FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM July 6, 2021

TO: The Commission

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SUBJECT: MUR 7180 (GEO Corrections Holdings, Inc.)

RE: Office of General Counsel's Notice to the Commission Following the Submission of Probable Cause Briefs

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I. INTRODUCTION

This matter was generated by a complaint alleging that GEO Corrections Holdings, Inc. ("GCH") violated the Act by making prohibited contributions while being a federal contractor. GCH is a subsidiary of The GEO Group, Inc. (the "GEO Group"), and parent to numerous other entities all in the GEO family of companies. A number of these entities, including the GEO Group, hold federal contracts. On January 23, 2018, the Commission found that there was reason to believe that GCH had made prohibited government contractor contributions, and the Office of General Counsel ("OGC") conducted an investigation.

On May 15, 2020, OGC notified GCH that it was prepared to recommend that the Commission find probable cause to believe that GCH violated 52 U.S.C. § 30119.[1] OGC included with this notification a copy of the General Counsel's Brief setting forth the factual and legal basis for the recommendation. A copy of the Brief was circulated to the Commission informationally the same day. On July 29, 2020, GCH submitted a Reply Brief[2] and, on April 8, 2021, the Commission held a Probable Cause Hearing.[3]

Pursuant to the *Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel*, 76 Fed. Reg. 63,570 (Oct. 13, 2011), OGC is hereby notifying the Commission that it intends to proceed with the recommendation to find probable cause to believe based on the factual and legal analysis set forth in the General Counsel's Brief. In addition, an analysis of the arguments presented in GCH's Reply Brief and at the Probable Cause Hearing is provided below. A copy of this Notice is being sent to GCH at the same time that it is circulated to the Commission.

II. FACTUAL AND LEGAL ANALYSIS

As set forth in OGC's Brief, the evidence developed during OGC's investigation establishes that the management, finances, and governing policies of GCH; its parent, the GEO Group; and its subsidiaries, including GEO Reentry Services, LLC ("GEO Reentry"), were so tightly interwoven that GCH should not be considered separate and distinct from these affiliates, but rather, they constitute the same entity for purposes of the Act's prohibition on contributions by federal contractors. Accordingly, this office recommends that the Commission find probable cause to believe that GCH violated 52 U.S.C. § 30119.

In GCH's Reply Brief and at the Probable Cause Hearing, GCH makes several arguments why the Commission should not find probable cause to believe that a violation occurred. First, GCH argues that such a finding against GCH would break from Commission precedent regarding when two entities are to be considered separate and distinct for purposes of the government contractor contribution prohibition. Second, GCH argues that any use of a "separate and distinct" or alter ego theory is outside the Commission's authority because it is not explicitly set forth in the Act or Commission regulations. Third, GCH argues that application of the prohibition to GCH would be unconstitutional either because GCH's contributions were made to independent-expenditure-only political committees ("IEOPCs") or because any application of the separate and distinct test is void for vagueness. Finally, GCH argues that such a finding would be improper because it did not have proper notice that a violation based on a separate and distinct theory was being considered by the Office of General Counsel ("OGC"). As discussed below, these arguments are unpersuasive and we maintain the recommendation that the Commission should find probable cause to believe that GCH violated 52 U.S.C. § 30119.

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1 PC Br. (May 14, 2020); *see* 52 U.S.C. § 30109(a)(3); 11 C.F.R. § 111.16; *Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel*, 76 Fed. Reg. 63,570 (Oct. 13, 2011).

2 Reply Br. (July 29, 2020).

3 *See* PC Hr'g Tr. (Apr. 8, 2021).

A. The Conclusion that GCH is Not a Separate and Distinct Entity is Consistent with Precedent and GCH's Asserted Contrary Support is Unpersuasive

GCH argues that its relationship with the other entities in the GEO family is analogous to prior matters in which the Commission has found entities to be separate and distinct. In support of this argument, GCH compares itself to other entities in past matters and court cases that share one or more common facts, but in so doing, GCH fails to acknowledge the ways in which its characteristics and the relevant circumstances differ from those examined in prior matters. Critically, the Commission has never looked to any one factor as decisive in determining whether entities are separate and distinct from one another. Instead, it has looked at *all* of the facts and circumstances surrounding the relevant entities to make this determination. The structure of GCH and its related corporate entities is unlike prior circumstances the Commission has considered in the context of the contractor contribution prohibition, and thus, a different outcome is appropriate.

