

**AGENDA DOCUMENT NO. 11-23-D**



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

FE  
MAY 25 P 5:50

**AGENDA ITEM**

**MEMORANDUM**

TO: The Commission

For Meeting of 5-26-11

FROM: Cynthia L. Bauerly

*CB*

Chair  
Ellen L. Weintraub

*ELW*

**SUBMITTED LATE**

DATE: May 25, 2011

SUBJECT: Agency Procedure for Disclosure of Exculpatory Evidence in the Enforcement Process

We request that the attached draft Agency Procedure for Disclosure of Exculpatory Evidence in the Enforcement Process be placed on the agenda for May 26, 2011.

Attachment

**FEDERAL ELECTION COMMISSION**

**11 CFR Part 111**

**[NOTICE 2011-XX]**

**Pilot Program for Agency Procedure for Disclosure of Exculpatory Evidence  
in the Enforcement Process**

**AGENCY:** Federal Election Commission

**ACTION:** Notice of Agency Procedure

**SUMMARY:** The Federal Election Commission (Commission) is establishing a pilot program to formalize the agency’s practice of disclosing exculpatory evidence acquired during the Commission’s investigation in enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (the Act).

**DATES:** Effective [15 days from the date of publication in the Federal Register].

**FOR FURTHER  
INFORMATION**

**CONTACT:** \_\_\_\_\_, Assistant General Counsel, or \_\_\_\_\_,  
Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or  
(800) 424-9530.

**SUPPLEMENTARY  
INFORMATION:**

**I. Background**

A. Criminal Proceedings: the Constitutional Obligation under Brady

In criminal proceedings, the Supreme Court has held that the Due Process Clause of the Fifth Amendment to the United States Constitution requires the government to provide criminal defendants with exculpatory evidence – *i.e.*, “evidence favorable to an accused” that is “material to guilt or punishment” – known to the government but unknown to the defendant. Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

Brady held that the Due Process Clause required the government to provide criminal defendants with exculpatory or potentially exculpatory evidence that is “material to guilt or punishment.” As the Supreme Court subsequently explained, “[t]he rationale underlying Brady is not to supply a defendant with all the evidence in the Government’s possession which might conceivably assist in the preparation of his defense, but to assure that the defendant will not be

denied access to exculpatory evidence known only to the Government.”<sup>1</sup> No duty exists under Brady to provide evidence already in the defendant’s possession or which can be obtained with reasonable diligence.<sup>2</sup> Courts have recognized that Brady does not apply to attorney strategies, legal theories, and evaluations of evidence because they are not “evidence.”<sup>3</sup> Moreover, in Giglio v. United States, 405 U.S. 150 (1972), the Supreme Court found disclosure in criminal proceedings is required “[w]hen the ‘reliability of a particular witness may well be determinative of guilt or innocence,’” and the prosecution has evidence that impeaches that witness’s testimony.<sup>4</sup>

## B. Disclosure in Governmental Civil Proceedings.

Courts have held that the Due Process Clause does not require application of Brady in administrative proceedings.<sup>5</sup> However, the Constitutional and ethical principles of fairness and due process in Brady inform the Commission’s formalization of its exculpatory evidence procedure in its civil administrative enforcement process. Thus, while the Constitution does not require the agency to institute a procedure requiring disclosure of exculpatory evidence to respondents in its civil enforcement process, doing so will (1) eliminate the potential for uncertainty regarding the Commission’s position on this issue, (2) serve the Commission’s goal of providing fairness to respondents, and (3) set forth a written procedural framework within which disclosures are made.

## II. Exculpatory Evidence Practice and Procedure

### A. Current Practice

Prior to any recommendation by the Office of General Counsel (“OGC”) to the Commission to proceed to a vote on probable cause, the General Counsel must notify respondents of such a recommendation, and provide a written brief stating the position of the General Counsel on the legal and factual issues of the case. 2 U.S.C. 437g(a)(3). Respondents have the opportunity to submit a response stating respondents’ position on the legal and factual issues. Id. This allows the Commission to be informed not only by the recommendations of its General Counsel, but also by the arguments of respondents. The Commission has similar procedures at various stages of the enforcement process to keep informed both by its staff and by respondents.

