

AGENDA DOCUMENT NO. 11-53-A



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of 10-6-11

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther *STW by Ben*
Commissioner

DATE: October 5, 2011

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

I request that the attached revised draft Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel be placed on the agenda for the October 6, 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: Kathleen Guith, Acting Associate General Counsel, or Joshua Smith, Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY
INFORMATION:**

I. Background.

The Federal Election Commission (Commission) is establishing an agency procedure to formalize the agency's practice 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.

In matters that proceed beyond the stage in which the Commission has determined there is reason to believe that a violation has occurred or is about to occur, and after the completion of any investigation, both the FECA, 2 U.S.C. 437g(a)(3), and the

Commission's regulations, 11 CFR 111.16(a), require OGC to make a recommendation to the Commission on whether or not to find probable cause to believe 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 provided to each respondent. 11 CFR 111.16(b). . The Probable Cause Brief must comport with the disclosure procedures adopted by the Commission on June 2, 2011. 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 brief (Reply Brief) responding to the Probable Cause Brief. 11 CFR 111.16(c). Additionally, pursuant to a procedural rule adopted by the Commission in 2007, a respondent may, as part of the Reply Brief, request a probable cause hearing (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 Reply Brief and the Probable Cause Hearing, if there is one, OGC must, pursuant to 11 CFR 111.16(d), then advise the Commission, by a written notice (OGC Notice), as to whether OGC intends to proceed with its recommendation or to withdraw the recommendation from Commission consideration.

The Commission hereby adopts the following procedures with respect to the following issues: (a) whether or not OGC must provide a copy of the OGC Notice to the respondent and (b) if the OGC Notice contains any new argument, statement, or facts, or contains new replies to all or any of the arguments contained in the Reply Brief, and, if a Probable Cause Hearing was conducted, those occurring at the hearing, whether the respondent should have an opportunity to reply.

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

1. The OGC Notice provided to the Commission by OGC following the Reply Brief (or if there was a Probable Cause Hearing, following the hearing), *see* 11 CFR 111.16(d), shall contemporaneously be provided to the respondent.
2. The OGC Notice may include information that replies to, or argues facts or law in response to, the respondent's Reply Brief, or arising out of the Probable Cause Hearing, if any.

3. If the OGC Notice contains new facts or new legal arguments raised by OGC and not contained in the Probable Cause Brief, or raised at the Probable Cause Hearing, if any, the respondent may submit a written request to address the new points raised by OGC. Any such written request must specify the new points that the respondent seeks to address and must be submitted to the Secretary of the Commission within five business days of the respondent's receipt of the OGC Notice
4. Within five 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 the OGC Notice. If the Commission approves the request, the Commission shall provide the respondent with a date by which the Supplemental Reply Brief must be filed, which shall in no event exceed 10 calendar days from notification to the respondent of the Commission's approval. Where necessary, the Commission reserves the right to request from a Respondent an agreement tolling any deadline, including any statutory or other deadline found in 11 CFR part 111. Any request that is not approved by the Commission within five business days of the Commission's receipt of the request shall be deemed denied without further action by the Commission.
5. All requests and Supplemental Reply Briefs should be directed to the Commission Secretary via email (secretary@fec.gov) or fax (202-208-3333). Upon receipt of a request, the Commission Secretary shall forward the request or brief to each Commissioner and the General Counsel. Absent good cause, to be determined at the sole discretion of the Commission, exercised by four affirmative votes, late requests will not be accepted.

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 sole discretion and may or may not exercise it as appropriate with respect to the facts and circumstances of each enforcement matter it considers, with or without notice. 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.