GCH argues that OGC's application of the separate and distinct test is inconsistent with the result in MUR 6726 (Chevron),[4] but the facts in the present matter are substantially different from Chevron. As OGC stated in the Probable Cause Brief: "[t]he record in the present matter demonstrates much more extensive overlap of management, control, and policy in addition to the other factors here that were not present in MUR 6726."[5] For example, in the Chevron matter, the two entities at issue shared a CEO, but most of the directors and officers did not overlap; in the present matter, there is a complete overlap in not just senior management but all corporate staff.[6] In the Chevron matter, the parent entity "provided general policy guidelines"; in the present matter, the entities do not have separate policies at all.[7] Moreover, factors present in the GEO arrangement, like the employee sharing agreement and the joint-debt obligation, in an amount approaching four times GCH's annual receipts, were absent in the Chevron matter.[8]

Similarly, GCH compares its circumstances to those in an advisory opinion in which the Commission concluded that the entities in question were separate and distinct, but in so doing, GCH again acknowledges only some of the relevant facts. In seeking to explain GCH's own acceptance of joint liability loans with the GEO Group, at the hearing, counsel stated that in Advisory Opinion 2005-01 (Mississippi Band of Choctaw Indians) "the Commission found joint indemnity agreements did not require an alter ego [finding]."[9] However, GCH omits other

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[4] Reply Br. at 44-47; PC Hr'g Tr. at 6-7, 11; *see* Factual & Legal Analysis ("F&LA"), MUR 6726 (Chevron).

[5] PC Br. at 23.

[6] *See* F&LA at 6, MUR 6726 (Chevron); Deposition of Marcel Maier, Vice President of Taxation at 38, 43, 72 (Oct. 8, 2019) ("Maier Dep."); GEO Resp. to First Request for Information at 6; Deposition of Amber Martin, Vice President for Contract Administration at 34 (June 10, 2019) ("Martin Dep.").

[7] *See* F&LA at 2, MUR 6726 (Chevron); Martin Dep. at 34.

[8] *See* PC Hr'g Tr. at 18-19, 42-43; Reply Br. at 41; Resp to Compl. at 5 (Jan. 20, 2017); Second Amended and Restated Credit Agreement, The GEO Group, Inc. and GEO Corrections Holdings, Inc. with BNP Paribas (Aug. 27, 2014).

[9] PC Hr'g Tr. at 18-19.

factors the Commission found relevant in AO 2005-01, such as the entities maintaining separate management, separate corporate employees, and separate personnel policies.[10] Thus, while the entities in that matter may have been similar in some regards, there are also significant ways in which GCH is more tightly interwoven with its related entities. In short, as detailed in OGC's brief, no one factor regarding the GEO family's structure is outcome determinative, but, taken together, the facts presented in this matter are materially different from prior matters in which the Commission has considered the separateness of entities in the context of the federal contractor contribution prohibition.

GCH's citations to court opinions to support its separateness from related entities are also unpersuasive. For instance, counsel was asked by Vice Chair Dickerson at the Probable Cause Hearing, "[O]n the question of shared personnel, what would you say is your best judicial decision for the unremarkability of your setup?"[11] Counsel directed the Vice Chair to "*U.S. v. Bestfoods*, from SCOTUS, where the Supreme Court said that overlapping management is a normal part of a complex structure."[12] But while the Court in *Bestfoods* recognized that "it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary," the Court continued, observing that "that fact *alone* may not serve to expose the parent corporation to liability for its subsidiary's acts."[13] Further, that case did not address a circumstance like the present, in which all corporate employees are held in common and employed only by the subsidiary pursuant to an employee sharing agreement. Thus, the Court's observation that overlapping management alone is insufficient to pierce the corporate veil is less compelling here where not just the directors, but all corporate managers and corporate staff are shared, and additional factors intertwining GCH with the GEO family are also present.

