FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

July 25, 2013

The Honorable Candace S. Miller
Chairman
Committee on House Administration
U.S. House of Representatives
1309 Longworth House Office Building
Washington, D.C. 20515

The Honorable Robert A. Brady
Ranking Member
Committee on House Administration
U.S. House of Representatives
1309 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Miller and Ranking Member Brady:

Following oversight hearings on November 3, 2011 before the Subcommittee on Elections of the House of Representatives Committee on House Administration, the Commission released a number of documents relating to the enforcement and compliance processes to the public. Those documents are currently available on the Commission website (www.fec.gov).

The Commission voted on July 23, 2013 to release an additional 13 pages that were originally withheld from that production due to privilege concerns. Of the 13 pages, two pages are from the 1997 Enforcement manual (pages 36 and 37) and 11 pages are from the document entitled "Additional Enforcement Materials" (pages 74, 304-310, 357-358 and 547). Two of these documents contain some redactions due to continuing privilege and confidentiality concerns. Finally, the Commission voted to remove the redaction from an additional page (page 170), which was part of the original set of documents. We have enclosed the individual pages with this letter, and have added them back into the documents available online to ensure they retain their context.

Please contact me with any questions at (202) 694-1613.

Sincerely,

Lisa J. Stevenson
Deputy General Counsel for Law

Enclosures

Cc: Hon. Caroline C. Hunter
Hon. Donald F. McGahn II
Hon. Matthew S. Petersen
Hon. Steven T. Walther
Hon. Ellen L. Weintraub
Mr. D. Alec Palmer, Staff Director

B. Legal Provisions Relevant to Commission's Authority to Obtain Injunctions

1. 2 U.S.C. § 437g

Section 437g(a)(2) provides that the action mandated when a person is "about to commit" a violation of the Act is a finding of reason to believe and commencement of an investigation. Moreover, section 437g(a)(1) provides all respondents 15 days to respond to complaints, and the Commission's regulations, at 11 C.F.R. § 111.6, provide that the Commission shall take no vote, other than a vote to dismiss, on a complaint until a response is received or the 15-day period is past. One court has suggested that expedited review that ignores the 15-day period violates the statute. Durkin for U.S. Senate Comm. v. FEC, [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9147, at 51,115 (D.N.H. 1990). Even after a finding of reason to believe, section 437g provides no authority to seek an injunction until the failure of post-probable cause conciliation. 2 U.S.C. § 437g(a)(6).

***SIDEBAR*: ABOUT INJUNCTIONS**

An injunction is simply an order from a court telling a person either to do something or to stop doing it and/or not do it in the future. If the person disobeys the order, the person can be held in contempt of court.

There are three different types of injunctions that courts can grant. Temporary restraining orders, or "TROs", are very short-term, emergency orders to a party to stop doing something until a judge can decide a motion for a preliminary injunction. TROs cannot last longer than ten days, and can be renewed once for an additional ten days. F. R. Civ. P. 65(b). Preliminary injunctions, the injunctions with which this Part of the Enforcement Manual is most concerned, are similar to TROs except that they last longer and cannot be issued without a hearing involving both parties. They preserve the status quo until the final disposition of a case. Permanent injunctions are final relief, based on a court's full-scale adjudication of a case. They require a party to permanently do, or refrain from doing, something (although they can be lifted or modified).

Courts generally apply a four-part test to determine whether a preliminary injunction should be granted in a particular case. While the specifics vary by jurisdiction, the four parts of the test are usually along these lines: (1) Has the party seeking the injunction demonstrated a substantial likelihood that it will win on the merits of the case? (2) Is a preliminary injunction required to prevent irreparable harm to the plaintiff, or to someone else? (3) Would a preliminary injunction cause undue harm to the party to be enjoined? (4) Would the preliminary injunction serve the public interest? However, this test is not absolute. The U.S. Court of Appeals for the D.C. Circuit has noted that a preliminary injunction can be granted either when the plaintiff demonstrates some harm if the preliminary junction were denied and a high likelihood of success on the merits, or when it demonstrates a great deal of harm without one and some likelihood of success on the merits. Cuomo v. NRC, 772 F.2d. 972, 978 (D.C. Cir. 1985).

