State of Washington
PUBLIC DISCLOSURE COMMISSION
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July 18, 2013

TO: Members, Public Disclosure Commission
FROM: Andrea McNamara Doyle, Executive Director
RE: Compliance Background for Retreat and Status Update

Agenda Item

At the July 25 meeting, the Commission is scheduled to receive background information about the compliance case classification system and a status report on pending complaints and investigations. This information is being provided in advance of the Commission's August retreat to allow you some time to consider it as you develop your direction and priorities for agency's Strategic Plan.

Background

The Compliance staff has long used a classification system to categorize cases as "routine," "moderately complex," and "complex." The classifications do not affect *how* the matters are treated or processed, but rather are used as a way to help track staff workload and agency performance measures that are focused on *how long* it takes to complete investigations.

Phil Stutzman, Director of Compliance, will provide a presentation explaining the criteria used to classify cases into the three categories, and will provide examples of each type. He will also provide information about the numbers of each category of cases the Commission has historically received over the course of recent years.

Also at the July 25 meeting, I will discuss the possibility of developing a PDC Compliance and Enforcement Manual. The purposes of such a manual would be twofold: to aid Commission staff in the consistent, efficient, and fair administration of their responsibilities under Chapter 42.17A RCW and Title 390 WAC; and to inform the public about the agency's current enforcement procedures. It would not be intended to bind the Commission, or to create any new rights, benefits, or defenses enforceable by any party or other person. It would not be intended to replace or supersede existing laws, regulations, or Commission interpretations, or change any of their meanings. Rather, it would provide general information about the Commission's enforcement process and resources available to staff and the public, describe procedures and issues that may arise at various points during the enforcement process, and provide guidance to staff for ensuring consistent, efficient, and fair processing of compliance matters.

Attached to this memorandum is a copy of the Federal Election Commission Office of General Counsel's (OGC) Enforcement Manual, which was recently released in June 2013 to replace its 1997 manual. While it is much more comprehensive than what the PDC would likely require, it provides an example of the type of information that could be included in a PDC Compliance and Enforcement manual. Other state campaign finance agencies may also have enforcement manuals that could be used as resources for the development of a PDC manual.

Finally, as requested at the June meeting, I will be providing the Commission a more detailed report on the status of pending complaints and investigations.

Enclosure: Federal Election Commission OGC Enforcement Manual

OGC Enforcement Manual

Office of the General Counsel

Federal Election Commission

June 2013

LIST OF ABBREVIATIONS OFTEN USED IN THIS MANUAL

ABA	American Bar Association
ADR(O)	Alternative Dispute Resolution (Office)
AF	Administrative Fines
AGC	Associate General Counsel for Enforcement
AO	Advisory Opinion
AR	Audit Referral (Case designation applied to matters the Audit Division refers to OGC)
CA	Conciliation Agreement
CELA	(Office of) Complaints Examination and Legal Administration
CMS	Case Management System (also known as "Law Manager")
DOC	Designation of Counsel
DOJ	Department of Justice
E&J	Explanation and Justification for Commission Regulation
ECM	Enterprise Content Manager (document management system)
EPS	Enforcement Priority System
EQS	Enforcement Query System
F&LA	Factual and Legal Analysis
FEC	Federal Election Commission
FECA	Federal Election Campaign Act (also referred to as the "Act")
First GCR	First General Counsel's Report
FOIA	Freedom of Information Act
FTR	Fast Track Resolution (an aspect of the Commission's *sua sponte* policy)
GC	General Counsel
GCR	General Counsel's Report
IRC	Internal Revenue Code
MOU	Memorandum of Understanding
MUR	Matter Under Review
NFA	No Further Action
OAR	Office of Administrative Review
OGC	Office of General Counsel
OSO	Opening Settlement Offer
PCC	Probable Cause (to Believe) Conciliation
PCTB	Probable Cause to Believe
PPCC	Pre-Probable Cause to Believe Conciliation
Pre-MUR	Case designation applied to matters such as *sua sponte* submissions and matters referred to the Commission from another agency or entity
RAD	Reports Analysis Division
RFAI	Request for Additional Information (issued by Reports Analysis Division)
RTB	Reason to Believe
RR	RAD Referral (Case designation applied to matters RAD refers to OGC)
SOL	Statute of Limitations
SOR	Statement of Reasons
VBM	Voting Ballot Matters

COMMISSION DIRECTIVES AND OGC ENFORCEMENT DOCUMENTS REFERENCED IN THIS MANUAL

Commission Directives

Commission Directive 6 – Handling of Internally Generated Matters, www.fec.gov/directives/directive_06.pdf
Commission Directive 17 – Circulation Authority; Agenda Deadline Procedures, www.fec.gov/directives/directive_17.pdf
Commission Directive 52 – Circulation Vote Procedures, www.fec.gov/directives/directive_52.pdf
Commission Directive 68 – Enforcement Procedures, www.fec.gov/directives/directive_68.pdf
Commission Directive 70 – Processing Audit Reports, www.fec.gov/directives/directive_70.pdf

OGC Enforcement Forms

Designation of Counsel Form, www.fec.gov/em/FEC_Designation_of_Counsel_Form.pdf
Sunshine Act Form

Enforcement Form 9 - Notification to Respondent of a Complaint
Enforcement Form 9A - Notification to Additional Respondents Not Named in a Complaint or Submission
Enforcement Form 11 – Acknowledgement of Receipt of Additional Material
Enforcement Form 11A – Notification of Defective Amendment
Enforcement Form 17 - Extension of Time Agreement
Enforcement Form 22 – Notification to Respondent of No Reason to Believe; Externally Generated Matter
Enforcement Form 23 – Notification to Respondent; Decline to Open a Matter; Internally Generated Matter
Enforcement Form 24 – Notification to Complainant of No Reason to Believe
Enforcement Form 25 – Notification to Respondent of Insufficient Votes to Find Reason to Believe; Externally Generated Matter
Enforcement Form 25A – Notification to Respondent of Partial Closing of a Matter
Enforcement Form 26 – Notification to Complainant of Insufficient Votes to Find Reason to Believe
Enforcement Form 27A – Notification to Respondent of Reason to Believe/Pre-Probable Cause Conciliation; Internally Generated Matter
Enforcement Form 28A – Notification to Respondent of Reason to Believe/Pre-Probable Cause Conciliation; Externally Generated Matter
Enforcement Form 31 – Notification to Respondent of Dismissal; Externally Generated Matter
Enforcement Form 32B – Notification to Complainant of Dismissal
Enforcement Form 34 – Notification to Respondent of No Further Action After Previous Reason to Believe Finding
Enforcement Form 35A – Notification to Complainant of No Further Action After Previous Reason to Believe Finding
Enforcement Form 37 – Notification to Respondent of Commission's Approval of Pre-Probable Cause Conciliation
Enforcement Form 38 – Letter to Respondent; Failure to Respond to Pre-Probable Cause Conciliation
Enforcement Form 38A – Letter to Respondent; Decline Pre-Probable Cause Conciliation
Enforcement Form 40 - Compulsory Process Respondent Cover Letter
Enforcement Form 41 - Compulsory Process Non-Respondent Cover Letter
Enforcement Form 43 - Letter to U.S. Marshal's Service
Enforcement Form 44 – Request for U.S. Postal Service Assistance

Enforcement Form 45 – Probable Cause Brief Cover Letter; Non-Knowing and Willful
Enforcement Form 45A – Probable Cause Brief Cover Letter; Knowing and Willful
Enforcement Form 50 – Notification to Respondent of Probable Cause and No Further Action
Enforcement Form 51 – Notification to Complainant of Probable Cause and No Further Action
Enforcement Form 53 – Notification to Respondent of Commission Rejection of Counteroffer to Probable Cause Conciliation Agreement; Further Conciliation
Enforcement Form 54 – Notification to Respondent of Commission Final Offer
Enforcement Form 55 – Notification to Respondent of Matter Closed with Signed Conciliation Agreement
Enforcement Form 56 – Notification to Complainant of Matter Closed with Signed Conciliation Agreement after Pre-Probable Cause Conciliation
Enforcement Form 57 – Notification to Complainant of Matter Closed with Signed Conciliation Agreement after Probable Cause Conciliation
Enforcement Form 58 – Statement of Reasons Cover Letter to Complainant
Enforcement Form 58A – Statement of Reasons Cover Letter to Respondent
Enforcement Form 59 – Notification to Referring Agency
Enforcement Form 60 –Notification to Respondent that Matter has now Closed for All Respondents
Enforcement Form 60B –Notification to Complainant that Matter has been Resolved Through Litigation
Enforcement Form 60D - E-Mail Notifying Commission that Matter has Closed
Enforcement Form 61 – Notification to Respondent that Commission has Authorized Suit
Enforcement Form 64 – E-Mail Notifying Commission of Request for Probable Cause Hearing
Enforcement Form 64A – E-Mail Notifying Commission of Insufficient Votes for Probable Cause Hearing
Enforcement Form 64B – Letter to Respondent Denying Request for Probable Cause Hearing
Enforcement Form 65 – Letter to Respondent Granting Request for Probable Cause Hearing
Enforcement Form 66 – Letter to Respondent Regarding Availability of Probable Cause Hearing Transcript
Enforcement Form 68 – First General Counsel's Report; Internally Generated Matter
Enforcement Form 69 – Factual & Legal Analysis
Enforcement Form 70 – First General Counsel's Report; Externally Generated Matter
Enforcement Form 74 – General Counsel's Report Recommending Pre-Probable Cause Conciliation
Enforcement Form 75 – General Counsel's Report Recommending Against Request for Pre-Probable Cause Conciliation
Enforcement Form 76A – Proposed Pre-Probable Cause Conciliation Agreement
Enforcement Form 77 – Proposed "Fast Track Resolution" Conciliation Agreement
Enforcement Form 79 - Deposition Subpoena
Enforcement Form 79A - Subpoena *Duces Tecum* (for one individual)
Enforcement Form 79B - Subpoena *Duces Tecum* (for other than one individual)
Enforcement Form 80 - Subpoena to Produce Documents
Enforcement Form 81 - Order to Submit Written Answers
Enforcement Form 82 - Subpoena to Produce Documents and Order to Submit Written Answers
Enforcement Form 83 – Informal Request for Documents or Additional Information
Enforcement Form 84 – Compulsory Process Instructions and Definitions
Enforcement Form 85 – Affidavit; Assertion of Fifth Amendment Privilege
Enforcement Form 85 – Affidavit Cover Letter; Assertion of Fifth Amendment Privilege
Enforcement Form 86A – Notification to Account Holder of Financial Institution Subpoena and Order (if represented by counsel)
Enforcement Form 86B – Notification to Account Holder of Financial Institution Subpoena and Order (if not represented by counsel)
Enforcement Form 86C - Motion to Quash Financial Institution Subpoena and Order

Enforcement Form 86D – Affidavit Supporting Motion to Quash Financial Institution Subpoena and Order
Enforcement Form 86E - Financial Institution Subpoena and Order Cover Letter
Enforcement Form 86F - Financial Institution Subpoena and Order
Enforcement Form 86G - Right to Financial Privacy Act of 1978 Certificate of Compliance and Cover Letter
Enforcement Form 90 – Probable Cause Brief
Enforcement Form 92 – Notice to Respondent of OGC's Probable Cause Recommendation
Enforcement Form 92A – Memorandum to the Commission Regarding OGC's Probable Cause Recommendation; Discussion of Proposed Conciliation Agreement
Enforcement Form 93 – Proposed Probable Cause Conciliation Agreement
Enforcement Form 94 – Recommendation Memorandum to Accept Counteroffer to Probable Cause Conciliation Agreement
Enforcement Form 95– Recommendation Memorandum to Reject Counteroffer to Probable Cause Conciliation Agreement; Counterproposal
Enforcement Form 96 – General Counsel Report Recommending Suit Authorization
Enforcement Form 96A – General Counsel Report; Recommendation to Enforce Subpoena or Order
Enforcement Form 97 – Memorandum to Commission Regarding Lengthy Extension Request
Enforcement Form 99 – Withdrawal Memorandum
Enforcement Form 99B – Errata Memorandum
Enforcement Form 104 – Notification of Failure to Pay a Civil Penalty
Enforcement Form 104A – Notification of Failure to Submit a Required Installment Payment
Enforcement Form 105 –Waiver of Confidentiality Memorandum
Enforcement Form 106 – Acknowledgement to Respondent of Waiver of Confidentiality
Enforcement Form 110 – Affidavit
Enforcement Form 114 – Request for Witness Fees
Enforcement Form 120 - Acknowledgement of Receipt of Probable Cause Brief
Enforcement Form 122 – Letter to Court Reporter; Release of Transcript
Enforcement Form 123 – Denial of Request for Transcript
Enforcement Form 129 - Financial Disclosure Form; Financial Hardship
Enforcement Form 131 – Form of Tolling Agreement
Enforcement Form 132 – Form of Tolling Agreement; Extension of Time to Respond
Enforcement Form 133 – Form of Tolling Agreement; Extension of Conciliation Process

1. INTRODUCTION

1.1 Purpose and Organization of the Manual

The purpose of this manual is to aid the attorneys and staff of the Enforcement Division in the Office of the General Counsel ("OGC") of the Federal Election Commission ("FEC" or "Commission") in the consistent, efficient and fair administration of their responsibilities under the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA"), Chapters 95 and 96 of Title 26 of the United States Code, and Title 11 of the Code of Federal Regulations.