At the hearing and in its brief, GCH also cited *Copperweld Corp. v. Independence Tube Corp.* for the proposition that "parent and subsidiary corporations always have a unity of purpose."[14] This case is inapposite, however, as it did not involve or discuss piercing the corporate veil, but addressed whether a parent and subsidiary could be considered to have conspired together and thus be subject to the Sherman Antitrust Act. In that specific context, the Court stated that "considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition."[15] By contrast to the antitrust considerations at issue in *Copperweld Corp.*, whether a federal contractor is separate and distinct from related entities when making contributions is of direct relevance to consideration of the Act's prohibition on contributions by federal contractors.[16]

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[10] Advisory Opinion 2005-01 at 2 (Mississippi Band of Choctaw Indians).

[11] PC Hr'g Tr. at 44.

[12] *Id*.; *see United States v. Bestfoods*, 524 U.S. 51 (1998).

[13] *United States v. Bestfoods*, 524 U.S. at 69 (emphasis added).

[14] PC Hr'g Tr. at 16; Reply Br. at 30 (citing *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 771-772 (1984)).

[15] *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 772 (1984).

[16] *Compare id*. at 772 ("The intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality."), *with* 18 C.J.S. Corporations § 24 ("In making an alter ego determination, a court is

Further, GCH argues that its corporate structure "is a function of the GEO Group's REIT status" and that because it was designed to comply with the complex requirements of maintaining that status, the structure, including the employee sharing program and complete overlap in management and corporate employees, cannot result in the entities being deemed one and the same.[17] GCH asserts that that this sharing agreement provides administrative ease and creates economies of scale within the GEO family of companies and that other corporate families, including other REITs, also employ sharing agreements for these purposes.[18] But the fact that this structure may be convenient and otherwise legal does not immunize GCH from liability under the Act. For instance, if a group of individuals start a business, they may legally choose to create it as a partnership or a corporation, and that decision may provide business advantages to the owners. However, that decision will also have consequences as to how the business is treated under the Act, such as whether it is subject to the ban on corporate contributions to candidates.[19]

GCH also asserts that finding it to be an alter ego of its parent would be unprecedented because "there is no reported case of veil piercing by a court in the context of a publicly traded corporation."[20] But, even assuming that piercing the veil of a publicly traded corporation is unprecedented, this argument misses the mark for two reasons. First, finding that GCH is not a separate and distinct entity for purposes of the Act's contractor contribution prohibition would have no direct impact on its parent company's public shareholders. Specifically, such a finding would not result in a civil penalty being assessed on the GEO Group's public shareholders. Second, GCH is not a publicly traded company; rather, its parent the GEO Group, Inc., is publicly traded. Indeed, the conflation of GCH and its parent company in the service of this argument further underscores that the GEO entities are not separate and distinct in operation.[21]

B. Application of the Commission's Separate and Distinct Test is Appropriate as it is Based on Long-Accepted Common Law Doctrines Regarding Corporate Separateness

In its brief and at the hearing, GCH argues that the use of an alter ego theory is prohibited because it is not stated in the Act or Commission regulations. GCH argues that under Section

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concerned with reality and not form, and with how the corporation operated."). *See also Anderson v. Abbott*, 321 U.S. 349, 362–63, 793 (1944) ("It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement."); *id*. at 365 ("[N]o State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy [ ] which Congress has announced.").

17 Reply Br. at 12-16; PC Hr'g Tr. at 28-29.

18 Reply Br. at 13-14; Maier Dep. at 40-41.

19 52 U.S.C. 30118; *see* 11 C.F.R. § 110.1(e), (g) (an LLC's election to be treated by the IRS as a partnership or a corporation dictates whether the LLC will be subject to the Act's corporate contribution prohibition).

