

AGENDA DOCUMENT NO. 11-53



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION COMMISSION
WASHINGTON, DC
2011 SEP 22 11:08

AGENDA ITEM

MEMORANDUM

For Meeting of 9-22-11

TO: The Commission

FROM: Steven T. Walther
Commissioner

DATE: September 6, 2011

SUBJECT: Agency Procedure Following the Submission of Probable Cause Briefs by
the Office of General Counsel

I request that the attached draft Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel be made available to the public and placed on the agenda for the September 22, 2011, Open Session.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[NOTICE 2011-XX]

**Agency Procedure Following the Submission
of Probable Cause Briefs
By the Office of General Counsel**

AGENCY: Federal Election Commission

ACTION: Notice of Agency Procedure

SUMMARY: The Federal Election Commission (Commission) is establishing an agency procedure to formalize the agency's practice in the latter stages of Probable Cause process in enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (FECA).

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.

In the enforcement process various issues have arisen regarding certain procedural aspects of the proceedings. One such issue that has arisen is what procedure should be followed, and perhaps formally established and adopted, in the latter stages of the Probable Cause process when, pursuant to 11 CFR 111.16(d) of the Commission's regulations, the Office of General Counsel (OGC) advises the Commission in writing as to whether or not it intends to proceed with a Probable Cause recommendation.

Following the investigation by OGC of the matters for which the Commission has determined there is reason to believe that a violation has occurred or is about to occur, both the FECA, 2 U.S.C. 437g(a)(3), and the Commission's regulations, 11 CFR 111.16, require OGC to make a recommendation to the Commission on whether or not to find probable cause that a violation has occurred or is about to occur.

When OGC makes its recommendation on whether or not the Commission should find probable cause, such recommendation is accompanied by a brief (Probable Cause Brief) supporting the recommendation. A copy of the Probable Cause Brief is also provided to each respondent. 11 CFR 111.16(b). The Probable Cause Brief is a formal OGC recommendation and not merely a statement of intent to make such a recommendation, which must comport with the disclosure aspects of the separate procedure adopted by the Commission on June 2, 2011, requiring a balanced approach to the presentation, including not only facts and/or law that tend to support, but also those that do not tend to support, a particular recommendation. See Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34986 (Jun. 15, 2011).

Once the Probable Cause Brief is received by a respondent, the respondent has the opportunity to file, within 15 days, a responding brief (Responding Brief) to OGC's Probable Cause Brief. 11 CFR 111.16(c). Additionally, pursuant to a procedural rule adopted by the Commission in 2007, respondents may, as part of their Responding Brief, request an oral Probable Cause hearing before the Commission. See Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007). The Commission will grant a request for a Probable Cause hearing if any two Commissioners agree that a hearing would help resolve significant or novel legal issues, or significant questions about the application of the law to the facts.

Following the filing of the Responding Brief, and, if there is a Probable Cause hearing, following the hearing, OGC must then advise the Commission, by a written notice, as to whether OGC intends to proceed with its recommendation or to withdraw the recommendation from Commission consideration. 11 CFR 111.16(d).

The issues that have arisen at this stage of the enforcement process are as follows: (a) whether OGC should provide a copy of its written notice to the respondent; (b) if OGC's written notice is accompanied by any further argument, statements or marshalling of facts, or replies to all or any of the arguments contained in the Responding Brief, and, if a Probable Cause hearing was conducted, those occurring at the hearing, whether the respondent should also receive a copy of OGC's further statement containing the arguments replying to the Respondent's Brief and/or hearing; and (c) whether in such instance in subparagraph (b), the respondent should have an opportunity to reply.

II. Procedure Following the Submission Of Probable Cause Briefs By the Office of General Counsel

The Commission hereby adopts the following procedure with respect to the issues discussed above:

1. The written notice required under 11 CFR 111.16(d) to be given to the Commission by OGC following the respondent's Responding Brief (and if there was a Probable Cause hearing, following the hearing) shall contemporaneously be provided to the respondent.
2. If, in addition to the written notice, OGC provides information in writing that replies to, or argues facts or law in response to, the respondent's Responding Brief, or arising out of the Probable Cause hearing, if any, such document shall be contemporaneously provided to the respondent when it is submitted by OGC to the Commission.
3. If the written notice and additional arguments by OGC contains new facts or new legal arguments not contained in the OGC Probable Cause Brief, and/or the Probable Cause hearing, if any, a respondent may submit a written request to address the new points raised by OGC. Any such written request must be submitted to the Secretary of the Commission within 5 business days of the respondent's receipt of the written notice from OGC.
4. Within 5 business days of receipt of a written request from a respondent, the Commission may, in its sole discretion, exercised by four affirmative votes, allow the respondent to address in writing the new points raised by OGC in the written notice. If the Commission approves the request, the Commission shall notify the respondent and shall provide the respondent with a date by which the respondent must file its reply. Any request that is not approved by the Commission within 5 business days of the Commission's receipt of the request shall be deemed denied.

IX. Conclusion.

Failure to adhere to this procedure does not create a jurisdictional bar for the Commission to pursue all remedies to correct or prevent a violation of the Act.

This notice establishes agency practices or procedures. This procedure sets forth the Commission's intentions concerning the exercise of its discretion in its enforcement program. However, the Commission retains that discretion and will exercise it as appropriate with respect to the facts and circumstances of each enforcement matter it considers. Consequently, this procedure does not bind the Commission or any member

of the general public, nor does it create any rights for respondents or third parties. As such, this notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay of effective date under 5 U.S.C. 553 of the Administrative Procedure Act (APA). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.