This manual is an internal guide to the core components of the enforcement process for attorneys and staff. The manual does not bind the Commission, nor is it intended to, and does not create any rights, benefits, or defenses, whether substantive or procedural, that are enforceable by any party involved in an enforcement matter or that are enforceable by any other person or entity, whether or not the person or entity is involved in any way, directly or indirectly, in an enforcement matter. It does not replace or supersede the law or change its meaning. This manual will be updated periodically; accordingly, the information presented herein is subject to change at any time without notice.

This manual contains eight sections and its organization follows the procedural stages of the enforcement process. Section One summarizes the Commission's compliance activities. It also includes a brief explanation of the enforcement process, a flowchart, a brief description of OGC, and organizational charts for OGC and the Commission. Section Two provides general information about resources available to attorneys and staff and discusses procedures and issues that may arise at numerous points during the enforcement process. Sections Three through Eight describe the various stages of the enforcement process in detail and provide guidance on issues pertaining to the individual stages.

1.2 The Commission, Its Compliance Activities, and Enforcement's Role

The FEC is the independent federal regulatory agency vested with the exclusive authority and responsibility for the civil enforcement of the federal campaign finance laws that are found in the Act, 2 U.S.C. §§ 431-57; the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-13; the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-39; and Title 11 of the Code of Federal Regulations. The FEC has jurisdiction over the financing of campaigns for President, Vice President, the U.S. Senate, and the U.S. House of Representatives.

The Commission's core functions include: (1) administering the public disclosure system for campaign finance activity; (2) providing information and policy guidance on campaign finance laws; (3) encouraging voluntary compliance with campaign finance laws; and (4) enforcing the campaign finance laws through audits, investigations, and civil litigation.

1.2.1 The Commissioners

The Commission consists of six Commissioners, no more than three of whom may be affiliated with the same political party, who are appointed by the President and confirmed by the Senate. The Chair and Vice Chair of the Commission, who may not be from the same political party, serve in those positions for one calendar year. The Commissioners serve in these capacities on a rotating basis, with the position of Chair alternating between the different parties. The Commissioners serve full time and are responsible for administering and enforcing the Act. They meet in closed sessions to discuss matters that, by law, must remain confidential, and in meetings open to the public. At both the open and the closed meetings,

the Commission formulates policy and votes on substantive legal and administrative matters that come before it.

1.2.2 The Commission's Compliance Activities

The Commission discharges its responsibility of ensuring compliance with the Act and regulations through a wide range of activities. Among other things, the Commission:

- **Facilitates disclosure** by publishing a variety of explanatory materials, issuing policies and procedures, and answering compliance questions from the public;
- **Publishes reports** filed by political committees and other entities and makes information from those reports available to the public in a variety of formats;
- **Clarifies the law** by promulgating regulations, issuing AOs, announcing final policies and guidance, publishing its findings from certain compliance and enforcement matters (including documents from closed matters), and hosting conferences and workshops;
- **Enforces the law** by reviewing reports filed by political committees and other entities for compliance with the Act and seeking appropriate clarifications or amendments; authorizing audits; evaluating complaints and information obtained in the normal course of carrying out its supervisory responsibilities; authorizing investigations; conciliating apparent violations of the Act and regulations; authorizing civil suit for those matters that do not conciliate; and, on occasion, cooperating with DOJ and other government agencies on matters involving overlapping jurisdiction.

1.2.3 What Role Does the Enforcement Division Play?

The Enforcement Division is responsible for overall enforcement of the Act, with the exception of: (1) administrative fines ("AF") for certain disclosure reports that are filed late or not at all; and (2) matters that are handled within the Alternative Dispute Resolution Office ("ADRO"). Consistent with procedures set forth in the Act, the Enforcement Division makes recommendations as to whether there is reason to believe ("RTB") a violation has occurred and whether an investigation should commence. If it is determined that there is RTB, the Commission may authorize OGC to conduct an investigation or negotiate a conciliation agreement ("CA"), which may include civil penalties and other remedies, to resolve matters with respondents. *See* 11 C.F.R. § 111.7-.18. If an enforcement matter does not conciliate during the administrative process, the Commission may authorize suit in district court, at which point the matter is transferred to the Litigation Division. *See* 11 C.F.R. § 111.19.

1.2.4 Other Commission Divisions with Enforcement Duties

1.2.4.1 Alternative Dispute Resolution Office

The Commission established ADRO to promote compliance with the federal election laws by encouraging settlements separate from the general enforcement process. In most enforcement matters where conciliation is involved, the Commission has already voted to find RTB that a violation has occurred or is about to occur. In Alternative Dispute Resolution ("ADR"), a settlement is generally

reached before any finding by the Commission since ADRO does not have an investigative capacity. ADRO usually handles matters where there is no dispute as to the material facts and where there is no need for an investigation. ADR tends to place emphasis on remedial measures focused on future compliance, such as hiring compliance specialists or having persons responsible for FEC disclosure attend Commission educational conferences, but ADRO also negotiates civil penalties, subject to approval by the Commission.

ADR is an option available only in limited instances based on criteria approved by the Commission. If the respondent and ADRO are able to reach a mutually acceptable settlement, ADRO presents a signed agreement to the Commission for approval. All ADR settlements are placed on the public record and are available for viewing on the FEC website. They do not serve as precedent for subsequent enforcement actions. If the respondent and ADRO are unable to reach a settlement during negotiations, the case may be sent to OGC for formal enforcement action.

1.2.4.2 Administrative Fines

The Administrative Fines (AF) process includes matters involving the failure of a political committee to: (1) file reports on time; (2) file reports at all; or (3) file 48-hour notices of contributions. 2 U.S.C. § 437g(a)(4)(C); 11 C.F.R. §§ 111.30-.46. The Commission created the AF program pursuant to amendments to the Act authorizing the Commission to impose fines for reporting violations calculated using published schedules. *See* 2 U.S.C. § 437g(a)(4)(C). The Reports Analysis Division ("RAD") and the Office of Administrative Review ("OAR") administer the AF program.

Under the AF regulations, if the Commission finds RTB that a committee violated the Act, the Commission sends a letter to the committee containing the factual and legal basis for its finding and the amount of the calculated fine. RAD administers this part of the process. Fine schedules are published in the AF regulations, and all fines are calculated using the formulas in these schedules. *See* 11 C.F.R. § 111.43. Unlike enforcement matters handled through OGC or ADRO, the penalties assessed through the AF program are not subject to negotiation. The Commission has established procedures permitting respondents to challenge the imposition of an administrative fine based on specific defenses. OAR handles the challenge process and forwards a written recommendation to the full Commission and to the respondent. After reviewing the respondent's written response and the recommendation from OAR, the Commission makes a final determination. 11 C.F.R. §§ 111.35-.37. A committee may challenge the Commission's final determination by filing suit in U.S. District Court. 11 C.F.R. § 111.38.

1.2.4.3 Office of Complaints Examination and Legal Administration

The Office of Complaints Examination and Legal Administration ("CELA") processes incoming complaints and referrals. In addition, it rates cases under the Commission's Enforcement Priority System ("EPS") and drafts General Counsel's Reports ("GCRs") with closure recommendations under EPS. Some of these reports include recommendations that the Commission remind respondents of provisions of the Act or regulations. For more information about CELA, see Section 1.5.1.

1.2.5 The Commission's Relationship with the Department of Justice in the Enforcement of the Act

The Act provides that the Commission "shall have exclusive jurisdiction with respect to the civil enforcement" of the provisions of the Act and Chapters 95 and 96 of Title 26 of the U.S. Code. 2 U.S.C. § 437c(b)(1). Jurisdiction for criminal enforcement of the Act and Chapters 95 and 96 of Title 26 resides with the Department of Justice ("DOJ"). DOJ's Public Integrity Section generally supervises criminal

prosecutions of violations of the Act, and it publishes a comprehensive *"Election Crimes Manual," available at* http://www.justice.gov/criminal/pin/docs/electbook-rvs0807.pdf, which may be useful to attorneys who are handling cases with overlapping criminal issues.

In December 1977, the Commission and DOJ entered into a Memorandum of Understanding ("MOU") relating to their respective law enforcement jurisdictions and responsibilities. 43 Fed. Reg. 5,441 (Feb. 8, 1978).

1.2.6 The Commission's Relationship with Other Agencies; Pre-emption of State Law

In certain instances, the Commission's civil jurisdiction may coincide or overlap with that of another federal agency. In at least one instance, the Act limited another agency's ability to regulate activity that the Act also regulates. *See Galliano v. U. S. Postal Serv.*, 836 F.2d 1362, 1367 (D.C. Cir. 1988) (holding that the Postal Service, in its enforcement of 39 U.S.C. § 3005, may not impose constraints on the names or disclaimers of organizations mailing solicitations for political contributions beyond those imposed by the Act). The Act also provides that its provisions and the rules promulgated under the Act supersede and pre-empt provisions of state law with regard to elections for federal office. 2 U.S.C. § 453; 11 C.F.R. § 108.7; *see also Weber v. Heaney*, 995 F.2d 872, 877 (8th Cir. 1993) (holding that the Act pre-empts the Minnesota Congressional Campaign Reform Act, under which Congressional candidates could agree to limit campaign expenditures in exchange for state funding). The Act, however, generally does not supersede state law with respect to elections for state and local office. *See* 11 C.F.R. § 108.7.

1.3 An Overview of the Enforcement Process

This subsection provides a general overview of the enforcement process; it is not intended to be exhaustive. The Act's provisions relating to the enforcement process are set forth at 2 U.S.C. § 437g, and the associated regulations are found at 11 C.F.R. Part 111, Subpart A. The Commission has approved and published a description of the enforcement process designed for the public, the *Guidebook for Complainants and Respondents on the FEC Enforcement Process, available at* http://www.fec.gov/em/respondent_guide.pdf. The enforcement process contains several stages, and a matter cannot proceed to the next stage unless at least four Commissioners vote to proceed.

1.3.1 How the Process Begins

The process begins in one of five ways: (1) the Commission receives a complaint from the public; (2) another agency or entity refers a matter to the Commission for possible enforcement action (known as an "external referral"); (3) the Audit Division or RAD refers a political committee to OGC for possible enforcement action (known as an "internal referral"); (4) the Commission receives a *sua sponte* submission, that is, an entity voluntarily self-reports an apparent violation of the Act or regulations to the Commission; or (5) under 2 U.S.C. § 437g(a)(2), 11 C.F.R. § 111.8 and Commission Directive 6, the Commission internally generates[1] a matter based on information ascertained in the normal course of carrying out its supervisory responsibilities.

1.3.2 Notice to Respondents and Opportunity to Respond

CELA notifies the respondents of their opportunity to respond in writing to the allegations within 15 days from the date of receipt of the Commission's notice and to explain why the Commission should take no action on the complaint. 11 C.F.R. § 111.6(a). The notice includes a designation of counsel (DOC) form on which the respondents may identify the counsel representing them in the matter. Both the respondent and any counsel must sign the form. Once a respondent designates counsel, Enforcement attorneys and staff should communicate only with that counsel. In the case of political committees, a separate DOC is not necessary for the treasurer unless the treasurer has potential personal liability or designates separate counsel.