20 PC Hr'g Tr. at 15.

21 *See* 18 C.J.S. Corporations § 24 ("In making an alter ego determination, a court is concerned with reality and not form, and with how the corporation operated."); *see also* F&LA at 2, 8-9, MUR 7180 (GEO Corrections Holdings, Inc.) (discussing prior instances in which counsel for various GEO entities confused GCH and related entities in filings before the National Labor Relations Board).

30108(b), the Act requires that "[a]ny rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to . . . section 30111(d)." GCH further contends that the "General Counsel's Brief rests *solely* on the application of an alter ego theory derived from an advisory opinion"[22] and that "[h]aving never been proposed as a regulation pursuant to the Act's rulemaking requirements, application of the alter ego theory in this matter is prohibited by the Act."[23]

GCH misstates the origins and history of the separate and distinct test. The Commission first cited to and applied the principle regarding separate and distinct entities in Advisory Opinion 1980-07 (California Savings & Loan League),[24] but has further applied the principle in numerous other advisory opinions and enforcement matters,[25] many of which were cited in the General Counsel's Brief, noting factors that the Commission has considered when determining whether an entity is separate and distinct.[26] GCH's response to the Complaint similarly cited many of the same advisory opinions and enforcement matters as support for its argument that GCH is separate and distinct.[27]

Moreover, the legal theory of overcoming the separate status of related corporations is not the creation of any advisory opinion or enforcement matter; rather, it is a common law doctrine that long predates the Act. Indeed, it is a component of the common law that generally undergirds the Act, as it does other statutes. As courts have explained, Congress is presumed to have had knowledge of the common law when it drafted the Act.[28] Thus, "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law."[29] Here, the Act does not speak to, and therefore has not undermined the application of, this common law doctrine. Furthermore, Congress has modified the Act after years of the Commission interpreting the common law to apply to the contractor and national bank prohibitions, and it has chosen not to modify the Act to disassociate it from these common law doctrines. Thus, the Commission's application of the separate and distinct test is not the creation of a new "rule of law," but instead is merely the Commission's application of the Act in the context of the common law foundation on which it was laid.

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22 Reply Br. at 7 (emphasis in original).

23 *Id*. at 8.

24 Advisory Opinion 1980-07 (California Savings & Loan League) (applying the principle to the national bank contribution prohibition).

25 *See, e.g.,* Advisory Opinion 1995-32 (Chicago Host Committee); F&LA, MUR 6168 (Park Federal Savings Bank); Advisory Opinion 1998- 11 (Patriot Holdings LLC); Advisory Opinion 1999-32 (Tohono O'odham Nation); Advisory Opinion 2005-01 (Mississippi Band of Choctaw Indians); F&LA, MUR 6403 (Aleut Corporation, *et al*.); F&LA, MUR 6726 (Chevron).

26 PC Br. at 10-11(collecting authorities).

27 *See* GCH Resp. at 9-14 (Jan. 20, 2017).

28 *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("The presumption holds nonetheless, for Congress is understood to legislate against a background of common-law adjudicatory principles.").

29 *U.S. v. Texas*, 507 U.S. 529, 534 (1993).

Further, contrary to GCH's arguments, the Commission has considered proposing regulations that would distill this principle into a set of regulatory criteria. After the Commission's consideration of the Chevron matter, there was a proposed rulemaking to clarify which criteria the Commission would consider in making the separate and distinct determination. The motion to open a rulemaking failed on a 3-3 vote. Former Commissioner Petersen, voting against the rulemaking, reasoned that "Congress when it enacted the Government contractor ban did so against a background of common law corporate principles. Among those are traditional principles regarding limited liability [and] the piercing of corporate veil. . . . If it is believed that the Commission has been applying the analysis incorrectly or that it wishes us to modify that analysis, I believe that that's more in the purview of Congress to give us that direction."[30]

