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One Hundred Eighteenth
Congress of the United States
House of Representatives

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August 28, 2023

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Re: Agenda Document No. 23-21-A (Proposed Directive Regarding Investigations Conducted by the Office of General Counsel)

Dear Commissioners:

As Ranking Member of the Committee on House Administration, which is charged with oversight of the Federal Election Commission (the "Commission" or "FEC"), and has jurisdiction over Federal elections generally,¹ I write to express my concern with Agenda Document No. 23-21-A (Proposed Directive Regarding Investigations Conducted by the Office of General Counsel). This proposal represents a dramatic shift in the enforcement practice of the agency, would exacerbate—rather than ameliorate—the burden of scarce resources available for the Office of the General Counsel ("OGC"), is unnecessary, and is inconsistent with the Commission's statutory obligations under the Federal Election Campaign Act of 1971 ("FECA" or "Act").

The proposed directive purports to "regularize the Commission's approval and oversight of investigations by the Office of General Counsel," by "requiring OGC to provide the Commission with a proposed Investigative Plan for approval at the time it circulates a First General Counsel's Report recommending reason-to-believe and an investigation."²

¹ Clause 1(k)(12) of Rule X of the Rules of the U.S. House of Representatives, <https://rules.house.gov/sites/repUBLICANS.rules118.house.gov/files/documents/Rules%20and%20Resources/118-House-Rules-Clerk.pdf>.

² Agenda Document No. 23-21-A.

Investigative Plans must contain,

[A]t a minimum: (a) a brief narrative overview of the investigation and the information OGC intends to seek, (b) the amount of time OGC believes the investigation will consume, (c) each identified respondent subject to the investigation, (d) each witness, category of witnesses, and category of documents to be consulted, and (e) the proposed discovery methods OGC intends to use during the investigation.³

Such Investigative Plans must be included as an addendum to a First General Counsel's Report recommending an investigation and must be approved "by the affirmative vote of four or more commissioners."⁴ The draft directive is ambiguous on the procedures for adopting such plans (*i.e.*, whether a vote to approve such plan is contemporaneous with approval of a reason-to-believe finding; whether an objection to an element of an Investigative Plan is a basis to oppose a reason-to-believe finding).

As drafted, I recommend opposing the adoption of the proposed directive.

First, the proposed directive will cause further delays in OGC's consideration of enforcement matters. The new Investigative Plans are required to be submitted contemporaneously with the First General Counsel's Report. Because the new requirements will create additional, labor-intensive work for OGC, more matters will not be ready for timely circulation. Delayed consideration of enforcement matters not only impacts government efficiency, but also can cause the statute of limitations to expire before the OGC has an opportunity to investigate potential violations.

According to the Status of Enforcement—Fiscal Year 2023, Second Quarter (01/01/23-03/31/23), memorandum from OGC, while the on-time circulation rate of First General Counsel's Reports has been trending upwards, with a rate of 81% in the First Quarter of FY 2023 and the 74% rate in the Second Quarter of FY 2023, OGC remains unable to timely circulate First General Counsel's Reports in at least **20% of matters**. That is one out of five matters. OGC has suggested that its ability to continue this progress depends on new case volume and successfully attracting and retaining high-quality staff.⁵ Preparing lengthy, and unnecessary, Investigative Plans will delay OGC's work and place additional matters closer to the expiration of the statute of limitations.

Second, the proposed directive's requirements are an unnecessary micro-management of the nonpartisan Office of General Counsel's work. As part of its regular practice, OGC already includes a discussion of a proposed investigation, if applicable, in a First General Counsel's Report to the Commission. Specifically, OGC requires First General Counsel's Reports to include a section titled "Proposed Investigation." This section discusses the facts that need to be established to determine the existence and scope of any violations. This section also describes the investigative plan and states whether the proposed investigation will be conducted informally, through compulsory process, or both.⁶

The current procedures provide the necessary flexibility for OGC to approach each investigation based on its own unique facts and circumstances. Indeed, the content and format of investigative plans are likely to

³ *Id.*

⁴ *Id.*

⁵ Responses to Questions from the Minority Members of the Committee on House Administration at 15, Fed. Election Comm'n., (June 16, 2023), available at <https://democrats-cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/evo-media-document/fec-response-2023.pdf>.

⁶ See OGC Enforcement Manual June 2013, available at https://www.fec.gov/resources/about-fec/commissioners/weintraub/ogc_docs/generalcounsel'smemorandumdatedjune122013.pdf.

vary according to each case; plans may be simple and short for narrow investigations or highly detailed for a complex matter.

