

August 19, 2013

Chair Ellen L. Weintraub
Vice Chairman Donald F. McGahn II
Commissioner Caroline C. Hunter
Commissioner Matthew S. Petersen
Commissioner Steven T. Walther
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Agenda Document No. 13-21 et seq.

Dear Commissioners,

These comments are submitted in response to the draft versions of a new Office of General Counsel (OGC) Enforcement Manual (Agenda Document Nos. 13-21, 13-21-A, and 13-21-B) that were placed on the Commission's agenda several weeks ago. Specifically, I write in response to proposed revisions to the Manual made in Agenda Document No. 13-21-A regarding the Commission's relationship with the Department of Justice. I write solely in my personal capacity, and not on behalf of any client. The views expressed are my own, and are based on my years of experience as both a Commissioner and as Special Counsel to the House Committee on Administration during the consideration and passage of the 1979 Amendments to FECA, which, as you know, included significant revisions to FECA's enforcement process provisions.

Most of what has appeared in the media, in both news reports and editorials, reflects a tremendous misunderstanding of (or simple disregard for) both the law as it is actually written and past Commission practice. Representatives of three "reform" organizations informed you in comments dated July 12, 2013, that "[a]ny Commissioner who votes for these proposed changes is voting to sabotage the enforcement of the nation's campaign finance laws by the FEC, the

Justice Department and United States Attorneys.”¹ While the reform lobby might prefer unaccountable enforcement of the laws by career bureaucrats who they presume will have an inherent bias toward more regulation, that preference is irrelevant here. Congress has already written the law, and it is clear. I encourage the Commission to look past the overblown rhetoric and uninformed opinion, and instead consider the language of the Act, its legislative history, past Commission practice, and finally, the common sense notion that career government employees must be accountable to agency leadership.

The Roles of the General Counsel and the Commission

Agenda Document No. 13-21-A appropriately makes clear that “[t]he Enforcement Division is responsible for *assisting* the Commission in the enforcement of the Act” (emphasis added). This is entirely consistent with the Act, which provided that “[a]ll 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.” 2 U.S.C. § 437c(c). Congress never had any intention of vesting the General Counsel, or any other employee or division within the agency, with *any* independent authority to administer or enforce the law.

The General Counsel, it must be remembered, is “appointed by the Commission” (2 U.S.C. § 437c(f)(1)) and exists to provide legal advice to “the Commission,” which consists of the six Presidentially-nominated, Senate-confirmed Commissioners. In a separate memorandum (Agenda Doc. No. 13-21-C), Mr. Herman suggests that Commission regulations use the term “the Commission” in both an institutional sense, as well as to refer to the six Commissioners. The point of the distinction is to assert that OGC has independent, decision-making authority. This self-aggrandizing view of OGC, while certainly not new, should be forcefully rejected by the Commission. Whether the regulations use the term “Commission” to refer to different divisions within the agency or not, the Commission cannot allow those regulations to be interpreted in a way that transfers the Commission’s statutory authority to staff.

When Congress amended the Act in 1979, following an extensive review of existing law and Commission practice at that time, it significantly revised the Act’s enforcement provisions. The primary reason for these revisions was to establish clear, statutorily-mandated procedures to effectively and deliberately limit agency discretion in enforcement matters.

¹ Comments of Americans for Campaign Reform, Campaign Legal Center, and Democracy 21 on Agenda Document No. 13-21 (July 12, 2013), http://www.campaignlegalcenter.org/images/FEC_Letter_on_Enforcement_Manual_7-12-13.pdf.

The Power To “Report” and “Refer”

The Commission is specifically authorized by the Act “to *report* apparent violations to the appropriate law enforcement authorities” (emphasis added). 2 U.S.C. § 437d(a)(9). The Act also specifies:

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 limitations set forth in paragraph (4)(A).

2 U.S.C. § 437g(a)(5)(C) (emphasis added).

The power to “report” and “refer” are explicitly and undeniably granted to “the Commission.” The referral provision provides that a referral may only be made following “an affirmative vote of 4 of its members.” The reporting provision does not contain parallel language, but the power to report apparent violations is one of the Commission’s enumerated powers set forth at 2 U.S.C. §437d(a). Under the Act “[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of the Act shall be made by a majority vote of the members of the Commission.” 2 U.S.C. § 437c(c). Thus, the Act requires “a majority vote of the members of the Commission” before any “report” of an apparent violation may be made. In either case, the authority to “report” or “refer” rests entirely with the Commissioners.

The Act does not authorize the Office of General Counsel to “report” or “refer” *any* matter to the Department of Justice (or any other law enforcement agency) at its own discretion. Accordingly, it is unquestionably proper that the Commission insist that staff “attorneys should not discuss or forward information or materials relating to the Commission’s compliance matters,” except with specific approval and authorization from the Commission. Agenda Document No. 13-21-A.