GCH continues, arguing that the alter ego test, like the challenged regulation in *FEC v. Swallow*, "imposes liability on secondary actors that the Act itself does not."[31] But *Swallow* is inapposite. In *Swallow,* the court found that the Commission had interpreted the Act too broadly in promulgating a regulation, by sweeping in aiders and abettors that were not mentioned by the Act. The court found that that Congress has taken a "statute-by-statute approach to civil aiding and abetting liability" and, therefore, that the absence in the statute of aiding and abetting language precludes the Commission from extending the law to such actors by regulation.[32] Here, GCH is not a secondary actor; its contributions under the specific facts of this case make it primarily liable as a federal contractor, not an aider and abettor. The actor covered under the Act is "any person [] who enters into any contract with the United States or any department or agency thereof."[33] While this prohibition plainly applies to an entity whose name appears on the contract, under common law, the fiction of separate entities may be overcome, and a parent and subsidiary considered one entity, when circumstances warrant. Contrary to the approach Congress has taken with civil aiding and abetting liability, as explained above, the common law underlies all statutes, unless Congress explicitly states otherwise. Thus, applying the separate and distinct test does not expand the scope of liability determined by the Act, but rather applies it using the common law background against which Congress fashioned the Act.

C. Applying the Act's Contractor Contribution Prohibition in the Present Circumstances Follows the Constitution and Commission Precedent

GCH argues that the contractor prohibition is unconstitutional as applied to entities making contributions to IEOPCs. Further, it argues that the *Wagner v. FEC* decision upholding the validity of the contractor prohibition generally "has no applicability to the matter at hand" and that, based on the court's opinion in *Speechnow.org v. FEC*, "[w]hile no court has yet ruled

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30 Transcript of Open Meeting, Discussion of Agenda Item 15-60-A (Nov. 10, 2015).

31 *See* Reply Br. at 8-9 (citing *FEC v. Swallow*, 304 F. Supp. 3d 1113, 1118 (D. Utah 2018)).

32 *FEC v. Swallow*, 304 F. Supp. 3d at 1118 (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, N.A., 511 U.S. 164, 177-178 (1994)).

33 52 U.S.C. § 30119(a).

on this issue [of as-applied constitutionality] directly, the writing is on the wall."[34] To the contrary, while GCH is correct that *Wagner* did not specifically resolve the issue as applied to federal contractor contributions to IEOPCs, *Wagner* is nonetheless instructive and the application of the contractor contribution prohibition has not been questioned by any court.

While *Citizens United v. FEC* and *Speechnow.org v. FEC* evaluated other sections of the Act in light of the compelling interest in preventing corruption or the appearance of corruption, [35] the *Wagner* court identified a second compelling interest in the context of the contractor contribution prohibition: "the risk of interference with merit-based administration."[36] Moreover, the court explains that, in the context of the contractor contribution prohibition, the risk of corruption or its appearance is more acute than when an ordinary person makes a contribution. "Unlike the corruption risk when a contribution is made by a member of the general public, in the case of contracting there is a very specific quo for which the contribution may serve as the quid: the grant or retention of the contract. . . . Moreover, because of that sharpened focus, the appearance problem is also greater: a contribution made while negotiating or performing a contract looks like a quid pro quo, whether or not it truly is."[37]

This second compelling interest in the merit-based administration of federal contracts, in addition to the unique application of the anti-corruption interest in the context of federal contractor contributors, distinguishes the present circumstances from those in *Speechnow.org*. Accordingly, contrary to GCH's constitutional argument, the Commission should continue to enforce the Act as passed by Congress, just as it has done even after *Citizens United* and *Speechnow.org*, conciliating at least three matters with contractors who contributed to IEOPCs.[38]

GCH also argues that because the agency's application of separate and distinct doctrine is not based on a discrete set of factors but is "based on the separate facts and circumstances presented," it fails to provide sufficient notice and precision to be permissible in the context of regulating political speech.[39] To the contrary, this is a long held common law doctrine that provides ample notice. Moreover, the Commission's repeated invocation of the doctrine has provided numerous examples of both the broader categories of consideration[40] and specific

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[34] Reply Br. at 47-48; *see id.* (arguing that "[i]f the anticorruption rationale does not apply in the independent expenditure context, then there is no viable rationale in support of upholding the federal contractor prohibition as it applies to contributions made to Super PACs.").

[35] *Citizens United v. FEC*, 558 U.S. 310 (2010); *Speechnow.org v. FEC*, 599 F.3d 686 (2010).