1.3.3 Matter is Assigned to Commission Staff

After the Commission receives a response, or after the time to file a response elapses, the matter may be directed to the Enforcement Division for action, provided the matter meets certain criteria under EPS. In general, matters that are deemed high priority under EPS (generally those reflecting such factors as a substantial amount of activity involved, high legal complexity, the presence of possible knowing and willful intent, and potential violations in areas that the Commission has set as priorities) are preliminarily assigned to the Enforcement Division. Other matters are referred to ADRO for appropriate action, and matters not warranting the further use of Commission resources are recommended for dismissal.

1.3.4 Preparation of General Counsel's Report

Once a matter is assigned to an Enforcement attorney, the attorney reviews the complaint in externally generated matters or other source materials for internally generated matters, plus any

[1] "Internally generated matters" include internal and external referrals, *sua sponte* submissions, and other matters described in 11 C.F.R. § 111.8 and Commission Directive 6. "Externally generated matters" are based on complaints.

responses, and relevant information ascertained in the normal course of carrying out the Commission's supervisory responsibilities, which may include press accounts and publicly available information. The attorney, on behalf of the General Counsel, then prepares a report to the Commission known as a General Counsel's Report ("GCR"), which contains recommendations for Commission action. *See* Sections 2 through 4.

The First GCR in a complaint-generated matter will usually recommend that the Commission take one of the following actions regarding each potential violation: (1) find RTB that a violation either occurred or is about to occur; (2) find no RTB; (3) dismiss as a matter of prosecutorial discretion; or (4) dismiss with a cautionary message to the respondent regarding its legal obligations under the Act or Commission regulations. In an internally generated matter, the First GCR will make an initial recommendation whether the Commission should open a Matter Under Review ("MUR"). If the recommendation is to open a MUR, the First GCR will also recommend the Commission find RTB. On occasion, the Commission has dismissed matters immediately after opening MURs so that documents from the matters could be placed on the public record.

1.3.5 Commission Consideration of General Counsel's Report

The First GCR is then sent, or "circulated," to the Commissioners for a vote on OGC's recommendations. As noted earlier, four affirmative votes are needed for the Commission to take action. For more information about the Commission voting procedures, see Sections 4.5.5.3 and 4.6.1. If the Commission finds no RTB or dismisses as to a potential violation, the process ends as to that aspect of the matter. Similarly, if the Commission declines to open a MUR in an internally generated matter, the entire process ends. If, however, the Commission finds RTB as to a violation, the Commission will authorize OGC either to investigate the violation or try to resolve the matter through pre-probable cause conciliation ("PPCC").

1.3.6 Notification to Respondent of Commission Findings

Following the Commission's vote on the General Counsel's recommendations, the respondent is notified of the Commission's findings, and if the case is closing at this stage, the complainant is also notified of the Commission's action closing the matter. If the Commission votes to find RTB, the complainant is not notified until the case closes because the Act requires that notifications to and investigations of respondents be kept confidential while the case is active.

1.3.7 Commission Investigation and Pre-Probable Cause Conciliation

During an investigation, *see* Section 5, OGC may seek to discover the facts through informal means, such as interviewing witnesses, or through Commission-approved compulsory process, such as a subpoena for documents or deposition. Once the investigation is complete, OGC prepares and circulates a GCR to the Commission presenting the relevant evidence and making appropriate recommendations. Usually, the GCR will recommend that the Commission either authorize PPCC or close the file. If the Commission authorizes PPCC, the case proceeds as described in the next paragraph. If the Commission decides to close the file, the case ends as to that respondent, or it may end entirely.

During PPCC, *see* Section 6, OGC will attempt to reach an agreement with the respondent to settle the matter. OGC will send the respondent a Commission-approved CA. Most CAs require the payment of a monetary civil penalty, and many require the respondent to take some form of remedial action. PPCC is a voluntary step; neither the Commission nor a respondent is required to participate. A respondent, however, may request PPCC. If the respondent wants to conciliate, and OGC and the

respondent can agree on the CA's terms, OGC submits the negotiated CA to the Commission. A respondent may also ask OGC to present a specific counter-offer to the Commission, even if OGC does not recommend that the Commission accept it. If four or more Commissioners accept the negotiated CA or a respondent's counter-offer, the process ends as to that respondent.

1.3.8 Probable Cause to Believe

If PPCC fails or was not attempted, the case may proceed to the PCTB stage. *See* Section 7. This stage begins when OGC serves a notification and brief on respondent with its recommendation as to whether the Commission should find PCTB that a violation occurred or is about to occur. OGC also notifies the respondent of the opportunities to request a hearing on PCTB and to request the disclosure of documents from OGC's investigative file. The respondent may file a Reply Brief setting forth its position on the factual and legal issues of the case. The respondent's Reply Brief may also include a request for a PCTB hearing, which will be held if two Commissioners vote to grant the request.

After the respondent files a Reply Brief and the PCTB hearing, if any, is held, OGC notifies the Commission in writing whether it intends to proceed with the recommendation set forth in its brief or whether it is withdrawing that recommendation. OGC serves this notification, known as the OGC Notice, on the respondent. The respondent may then request to file a Supplemental Reply Brief. The Commission reviews the initial briefs, the OGC Notice, and any Supplemental Reply Brief, and makes a finding of PCTB, no PCTB, or No Further Action ("NFA"). If the Commission finds no PCTB or votes to take NFA, the case is closed. If the Commission finds PCTB, it is statutorily required to conciliate with the respondent for at least 30 days, but not more than 90 days. If the Commission finds PCTB within 45 days before any election, it is required to conciliate for 15 days from the date of the finding. Otherwise, probable cause conciliation ("PCC") proceeds in the same manner as during PPCC. If PCC succeeds and the Commission accepts the negotiated CA, the case is closed as to the conciliating respondent.

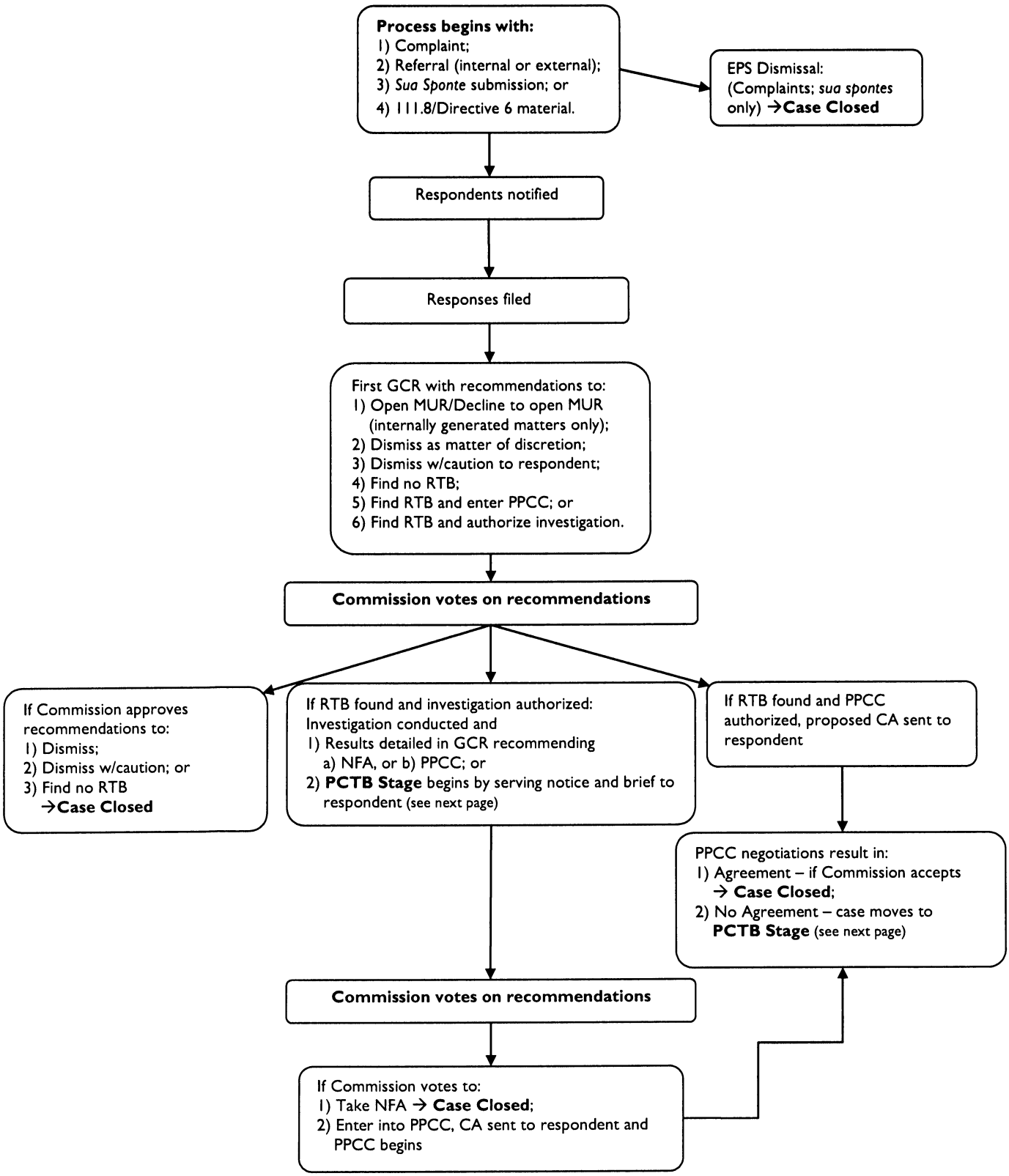
1.3.9 Commission Authorization to File Civil Suit

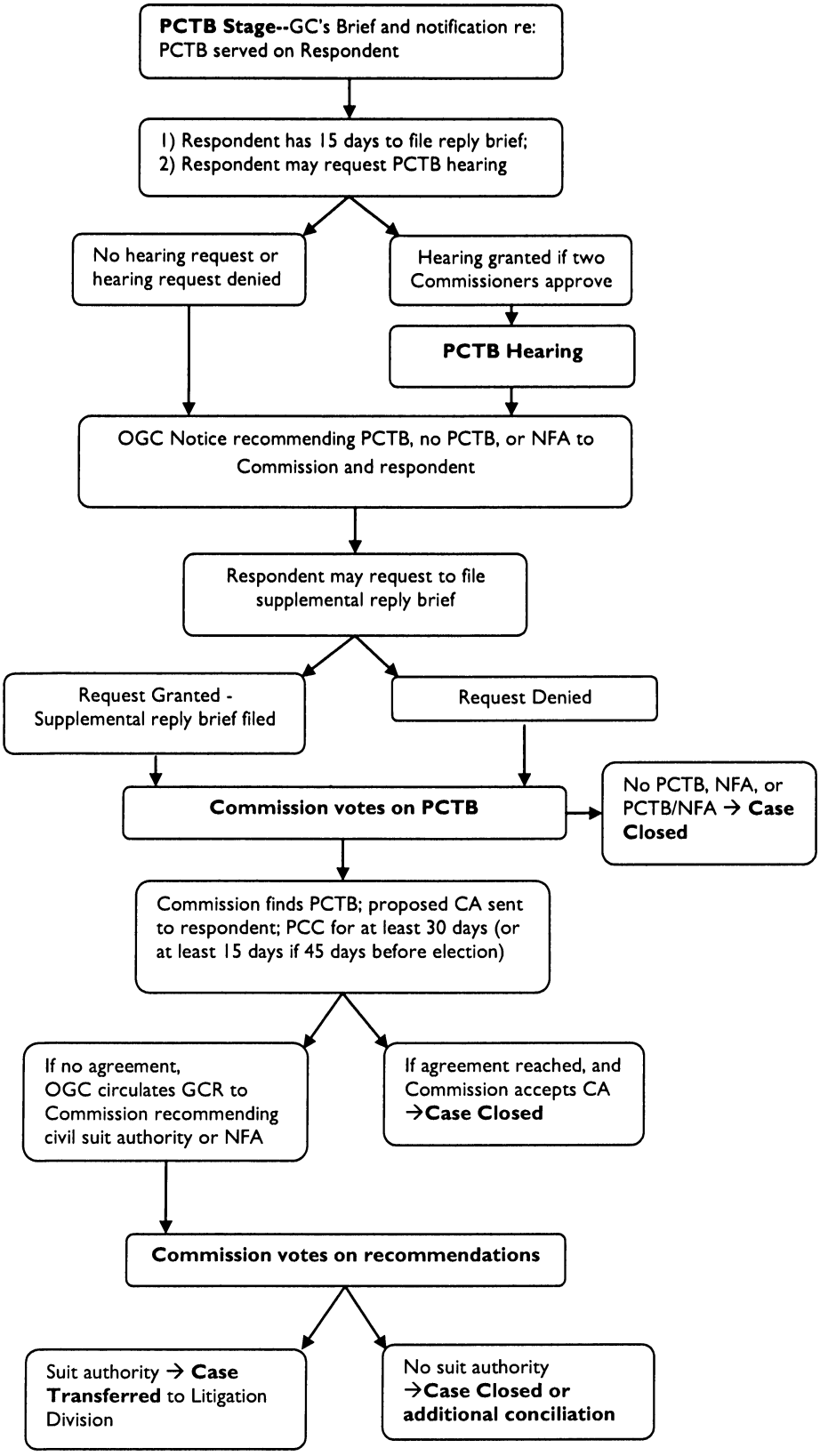
If the case does not conciliate, the matter moves to the final stage of the enforcement process. OGC circulates a GCR to the Commission either recommending that it authorize the filing of a civil suit against the respondent in federal court, or that the Commission take NFA and close the case. If the Commission authorizes a civil suit, the case is transferred to OGC's Litigation Division. If it does not authorize litigation, or it approves OGC's recommendation to take NFA, the case is closed as to that respondent. Occasionally, the Commission will direct OGC to continue conciliating before authorizing suit.