---

<sup>1</sup> United States v. LeRoy, 687 F.2d 610, 619 (2d Cir. 1983) (citations omitted).

<sup>2</sup> See, e.g., United States v. Meros, 866 F.2d 1304, 1308 (11th Cir 1989); Hoke v. Netherland, 92 F.3d 1350, 1355-56 (4th Cir. 1996); United States v. Beaver, 524 F.2d 963, 966 (5th Cir. 1975).

<sup>3</sup> Morris v. Ylst, 447 F.3d 735, 742 (9th Cir. 2006); U.S. v. NYNEX Corp., 781 F. Supp. 19, 25-26 (D.D.C. 1991); see Williamson v. Moore, 221 F.3d 1177, 1182 (11th Cir. 2000).

<sup>4</sup> Giglio v. United States, 405 U.S. 150, 154-55 (1972) (Giglio).

<sup>5</sup> Mister Discount Stockbrokers v. SEC, 768 F.2d 875, 878 (7th Cir. 1985) (no right to exculpatory evidence in National Association of Securities Dealers (NASD) proceedings which are treated the same as administrative agency action); Sanford v. NASD, 30 F. Supp. 2d 1, 22 n.12 (D.D.C. 1998) (same); NLRB v. Nueva Eng’g, Inc., 761 F.2d 961, 969 (4th Cir. 1985) (“[W]e find Brady inapposite and hold that the ALJ properly denied Nueva’s demand for exculpatory materials.”).

In addition, while the Commission may attempt to conciliate matters with respondents at any time, the Act requires the Commission to do so at the probable cause stage. Specifically, if the Commission determines that there is probable cause, the Act requires that, for a period of at least 30 days (or at least 15 days, if the probable cause determination occurs within 45 days of an election), the Commission must “attempt to correct or prevent such violation by informal methods of conference, conciliation, and persuasion.” 2 U.S.C. 437g(a)(4).

The probable cause brief provided to respondents presents OGC’s analysis of the information and may address any available exculpatory evidence. The Commission’s practice at the probable cause stage has generally been to provide respondents, upon request, with information cited in the General Counsel’s probable cause brief. Where possible, this has included producing copies of documents containing the information upon which OGC is relying to support its recommendation to the Commission that there is probable cause to believe a violation of the Act has occurred. This production of documents is subject to all applicable privileges and confidentiality considerations, including the confidentiality provisions of the Act. Where such considerations apply, OGC has generally provided only the relevant information derived from the document, and not the document itself. Examples of the types of documents OGC has provided at this stage are deposition transcripts, responses to formal discovery, and documents obtained in response to requests for documents. In instances where OGC obtains factual evidence from a source other than the respondent that tends to exculpate the respondent, OGC may generally describe the evidence in its brief, particularly if OGC does not know whether a respondent is already aware of the evidence.<sup>6</sup> In instances where OGC provides mitigating or exculpatory information, such production is also subject to privilege and confidentiality concerns.

In two instances, OGC may provide information to respondents at earlier stages in the enforcement process. First, pursuant to the Commission’s Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations, all deponents, including respondent deponents, may obtain a copy of the transcript of their own deposition, including any exhibits that may have been obtained from sources other than the respondent, provided there is no good cause to limit the deponent’s access to the transcript.<sup>7</sup> Second, OGC may share information, including documents, with respondents during the post-investigative pre-probable cause conciliation process to assist in explaining the factual basis for a violation. That information may include documents not already in the respondent’s possession. This practice is used for the purpose of facilitating conciliation.

---

<sup>6</sup> OGC will also discuss the potentially exculpatory evidence, as well as any available mitigating evidence, in written documents advising the Commission whether to proceed with the probable cause recommendation or whether to withdraw the recommendation from Commission consideration. See 11 C.F.R. § 111.16(d).

<sup>7</sup> See Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations, 68 Fed. Reg. 50688 (Aug. 22, 2003), available at <http://www.fec.gov/agenda/agendas2003/notice2003-15/fr68n163p50688.pdf>.