[36] *Wagner v. FEC*, 793 F.3d 1, 22 (D.C. Cir. 2015) (*en banc*).

[37] *Id.* at 22.

[38] *See* MUR 7568 (Alpha Marine) (finding reason to believe finding and accepting a negotiated conciliation agreement); MUR 7451 (Ring Power Corp.) (same); MUR 7099 (Suffolk Construction) (same).

[39] Reply Br. at 9-10 (quoting GC Brief at 10).

[40] F&LA at 3, MUR 6168 (Park Federal Savings Bank) ("Courts will disregard the fiction of a separate legal entity when there is such domination of finances, policy and practices by the parent that the subsidiary has no separate existence of its own and is merely a business conduit for its principal.") (as cited in PC Br. at 11).

factors that the Commission has contemplated in prior matters.[41] GCH's extensive discussion of these factors in its response to the Complaint in this matter demonstrates that GCH was aware of that the Commission could find liability under the Act on the basis of a separate and distinct analysis.[42]

Further, just because the test is not based on a discrete set of factors but looks to the facts of the individual case does not necessarily make the test improperly vague. Other provisions in the Act also require fact-specific analysis. For instance, in determining whether an organization is a political committee under the Act, the Commission has adopted a case-by-case approach to determining the "major purpose" of the organization.[43] This approach requires a fact-intensive analysis of a group's organizational documents and public statements, as well as the group's spending, and it was upheld by the court in *Shays v. FEC* ("*Shays II*").[44] As another example, a federal candidate or office holder is prohibited from soliciting funds in connection with a federal election "unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act," but determining whether a solicitation has occurred requires a fact-specific determination considering the context of the communication.[45] The broad definition of "to solicit," encompassing both implicit and explicit solicitations, was not only sanctioned by the court in *Shays v. FEC* ("*Shays I*") but was *required* by the court to prevent persons from circumventing the law by "mak[ing] their intentions clear without overtly 'asking' for money."[46]

D. The Commission Has Provided Ample Notice of its Use of the Separate and Distinct Test

In its Reply Brief and at the Probable Cause Hearing, GCH understates the notice provided by the Commission regarding the use of the common law doctrine of corporate separateness, and the notice to GCH specifically that such a theory of liability was at issue in this matter. The public, and GCH in particular, have had ample notice that the Commission

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41 Among the circumstances that the Commission has considered in past matters are common ownership; common management and control; the separation of finances, including accepting liability for the debts and contracts of related entities; separate employees; following the formalities of separate incorporation; and separate corporate policies. *See, e.g.,* F&LA at 2, 6, MUR 6726 (Chevron); F&LA at 3, MUR 6168 (Park Federal Savings Bank); Advisory Opinion 1998- 11 at 1, 5, n.3 (Patriot Holdings LLC); Advisory Opinion 1999-32 at 2, 5 (Tohono O'odham Nation); Advisory Opinion 2005-01 at 2, 4 (Mississippi Band of Choctaw Indians).

42 *See* GCH Resp. at 9-14.

43 *See* Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) ("Supplemental E&J") (explaining that its decision to make political committee status determinations through enforcement actions, rather than by regulation, was necessary because the major purpose doctrine "requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size fits-all rule").

44 *Id*. *See Shays v. FEC*, 511 F. Supp. 2d 19,29 (D.D.C. 2007) ("*Shays II*") (upholding the Commission's Supplemental E&J as an appropriate exercise of agency's ability to engage in case-by-case determination of political committee status).

45 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.2(m).

46 *Shays v. FEC*, 414 F.3d 76, 106 (D.C. Cir. 2005) ("*Shays I*").

considers whether related entities are, in fact, separate and distinct when applying the contractor contribution prohibition.