By contrast, the Investigative Plans required under the proposed directive take a one-size-fits-all approach, hampering OGC's ability to tailor plans to the unique circumstances of each case. Imposing these new, formulaic requirements on OGC is unnecessary. The additional burden on OGC continues even after the Investigative Plan is approved. The proposed directive requires frequent written updates to the Commission on the status of investigation, requires written requests for proposed subpoenas or orders, and imposes a two-week delay following approval of a subpoena before issuance.⁷

Third, the proposed directive conflicts with FECA. The proposed directive could allow Commissioners to base votes on whether reason-to-believe a violation occurred on approval of the Investigative Plan. This is violation of the Act's clear commands. A careful examination of the text is instructive.

Section 30109 provides:

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 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation.⁸

Additionally, where the Commission has "reason to believe" a violation has occurred or is about to occur, FECA provides that:

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.⁹

Section 30107 provides:

Specific authorities. The Commission has the power — (9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.¹⁰

FECA thus specifies what the Commission considers when it approves an investigation by OGC. The plain meaning of these sections requires the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a *precondition* to opening an investigation into the alleged violation.¹¹ Once the Commission has made the reason-to-believe finding, it "shall make an investigation" of the alleged violation.¹²

A reason-to-believe finding is not a finding that the respondent violated the Act, but instead means that the Commission believes a violation may have occurred based on the available information. Indeed, the

⁷ Agenda Document No. 23-21-A.

⁸ 52 U.S.C. § 30109(a)(2).

⁹ *Id.*

¹⁰ 52 U.S.C. § 30107(a)(9).

¹¹ 52 U.S.C. § 30109(a)(2); *see also* 11 C.F.R. §§ 111.9-.10.

¹² 52 U.S.C. § 30109(a)(2). Public-facing guidance for complainants and respondents published by the Commission provides, "[u]pon finding reason to believe that a violation has occurred or is about to occur, the Commission may authorize an investigation." *See* Guidebook for Complainants and Respondents on the FEC Enforcement Process, May 2012, available at http://www.fec.gov/em/respondent_guide.pdf.

Commission has consistently determined that reason-to-believe is a merely threshold determination that by itself does not establish that the law has been violated.¹³

Such determinations indicate only that the Commission has found sufficient legal justification to open an investigation to determine whether there is probable cause to believe that a violation of the Act has occurred.¹⁴ A reason-to-believe finding followed by an investigation is appropriate, for example, when there is reason to believe a violation may have occurred, but an investigation is required to determine whether a violation occurred and, if so, the scope of the violation.

The relevant consideration for Commissioners, under the Act and Commission regulations, at the reason-to-believe stage is whether that threshold determination has been met. An overview of the proposed investigation, the amount of time the investigation will consume, the identity of specific respondents, witnesses, categories of witnesses, categories of documents, and proposed methods are immaterial to making that statutorily required determination. The statute is unambiguously clear on this point.

Under the proposed directive, however, Commissioners dissatisfied with specific elements of the detailed Investigative Plan are not restricted in voting against the reason-to-believe finding, or in needlessly holding over the matter to a future Executive Session pending revisions to the Investigative Plan. Not only will those delays hamper the expeditious review of enforcement matters but they are non-germane to the statutory task at hand.

Certainly, Commissioners are rightly concerned about the best use of scarce resources. The Commission retains, however, several tools to address this concern. The Commission is already informed of OGC's planned investigation in the First General Counsel's Report and can ascertain relevant answers about the investigation from this summary and any discussion of the matter in Executive Session. In specific matters, the Commission may instead authorize pre-probable cause conciliation, instead of an investigation, based on resource and timing considerations. Or the Commission may elect to dismiss the matter. Finally, the Commission can seek additional funding from Congress to address limited resources.

Ultimately, the proposed directive could impose needless and superfluous work on OGC, delaying their timely review of enforcement matters and depriving the American public of meaningful enforcement of our nation's campaign finance laws.

* * *

I have greatly appreciated the Commission's thorough and thoughtful responses to the Committee's oversight inquires. Notably, a desire to significantly restructure the enforcement procedures has not been raised in response to the dozens of questions the Commission has answered. Next month, the Committee on House Administration has noticed an oversight hearing of the Federal Election Commission. That forum presents an opportunity for Commissioners to advance their perspective on these changes, the underlying impetus for the change, and an opportunity for meaningful Congressional oversight.

Moreover, given the potential impact of the proposed directive, the Commission would benefit from the perspective of regulated entities, other stakeholders, and the American public before making a final decision

¹³ See Guidebook for Complainants and Respondents on the FEC Enforcement Process, (May 2012), available at http://www.fec.gov/em/respondent_guide.pdf.

¹⁴ See 72 F.R. 12545, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process (March 16, 2007).

on the adoption of the proposed directive, including through an explicit and fulsome public comment opportunity.

Sincerely,

A handwritten signature in cursive script that reads "Joseph D. Morelle". The signature is written in black ink and is positioned above the printed name.

Joseph D. Morelle
Ranking Member
Committee on House Administration