2. 2 U.S.C. § 437d(a)(6)

Reference to injunctive relief also appears at 2 U.S.C. § 437d, which lists the Commission's organic powers. These include the power to "initiate (through civil actions for injunctive . . . relief) . . . any civil action in the name of the Commission to enforce the provisions of this Act." The question is whether this provision constitutes an independent basis for obtaining an injunction, or whether it is merely in aid of section 437g(a)(6). An examination of other agencies' enabling statutes indicates that section 437d(a)(6) may not provide an independent basis for seeking a preliminary injunction.

Generally, other agencies that seek preliminary injunctions in aid of their enforcement processes have specific statutory authority to do so. For some of these agencies, the authority is an integral part of their enforcement statute, for others, the authority is in a stand-alone statute that is in addition to their regular enforcement procedures. Moreover, cases indicate that where an agency has sought injunctive relief outside the context of a specific enforcement proceeding—just as the Commission might want to seek an injunction under 2 U.S.C. § 437d(a)(6) without beginning the 437g enforcement process—the agency has had stand-alone statutory authority to do so, separate and apart from either the agency's statutory enforcement provisions or its organic powers. By contrast, section 437d(a)(6) is neither part of the Commission's statutory enforcement provision, nor is it a freestanding section dealing only with injunctions.

Thus, it appears that section 437d(a)(6) is more appropriately viewed as part of an organic listing of the Commission's powers rather than as an independent statutory basis for injunctive relief.

3. The All Writs Act

The All Writs Act, 28 U.S.C. § 1651, provides that "the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." In a narrow range of emergencies, the Commission could invoke the All Writs Act to obtain an injunction preserving the jurisdiction of the Commission and of the U. S. District Court which would consider any subsequent enforcement litigation under 2 U.S.C. § 437g(a)(6). See FTC v. Dean Foods Co., 384 U.S. 597 (1966). But cf. Sampson v. Murray, 415 U.S. 61, 76-78 (1974) (narrowing Dean Foods). However, in almost all FECA enforcement proceedings, respondents remain subject to sanction for violating the Act, even if the sanction is not imposed until after the election. Therefore, while a preliminary injunction might prevent further harm from an illegal activity, it would not be necessary to preserve the Commission's jurisdiction over the matter. Situations in which it would be appropriate for the Commission to seek a preliminary injunction under the All Writs Act would be extremely rare and would require that a particular respondent be on the verge of effectively ceasing to exist because of an impending merger, a likely dispersal of assets in an attempt to hide them, or some other similar development.

4. First Amendment Considerations

Unlike restrictions on contributions, restrictions on expenditures "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." Buckley v. Valeo, 424 U.S. 1, 19 (1976). Thus, the First Amendment concerns that so often impact the work of the Commission may be strongest when the question is whether to preliminarily enjoin expenditures—especially expenditures for communications, such as newspaper or broadcast advertisements. Not only are communications for political speech at the "core

CA will require that we use different language in the agreement, language that we have also used in the past to explain a substantial reduction in the CP.

Here is the language we intend to use for the foreseeable future:
In ordinary circumstances, the Commission would seek a substantially higher civil penalty based on the violations outlined in this agreement as well as the mitigating circumstances, including that the Respondents refunded contributions received in violation of 2 U.S.C. § 441b(a) as directed by the Commission's auditors. However, the Commission is taking into account the fact that the Committee is defunct, has very little cash on hand, and has a limited ability to raise any additional funds. Respondents will pay a civil penalty to the Federal Election Commission in the amount of five thousand dollars ($5,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

EMAIL Commissioners Before Closing Letters Are Mailed (SR) 6/14/07

We are slightly modifying our case closing procedure. In all future cases, please send the standard e-mail to Commissioner's offices regarding case closure a few hours before the closing letters go out. This will give the Commissioners some opportunity to respond before notification is sent to complainants and respondents.