Once the Commission votes to close the entire file, OGC notifies the respondent and the complainant in writing. In complaint-generated matters and in any matter in which the Commission has voted to open a MUR, the Commission places appropriate documents from the case file on the public record at the appropriate time. *See* Section 8.

FLOW CHART BEGINS ON NEXT PAGE

1.4 Flow Chart of the Enforcement Process




PCTB Stage--GC's Brief and notification re: PCTB served on Respondent
1) Respondent has 15 days to file reply brief;
2) Respondent may request PCTB hearing
No hearing request or hearing request denied
Hearing granted if two Commissioners approve
PCTB Hearing
OGC Notice recommending PCTB, no PCTB, or NFA to Commission and respondent
Respondent may request to file supplemental reply brief
Request Granted - Supplemental reply brief filed
Request Denied
Commission votes on PCTB
No PCTB, NFA, or PCTB/NFA → **Case Closed**
Commission finds PCTB; proposed CA sent to respondent; PCC for at least 30 days (or at least 15 days if 45 days before election)
If no agreement, OGC circulates GCR to Commission recommending civil suit authority or NFA
If agreement reached, and Commission accepts CA →**Case Closed**
Commission votes on recommendations
Suit authority → **Case Transferred** to Litigation Division
No suit authority →**Case Closed or additional conciliation**

1.5 Office of General Counsel (OGC)

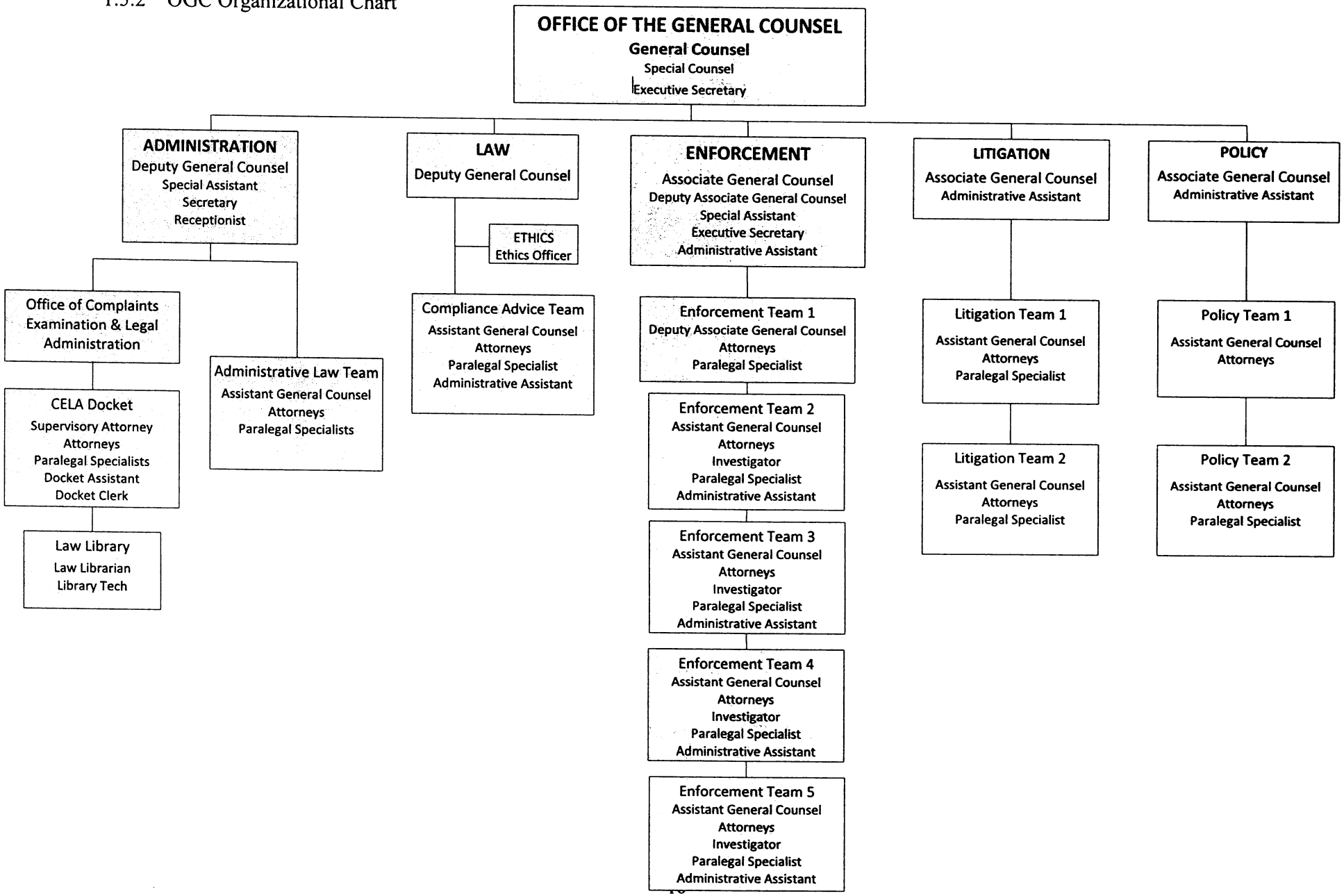
OGC consists of five organizational units: (1) the Deputy General Counsel for Administration; (2) the Deputy General Counsel for Law; (3) the Policy Division; (4) the Enforcement Division; and (5) the Litigation Division. The Deputy General Counsel for Administration is responsible for overseeing the Administrative Law Team, CELA, the Law Library, and all OGC administrative functions. The Deputy General Counsel for Law directly supervises the Compliance Advice Team and manages the Commission's ethics program. The Deputy General Counsel for Law also has primary responsibility for assisting the General Counsel in all of the substantive aspects of the General Counsel's duties and shares in the management of all phases of OGC programs. The Policy Division drafts for Commission consideration AOs and regulations interpreting the federal campaign finance law. The Enforcement Division recommends to the Commission appropriate action to take with respect to administrative complaints and apparent violations. Where authorized, the Enforcement Division investigates alleged violations of the Act and negotiates conciliation agreements, which may include civil penalties and other remedies. If an enforcement matter does not conciliate during the administrative process, the Commission may authorize suit in district court, at which point the matter is transferred to the Litigation Division. The Litigation Division represents the Commission before the federal district courts and courts of appeal in all civil litigation involving the campaign finance statutes. The Division assists the Solicitor General's office at DOJ when the Commission's cases are before the Supreme Court.

1.5.1 Office of Complaints Examination and Legal Administration

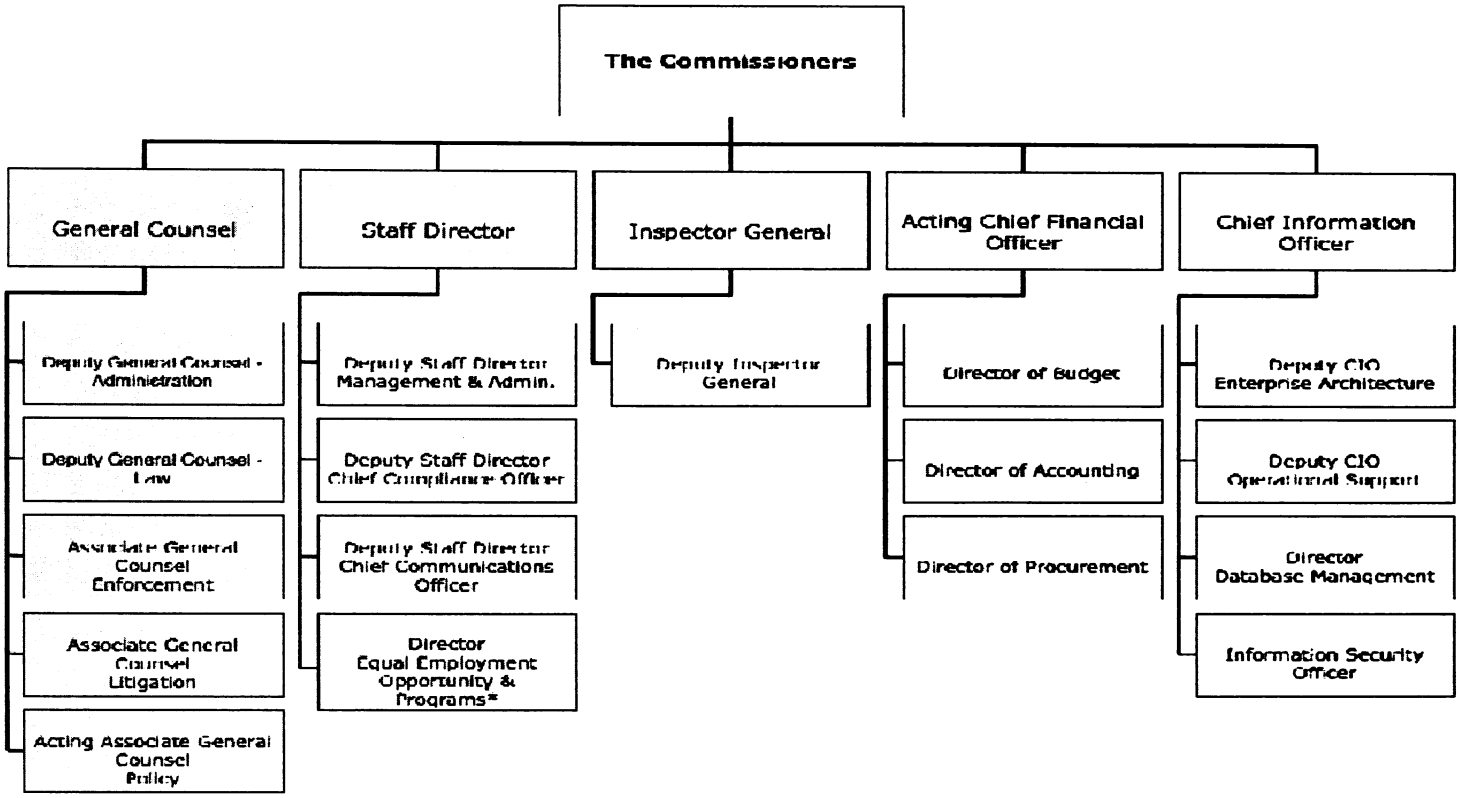
CELA processes incoming complaints, referrals, responses, and *sua sponte* submissions. The Deputy General Counsel for Administration oversees CELA and is assisted by a Supervisory Attorney and a staff of attorneys, paralegals, and docketing personnel. CELA rates incoming cases under EPS criteria approved by the Commission, drafts reports with closure recommendations under EPS, and maintains all permanent cases files.

CELA's Docket Section serves as the main distribution center for enforcement materials. The Docket Section receives incoming enforcement correspondence and materials, scans and distributes them to appropriate staff, and places them in the Commission's permanent case files. All reports and memoranda directed to the Commission are routed through the Docket Section to the Commission Secretary and Clerk. The Docket Section also receives documents from the Commission Secretary and Clerk, such as certifications, and then scans and distributes them to appropriate personnel. All outgoing enforcement correspondence and notifications are routed through the Docket Section before mailing.

