that the Republicans hold a majority.

did they cry foul with respect to any other Commission business. Republicans have had this temporary majority for over six months, without incident. If we were committed to some sort of partisan power grab, we would have done so long ago.

The reformers and their media enablers claim that the enforcement manual can be approved by a simple majority vote. Regardless of whether such a vote could approve the manual, what is certainly true is that the staff proposal has always lacked majority support, regardless of how one defines a majority. Thus, whether or not our proposal could pass on a 3-2 vote inverts the real problem: the staff proposal will not pass, and despite that, they may still wish to go it alone in spite of the views of a majority of the Commission. Certainly, one or two Commissioners cannot unilaterally empower the staff to go it alone and operate beyond the Commission and *ultra vires* of the statute – although given the delay in considering the manual, this is precisely what has already happened. This is particularly offensive when a majority of the Commission disagrees, and when there was never a bi-partisan, four Commissioner vote to empower OGC in the first instance.

Much to the dismay of reform industry lobbyists, the Commissioners are not simply a veto on the staff, and to assume otherwise inverts the grand compromise of the statute, which vests decision-making power with the Commissioners. Hopefully, other Commissioners will rise to the occasion and put forth credible proposals of their own that could foster compromise, and thus avoid the 3-2 procedural issue all together. Ultimately, it is up to them.