Preparing F&LAS for all Dispositions at FGCR Stage (SR) 6/14/07

We discussed the recent changes regarding the use of F&LAs and the placement of FGCRs on the public record. There has been some confusion about this, but one thing that appears clear is that F&LAs should be prepared for all dispositions (RTB, no RTB, and dismissal) at the FGCR stage. This will alleviate the need to place the FGCR on the public record and thus the burden of redacting the FGCR. It will also allow us to include information in the FGCR that may not be appropriate for the public record. We discussed the separate issue of whether F&LAs or some other method should be used to alleviate the need for placing later GCRs on the public record to explain NFA dispositions. We will be following up with GLA for their guidance on this issue.

Supplement Objection Memos by Email (MS) 7/26/07

Ordinarily, Ann Marie would like to have objection memos submitted by COB on the Thursday preceding the Executive Session. If more information becomes available on Friday, the staff attorney can supplement the memo with an e-mail to all recipients of the memo. An exception will be granted if a matter is not even objected to until sometime on Thursday, in which case the memo is due by noon on Friday. In such cases, the staff attorney should send an e-mail by COB Thursday notifying Tommie, Ann Marie, Dora and Cynthia of the fact that there is an objection and that the memo will be forthcoming by noon on Friday.

Requesting Commission Secretary to Make Changes(MS) 7/26/07

The Commission Secretary's Office has expressed concern about minor errors in CAs and F&LAs that the Commission is being asked to approve on an "as is" basis. The Commission Secretary's Office believes that such corrections need to be approved by the Commission via errata or via vote at the Executive Session. All personnel need to show the same vigilance in reviewing and proofreading such attachments, as they put into reviewing and proofreading the main GCRs.

RTB Findings in Millionaire Amendment Cases (SL)9/7/07

We have not been completely consistent in Millionaire's Amendment cases in recommending reason to believe findings as to the candidate; sometimes we have recommended findings of violations of the relevant statutory provisions only and sometimes we have also recommended findings of 11 CFR 400.25, which gives the candidate the responsibility of ensuring that his or her committee timely files the appropriate Form 10s. From now on in these matters, please recommend reason to believe findings as to the candidate only for violating the statutory provisions, although you should continue to cite to section 400.25 in the text.

Meetings with Associate GC to discuss additional recommendations and planned investigation (SL)9/7/07

Ann Marie would like to meet to discuss the "game plan" before we draft GCR #2's or other GCR summarizing investigations and making recommendations so we can resolve the possible judgment calls sooner rather than later

ENFORCEMENT PROCEDURE 2003-9

October 27, 2003

MEMORANDUM

TO: The Commission

FROM: Lawrence H. Norton
General Counsel

Rhonda J. Vosdingh
Associate General Counsel

SUBJECT: Extended Discovery Authority and Status of Enforcement

During the Executive Session on October 15, 2003, the Commission considered a document submitted by this Office entitled "Status of Enforcement." In section three of the document we requested that the Commission "grant OGC greater latitude to conduct investigations." The document stated that under this proposal, "General Counsel's Reports would detail the scope and types of discovery to be undertaken, including the names of any persons known at the time whose testimony we intend to take and those persons to whom we intend to serve interrogatories and document requests – without attaching the specific discovery-related documents to be reviewed and approved by the Commission." Rather than approve specific discovery documents, the Commission would authorize the use of compulsory process in a particular Matter Under Review. OGC's proposal also contemplated that the Commission would be notified before discovery was sent to individual Members of Congress or other prominent persons. The document specifically proposed that OGC "no longer be required to notify the Commission every time we want to issue interrogatories, and then provide the Commission with a copy of those interrogatories. Nor would OGC have to notify the Commission of every subsequent deposition."

During the Executive Session there appeared to be a consensus to allow OGC to proceed with this new approach. The memorandum is intended to memorialize this Office's understanding that we may now proceed with formal discovery as outlined in the "Status of Enforcement" document considered at the October 15, 2003, Executive Session. Based on the discussion at that Executive Session, before any compulsory process is issued it will be subject to the review and approval of the General Counsel, Deputy General Counsel, or Associate General Counsel for Enforcement.