1.5.2 OGC Organizational Chart



1.5.3 Commission Organizational Chart



The position of Chief Information Officer normally reports directly to the Staff Director who, in turn, reports to the Commission itself. At present, however, the same individual is serving in both the position of the Staff Director and the position of the Chief Information Officer, pursuant to an authorization by the Commission and based, in part, on an advance decision from the Comptroller General. Accordingly the organizational chart above reflects both positions — the Staff Director and the Chief Information Officer — as reporting directly to the Commission.

2 RESOURCES AND GENERAL PROCEDURES

2.1 Introduction

This section identifies basic resources and explains general procedures that relate to the Enforcement Division's work, and it discusses topics that arise in multiple stages of the enforcement process. First, this section discusses resources available on the Commission's website, the Enforcement Division's forms and templates, and the Enforcement Citation, Style, and Usage Guide ("Style Guide"). Second, it provides general descriptions of the Commission's Case Management System ("CMS") and its document management system, known as Enterprise Content Manager ("ECM"). Third, this section discusses the procedures that precede internal referrals from RAD or the Audit Division to OGC for possible enforcement action, and gives guidance regarding requests for extensions of time. Fourth, this section provides direction regarding the use, maintenance, and retention of Commission records. Finally, this section concludes with overviews of the Act's confidentiality provisions, the Commission's Disclosure Procedure, and privileges that may pertain to documents in OGC's possession.

2.2 Basic Resources

In addition to copies of the Act and Title 11 of the Code of Federal Regulations provided to Enforcement attorneys and staff, the following resources are available.

Resources on the FEC Website

2.2.1.1 Enforcement Query System

Attorneys and staff can research closed Enforcement, ADR, and AF cases, and view the related public documents from 1999 to the present through the Enforcement Query System ("EQS") found on the Commission's website. Cases that pre-dated EQS can be found in the Matter Under Review Archive - 1975 through 1998, *available at* www.fec.gov/MUR/ (the link on the EQS web page is labeled "Search MUR Archives").

Users can search public documents in EQS for key words or phrases or run searches using the pre-set search options. Available documents include: complaints and responses; GCRs with recommendations for Commission action; memoranda from ADRO with recommendations for Commission action; notifications of findings, briefs, and responses; CAs; Statements of Reasons ("SORs"), *see* Section 8.3.4.4; AF records; and certifications of Commission votes. An EQS tutorial is available on the FEC website.

For the MUR Archive, the criteria currently available for searches include: (1) case number; (2) respondent (the entity that was the focus of the case) or complainant (person or entity filing the complaint that began the case); (3) the primary subject or statutory or regulatory citation; and (4) the time period in which the matter was started and/or completed.

Attorneys and staff should be aware of the following:

- There is a short period of time between the date a case closes and the date that the Commission places case documents on EQS, which is generally not more than 30 days. During this period, attorneys and staff can locate documents from recently closed cases through ECM or the Commission's Voting Ballot Matters ("VBM") folder. VBM is an internal FEC network file location containing documents that are accessible to the Commissioners and their staffs.

- Before the Commission places documents on EQS, where they are permanently accessible to the public, OGC's Administrative Law team reviews the documents and redacts material that must remain confidential under the Act or is exempted from disclosure by FOIA. Unredacted versions of OGC-generated documents are available in ECM, generally accessible to OGC staff in pdf and Word versions, or in pdf format in VBM, which is accessible to all FEC staff. In addition, the Commission's hard copy permanent files are archived off-site for at least ten years. *See* Section 2.7.6.

- The Commission's practice of making case documents public has changed over the years. For the Commission's first several years, the majority of case documents were made public, including all OGC-generated reports and investigative materials such as deposition transcripts. The Commission viewed the confidentiality requirement as ending with the termination of a case and placed on its public record the documents that had been considered by the Commissioners in their determination of a case, other than those materials exempt from disclosure under the FECA or under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). *See* 11 C.F.R. § 5.4(a)(4). In *AFL–CIO v. FEC,* 177 F. Supp. 2d 48 (D.D.C. 2001), the district court disagreed with the Commission's interpretation of the confidentiality provision and found that the protection of section 437g(a)(12)(A) does not lapse at the time the Commission terminates an investigation. 177 F. Supp. 2d at 56. Following that district court decision, the Commission placed on the public record only those documents that reflected the agency's "final determination" with respect to enforcement matters and removed most investigative materials from files closing after late 2003. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003), *available at* http://www.fec.gov/agenda/agendas2003/notice2003-25/fr68n243p70426.pdf. In 2009, the Commission adopted a policy that resumed the practice of placing all First GCRs on the public record, whether or not the Commission adopted OGC's recommendations. *See* Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009), *available at* http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-28.pdf.

2.2.1.2 Other FEC Resources

Enforcement staff can access disclosure reports and Requests For Additional Information ("RFAI") through the Campaign Finance Disclosure Portal on the Commission's website. Explanations and Justifications ("E&Js") for Commission Regulations, AOs, Commission policy statements, and other guidance are also available on the FEC website. *See* Sections 3.4.1.3 (Commission Information Sources); 3.4.2.1 (FEC Website).

2.2.2 Writing Resources

2.2.2.1 Enforcement Forms and Templates

Forms and templates for documents frequently used by attorneys and staff are available in ECM. The forms folder contains templates for documents frequently circulated to the Commission, such as GCRs, memoranda, subpoenas, and interrogatories. It also contains templates for other documents and correspondence that are typically sent to parties and others in an enforcement matter. This Manual cites many of these forms and templates in discussing the enforcement process.

Attorneys and staff should take note of the following:

- Forms and templates usually may be modified to fit the circumstances of a particular matter or situation. Some forms contain language that should not be modified without the Associate General Counsel's ("AGC") approval; those situations are noted in this manual.

- Correspondence should usually be prepared without dates because the CELA Docket Technician generally date-stamps all correspondence before mailing. If, however, a letter must be sent immediately by fax or e-mail and there is not enough time to go through CELA, the attorney should insert the date.

- As indicated on the header of a number of templates, certain correspondence should be sent by Certified Mail, Return Receipt Requested. The administrative assistant typically completes the certified mail forms, initials the green receipt card, and writes the case number on the card so that CELA can return the signed receipt card to the attorney. To track the progress of delivery, the attorney can use the "Track & Confirm" feature on the Postal Service's website (www.usps.com). This link also contains a feature that enables the sender to obtain a copy of the proof of delivery via e-mail.

2.2.2.2 Enforcement Citation, Style, and Usage Guide

The Style Guide sets forth a uniform system of citation and guidance on usage and style for Enforcement Division reports, memoranda, correspondence, and other written materials. Based largely on the conventions in *The Bluebook*, the Style Guide also provides citation rules for documents that are particular to the Commission.

2.3 Case Management System (CMS)

CMS is a database that electronically tracks and stores information related to enforcement cases. CMS allows attorneys and staff to search records relating to current and prior enforcement matters. Attorneys and staff can use CMS to identify matters that address specific legal, statutory, or regulatory issues; to compare recommendations in previous matters to the assigned matter; and to identify people and entities (referred to by CMS as "players") in a particular matter. All attorneys and staff are provided a general CMS training guide and training materials concerning its application to the Enforcement Division's work.

Attorneys are responsible for entering certain data directly into CMS to document the events in a matter. Not only does OGC use CMS to track cases, but the Commissioners, their staffs, and other divisions of the Commission also rely on the data in CMS. Accordingly, attorneys must enter all relevant information correctly and as soon as possible.

Generally, by the time an attorney is assigned a case, CELA staff will have entered the case number, main "players," EPS information, the earliest and latest dates on which the Statute of Limitations ("SOL") expires, and other general case information. Once the case is assigned to an attorney, the attorney is responsible for ensuring that case information in CMS is correct, current, and complete at all stages of a case. A list of the entries that attorneys must make is available. Attorneys must routinely review and update the CMS entries in each assigned case.

Enforcement attorneys and staff should refer to the CMS Manual for more details concerning its use; some best practices, however, include the following:

- The attorney assigned to a case is responsible for entering all post-activation information into the Calendar tab. Stage information – for example, First GCR stage, RTB stage, *etc.* – is entered by

CELA and the Staff Director's Office; however, the attorneys are responsible for entering the PCTB Briefing stage.

- Although attorneys and paralegals can enter and edit Calendar tab information, they may not be authorized to edit information in other tabs. When, for example, information in the "Players" tab needs to be updated to reflect the name of a new committee treasurer, the attorney should e-mail the appropriate information to CELA staff and direct them to update the entry.

- Before drafting a GCR to the Commission recommending that it close the entire case, attorneys should check CMS to ensure that the matter will be resolved as to every respondent. If, for example, the Commission previously took no action as to a respondent at the First GCR stage in a complaint-generated matter, *see* Section 4.4.5, the attorney should include a recommendation to close the file as to that respondent in the final GCR.

- Occasionally, there will be important information that should be recorded in CMS that does not clearly fit into a designated event category. In such situations, the attorney should document the information in the "Notes" field. For example, the attorney should make an entry in the Notes field that he or she is using informal methods rather than compulsory process to conduct an investigatory step.

- The "Commission" tab in the "FEC Case Notebook" contains the Commission's findings as they appear in the certification; attorneys and staff may find this tab helpful when they do not have the paper copy of the certification.

- Attorneys and staff may find additional information on related cases by accessing the "Related Cases" tab within the "FEC Case Notebook."

- Attorneys and staff can view information regarding the Commission's vote in a matter by accessing the "Commission Notebook." This notebook may be helpful when, for example, the attorney does not know the name or number of a matter, but knows the date of the Commission's vote. The attorney can enter the date of the vote into the "Vote Date" field to see a record of all the votes on that date.

2.4 Enterprise Content Manager

ECM is an application for storing, organizing, sharing, editing, and distributing documents from a central location. Attorneys and staff should store all case-related documents in ECM, rather than on their computer's hard drive, so that the documents are available to other attorneys and staff.

2.5 Procedures Preceding Internal Referrals

2.5.1 RAD Review and Referral Procedures

RAD monitors the filing of disclosure reports by federal political committees and other reporting entities, reviews their contents for compliance with the federal campaign finance laws, and, when necessary, sends RFAIs. RFAIs are written requests for clarification, correction of potential inaccuracies, or remedial action on apparent violations found on disclosure reports. Prior to any potential referral, RAD will contact the committee or reporting entity and give it an opportunity to take corrective action, if possible, or to provide clarification. Pursuant to internal Commission thresholds, depending upon the nature and extent of the apparent violations and any corrective actions taken, RAD may refer apparent

violations to OGC, ADRO, or the AF Program for possible enforcement action, or to the Audit Division for a possible audit. In addition, during the report review process and prior to any potential referral, if a committee or reporting entity disagrees with a RAD request to take a corrective action, and the disagreement is based upon a material dispute on a question of law, the committee or reporting entity may seek to have the legal question considered by the Commission. For more information, refer to the Commission's Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45,798 (Aug. 1, 2011) ("Legal Questions Policy Statement"), *available at* http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-11.pdf.

In conducting its regular review of disclosure reports filed with the Commission, RAD relies on written procedures that are revised every two years, corresponding with the election cycle, and that are approved by the Commission (the "RAD Procedures"). The RAD Procedures set forth how RAD conducts its regular review of reports filed by political committees and other filing entities, and the circumstances when RAD will refer potential violations of the reporting requirements of the Act for possible enforcement action to OGC, ADRO, or the AF Program, or to the Audit Division for a possible audit.

2.5.2 Audit Referrals

Pursuant to 2 U.S.C. § 438(b), the Audit Division conducts audits of committees required to file reports under 2 U.S.C. § 434. It also conducts audits under 26 U.S.C. §§ 9007 and 9038 of all presidential candidates and nominating conventions that qualify for public financing. During an audit, the committee will have the opportunity to review and respond to any proposed or suggested findings made by the Audit Division. During the audit process, if a committee disagrees with an Audit Division request to take a corrective action, and the disagreement is based upon a material dispute on a question of law, the committee or reporting entity may seek to have the legal question considered by the Commission. For more information, refer to the Legal Questions Policy Statement, 76 Fed. Reg. 45,798.

