FEDERAL ELECTION COMMISSION
Washington, DC

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
GEO Corrections Holdings, Inc., *et al.*	)	MUR 7180
	)	

STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR III

This Matter arose from a Complaint alleging that GEO Corrections Holdings, Inc. ("GCH") violated the Federal Election Campaign Act of 1971, as amended (the "Act") by making prohibited contributions to three separate independent expenditure-only political committees—Rebuilding America Now, the Senate Leadership Fund, and Conservative Solutions PAC—while holding federal government contracts in Louisiana and Georgia.[1]

GCH, which acknowledged making the contributions but denied the allegation that it is a federal contractor, is a wholly-owned subsidiary of The GEO Group, Inc. ("GEO"), a publicly traded real estate investment trust.[2] In its pre-reason-to-believe ("RTB") Response, GCH provided credible documentation proving that the Louisiana agreement was not a contract with the federal government, as well as affidavits from GEO executives stating that Cornell Companies—a different, separately-incorporated GEO subsidiary—held the Georgia contract, rather than GCH.[3]

Nevertheless, in early 2018, the Commission found reason to believe a violation of the Act had occurred in this Matter.[4] The strongest evidence for this contention was a brief that counsel for GCH filed with the National Labor Relations Board in an unrelated matter. That document stated that GCH operated the D. Ray James Detention Facility pursuant to a contract with the Federal Bureau of Prisons.[5] But while this central fact may have supported

[1] MUR 7180 (GEO Corrections Holdings, Inc.), Compl. at 3–5 and Supp. Compl. at 2.

[2] GEO is traded on the New York Stock Exchange under the ticker symbol "GEO." *See* https://www.nyse.com/quote/XNYS:GEO.

[3] MUR 7180, GEO and GCH Resp. at 1–2.

[4] MUR 7180, Certification (Jan. 23, 2018) (Comm'rs Goodman, Hunter, Petersen, Walther, and Weintraub voting affirmatively).

[5] *See* MUR 7180, First Gen. Counsel's Report at 3 ("[T]he available information, including GC Holdings' representation in an unrelated National Labor Relations Board ('NLRB') proceeding that it is a federal contractor, suggests that GC Holdings may have been a federal contractor when it made its contributions to RAN and to other committees."); MUR 7180, Supp. Compl., Ex. A.

RTB at the time, OGC's subsequent investigation conclusively proved that GCH did not hold the relevant contract.[6]

Accordingly, it is now undisputed that GCH was not a party to a federal contract at the relevant point in time. However, OGC recommended that the Commission find probable cause that GCH violated the Act's federal contractor ban on the theory that it was insufficiently "separate and distinct" from its parent, subsidiaries, and sister entities.[7] OGC's analysis was grounded in the application of a four-factor test (itself apparently gleaned from various prior Commission advisory opinions and enforcement matters) supporting the assertion that GCH, GEO, and their respective subsidiaries were "so tightly interwoven that [they] should not be considered separate and distinct," but should instead be considered the same entity for our purposes.[8]

It is not necessary, in our opinion, to address in detail the fact that corporate structures like this one—where a parent company (*e.g.*, GEO) owns and operates a holding company (*e.g.*, GCH) that itself exists to hold or control operating companies (*e.g.*, GCH's subsidiaries)—are lawful and common. The bigger issue, in our view, is that OGC disregards the simple, stubborn reality that both its legal theory (the corporate law concept and equitable remedy of "alter ego," also known as "piercing the corporate veil," which virtually never applies to public companies like GEO[9]) and the four-factor test it used to support its probable cause recommendation lack basis in the Act and Commission regulations. Although OGC's goal of setting forth factors for what qualifies as a "separate and distinct legal entity" in this Matter may have been well-intentioned, the fact remains that under the Act, the

[6] In a supplemental Response, GEO provided a copy of the contract for the operation of the D. Ray James Detention Facility showing that the contracting party was Cornell Companies, Inc., along with additional explanation regarding the mistaken employer identification in the NLRB matter. MUR 7180, GEO Supp. Resp., Attachment D at 1–3.