ENFORCEMENT PROCEDURE 2003-8

MEMORANDUM

To: The Commission

James A. Pehrkon
Staff Director

From: Lawrence H. Norton
General Counsel

Gregory R. Baker
Acting Associate General Counsel

Mark A. Goodin
Attorney

Subject: Adverse Inference Based on Failure to Maintain Records Required to be Kept by Regulation

I. Introduction

The Commission recently has addressed certain matters involving the possible application of an adverse inference in the context of a committee's failure to maintain records. We have drafted this memorandum to respond to the issue of whether, and to what extent, the Commission may draw an adverse inference from a committee's violation of the record retention requirements of the Federal Election Campaign Act of 1971, as amended (the "Act"), and the Commission's regulations.

In summary, authority exists for the Commission to draw such an adverse inference. The adverse inference rule provides a tool for courts and agencies to infer that when a party fails to produce relevant evidence within his or her control, then the evidence is unfavorable to that party. This broad principle applies in a variety of evidentiary contexts, including the failure of a party to produce records that it was required to maintain pursuant to a record retention regulation.

II. Analysis

A. The Adverse Inference Rule

The adverse inference rule provides that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *International Union (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972); *see also, Arvin-Edison Water Storage Dist. v. Hodel*, 610 F. Supp. 1206, 1218 n.41 (D.D.C. 1985). The theory underlying this rule is that, all things being equal, "a party will of his own volition introduce the strongest evidence available to prove his case." *International Union (UAW)*, 459 F.2d at 1338. Conversely, if the party fails to introduce such evidence, then the trier of fact may infer that the evidence was withheld because it contravened the position of the party suppressing it. *Id.*

This broad principle of adverse inference applies to a variety of evidentiary circumstances. For example, when a party unreasonably resists a subpoena for relevant testimony or documents, the trier of fact can infer that the refusal to comply with the subpoena indicates that the evidence or testimony would be adverse to the party's position. *See International Union (UAW)*, 459 F.2d at 1338-39. "Indeed, in some circumstances defiance of a subpoena may justify striking a defense ... or completely barring introduction of evidence on the point in question." *Id.* at 1338. In *International Union (UAW)*, the District of Columbia Circuit also held that there was no need for the administrative agency to seek enforcement of the subpoena in court before drawing an adverse inference from the resisting party's failure to comply with it. 459 F.2d at 1338-39 ("adverse inference rule plays a vital role in protecting the integrity of the administrative process in cases where a subpoena is ignored").

Furthermore, the adverse inference rule may be applied in cases where a party fails to offer testimony of its own, or of others under its control, where such testimony would be expected to benefit that party. *See, e.g., Warshawsky & Co. v. NLRB*, 182 F.3d 948, 955 (D.C. Cir. 1999) (union's failure to produce evidence of its members' conversations supported adverse inference against union); *District 65, Distributive Workers of Am. v. NLRB*, 593 F.2d 1155, 1163-64 & n.21 (D.C. Cir. 1978) (administrative law judge properly inferred that testimony of company's missing witnesses would have been unfavorable to the company); *cf. Bufco Corp. v. NLRB*, 147 F.3d 964, 971 (D.C. Cir. 1998) (adverse inference *not* drawn because certain employees who might have testified were not "peculiarly within the power of one of the parties to produce"). Even the Fifth Amendment does not preclude a court in a civil action from drawing an adverse inference against a party who refuses to testify in response to probative evidence offered against him. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *see also, SEC v. International Loan Network, Inc.*, 770 F. Supp. 678, 695-96 (D.D.C. 1991), *aff'd*, 968 F.2d 1304 (D.C. Cir. 1992) (court may draw adverse inference from party's refusal to testify based on Fifth Amendment); *Pagel, Inc. v. SEC*, 803 F.2d 942, 946-47 (8th Cir. 1986) (agency did not err in taking into account adverse inference based

on broker-dealer's invocation of Fifth Amendment privilege against self-incrimination); *Cerrone v. Shalala*, 3 F. Supp. 2d 1174, 1175 n.3, 1180 (D. Colo. 1998) (agency's finding, based in part on adverse inference drawn against disability benefit recipient who invoked Fifth Amendment, was supported by substantial evidence).