The Commission is also right to reject the General Counsel’s claim of the staff authority under the referral provision. Mr. Herman asserts:

There is nothing in the referral provision that could be read to prevent the Commission from responding to a DOJ initiated inquiry regarding a criminal investigation or proceeding that DOJ has already initiated. . . . Therefore, the referral provision does not

prevent the Commission from assisting DOJ with a criminal FECA matter that would exist regardless of that assistance.

Memorandum From Anthony Herman to the Commission Secretary Regarding Information Sharing with the Department of Justice at 19, June 26, 2013 (Agenda Doc. No. 13-21-D). In the above-quoted passage, Mr. Herman incorrectly uses the phrase “the Commission” where what he means is “the Office of General Counsel.” (There is, of course, nothing that prevents “the Commission” from cooperating with DOJ). The fact that Mr. Herman confuses OGC with “the Commission” aside, this reading of the statute ignores its very purpose. Mr. Herman’s reading suggests that the Commission (or, rather, its staff) has unbounded authority to enforce the law in any manner it pleases so long as that method does not directly conflict with a provision of the Act. This is not how the Act functions. Rather, the Commission was granted *limited* authority by Congress to enforce the Act under a specific set of procedures set forth in the Act. Under the Act, the Commission is authorized to engage with other law enforcement agencies – but only under the terms of the “report” and “refer” provisions. The Commission does not have unwritten authority to “respond” and “assist,” as Mr. Herman suggests.

Under the Act’s “report” and “refer” provisions, OGC has no independent authority to transmit any information pertaining to the Commission’s pending matters or investigations to DOJ, or any other law enforcement agency, without approval from the Commission. Mr. Herman’s insistence that “[n]othing in FECA or the Commission’s regulations bars OGC from cooperating with DOJ requests for enforcement records and information or requires that the Commission approve the sharing of enforcement records with DOJ as a general rule,” is demonstrably false. *Id.* at 18. 2 U.S.C. §§ 437d(a)(9) and 437g(a)(5)(C) do precisely that. Accordingly, Agenda Document No. 12-31-A makes explicit what should be obvious and uncontroversial: “Providing information or records to another law enforcement agency, even in response to a request, is a report under the Act and must be authorized by the Commission.”

It is imperative that the Commission also reject any pending Memorandum of Understanding that purports to grant OGC the authority to “‘share information with [DOJ] regarding any Commission enforcement proceeding ... either upon the request of the Department’ *or when OGC concludes appropriate*” (emphasis added). Memorandum From Anthony Herman to the Commission Secretary Regarding Information Sharing with the Department of Justice at 10, June 26, 2013 (Agenda Doc. No. 13-21-D). Placing such decision-making authority and discretion with the General Counsel is contrary to the plain language of the Act, whether such information sharing is treated as a report or a referral.

Commission Cooperation With DOJ

I agree with the General Counsel that the FEC should continue to cooperate with DOJ, and I presume every Commissioner, past and present, feels the same way. However, I see absolutely no legitimate reason why the Commission cannot cooperate with DOJ on the enforcement of the Act in a manner that is consistent with the Act's clear requirements.

To the extent that OGC now, or in the past, has provided information to DOJ either in response to a request or on its own initiative, and has done so without Commission authorization, such action violated the Act. Mr. Herman writes, "[f]rom 1987 to 2000, during Larry Noble's tenure as general counsel, OGC freely provided information and documents to DOJ." Based on my own experience, this assertion is either incorrect or vastly overstated. Memorandum From Anthony Herman to the Commission Secretary Regarding Information Sharing with the Department of Justice at 2, June 26, 2013 (Agenda Doc. No. 13-21-D). Mr. Herman's memorandum also states that Mr. Noble required DOJ to issue "friendly" subpoenas when it sought information. If OGC responded to these "friendly" subpoenas without notifying the Commission and receiving authorization, as Mr. Herman's memorandum indicates was the case, then that practice was contrary to the requirements of the Act.

Following Mr. Noble's departure from OGC, however, his successor appears to have fully acknowledged the Act's requirements and constraints. Another document released by the Commission sets forth DOJ's understanding of the FEC's position regarding interagency sharing of information. According to DOJ:

The FEC's position is, that under current law, it can inform the Justice Department of information in the FEC's possession suggesting that an offense under FECA has occurred only after the FEC (1) has determined that there is "reason to believe" a FECA violation occurred; (2) has conducted an investigation of the matter; (3) has determined that the investigation indicates that there is "probable cause to believe" a FECA violation has occurred *and* that the violation was "knowing and willful;" and (4) then determines that the matter should be referred to the Department of Justice for prosecutorial evaluation. See FECA, subparagraphs 437g(a)(2), (5)(C). Not only do these multiple determinations take considerable time, at least four FEC commissioners must vote affirmatively to take each step. See FECA, subsection 437c(c).