[7] Although OGC presented both theories to the Commission in its First General Counsel's Report, the lion's share of its investigation appears to have focused on the theory that GCH may not have been "separate and distinct" from its parent, subsidiaries, or sister entities, which is presented as the only argument in the General Counsel's Brief. *See* MUR 7180, Gen. Counsel's Brief at 1.

[8] *Id.* These factors are said to be "(1) extensive overlap in management and control, underlined by the use of a single employer across entities; (2) transactions not conducted at arm's length; (3) interwoven finances; and (4) a single set of corporate policies established by the parent company and applied throughout the GEO family of companies, including at GCH." *Id.* at 12.

[9] *See, e.g.*, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853 (1982). Procedurally, the party seeking to pierce the corporate veil has the burden of proof and must prove that the veil should be pierced by a preponderance of the evidence. *See, e.g., U.S. v. Friedland*, 173 F. Supp.2d 1077, 1092 (D. Colo. 2001); *McCallum Family L.L.C. v. Winger*, 221 P.3d 69 (Colo. App. 2009). Courts—which recognize the value of limited liability—tend to strongly disfavor piercing the corporate veil. An empirical study of veil-piercing cases published in 2010 found zero cases in which courts pierced the veil of a public corporation. *See* Richmond McPherson & Nader Raja, Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil, 45 Wake Forest L. Rev. 931 (2010).

Commission simply lacks the statutory authority to create new rules to wield against respondents in enforcement matters, absent formal rulemaking.[10]

Lacking on-point regulatory authority, OGC relies principally on prior advisory opinions of the Commission. We reject this approach. It has long been understood that where the law is unclear on a given issue, advisory opinions can be used only as a shield by similarly situated respondents, not as a sword to be brandished by OGC in future matters.[11]

Moreover, in fashioning its alter ego test, OGC fundamentally misinterprets common corporate structures and practices in support of an unprecedented attempt to pierce a public company's corporate structure.[12] A vote to enforce under these circumstances would carry implications far beyond this particular Matter and potentially contradicts basic principles of corporate law and limited liability upheld by courts over decades.

---

[10] 52 U.S.C. § 30108(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title."); 11 C.F.R. § 112.4(e) ("Any rule of law which is not stated in the Act or in chapters 95 or 96 of the Internal Revenue Code of 1954, or in a regulation duly prescribed by the Commission, may be initially proposed only as a rule or regulation pursuant to procedures established in 52 U.S.C. 30111(d) or 26 U.S.C. 9009(c) and 9039(c) as applicable.")

[11] *See, e.g.*, 1996 Presidential Audits, Statement of Reasons of Vice Chairman Darryl R. Wold and Comm'rs Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom at 3 ("[w]here the law is of uncertain application, advisory opinions cannot be used as a sword of enforcement"); MUR 5625 (Aristotle International, Inc.); Statement of Reasons of Chairman Matthew S. Petersen and Comm'rs Caroline C. Hunter and Donald F. McGahn at 2 n.3 ("Of course, it is well-established that advisory opinions cannot be used as a sword, but instead merely a shield from burdensome Commission enforcement action."). The Commission also cannot establish new rules and regulations via the enforcement process. *See* MUR 5642 (George Soros), Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm'rs Caroline C. Hunter and Donald F. McGahn II at 4 ("the Commission, by statute and regulation, is prohibited from establishing new regulatory requirements through this or any enforcement matter").

[12] For example, OGC contends that corporate decision-making "for the benefit of the whole group of companies pursuant to a unified set of interests" is an unusual circumstance that weighs in favor of piercing the corporate veil. *See* MUR 7180, Gen. Counsel's Brief at 12. However, the Supreme Court has recognized that unity of corporate purpose between a parent and a subsidiary is a universal fact. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771–72 (1984) ("A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one."). OGC also contends that "a single set of corporate policies" in use throughout a parent-subsidiary arrangement indicates a lack of separateness or distinctness—despite courts' conclusions that such an arrangement is unremarkable. *See, e.g.*, *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 593 (5th Cir. 1999) (parent company's requirement that a subsidiary "use certain operations manuals" was part of an overall relationship representing "nothing more than a typical corporate relationship between a parent and subsidiary").