Additionally, the adverse inference rule may be applied in cases where a party fails to preserve evidence under its control. Such circumstances may arise where litigation is pending or foreseeable. *See Johnson v. Washington Metro. Area Transit Auth.*, 764 F. Supp. 1568, 1579-80 (D.D.C. 1991), *order amended by* 773 F. Supp. 459 (D.D.C. 1991), *opinion amended by* 790 F. Supp. 1174 (D.D.C. 1991) (court exercised discretion in refusing to draw adverse inference where audio tapes destroyed before it was clear that suit would be filed and where evidence could be obtained through other sources); *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir. 1998) (permissive adverse inference may be drawn where party in control of documents knew of legal claim and knew of document's relevance to claim). Moreover, and as discussed more fully below, an adverse inference may be drawn where a party fails to preserve documents in violation of a record retention requirement. *See, e.g., Webb v. District of Columbia*, 146 F.3d 964, 969-70, 972-74 (D.C. Cir. 1998), *remanded to* 189 F.R.D. 180 (D.D.C. 1999) (reinstating default judgment); *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107 (2d Cir. 2001).

B. Courts and Agencies May Draw an Adverse Inference Based on the Violation of a Record Retention Regulation

As noted above, the broad principle of adverse inference may apply to the particular instance of a party's violation of record retention regulations. *Webb*, 146 F.3d at 969-70, 972-74. In order to draw an adverse inference, the violated regulation must have created a legal obligation for a party to retain particular records. In *Webb*, the district court determined that the employer "knowingly violated" 29 C.F.R. § 1602.31, a regulation mandating that government entities "maintain all personnel files for two years from the making of the record or the date of the action involved...." 146 F.3d at 969-70. Although the district court concluded that default was the only appropriate sanction against the employer for its failure to preserve records in compliance with this regulation, the appellate court remanded the case for consideration of lesser sanctions, such as the drawing of adverse inferences. *Id.* at 972-74. *See also Reddy v. CFTC*, 191 F.3d 109, 121-22 (2d Cir. 1999) (failure of certain commodities traders to comply with the CFTC's reporting requirements "supported an inference [by the administrative law judge] that had the records been kept, they would have been unfavorable to [the traders'] defense").

Some record retention regulations contain exceptions on their face, and thus cannot support an adverse inference. *See, e.g., Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 716 (7th Cir. 1998) (bank did *not* violate record retention regulation where another portion of that regulation provided that inadvertent failure to comply with it did not constitute a violation). In addition, the Second Circuit has interpreted this "legal

obligation" factor to create a duty to retain records only where the party seeking the inference is a member of the "general class" of persons that the regulatory agency sought to protect in promulgating the rule. *Byrnie*, 243 F.3d at 109. For example, a securities record retention regulation would not "create a duty to preserve covered records" for use in an employment discrimination suit. *Id.* at 109. In contrast, EEOC record regulations would provide such a legal obligation. *Id.*

Courts differ on whether a showing of conscious disregard of the record retention requirement or bad faith is necessary to draw an adverse inference. In the District of Columbia Circuit, a party must "consciously disregard[] its obligation" to preserve evidence before a court will sanction such misconduct. *Webb*, 146 F.3d 969 (citing *Shepherd v. American Broad. Cos.*, 62 F.3d 1469, 1481 (D.C. Cir. 1995)) (employer "knowingly violated" 29 C.F.R. § 1602.31). The Second Circuit has held that "intentional destruction of documents" suffices. *Byrnie*, 243 F.3d at 109; *see also Zimmerman v. Associates First Capital Corp.*, 251 F.3d 376, 383-84 (2d Cir. 2001) ("intentional destruction satisfies the *mens rea* requirement").

