

RECEIVED

By Office of the Commission Secretary at 2:35 pm, Oct 26, 2023



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 23-21-B
AGENDA ITEM
For meeting of November 2, 2023

To: The Commission
The Office of the Commission Secretary

From: Shana M. Broussard *SMB*
Commissioner

Dara Lindenbaum *DL*
Chair

Date: October 26, 2023

Re: Investigations Conducted by the Office of General Counsel

In August, a proposed directive establishing a system of approval and oversight of investigations by the Office of General Counsel (“OGC”) was circulated for the Commission’s consideration. While that proposed directive includes procedures that have the potential to improve the efficiency and transparency of investigations, we propose the following modifications that we believe better balance the demands on OGC with the Commission’s responsibility to oversee investigations.

First, paragraphs 1 and 2 provide that OGC will submit an Investigative Plan to the Commission only after the receipt of the respondent’s response to the RTB finding. These edits reflect the fact that any response to a Commission finding of reason to believe (“RTB”) could affect a proposed investigation. By waiting for the RTB response, the proposed directive ensures that OGC has all the information it needs to propose a deliberate and thorough investigation while avoiding the need to formally amend a plan the Commission previously adopted through a second vote.

Second, paragraph 5 contains a new footnote stating that “the identification of new sources of publicly available information” is not an expansion of the scope of the investigation requiring a revised Investigative Plan and tally vote by the Commission. This reflects the long-held practice by OGC to consult and consider common sources of publicly available information, including official records from other government agencies and news sources. The footnote also requires that such new sources of publicly available information must be included in regular updates to the Commission

Finally, paragraph 8 has been revised to provide that the directive will sunset on June 30, 2025, rather than December 31, 2025. This streamlines the current proposal while providing adequate time for the Commission to assess whether the process has been effective and should be adopted permanently or requires changes.

We ask that this draft be placed on the Commission’s agenda for the Open Meeting of November 3, 2023.

FEDERAL ELECTION COMMISSION		
MANUAL OF DIRECTIVES	COMMISSION DIRECTIVE	
	REVOKES: N/A	NO. XX
		EFFECTIVE DATE: XX
Investigations Conducted by the Office of General Counsel; Enforcement Investigative Plans		

A reason-to-believe (“RTB”) finding in an enforcement matter is followed by either pre-probable cause conciliation or a post-RTB investigation. *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007). The purpose of this directive is to set forth how the Office of General Counsel (“OGC”) will conduct such investigations.

1. Where OGC recommends RTB, it must either recommend pre-probable cause conciliation or a post-RTB investigation.
2. Where OGC recommends an investigation, the First General Counsel’s Report will include a proposed course of that investigation. Following notification to respondents of the Commission’s RTB finding, and receipt of their response, within two-weeks OGC will submit to the Commission a completed Investigative Plan. OGC’s proposed Investigative Plan will be subject to Commission approval as detailed herein. No investigation may be conducted by OGC except as directed in an Investigative Plan approved by the affirmative vote of four or more commissioners, subject to the procedures for revising such plan as detailed below.
3. The Investigative Plan will contain, at 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.
4. Once an Investigative Plan has been approved and until the investigation is completed, OGC shall provide periodic updates to the Commission in writing via email or an informational memo on the following schedule:
 - a. For those investigations where OGC’s Investigative Plan states that the investigation will last fewer than six months: OGC shall provide such written updates on a monthly basis via email.
 - b. For those investigations where OGC’s Investigative Plan states that the investigation will last six months or more: OGC shall provide written updates on a quarterly basis via informational memo or email.

5. If, based upon new information discovered through, or during the course of, an ongoing investigation, OGC believes the investigation should be revised or expanded beyond what has been authorized, it shall circulate a revised Investigative Plan on a 48-hour no objection ballot, except in exigent circumstances where OGC determines that a shorter timeframe for the ballot is necessary. For purposes of this paragraph, the identification of new witnesses outside the categories of witnesses already identified in the Investigative Plan or sources for third-party document requests outside the categories of sources already identified in the Investigative Plan will be considered an expansion of the investigation.¹ If any commissioner objects to OGC's recommendations, the matter shall be placed on the agenda for the next executive session of the Commission and will be adopted upon approval by four or more affirmative votes of the Commission. Any previously approved Investigative Plan shall remain in effect until such time as a revised Investigative Plan has been approved.
6. All compulsory process shall be conducted by subpoena or order. All specific requests for compulsory process by OGC shall be accompanied by a proposed subpoena or order. Each subpoena or order shall be circulated on a 48-hour no objection ballot. If any commissioner objects, the matter shall be placed on the agenda for the next executive session of the Commission and will be adopted upon approval by four or more affirmative votes of the Commission. After the Commission approves a subpoena or order, but before the issuance of any subpoena or order, OGC will, unless otherwise authorized, provide the intended recipient with written notice that the Commission has authorized the issuance of a subpoena or order and provide the recipient with two weeks to provide the information voluntarily or in the case of depositions provide the recipient with two weeks to voluntarily agree to appear at a deposition. OGC may proceed with issuing the subpoena or order at the end of the two-week period if the requested information is not received or in the process of being received. In the relevant 48-hour no objection ballot or by approval of four or more affirmative votes at an executive session, upon OGC's recommendation, the Commission may waive the requirement for a two-week waiting period prior to delivery of a subpoena or order to a recipient.
7. Upon the conclusion of a matter, all Investigative Plans circulated under this Directive, including the initial Investigative Plan attached to the First General Counsel's Report as well as further Investigative Plans expanding the scope of the investigation together with their accompanying memos, in addition to status reports relating to investigations, will be segregated and shall not be included in the public file, unless there are four affirmative votes of the Commission to do otherwise, with redactions as appropriate. Such Investigative Plans shall not be considered "supplements" to General Counsel's Reports, for purposes of the FEC's disclosure policy. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50702 (Aug. 2, 2016).
8. The procedures set forth herein shall apply to all investigations approved on or after the date on which this Directive is adopted, except that OGC shall provide the quarterly reports

¹ The identification of new sources of publicly available information is not considered an expansion of the scope of the investigation but will be identified in subsequent investigative plan updates.

specified in paragraph 4(b) for all open investigations. This Directive will remain in force until June 30, 2025, subject to renewal by the Commission.

The Commission approved Directive Number XX on .