The committee will receive a copy of the Audit Division's Draft Final Audit Report, after which it may request an oral hearing before the full Commission within 15 days of receipt. Two Commissioners must agree to hold the hearing before the request is granted. Within 30 days of receipt of the request, the Commission will inform the committee whether the Commission is granting the committee's request. For more information on the audit hearing process, refer to the Commission's Procedural Rules for Audit Hearings, 74 Fed. Reg. 33,140 (July 10, 2009) ("Audit Hearings Procedure"), *available at* http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-12.pdf.

The Final Audit Report, which may result in a referral to the Enforcement Division for further action, will be reviewed by the Commission and must be approved by at least four Commissioners. For more information on the Commission's audit report process, refer to FEC Directive 70, FEC Directive on Processing Audit Reports (Apr. 26, 2011), *available* at http://www.fec.gov/directives/directive_70.pdf.

Depending upon the nature and seriousness of apparent violations identified during an audit and any corrective actions taken, the Audit Division's findings may result in a referral to OGC for possible enforcement action. The Audit Division may also refer matters to be handled through the Commission's ADR or Administrative Fines processes.

2.6 Extensions of Time

The Commission has delegated to OGC certain authority to grant reasonable extensions of time for good cause shown. Requests for extensions must be in writing, and they should state the reason for the request and a proposed date for compliance. The attorney should discuss all requests for extensions

with the team's Assistant General Counsel, also known as a "team leader," and any agreement to grant an extension of time must be in writing (Enforcement Form 17). Generally, if the extension sought is reasonable, the reason for the extension appears valid, and the request is not primarily made to delay the process, the attorney should grant it. Common examples of good cause include irreconcilable work conflicts, illness, and family emergencies. The attorney may negotiate a shorter extension than the one requested by the respondent, and the attorney must be cognizant of the impact that an extension may have on all applicable SOLs. If the SOL will expire as to any violation within two years of the request, the attorney should make any agreement to an extension of time contingent upon the respondent executing a tolling agreement. There are three template tolling agreements (Enforcement Forms 131-33); use the template that best fits the situation. For more information about the SOL, see Section 3.6.3.

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Updating CMS to Reflect Tolling Agreement

If a respondent signs a tolling agreement, the attorney must immediately update the SOL expiration date in CMS. The information is relied on in numerous internal reports and it is essential that it be maintained.

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2.7 Managing and Retaining Commission Records

2.7.1 Introduction

The following sections explain how to properly manage and retain enforcement records, consistent with federal law. Proper records management is important for many reasons. Not only does it assist in locating documents, but various federal statutes and regulations require an agency's employees to retain federal records. *See, e.g.*, 18 U.S.C. § 1519 (criminal penalties for any person who knowingly alters, destroys, or conceals records with the intent to impede, obstruct, or influence a federal investigation); Chapters 21, 29, 31, 33 of Title 44 of the U.S. Code (National Archives and Records Administration record disposition requirements); 36 C.F.R. §§ 1220.30, 1220.32, 1220.34 (records management regulations). The next section explains which "federal records" attorneys and staff must retain.

2.7.2 What is a "Federal Record"?

"Federal records" include books, papers, maps, photographs, audio and video recordings, electronic documents such as e-mails and spreadsheets, and other documentary materials, regardless of physical form or characteristics, made or received by an FEC employee in connection with the transaction of public business and preserved or appropriate for preservation by the FEC or its legitimate successor as evidence of the FEC's functions, policies, decisions, procedures, operations, or other activities of the FEC, or because of the informational value of the data in them. 44 U.S.C. § 3301. *But see* Section 2.9.3 regarding privileges that may attach to such documents. Materials that do not qualify as federal records are those that are not connected with the conduct of government business, such as files created before entering government service; personal, family, or social correspondence; personal insurance or medical papers; and copies of personnel-related documents.

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Is the document a "federal record?"

If the answer to one or more of the following questions is "yes," it is likely that the document being considered is a federal record that should be retained. Any questions on this issue should be directed to the Administrative Law Team.

- Did you receive the document as a result of your FEC job?
- Did you create or use the document to conduct or facilitate Commission business?
- Did you distribute this document to others?
- Did you put the document in a Commission file?
- If not, do you still need to refer to this document later to conduct Commission business?

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2.7.3 Enforcement Records

In general, federal records include documents associated in some fashion with a MUR (including matters not yet qualifying as MURs such as Pre-MURs, RAD Referrals, and Audit Referrals). Federal records include documents that Enforcement attorneys and staff create as well as receive. The proper retention procedure as to each class of documents is discussed below.

2.7.4 Documents Created by Enforcement Attorneys and Staff

GCRs, memoranda, and letters to respondents, respondent's counsel, witnesses, and other case-related documents should be created and stored in the appropriate folders in ECM. After the original document is signed, the attorney or staff sends the signed original to CELA, where it is copied and placed in the permanent case file. See Section 3.2.2 for information about the permanent file.

2.7.5 Documents Received by Enforcement Attorneys or Staff

Incoming correspondence related to open matters is usually routed through CELA. CELA places the correspondence in ECM and VBM. CELA also transmits copies of correspondence to the assigned attorney via e-mail in attached Portable Document Format ("PDF") files. Upon receipt, the attorney should retain the correspondence in a separate case folder.

When CELA receives voluminous documents, it informs the attorney of the delivery by stamping the transmittal correspondence accompanying the documents with the word "Bulk" and placing a copy of the transmittal correspondence in the attorney's mailbox. The attorney can inspect the hard copy documents in CELA. The attorney can then decide which documents need to be copied or scanned immediately for the attorney's use.

2.7.5.1 E-mails Received by Enforcement Attorneys or CELA

E-mail correspondence and attachments that attorneys receive should be forwarded to the CELA Docket Technician, but the e-mails and attachments must first be converted to PDF format. The subject line of the forwarding e-mail to CELA should clearly indicate the case name and content of the PDF files.

Alternatively, attorneys may print hard copies of e-mails and attachments and give them to the CELA Docket Technician for placement in the permanent case file. Even though the e-mail will have a date printed on it, the paper copy should be date-stamped on the date the attorney opens the e-mail. The attorney must also print copies of all of the attachments to the e-mail and provide them to the CELA Docket Technician.

CELA uses the following abbreviations to describe correspondence it receives or creates:

- RESP: Describes any type of response (*i.e.*, complaint response, RTB response, etc.)
- CA: Describes a CA-related correspondence
- NTFLTR: Describes all types of notification letters
- DOC: Designation of Counsel ("DOC")
- TOLL: Describes tolling agreements
- DISC: Describes correspondence related to discovery
- MISC: Describes documents not easily categorized

The above document descriptions are informal labels and do not necessarily indicate how CELA will ultimately name and archive the document in VBM or ECM.

2.7.5.2 Other Records Received by Enforcement Attorneys or Staff

Similar procedures apply when enforcement records are sent or received through means that bypass CELA. For example, if an attorney receives a fax at a machine other than the one monitored by the OGC receptionist (the receptionist is responsible for processing all materials faxed to the machine in the reception area), the attorney must date-stamp the fax and deliver it to the CELA Docket Technician. The attorney should inform the technician if the attorney already distributed copies of the fax to other team members. In addition, discovery materials obtained through means that bypass CELA, such as documents provided by a deponent immediately before a deposition begins, must be date-stamped and brought to CELA.

2.7.6 Archived Records

After a case is closed and the Administrative Law team reviews and organizes the closed file materials, *see* Section 8, the permanent file will ultimately be transferred off-site for storage. If an attorney needs documents from a file that is being stored off-site, it may be possible to obtain them by making a request through the Administration Division to have the case file temporarily returned to the FEC. Records are generally destroyed if the case has been closed for more than ten years. Before making a request for documents from a file that has been transferred off-site, the attorney should consult the Administrative Law team and CELA.

2.8 Confidentiality Considerations in the Enforcement Process

2.8.1 Introduction

This section examines the confidentiality provisions of the Act and the related regulations, and it discusses waivers of these provisions.

2.8.2 Confidentiality Provisions under the Act

2.8.2.1 Confidentiality of Commission Notifications and Investigations

Title 2 U.S.C. § 437g(a)(12)(A) prohibits "the Commission or ... any person" from making public "any notification or investigation made under this section" without "written consent of the person receiving such notification or the person with respect to whom such investigation is made." The associated regulation is 11 C.F.R. § 111.21, and subsection (a) provides that, except for the disclosures provided for under 11 C.F.R. § 111.20:

> No complaint filed with the Commission, nor any notification sent by the Commission, nor any investigation conducted by the Commission, nor any findings made by the Commission shall be made public by the Commission or by any person or entity without the written consent of the respondent with respect to whom the complaint was filed, the notification sent, the investigation conducted, or the finding made.

A respondent can waive this confidentiality provision and permit the Commission to make notifications and investigations relevant to the person or entity public. This consent must be in writing. *See* Enforcement Forms 105 and 106. The confidentiality protections of 2 U.S.C. § 437g(a)(12) expire when the case closes as to all respondents. At that point, the Act requires public disclosure of certain Commission actions. *See* 11 C.F.R. § 111.20.

2.8.2.2 Confidentiality of Information Derived in Connection with Conciliation

The Act also provides that "[n]o action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission may be made public by the Commission without written consent of the respondent and the Commission." 2 U.S.C. § 437g(a)(4)(B)(i). Although a final, signed CA becomes part of the public record, information relating to conciliation negotiations remains confidential even after a case is closed unless waived. *See* 2 U.S.C. § 437g(a)(4)(B); *see also* 11 C.F.R. §§ 111.20-.21. This confidential information includes the initial offer, any counterproposals or counteroffers, and may also include certain information submitted by a respondent during the conciliation process that relates to conciliation or settlement. Unlike Section 437g(a)(12) confidentiality, confidentiality under Section 437g(a)(4) can be waived only if both the respondent and the Commission agree to do so.

2.8.2.3 Violations of the Act's Notification and Investigation Confidentiality Provision

The Act provides that "[a]ny member or employee of the Commission, or any other person" who violates the confidentiality provision set forth in 2 U.S.C. § 437g(a)(12) "shall be fined." 2 U.S.C. § 437g(a)(12)(B). If the violation is determined to have occurred "knowingly and willfully," the amount of the fine is increased. *Id.*; *see* 11 C.F.R. § 111.24(b). The confidentiality provisions of the Act do not preclude providing information or records relating to the enforcement and conciliation process to federal law enforcement agencies such as the DOJ.

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Confidentiality reminders

- Confidentiality concerns can arise at any stage of the enforcement process.

- In multiple-respondent cases, attorneys should be careful not to reveal confidential information about one respondent to another absent certain circumstances, as discussed in Section 2.9.

- A respondent can waive confidentiality only as to that respondent.

- Attorneys must understand the interplay between the Act's confidentiality provisions and the Commission's Disclosure Procedure. For further information, see Section 2.9.

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2.9 Disclosure Considerations in the Enforcement Process

2.9.1 Introduction

This section provides an overview of the Commission's "Agency Procedure for Disclosure of Documents and Information in the Enforcement Process," 76 Fed. Reg. 34,986 (June 15, 2011) ("Disclosure Procedure"), *available at* http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-06.pdf. It also gives a general description of the privileges that may be asserted in response to a request for documents under the Disclosure Procedure.

2.9.2 The Commission's Agency Procedure for Disclosure of Documents and Information in the Enforcement Process

The Disclosure Procedure "formalizes the Commission's policy on disclosure to respondents of relevant information gathered by the Commission in the investigative stage of its enforcement proceedings." 76 Fed. Reg. at 34,986. The Disclosure Procedure defines the types of documents that the Commission may make available to respondents and describes how the Commission will permit "increased access to documents and information," consistent with the confidentiality provisions of 2 U.S.C. § 437g(a)(12). *Id.* at 34,989. When confronted with disclosure issues, the attorney should consult with the team leader and the AGC or Deputy AGC, and refer to the Disclosure Procedure.