Other courts require that in order to draw an adverse inference, the party controlling the evidence must act in bad faith. In *Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002), the Seventh Circuit held that, in the absence of bad faith, a violation of an EEOC record retention regulation would not "warrant an inference that the document[s], if produced, would have contained information adverse to the employer's case." "'[B]ad faith' means destruction for the purpose of hiding adverse information," and it is a question of fact for which "the trier of fact is entitled to draw any reasonable inference." *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998) (addressing federal employment record retention regulation). *See also Beniushus v. Apfel*, No. 98-C-0395, 2001 WL 303548, at *6, 8 (N.D. Ill. Mar. 27, 2001) (no adverse inference drawn in light of insufficient evidence to support bad faith violation of federal employment record retention regulation); *Smith v. Borg-Warner*, No. IP-98-1609-C-TG, 2000 WL 1006619, at * 7-9 (S.D. Ind. July 19, 2000) (bad faith violation of federal employment record retention regulation supported adverse inference jury instruction).

Certain circuits appear to permit the drawing of an adverse inference simply by establishing that a party violated a record retention regulation, without reference to the party's state of mind. *See, e.g., Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994) ("because [the employer] violated [29 C.F.R.] § 1602.14 by destroying the tests and records," the disappointed job applicant "was entitled to the benefit of a presumption that the destroyed documents would have bolstered" her employment discrimination case); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1419 (10th Cir. 1987) ("because [the employer] violated [29 C.F.R.] § 1602.14 by destroying the personnel records," the employment discrimination plaintiff was "entitled to the benefit of a presumption that the destroyed documents would have bolstered her case"). Although these courts do not require a showing concerning the state of mind of the party controlling the documents,

they still permit the inference to be rebutted by evidence presented to the factfinder. *See, e.g., Favors*, 13 F.3d at 1239; *Hicks*, 833 F.2d at 1419.

Once a party demonstrates his entitlement to an adverse inference, the extent of such an inference must be determined. Here, too, courts are solicitous toward the prejudiced party. In *Webb*, the D.C. Circuit suggested that the employer's violation of record retention regulations could support expansive adverse inferences, including inferences that the personnel files could have contained "only favorable letters," or that documents in the files would have reflected the employer's "retaliatory" or "discriminatory" intent. 146 F.3d at 973-74 & n.20. The Second Circuit has held that the party invoking the adverse inference "may rely on circumstantial evidence to suggest the contents of destroyed evidence." *Byrnie*, 243 F.3d at 110 (rejecting employer's contention that adverse inference must be "limited to giving the greatest weight possible to other existing evidence favorable to the plaintiff"). It is then a matter for the factfinder to determine, "based on the strength of the evidence presented, whether the documents likely had such content." *Id.*

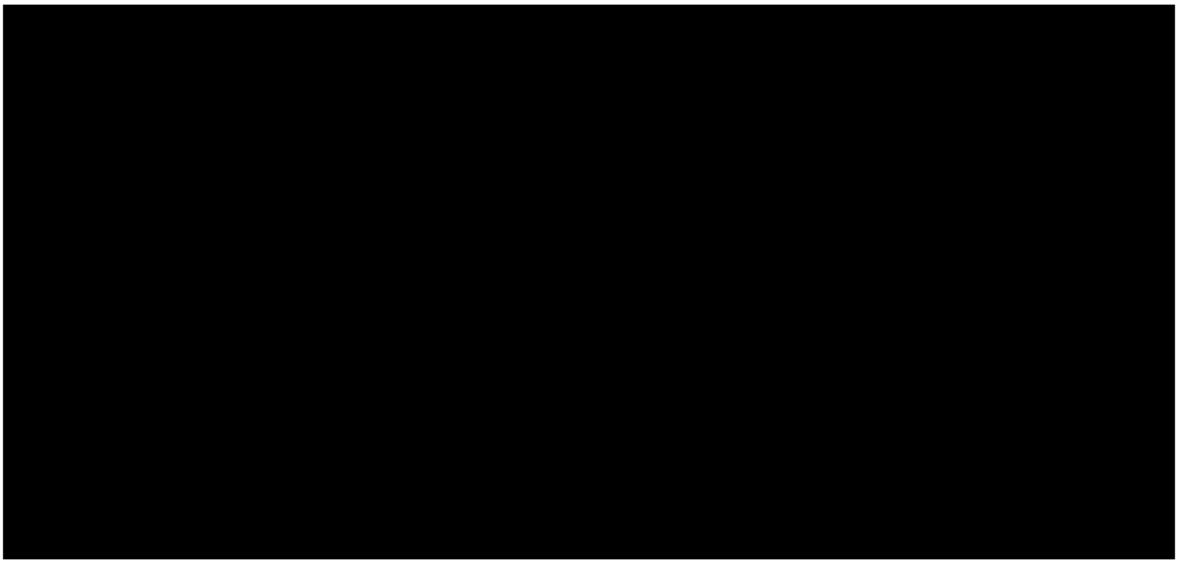
An adverse inference can also be rebutted. While noting in *Webb* that "an adverse inference presumption should not test the limits of reason," the court found that the plaintiff would be entitled to make an argument that was "conceivable, although unlikely"; however, the defendant-employer "would be entitled to attempt to rebut it." 146 F.3d at 974 & n.20. *See also Hicks*, 833 F.2d at 1419 (employee alleging sexual harassment entitled to presumption that records destroyed in violation of regulation "would have bolstered her case," but employer can offer rebuttal evidence, which should be weighed by factfinder on remand); *Favors*, 13 F.3d at 1239 (district court's finding that employer rebutted inference that evidence destroyed in violation of regulation would have bolstered employee's case was not clearly erroneous).