## B. Pilot Program

### 1. Definitions

- a. For purposes of this pilot program, the term “documents” includes writings, drawings, graphs, charts, photographs, recordings and other data compilations, including data stored by computer, from which information can be obtained.
- b. For purposes of this pilot program, the term “exculpatory evidence” means documents in the possession of the Commission, not reasonably knowable by the respondent, that are favorable to respondent and material to whether there is probable cause that respondent violated the Act.

2. General Rule: Within fifteen (15) days of the date of the General Counsel’s notification to a respondent of a recommendation to the Commission to proceed to a vote on probable cause, the Commission shall make available to a respondent all documents, not publicly available and not in the possession of the respondent, obtained in connection with its investigation that contain exculpatory evidence, as defined herein. This shall be done either by producing copies in electronic format or permitting inspection and copying of such documents. The following documents are covered by this procedure:

- a. Documents, not in possession of a respondent, turned over in response to any subpoenas or other requests, written or otherwise;
- b. all deposition transcripts and deposition transcript exhibits; and
- c. any other documents, not publicly available and not in possession of a respondent, obtained by the Commission from sources outside the Commission.

3. Nothing in this pilot program shall require OGC to conduct any search for materials outside those it receives in the course of its investigatory activities, nor does it require staff to conduct any search for exculpatory materials that may be found in the offices of other agencies. Consistent with Brady and its progeny, nothing in this pilot program requires the Commission to produce documents containing attorney strategies, legal theories, and evaluations of evidence or similar documents that are not “evidence.”

4. Excluded Documents: The Commission shall withhold a document or a category of documents from a respondent if:
  - a. the document or category of documents contains privileged information, such as, but not limited to, attorney-client communications, attorney-work product, or the deliberative process privilege; provided, however, if the document contains only a portion of material that may not be disclosed, OGC shall excise or redact from such document such information that prevents disclosure

- if the remaining portion is informative, and the remaining portion shall then be disclosed;
- b. the document or category of documents is not relevant to the subject matter of the proceeding;
  - c. the document or category of documents contains information only a portion of which prevents disclosure, and that portion cannot be excised or redacted without altering the meaning of the document; or
  - d. the Commission is prevented by law, regulation, or upon agreement with the source of the information or document from disclosing the document or category of documents. This includes any information that was derived from such information or documents, including all separate documents quoting, summarizing, or otherwise using information provided by the source of the information or document.

## 5. Co-respondents

If there is more than one respondent under investigation in the same matter, or in related matters, before the Commission may produce documents to one co-respondent that either (a) have been provided to the Commission by another co-respondent or (b) that relate to another co-respondent, OGC must obtain a confidentiality waiver from the co-respondent who provided the document or about whom the document relates. Additionally, the respondent receiving such documents must sign a nondisclosure agreement to keep confidential any document or information it obtains from the Commission. If the respondent does not agree to provide a confidentiality waiver, the information may be produced to respondents if redaction or a summary of the information may be provided without violating the confidentiality provisions of the Act.

## 6. Costs

The respondent is responsible for all costs related to production of documents pursuant to this procedure.

## 7. Remedies and Consequences of Disclosure

The intentions of the Commission pursuant to these procedures do not create any rights that are reviewable or enforceable in any court. Any failure by the Commission to make a document available does not create any rights for a respondent to seek judicial review in court, nor give a defendant in litigation any rights to request or receive a dismissal or remand or any other judicial remedy. Disclosure of documents pursuant to this procedure is not an admission by the Commission that the information or document exculpates or mitigates respondent's liability for potential violations of the Act. In any civil litigation with the respondent, the discovery rules of the court in which the matter is pending, and any order made by that court, shall govern the obligations of the Commission.

## 8. Pilot Program

This agency procedure is being established as a pilot program. The pilot program will last one year from the time that this procedure is approved. After one year, the Office of General Counsel will prepare a Memorandum to the Commission for consideration at Executive Session describing the program's application over the year. Such Memorandum should address whether the procedure has provided an appropriate balance between the statutory confidentiality provisions and the interest in providing respondents with exculpatory documents. At such time, a vote will be scheduled on whether the program should continue. Four affirmative votes will be required to extend or make permanent the program or the program will terminate. The Commission may terminate or modify this pilot program through additional statements prior to the twelfth month of the pilot program by an affirmative vote of four of its members.