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FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 22-02-B
AGENDA ITEM
For meeting of February 17, 2022
SUBMITTED LATE

MEMORANDUM

TO: The Commission
The Office of the Commission Secretary

FROM: Allen Dickerson 
Chairman

DATE: February 14, 2022

RE: Proposed Rule of Agency Procedure Concerning the Treatment of
Foreign State Respondents at the Initiation of the Enforcement
Process

The Federal Election Campaign Act of 1971, as amended (the “Act”) grants the Federal Election Commission “exclusive jurisdiction with respect to civil enforcement” of the provisions of the Act. 52 U.S.C. § 30106(b)(1). This authority extends to certain classes of foreign nationals, including any “government of a foreign country,” as well as any “partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.” 52 U.S.C. § 30121(b)(1) (defining “foreign principal” to incorporate the definition found at 22 U.S.C. § 611(b)).

In all enforcement matters, the Office of General Counsel (“OGC”) is required to send each respondent a notification letter concerning the relevant complaint, referral, or allegation. 52 U.S.C. § 30109(a)(1). These letters are a vehicle for “(1) informing the respondent that the Commission has received allegations as to possible violations of the federal campaign laws by the respondent, (2) providing a copy of the complaint or referral document, or in limited circumstances, a summary thereof, and (3) giving the respondent an opportunity to respond in writing in a timely manner.” Guidebook for Complainants and Respondents on the FEC Enforcement Process at 10, Fed. Election Comm’n (May 2012).

After the response period has elapsed, OGC evaluates the complaint and response and determines the matter’s level of priority. *See id.* at 11. If it meets the relevant criteria, the matter is assigned to the Enforcement Division and a First General

Counsel's Report ("FGCR") is drafted containing a recommendation to the Commission as to whether there is "reason to believe" the respondent has "committed or is about to commit a violation of the law over which the Commission has jurisdiction." *See* 52 U.S.C. § 30109(a)(2).

This process is well established. But complexities arise when the respondent in a matter is a foreign respondent, and in particular a foreign state, a political subdivision of a foreign state, a head of state or other foreign official acting in his or her official capacity, or an agency or instrumentality of a foreign state ("foreign state respondent").

The United States has obligations under international law and practice. As an organ of the federal government, the Commission's actions implicate these responsibilities. Because missteps in the arena of foreign affairs can have serious consequences for the interests of the United States and its allies, it is my view that the Commission should apprise the Department of State ("Department") at the inception of enforcement matters involving foreign state respondents.

Accordingly, pursuant to Directive 17, attached is a proposed rule of agency procedure with respect to the treatment of foreign state respondents at the initiation of the enforcement process. I intend to move this document for the Commission's adoption at its meeting on February 15, 2022.

FEDERAL ELECTION COMMISSION

11 C.F.R. Part 111

[Notice 2022-__]

Rule of Agency Procedure Concerning the Treatment of Foreign State Respondents at the Initiation of the Enforcement Process

AGENCY: Federal Election Commission.

ACTION: Rule of Agency Procedure.

SUMMARY: The Federal Election Commission is adopting a procedure concerning the enforcement process in situations where the respondent to a complaint is a foreign state, a political subdivision of a foreign state, a head of state or other foreign official acting in his or her official capacity, or an agency or instrumentality of a foreign state.

DATES: Effective on _____, 2022.

SUPPLEMENTARY INFORMATION: This procedure requires the Commission to adopt a supplemental notification process in matters involving foreign state respondents.

In all enforcement matters in which a foreign state, political subdivision of a foreign state, a head of state or other foreign official acting in his or her official capacity, or any agency or instrumentality of a foreign state is identified as a respondent, the Office of General Counsel (“OGC”), prior to issuing the notification letters required by 52 U.S.C. § 30109(a)(1), will notify the Office of the Legal Adviser at the Department of State (“Department”) of the receipt of the complaint and of the Commission’s statutory notification obligations. This procedure does not alter the Commission’s statutory obligation to issue notification letters to respondents within the period required by 52 U.S.C. § 30109(a)(1).

In such matters, OGC will provide a simultaneous report to the Commission concerning the notification to the Department and will promptly inform the Commission of any subsequent communications between OGC and the Department.

Within forty-five days of receiving a complaint naming a foreign state respondent, OGC will make a recommendation to the Commission as to whether consultation with the Department is appropriate to obtain its views concerning any legal or factual question presented by the matter.

This notice represents a general statement announcing the general course of action that the Commission intends to follow. This rule of agency procedure does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay in 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.