Under the Disclosure Procedure, following a timely request and subject to certain exceptions, OGC "shall make available to a respondent all relevant documents gathered by [OGC] in its investigation, not publicly available and not already in the possession of the respondent, in connection with its investigation of allegations against the respondent." *Id.* at 34,990. The documents covered by the Disclosure Procedure include those gathered in response to subpoenas or other requests, written or otherwise, and not already in the respondent's possession; all deposition transcripts and exhibits; and documents not publicly available that OGC gathered from sources outside the Commission in its investigation. *Id.* These documents also include any document containing exculpatory information. *Id.* The Disclosure Procedure defines "exculpatory information" as:

> Information gathered by [OGC] in its investigation, not reasonably knowable by the respondent, that is relevant to a possible violation of the Act or the Commission's regulations, under investigation by the Commission and that may tend to favor the respondent in defense of violations alleged or which would be relevant to the mitigation of the amount of any civil penalty resulting from a finding of such a violation by a court.

Id. A respondent may make a written request for disclosure of documents within 15 days of (1) the date of OGC's notification to the respondent of its recommendation to the Commission to proceed to a vote on

probable cause; or (2) no later than seven days after certification of a vote by the Commission to conciliate with a respondent. *Id.* at 34,991.

Unless the Commission determines otherwise, and subject to certain exceptions, OGC may withhold documents containing privileged information; documents not relevant to the subject matter of the proceeding; documents that are precluded by law or regulation from disclosure, including, under certain circumstances, information obtained from, or regarding, co-respondents; documents that contain information that may not be excised or redacted without affecting the main import of the document; or documents or information obtained from DOJ or another government entity pursuant to an agreement or request not to disclose them. *Id.* at 34,990. For guidance on potentially applicable privileges, refer to Section 2.9.3. If a respondent makes a timely written request for any of the documents OGC withheld and, if requested, signs a tolling agreement, the Commission will determine whether it is appropriate to provide the requested documents. 76 Fed. Reg. at 34,990.

The procedure also contains a section regarding requests for documents by one respondent that either relate to, or were provided by, a co-respondent. *Id.* at 34,991. Generally, OGC may be required to seek a confidentiality waiver from the co-respondent and a non-disclosure agreement from the requesting respondent. This section also contains guidance if the co-respondent refuses to sign a confidentiality waiver. *Id.*

2.9.3 Asserting Privilege in Response to Requests for Disclosure

2.9.3.1 Introduction

This section provides general guidance regarding some of the privileges that may apply to a request for disclosure of Commission documents. Before asserting any privilege, the attorney must consult with the team leader and the AGC or Deputy AGC and review applicable law and policy guidance to determine if exceptions to the privilege apply and how to avoid waiving the privilege. If a privilege is applicable, and no exception applies, the attorney must prepare a withheld document list.
76 Fed. Reg. at 34,990.

2.9.3.2 Attorney-Client Privilege

In general, the attorney-client privilege protects from disclosure confidential communications made between an attorney and client when the client is seeking or receiving legal advice. Although various authorities define the privilege in different terms, the elements of the privilege generally include: (1) a communication; (2) that was made in confidence; (3) between an attorney and client (or client's representatives); (4) for the purpose of seeking or obtaining legal advice; and (5) the privilege was not waived. Different jurisdictions have adopted their own formulations of this privilege, so attorneys must examine the relevant law and policy guidance, as well as consult with their team leader and the AGC or Deputy AGC.

2.9.3.3 Work-Product Doctrine

In general, the attorney work-product doctrine protects documents that were: (1) created by or at the direction of an attorney; and (2) created in reasonable anticipation of litigation. *See Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) (defining the doctrine and discussing the role that mental impressions and beliefs play in that determination). All enforcement matters are conducted in anticipation of litigation, so the doctrine generally applies to case-related work product created by or at the direction of the attorney. There are, however, exceptions and other considerations involved in this doctrine's application, which are set forth in case law and the Disclosure Procedure. Attorneys must

examine the applicable law and policy guidance as well as consult with their team leader and the AGC or Deputy AGC before asserting a claim of work-product privilege.

2.9.3.4 Deliberative Process Privilege

In general, agencies may withhold documents that reflect agency communications that are both (1) deliberative and (2) predecisional. This privilege exists to protect the integrity of an agency's decision-making processes, and it may be invoked to protect documents when release would harm the decisional process. "Deliberative" communications are those communications that are offered in support of the agency's decision-making process. "Predecisional" communications are those communications that are antecedent to the adoption of an agency policy. As with the assertion of any other privilege, attorneys must research the applicable law and policy guidance as well as consult with their team leader and the AGC before asserting this privilege. The deliberative process privilege may not be invoked absent approval of the General Counsel or his or her delegatee.

2.9.3.5 Law Enforcement Privilege

In general, this privilege exempts from disclosure records or information compiled for law enforcement purposes, to the extent that the production of those records: (1) could reasonably be expected to interfere with enforcement proceedings; (2) would deprive a person of a right to a fair trial or an impartial adjudication; (3) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (4) could reasonably be expected to disclose the identity of and/or information provided by a confidential source; (5) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions; or (6) could reasonably be expected to endanger the life or physical safety of any individual. As with the assertion of any other privilege, attorneys must research the applicable law and policy guidance as well as consult with their team leader and the AGC or Deputy AGC before asserting this privilege.

3 FROM CASE ASSIGNMENT TO THE REASON TO BELIEVE STAGE

3.1 Introduction and Purpose

This section covers issues and procedures relevant to the earliest phases of enforcement matters. It discusses case assignments, case files, the types of respondents commonly named in matters, and notifications to respondents. This section next discusses how to handle cases under the Commission's *sua sponte* policy and its directive regarding SOL-sensitive matters. It then identifies resources from which attorneys locate the facts and gather the law in their assigned cases, and it explains how to plan the First GCR. The section concludes with direction regarding the handling of RFAI notices and termination requests in pending enforcement matters and information about the SOL.

3.2 Initial Considerations for a Newly Assigned Matter

3.2.1 Activation, Pre-Activation Review, and "Pre-Tagging" Matters

A case is "activated" when the AGC, in consultation with the Deputy General Counsel for Administration, assigns it to an Enforcement attorney. Generally, this assignment happens after CELA notifies the respondents and the Commission has received the responses, or, in the case of a *sua sponte* submission, after CELA has notified the submitter that the Commission has received the submission. Although a respondent is not required to file a response, CELA may attempt to follow up with the respondent by phone if the respondent does not file a response within the 15-day statutory response period.

The AGC may preliminarily assign a case to an attorney before it is activated, a process known as "pre-tagging" a matter. Pre-tagging is particularly helpful when a case is SOL-sensitive, that is, when the SOL as to some or all of the potential violations will expire within 12 months. The attorney can begin work on the case even before the Commission receives responses. Refer to Sections 3.2.9 and 3.6.3 for information about SOLs. The attorney can find documents pertaining to the pre-tagged case in the permanent file.

3.2.2 Case Files

The hard copy permanent file is maintained in the CELA file room and contains all original documents submitted by complainants and respondents and relevant correspondence. As the case progresses, additional documents are added to the file, including all correspondence between the FEC and parties or witnesses, all documents circulated to the Commission, and Commission certifications. CELA maintains an electronic duplicate of this file in ECM entitled "CELA Permanent Files." References in this manual to the "permanent file" refer to both the hard copy and electronic versions of the permanent file, except where noted. In addition, case documents are included in VBM. *See* Section 2.2.1.1.

When a matter is activated, the assigned attorney and the team leader each receive a file that includes copies of the documents in the permanent file. Upon receipt of this file, the attorney should verify that the information in CMS is accurate, including the names and addresses of the parties and counsel, the EPS information, the SOL dates, the First GCR's due date, and the name of the assigned attorney. In assessing the SOL dates of activity in the complaint, the assigned attorney and team leader must enter into CMS both the earliest and latest SOL dates at issue, and continue to update that information as the matter progresses through the enforcement process.

The attorney may also receive a file known as a "Prep File." Prep files are created in externally generated cases that meet the criteria for activation. Paralegals or investigators create Prep Files, which summarize the matter and contain information relevant to the case. In most cases, the paralegal will start preparing the Prep File shortly after the complaint has been filed, so that a completed Prep File will be available to the assigned attorney as soon as the case is activated.

3.2.3 Reviewing the Complaint

The attorney should read the complaint and all attachments carefully to identify allegations and issues that may be implicated in a matter. If the attorney identifies a potential violation that the complainant did not identify or plead clearly or expressly in the complaint, it may be necessary to send the respondent a pre-RTB letter giving the respondent notice of the existence of the potential violation and an opportunity to respond. The attorney should discuss any such instance with the team leader and the AGC or Deputy AGC.

The attorney also should inspect any attachment or source referred to in the complaint to confirm that factual assertions in the complaint regarding these sources are accurate. Further, the attorney should confirm that the permanent file contains all attachments referenced in the complaint. If any items are missing from the permanent file, the attorney should discuss the matter with the team leader and the CELA Supervisory Attorney to determine whether to contact the complainant to request the omitted items. Although such contacts may be made informally over the phone, detailed written summaries of all such discussions must promptly be prepared and placed in the case file. Finally, the attorney should note whether the complainant's allegations are based on the complainant's personal knowledge or an apparently reliable source, such as an affidavit from a witness to the activity in question, whether the allegations are based on circumstantial evidence, or whether they are based on less-reliable information or mere speculation.

Once the case is activated, the assigned Enforcement attorney should review the file to ensure that all respondents have been properly notified. For instance, some political committees are connected or have similar names, and the attorney must confirm that CELA notified the correct committee. The attorney should refer to the committee's Statement of Organization to determine whether the organization is registered with the Commission and that the current treasurer has been named in the complaint in his or her official capacity. If a respondent has not been notified or has been misnamed, the Enforcement attorney should request that CELA send new notifications.

There may be instances in which CELA or Enforcement must send additional notification letters. For example, in some cases it may not become clear until the assigned attorney analyzes the case that an individual or other entity not yet named as a respondent faces potential liability and should be notified. In this situation, the attorney should consult with the team leader regarding whether to recommend that CELA notify that party of the complaint and seek a response. The decision to notify should be made as early as possible.

The attorney may need to draft a notification letter in a complaint-generated matter when a prospective respondent is not identified in the complaint, but it becomes apparent from another source, such as a disclosure report, that the party may have liability as a result of the activity described in the complaint. For example, the attorney's examination of an alleged 2 U.S.C. § 441f violation may result in information that a reimbursed contribution scenario involved entities other than those identified in the complaint. Similarly, the facts disclosed in a *sua sponte* submission may lead to information that implicates additional respondents who are not named in the submission. If the additional respondents are not named in the complaint or submission, but it is clear from the material in or attached to the complaint or submission that they should have been named, CELA will send a notification to these respondents

enclosing the complaint or *sua sponte* submission. Similarly, if the respondents are not named in the complaint or submission, but other sources make it apparent that they should be named as respondents, CELA will send a pre-RTB letter that encloses the complaint or submission and details the respondent's potential liability. The attorney should work with the CELA Supervisory Attorney to draft this letter. The attorney should use Enforcement Form 9A as a template.

3.2.4 Complaint Requirements, Notifications, and Related Issues

After determining that a complaint filed with the Commission is sufficient under the Act, CELA assigns a MUR number and notifies the respondents of the complaint. A proper complaint must be in writing, provide the full name and address of the complainant, and be signed, sworn to, and notarized. 2 U.S.C. § 437g(a)(1); 11 C.F.R. § 111.4. The notary public's certificate must say "signed and sworn to before me," or words that connote the complainant affirmed the complaint, such as "under penalty of perjury." *Id.* In the case of a defective complaint, CELA will promptly notify in writing the person who filed the document and explain why the document does not satisfy the applicable statutory or regulatory requirements (*e.g.*, it is unsworn or not properly notarized).

In addition, 11 C.F.R. § 111.4 suggests that a complaint:

- Clearly recite the facts that describe a violation of a statute or regulation under the Commission's jurisdiction (citations to the law and regulations are not necessary);
- Clearly identify each person, committee, or group that is alleged to have committed a violation;
- Include any documentation supporting the alleged violations, if available; and
- Differentiate between statements based on the complainant's personal knowledge and those based on information and belief. Statements not based on personal knowledge should identify the source of the information.

CELA also assigns appropriate numbers to internally generated matters — "RR" numbers for RAD referrals, "AR" numbers for Audit Referrals, and "Pre-MUR" numbers for all other internally generated matters — and notifies the respondents of internal and external referrals. *See* Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 Fed. Reg. 38,617 (Aug. 4, 2009), *available at* http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-18.pdf. In most referrals, the respondent receives a copy of the referral document, although because of confidentiality concerns related to law enforcement purposes, the respondent will normally receive only a letter summarizing the facts and allegations in an external referral. *Id.* at 38,617-18. In some cases, CELA may also need to notify additional respondents who are identified in the submission and await their responses. They would then be given 15 days to respond after notification, as with the original respondents.