At the hearing, counsel for GCH described the separate and distinct test as "mentioned in footnotes or in advisory opinions" but not in the Act or regulations.[47] Counsel continued, asserting that "it's never actually been applied against anybody in a government contractor theory."[48] But, even putting aside being a well-known and long-held common law doctrine, the Commission's use of the doctrine is not hidden away in a stray footnote. Instead, in the contractor contribution prohibition context, it has been the subject of three advisory opinions and two prior enforcement matters,[49] each of which were cited by GCH at the outset of this matter in its response to the complaint.[50] It has also been discussed in the context of the national bank contribution prohibition in numerous advisory opinions and enforcement matters.[51]

While the Commission has not found related entities to be alter egos in any of the prior matters relating to the contractor contribution prohibition, that does not detract from the notice they provide future respondents of the state of the law. Instead, these matters provide notice not only that the Commission applies the common law doctrine, but also notice of numerous factors that the Commission has found relevant to consider in such a determination, as GCH noted in its response to the complaint arguing that it is a separate and distinct legal entity.[52] As described above, the facts of the present matter demonstrate that such a finding is appropriate here.

Finally, any argument that GCH was not on notice that it could be liable on the basis of not being separate and distinct from its related contractor entities is without merit. The separate and distinct theory was raised in the supplemental complaint; GCH then responded to this issue at length in its response.[53] Again, the statement of the law included in the Commission's factual and legal analysis sent to GCH following its reason to believe finding also included a recital of the separate and distinct standard.[54] Moreover, as GCH acknowledged at the Probable Cause Hearing, after receiving the first correspondence from OGC after the RTB finding, it was once

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47 PC Hr'g Tr. At 40-41.

48 *Id*. at 41.

49 *See* F&LA, MUR 6403 (Aleut Corporation, *et al*.); F&LA, MUR 6726 (Chevron); Advisory Opinion 1998-11 (Patriot Holdings LLC); Advisory Opinion 1999-32 (Tohono O'odham Nation); Advisory Opinion 2005-01 (Mississippi Band of Choctaw Indians).

50 GCH Resp. at 10-14

51 *See e.g*., Advisory Opinion 1995-32 (Chicago Host Committee); Advisory Opinion 1980-07 (California Savings & Loan League); F&LA at 2, MUR 6168 (Park Federal Savings Bank).

52 *See* GCH Resp. at 12-13.

53 *See* Supp. Compl. at 5-6 (Dec. 20, 2016); GCH Resp. at 9-14.

54 F&LA at 6 ("With respect to a parent company that has an ownership interest in a federal-contractor subsidiary, the Commission has recognized that such parent company may make a contribution without violating section 30119 if it is a 'separate and distinct legal entity' from its federal contractor subsidiary and 'has sufficient revenue derived from sources other than its contractor subsidiary to make a contribution.' If, however, the subsidiary is merely an agent, instrumentality, or alter ego of the holding company, then the parent company is prohibited from making a contribution.") (internal citations omitted).

again made aware that the separate and distinct theory was at issue.[55] Thus, GCH was repeatedly put on notice that the separate and distinct theory of a violation was at issue.[56]

III. CONCLUSION

After considering the arguments put forward by GCH in its brief and at the probable cause hearing, Commission and court precedent, and the factual record surrounding the structure and practices of the GEO family of companies, this office maintains its recommendation that there is probable cause to believe that GCH did not operate as a separate and distinct entity from its federal contractor affiliates and therefore its contributions were prohibited by the Act.

IV. RECOMMENDATION

Find probable cause to believe that GEO Corrections Holdings, Inc. violated 52 U.S.C. § 30119.

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[55] *See* GCH Resp. to Req. for Information at 2 (June 22, 2018) (discussing the separate and distinct or alter ego theory in response to OGC's above refenced letter and request for information from May 1, 2018).

[56] Notably, even absent the repeated references to this theory, GCH received all the notice that the Act and due process require via OGC's Probable Cause Brief and the opportunity to respond to that brief. *See* MUR 3122 (GOPAC) (respondent made similar arguments when OGC included an additional violation in its recommendations at the probable cause stage which were discovered during an investigation but had not been included at the RTB stage. The Commission was unpersuaded by respondent's argument and made a probable cause finding on the violation and that violation was ultimately resolved via a consent order approved by the U.S. District Court for D.C.).