C. The Commission's Reliance on the Adverse Inference Rule

When faced with a person's failure to produce records that were required to be maintained pursuant to record retention regulations, the Commission – as the prejudiced party – should consider drawing an adverse inference. *See Webb*, 146 F.3d at 969-70, 972-74; *Byrnie*, 243 F.3d at 107-10. For example, the Commission could draw an adverse inference in an audit or enforcement matter with respect to the allocation of expenses by a party committee between federal and non-federal accounts. *See* 11 C.F.R. § 106.7 (2002) (regulations promulgated under the Bipartisan Campaign Reform Act of 2002); 11 C.F.R. § 106.5 (2002) (former regulations, expired Dec. 31, 2002). If a state party committee wishes to take advantage of favorable allocation methods for expenditures in connection with certain activity described in Section 106.7, then it must maintain records in accordance with 11 C.F.R. § 106.7(d). If the party committee does not comply with the recordkeeping regulation, then the Commission might infer that the missing records would have been unfavorable to the party committee.

Moreover, the violation of a record retention regulation could support a broad range of "conceivable" adverse inferences. *See Webb*, 146 F.3d at 973-74 & n.20. In the preceding example, if the state party did not retain the records required by the regulation, it would be appropriate to draw an adverse inference that the expenditure at issue involved federal activity. On the other hand, absent further evidence, a political committee's failure to retain records under Section 106.7 for allocation purposes would be unlikely to support an inference that the committee received contributions from prohibited sources.

Ultimately, some evidence (such as the knowledge or intent of the respondent) may be relevant to the Commission (or a reviewing court) in the drawing of an adverse inference. For instance, auditors may be able to explore the explanation as to why records that are required to be retained under the regulations do not exist. In some cases, this Office may need to initiate discovery on that point. Because recollections about the disposition of records are likely to fade with time, it may be appropriate in some cases to expedite a referral from the Audit Division to this Office.



cc: Robert J. Costa
Joseph F. Stoltz
Rhonda J. Vosdingh
Lawrence L. Calvert, Jr.
Richard B. Bader
Rosemary C. Smith

MEMORANDUM

TO: The Commission

FROM: Lawrence M. Noble
General Counsel

BY: Lois G. Lerner
Associate General Counsel

SUBJECT: Revised Procedure for Statements of Reason
in Deadlocked Vote Situations

In externally generated matters where this Office recommends that the Commission proceed against a respondent(s) but the Commission votes against doing so or is deadlocked, a Statement of Reasons is required to be sent to the complainant when the matter is concluded. The current procedure for issuing these Statements is bifurcated. In majority vote situations, this Office forwards a memo explaining the necessity for the Statement and attaches a draft Statement that the Commissioners revise and finalize. In deadlocked vote situations, however, the Statement of Reasons is prepared directly by the Commissioners without this Office providing a draft. It has been this Office's practice in such circumstances to have the staff member assigned to the case contact one or all of the Executive Assistants of the Commissioners who voted against going forward to confirm that a Statement of Reasons is in fact required and, subsequently, to remind the Commissioners' offices if a Statement is not forthcoming within 30 days.