I. APPLICABLE LAW

Under the Act, federal government contractors are prohibited from "directly or indirectly" contributing to any political party, committee, or federal candidate or to "any person or any political purpose or use."[13] "Knowing[]" solicitations of such contributions are also prohibited.[14] In determining whether a person or entity has made a contribution in violation of 52 U.S.C. § 30119, the Commission first looks to whether the entity met the statutory and regulatory definition of "federal contractor" at the time the contribution was made.[15] A "federal contractor" includes any person who is negotiating or performing a contract with the federal government or its agencies for certain enumerated purposes.[16]

The Commission has recognized in advisory opinions that parent companies with an ownership interest in a federal contractor subsidiary may make contributions without violating section 30119 if the parent is a "separate and distinct legal entity" from the subsidiary and "has sufficient revenue derived from sources other than its contractor subsidiary to make a contribution." These advisory opinions state that if the subsidiary is merely an agent, instrumentality, or alter ego of the holding company, then the parent company is prohibited from making a contribution.[17] To date, however, we have not promulgated a regulation containing a legal standard enumerating the factors a parent entity must satisfy to be considered "separate and distinct" from a federal contractor subsidiary. Instead, OGC notes that in previous enforcement matters we have made this determination based on the facts and circumstances at hand.[18] Moreover, as of this writing, the Commission has not pursued an enforcement action based on this "separate and distinct legal entity" theory.[19]

[13] 52 U.S.C. § 30119(a)(l); 11 C.F.R. § 115.2(a).

[14] 52 U.S.C. § 30119(a)(2); 11 C.F.R. § 115.2(c).

[15] *See, e.g.*, MUR 6403 (Ahtna, Inc., *et al.*), Factual and Legal Analysis at 7.

[16] 52 U.S.C. § 30119(a)(l); 11 C.F.R. § 115.2(a).

[17] *See* Adv. Op. 2005-01 (Mississippi Band of Choctaw Indians) (the government contractor status of a tribal corporation, a distinct and separate legal entity from the tribe, does not prohibit the tribe from making contributions to federal candidates, political parties, and political committees as long as the tribe does not use revenues from the tribal corporation to make contributions), citing Adv. Op. 1999-32 (Tohono O'odham Nation) (the commercial activity of an Indian tribe's utility authority as a government contractor is treated as separate from the tribe and its political activities).

[18] MUR 7180, Gen. Counsel's Brief at 10, 21.

[19] *See* MUR 6726 (Chevron Corporation, *et al.*) (Commission found no reason to believe a violation occurred because contributing entity and contracting entity were separate and distinct legal entities); MUR 6403 (Alaskans Standing Together, *et al.*) (Commission dismissed allegations against contracting/contributing entities pursuant to *Heckler v. Chaney*).

II. ANALYSIS

Given the uncontroverted evidence that GCH was not a party to a federal government contract,[20] OGC instead based its probable cause recommendation on an analysis of whether GCH, GEO, and their subsidiaries were "separate and distinct legal entit[ies]." This phrase—which OGC appears to view as a "legal standard"[21] but which does not appear in the Act or Commission regulations—is applied via a motley collection of factors from prior Commission advisory opinions and enforcement matters, culminating in a somewhat tortured interpretation of corporate law.