Letter From William A. Moschella, Assistant Attorney General, Department of Justice To Speaker of the House J. Dennis Hastert, June 22, 2006 (Agenda Document No. 13-21-i).

In 2006, there seems to have been no dispute over what was required under the Act. In addition:

Where the Justice Department has become aware of a FECA offense, the FEC has been willing to make enforcement-related information available in response to a grand jury subpoena. However, the FEC does not believe that it has a duty to alert criminal law enforcement authorities to possible campaign financing crimes about which law enforcement authorities may not be aware.

Id. DOJ's view, in 2006, was informed by the Commission's (or OGC's) reading of 2 U.S.C. § 437g(a)(12)(A) which requires that "[a]ny notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." For many years, this language was understood by the FEC to *prohibit* the sharing of investigation materials with DOJ. (This reading was revised sometime after 2001 to authorize the sharing of information with DOJ.) According to Mr. Moschella's letter, DOJ viewed the Act as an impediment to criminal enforcement, and it recommended statutory amendments. Congress did not act on these proposed amendments.

Mr. Moschella's account of the Commission's 2006 position on information sharing with DOJ makes absolutely clear that there is absolutely no established precedent for the position that OGC may, on its own initiative, refer, report, or otherwise transmit internal investigatory materials to DOJ when such materials have not been requested. The proposed Memorandum of Understanding, which would authorize OGC to share materials with DOJ "either upon the request of the Department' *or when OGC concludes appropriate*" is *not* based on historic practice. To the extent that Mr. Herman's memorandum suggests otherwise, I believe it is inaccurate.

Given the context in which it arose, the fact that the new Memorandum of Understanding would depart from past practices is not surprising. Agenda Document No. 13-21-G reveals that when OGC was asked in 2011 how it handled requests for information from DOJ, someone within OGC explained that OGC "follows a general practice of handling such inquiries from DOJ, but that it did not have a written policy detailing its practice." Apparently, OGC was forced to "conduct[] additional research" to determine what "its current practice has generally been." This internal review also revealed that "until recently, the practice of formally notifying the Commission in advance of sharing documents was mixed."

It *should* go without saying that an internal "procedure" that is generally unknown and in total disarray deserves to be completely re-evaluated, and that one entirely reasonable conclusion to draw from this experience is that too much discretion, and too little oversight, was given to OGC over the years with respect to these matters.

Mr. Herman also devotes considerable effort in explaining why “[t]he Commission should continue its practice of freely cooperating with DOJ,” and argues that:

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

Memorandum From Anthony Herman to the Commission Secretary Regarding Information Sharing with the Department of Justice at 1, June 26, 2013 (Agenda Doc. No. 13-21-D).

Whether a practice is consistent with the practice of other federal agencies, or is believed to be “good policy,” is irrelevant. The Commission has its own authorizing statute, and the Commission was constructed differently than other agencies. The question to ask is *not* whether any other agency “requires a subpoena or an agency vote each time it shares information or documents with DOJ,” but whether any other agency has specific statutory language comparable to 2 U.S.C. §§ 437c(c) and 437d(a)(9). If the answer is no, then the practices of the SEC, FTC, CFTC, and NRC make no difference whatsoever.

Conclusion

Last month, the *Washington Post* reported that Commissioner McGahn “accused [OGC] of exceeding its authority by sharing records with the Justice Department and then withholding information about interagency cooperation from commissioners.” While I do not have details of what exactly transpired, there can be no excuse for the General Counsel circumventing the Commission’s decision-making authority by sharing internal materials and making referrals to DOJ without Commission approval.

The Commission should adopt the proposed language in the draft Enforcement Manual that makes clear that the Act requires Commission approval before the Office of General Counsel may “report” or “refer” a matter to another agency. Unfortunately, it appears from the Commission’s recent experiences that the very clear language of the Act must be reiterated and explained. The Commission should do so immediately.

The Commission has a duty to take up the matters before it. Some have suggested that consideration of certain important matters should or must be delayed until the newly nominated members are confirmed. The Act, however, is written so that the prospect of new members – and the accompanying prospect of a different voting outcome – cannot be used as a strategic tactic. Under the Act, “[a] member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the

Commission.” 2 U.S.C. § 437c(a)(2)(C). Congress allowed for “hold-over” Commissioners so that the Commission’s business could proceed uninterrupted by the nomination and confirmation process. Refusing to place an item on the Commission’s agenda in the hopes that new Commissioners may see the matter differently is not what Congress intended.

When the hold-over provision and its underlying purpose are coupled with the basic structure of the Commission (a body consisting of six members with equal votes and a rotating chairmanship), it is perfectly clear that Congress did not intend for any single Commissioner to have the ability to unilaterally withhold a matter from a Commission vote by indefinitely postponing its consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Josefiak', with a stylized, flowing script.

Thomas J. Josefiak