In order to make the procedures used in both situations more consistent and efficient, this Office is adjusting the present process. We will continue to forward draft Statements in majority vote situations. In addition, we will be forwarding a brief memo explaining the necessity for a Statement in all situations -- including deadlocked votes. The memo will note that a Statement is due by a date certain -- 30 days after the Commission's vote which necessitated the Statement. This will provide a consistent vehicle to explain the requirement in all applicable situations.

We have discussed this revised procedure with the Commission Secretary and she has raised no objections to the change. We hope that the implementation of this revised procedure will assist both the Commission and this Office in tracking these Statements and ensuring that they are issued timely.

Attachment
Revised Form 102

FORM 102 (revised January 1997)

MEMORANDUM

TO: The Commission

FROM: Lawrence M. Noble] use this signature block for
General Counsel] option 1 below

BY: >] use this signature block for
Assistant General Counsel] option 2 below

SUBJECT: >[Draft] Statement of Reasons -- MUR >

***OPTION 1**
Use when there is a majority vote not to go forward and attach a Draft Statement:
> [explanation of why a Statement of Reasons is necessary and the background and issues in the case]

A draft Statement of Reasons reflecting the basis for the Commission's action is attached.

Attachment
Draft Statement of Reasons

Staff Assigned: >

***OPTION 2**
Use for deadlocked votes:
On >, 199>, the Commission dismissed the allegations against > in MUR > due to a lack of four affirmative votes to proceed against the respondent(s). Commissioner > made the motion not to adopt the General Counsel's recommendations. As a result of this dismissal, a Statement of Reasons is required. The Statement of Reasons should be ready for issuance by >, 199>, which is 30 days after the Commission's vote necessitating the Statement.

Staff Assigned: >

FORM 102 (revised January 1997) (use numbered paper)

AGENDA DOCUMENT NO. XO1-17

FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 26, 2001

SENSITIVE

MEMORANDUM

TO: The Commission

FROM: Lois G. Lerner
Acting General Counsel

SUBJECT: Modifications to the Enforcement Priority System and Public Financing Enforcement Priority System for Media Exemption Cases

On November 14, 2000, the Commission directed the Office of General Counsel to examine its procedures under the Enforcement Priority System ("EPS") and Public Financing Enforcement Priority System ("EPS II") for handling cases where the media exemption is clearly implicated by the assertions made in the complaint. Specifically, in the context of discussing MURs 4929 (NBC, CBS, *et al.*), 5006 (Hardball), 5090 (Harley Carnes, WCBS) and 5117 (New York Times), Commissioners expressed a desire to minimize the resources allocated to processing reports for matters that clearly fall within the media exemption. The Commission requested OGC to propose a method for quickly disposing of matters clearly falling within the media exemption regulations. *See* 2 U.S.C. § 431(9)(B)(i); 11 CFR §§ 100.7(b)(2) and 100.8(b)(2).

This Office proposes that cases clearly falling within the media exemption would be identified under EPS and EPS II under "Category A. Initial Considerations - Preliminary," as cases falling within the media exemption and, therefore, included in the next case closing report to the Commission,[1] without further consideration of the remaining rating criteria. *See* attached exhibit.

Using the standards set forth in the Commission's regulations, OGC will determine whether the allegations center on communications made by a legitimate media organization that is not owned or controlled by a political party, political committee, or candidate. In the event the allegations in the complaint fall within the criteria, OGC will not rate the case, but instead will recommend that it be closed through EPS or EPS II.

[1] Where a complaint contains allegations in addition to those involving the media exemption OGC will rate the matter.