Such an approach runs counter to the Act itself, which provides that any rule of law not explicitly stated in the FECA must be promulgated through the Commission's formal rulemaking process before it may be invoked.[22] Past commissioners have agreed, explaining that "Congress included an express prohibition in the FECA against the Commission using advisory opinions to establish rules of conduct" and "absent controlling regulations or the authoritative interpretations of the courts, the Commission's enforcement standard [must] be the natural dictate of the language of the statute itself."[23]

Here, OGC cites a veritable soup of advisory opinions and enforcement matters in support of its view that it is entitled and qualified to perform an "alter ego" analysis of GCH's corporate structure.[24] But advisory opinions cannot be used as a rule of law, or as a mechanism to curtail or prevent potential speech. Although a requestor (or a person in a position analogous to that of a prior requestor) may use an advisory opinion as a defense against an enforcement action, that is a one-way street; the Commission itself must base its enforcement case on the Act. Given the Act's lack of an "alter ego" remedy, OGC does not have the authority to fill in the gaps in the law and proceed via a patchwork theory of enforcement. The Commission, not OGC, retains that authority, and we may exercise it only through proper rulemaking procedures.[25]

This approach also runs afoul of the Supreme Court's admonition that the Commission "must eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es]

---

[20] A fact that OGC acknowledges. *See* Gen. Counsel's Brief at 1 n.2 ("GCH has subsequently provided contracts relating to each of these matters demonstrating that GCH was not the named party on the relevant federal contracts.") and 18 n.88 ("GCH has provided contracts relating to each of these matters demonstrating that GCH was not the named party on the relevant federal contracts.").

[21] *Id.* at 9–10.

[22] *See supra* n.10.

[23] *See supra* n.11.

[24] MUR 7180, Gen. Counsel's Brief at n.51–57 and accompanying text.

[25] This is also a wise course, even if it were not the law. Had OGC's position in this Matter been subjected to the notice and comment process required before we may adopt a regulation, *see* 52 U.S.C. § 30108(b) and 11 C.F.R. § 112.4(e), it is likely that we would have received expert comments pointing out the numerous infirmities noted by Respondent in its Reply to the General Counsel's Brief. It is worth remembering that our expertise in the application of FECA carries an implication that we lack expertise in other areas. In that regard, this Matter should serve as a cautionary tale.

complex argument in a trial court and a virtually inevitable appeal.'"[26] The Commission does not have the power to "create[] a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests"[27]—but that is precisely what OGC has done in this Matter by essentially cobbling together a new rule of equity.

Finally, we note the "substantial doubt about the constitutionality of any limits on Super PAC contributions" in the wake of the *Citizens United* and *SpeechNow.org* decisions.[28] Although the ban on contractor contributions to candidates and political parties was upheld by the D.C. Circuit in *Wagner v. FEC*,[29] the plaintiffs in that case specified that their challenge did not encompass super PAC contributions, and the court did not reach the question.[30] We are skeptical of the Commission's ability to identify a sufficient anticorruption interest in limiting government contractor contributions made to fund independent expenditures, and suspect that future litigation will test that skepticism. In this Matter, however, the lack of statutory and regulatory authority for OGC's "separate and distinct" test allows us to conclude this Matter without further addressing this clearly important constitutional question.

III. CONCLUSION

The Commission should exercise humility when operating outside its core competency. Courts, which actually possess the authority to pierce a corporation's veil, are disinclined to do so and, to our knowledge, have never done so on similar facts to those presented here. That alone should give us pause. Moreover, the capricious application of factors collected from prior advisory opinions and enforcement actions does not form a sound or lawful basis for enforcement under the Act.

Accordingly, based on the above, we declined to find probable cause to believe GCH violated 52 U.S.C. § 30119.

---

[26] *Fed. Election Comm'n v. Wis. Right to Life*, Inc., 551 U.S. 449, 469 (2007).

[27] *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 336 (2010).

[28] *Wagner v. Fed. Election Comm'n*, 901 F. Supp. 2d 101, 107 (D.D.C. 2012), *vacated*, 717 F.3d 1007 (D.C. Cir. 2013); *see Citizens United*, 558 U.S. at 357 ("Limits on independent expenditures, such as §441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question."); *SpeechNow.org v. FEC,* 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) ("In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.").

[29] 793 F.3d 1 (D.C. Cir. 2015).

[30] *Id.* at 4.

October 13, 2021
Date

Allen Dickerson
Vice Chair

October 13, 2021
Date

Sean J. Cooksey
Commissioner

October 13, 2021
Date

James E. "Trey" Trainor III
Commissioner