3.2.5 Naming Respondents

3.2.5.1 Political Committees and Treasurers: Treasurer Policy

If a federal political committee is involved in an enforcement proceeding, the Commission's general policy is to name the committee and its current treasurer in his or her official capacity as respondents in the matter. *See* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005), *available at*

http://www.fec.gov/law/policy/2004/notice2004-20.pdf ("Treasurer Policy"). Before circulating any GCR to the Commission, the attorney should confirm the identity of the committee's current treasurer by checking the committee's most recent Statement of Organization. If the treasurer has changed since the filing of the complaint, the attorney should name the current treasurer in the report and notify CELA of the change so that CELA may designate the current treasurer as the proper respondent. The current treasurer should be named even if the current treasurer was not the treasurer at the time of the alleged violation because official capacity claims are considered to be against the office of treasurer rather than the individual holding the position. *Id.* at 4, 6. If the complaint asserts allegations that involve a past or present treasurer's violation of obligations that the Act or regulations impose specifically on treasurers, the treasurer may also be named in his or her personal capacity, even if not acting as the current treasurer. *Id.* at 5. The Commission, however, typically takes action against a treasurer in his or her personal capacity only if the treasurer knowingly and willfully violated the law, recklessly failed to fulfill the duties imposed on the treasurer by law, or intentionally deprived him- or herself of facts giving rise to the violation. *Id.* at 3.

3.2.5.2 Committee Staff

In some instances, the Act contemplates that committee staff may be named as respondents, although naming such individuals is uncommon. An example where naming staff would be appropriate would be if a staff member of an authorized committee is alleged or appears to have spent contributions for personal use. *See* 2 U.S.C. § 439a(b) (prohibiting "any person" from converting a contribution or donation to personal use).

3.2.5.3 Corporations; Labor Organizations; Officers

Section 441b of the Act prohibits corporations, labor organizations, and national banks from making contributions to federal candidates. If the information in a matter indicates that a corporation or labor organization may have made a prohibited contribution, it should be named as a respondent. Further, if the information indicates that the officers of such an organization may have consented to the prohibited contribution, they may be named as respondents as well. *Id.* Naming a corporation or a labor organization also would be proper if there is information that the corporation or labor organization may be the true source of contributions illegally made in the names of others. 2 U.S.C. § 441f. Staff can usually find accurate contact information for a prospective corporate respondent, the agent for service of process, as well as the names as corporate officers, through documents filed with the Secretary of State in the state where the corporation is headquartered or in states where it does business.

3.2.5.4 Individuals

There are various situations in which an individual may be named as a respondent. For example, if an individual appears to have made an excessive contribution to a committee, that individual could be named as a respondent. 2 U.S.C. § 441a(a). Similarly, an individual who is alleged or appears to have converted a contribution or donation to personal use in violation of 2 U.S.C. § 439a(b) may be named a respondent.

3.2.5.5 Candidates

A candidate is not automatically named as a respondent simply because the information indicates that the candidate's authorized committee may have violated the Act or regulations. Candidates are named only if the information indicates that they may have had personal involvement in the activities or transactions giving rise to the violations, or if the statute or regulation involved ascribes liability to candidates, such as 2 U.S.C. § 441i(e)(1).

3.2.6 Designation of Counsel (DOC)

The complaint notification package CELA sends to respondents includes a DOC form on which the respondents may identify the counsel representing them in the matter. The respondent and the designated counsel must sign the form. Once a respondent designates counsel, attorneys and staff must communicate only with that counsel unless consent is given by that counsel for the FEC to communicate with the client, which is rare. In the case of political committees, a separate DOC is not necessary for the treasurer unless the treasurer has potential personal liability or designates separate counsel. The attorney should check the permanent file to determine if CELA received a DOC, and if so, that the CMS entries regarding counsel are correct.

3.2.7 Reviewing the Responses

Respondents have the opportunity to demonstrate in writing why no action should be taken against them at the initial stage of a matter. 2 U.S.C. § 437g(a)(1). The attorney should review the file and determine if it contains responses from all respondents who were notified. Respondents do not have to file responses, but if there are respondents who have not submitted responses after OGC sent notification letters and after CELA has tried to contact them by phone, the attorney should confirm that the notification letters were properly addressed. If they were, further action is generally not required; if not, the attorney should direct CELA to re-notify the respondents.

In reviewing responses, the attorney notes all defenses and mitigating claims. The attorney should also note whether the respondent has responded to all allegations raised by the complaint, referral, or pre-RTB notification letter, whether the respondent has submitted supporting documentation, and whether the respondent has answered under oath or submitted sworn affidavits. If the respondent submits an affidavit or sworn declaration, the attorney should assess whether it is supported by the affiant's personal knowledge. If an affidavit or sworn declaration is not based on personal knowledge or is contradicted by information that either existed or was created at or near the time of the activity in question, it may be less persuasive. The attorney should consider all such factors in determining the proper recommendations.

3.2.8 Supplements and Amendments to the Complaint

After filing a complaint, complainants sometimes submit additional documents presenting additional information or claims. This may occur while the case is in CELA or after activation. An "amendment" to the complaint adds new violations or names additional respondents. A "supplement" provides additional information pertaining to the allegations in the original complaint, but it does not allege new violations or name new respondents.

An amendment must meet the statutory requirements for a proper complaint. *See* 2 U.S.C. § 437g(a)(1) (setting forth requirements). Thus, an amendment must be in writing, must be signed and sworn to by the person filing such amendment, must be notarized, and must be made under penalty of perjury. The notary must represent as part of the jurat that the swearing occurred. If the amendment lacks any of these requirements, CELA returns the document with a letter explaining the deficiency. A supplement does not need to meet the statutory requirements for a proper complaint because it does not allege new violations or name new respondents.

If the amendment or supplement arrives before activation, CELA reviews it and sends the appropriate notifications. After notification, the attorney is responsible for reviewing these documents. The attorney and team leader should consult with CELA to determine the correct notification letter to send. Respondents are given 15 days to respond to these allegations.

Procedures for processing an amendment received after activation:

- The attorney, in consultation with CELA staff, determines if the amendment meets the statutory requirements for a proper complaint.
- If proper, CELA prepares a letter to the complainant acknowledging receipt of the additional material. *See* Enforcement Form 11.
- If not proper, CELA notifies the complainant of any defect and notifies respondents that a defective amendment was filed. *See* Enforcement Form 11A.
- If there is no defect in the amendment, or after the defect has been cured, CELA sends copies of the amendment to all implicated respondents. If the amendment names new respondents, the new respondents should receive copies of the amendment, and, if necessary, copies of the original complaint. If the amendment standing alone is sufficient to give the new respondents adequate notice as to the allegations against them, it may not be necessary to include a copy of the original complaint.
- Upon receipt of a supplement, CELA sends a notification to the complainant and respondents.

3.2.9 Procedures for SOL-Sensitive Cases

3.2.9.1 Directive 68

Commission Directive 68 sets forth procedures for managing SOL-sensitive enforcement matters. The Directive is *available at* http://www.fec.gov/directives/directive_68.pdf. Under the Directive, an enforcement matter is SOL-sensitive if any part of the alleged violations will fall outside of the five-year SOL within 12 months. *Id.* at 3. OGC is required to activate any open SOL-sensitive matter within 15 days of the last response to the complaint or within 15 days of receipt of a *sua sponte* submission. *Id.* Further, OGC must circulate the First GCR in an SOL-sensitive matter within 30 days of activation and ensure that the matter is presented to the Commission for a vote on PCTB at least six months prior to any violation falling outside the SOL. *Id.* at 3-4. The directive also requires all SOL-tolling agreements to be in writing. *Id.* at 4. For more information about the SOL and its implications, see Section 3.6.3.

Directive 68 also requires the attorney, on behalf of the General Counsel, to prepare and send status reports to all respondents and the Commission if the Commission has not voted to find RTB, no RTB, or to dismiss the matter within 12 months of receipt of the complaint, referral, or *sua sponte submission,* and at every 12-month interval thereafter. The attorney must also prepare and send a similar report 12 months after the Commission has found RTB, and at every 12-month interval thereafter.

These status reports must: (1) list the case number (MUR, Pre-MUR, or Referral); (2) identify the date the matter was received, or the date of the RTB vote, whichever applies; (3) state whether the matter is pending with OGC or the Commission; and (4) provide a reasonable estimate of when the Commission is expected to vote on the matter. The attorney must send the status report to respondents and the Commission within five business days after the matter has reached the applicable 12-month interval. The attorney should prepare the report for OGC to circulate to the Commission on an informational basis.

3.2.9.2 Tolling

If the SOL on the alleged violations will expire within two years as to any activity in an assigned case, the attorney should request that the respondent sign an agreement to toll the SOL: (1) as a condition of granting any extension; or (2) if the respondent wishes to enter into PPCC. In addition, the Commission's *sua sponte* policy provides that the attorney may ask the submitter to waive or toll the SOL for activity that had been previously concealed or not timely disclosed. *See* Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions), 72 Fed. Reg. 16,695 (Apr. 5, 2007), *available at* http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-8.pdf. There are three examples of tolling agreement templates, Enforcement Forms 131-33. The attorney should choose the form that best fits the situation. See Section 3.3 for more information about the *sua sponte* policy.

3.3 Handling *Sua Sponte* Submissions

A *sua sponte* submission is the result of an individual or entity self-reporting statutory or regulatory violations of which the Commission had no prior knowledge. To encourage self-reporting, the Commission adopted a policy for dealing with *sua sponte* matters that will generally offer a civil penalty between 25% and 75% lower than the Commission would otherwise have sought in an identical matter arising by other means. *See* Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions), 72 Fed. Reg. 16,695 (Apr. 5, 2007), *available at* http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-8.pdf.

3.3.1 The Sua Sponte Policy

Under the policy, the Commission may offer favorable treatment as an incentive to self-report violations. The policy contains a non-exhaustive list of the factors the Commission may consider in *sua sponte* matters, including the nature of the violation, the extent of corrective action and new self-governance measures, and the extent of the submitter's disclosure to and cooperation with the Commission. 72 Fed. Reg. at 16,697. Under the policy, the Commission may do one or more of the following:

- Take no action against particular respondents;
- Offer a significantly lower civil penalty than what the Commission otherwise would have sought in a complaint-generated matter involving similar circumstances or, where appropriate, no civil penalty;
- Offer conciliation before a PCTB finding and, in certain cases, proceed directly to conciliation without the Commission first finding RTB;
- Refrain from making a formal finding that a violation was knowing and willful, even where the available information would otherwise support such a finding;
- Proceed only as to an organization rather than as to various individuals or, where appropriate, proceed only as to individuals rather than organizational respondents; and
- Include language in the CA that indicates the level of cooperation provided by respondents and the remedial action taken.

Id. at 16,696. Additionally, in cases where the submission includes privileged or sensitive information, the Commission may work with the submitter to protect privileged information from public disclosure while permitting the Commission to verify the sufficiency of the submission. *Id.*

For reasons that are made clear in the next section, the attorney should meet with the AGC and team leader early in the process to decide on the proper recommendation to make in a *sua sponte* matter.

3.3.2 Fast Track Resolution of *Sua Sponte* matters

Under Fast Track Resolution ("FTR"), the Commission may expedite the matter and conciliate a violation with a respondent without an RTB finding. Thus, it is important to identify potential candidates for FTR as soon as possible in the enforcement process. The *sua sponte* policy has a checklist to help determine if FTR may be appropriate. 72 Fed. Reg. at 16,698. Generally, submissions that are substantially complete and present straightforward non-knowing and willful violations to which all respondents admit liability may be good candidates for FTR.

3.3.3 The Entry Meeting

Individuals who or entities that wish to self-report violations ("submitter") often ask to meet with OGC before making a formal *sua sponte* submission. Generally, the AGC or a Deputy AGC and a team leader will meet with the submitter and its counsel. Two OGC officials should attend the meeting so that one can ask questions and the other can take notes, which should be used to prepare a memo to the file.

At the meeting, the submitter explains the basis for the submission and may provide documents. The OGC officials should explain the Commission's *sua sponte* policy and ask follow-up questions to complete the factual background. The OGC officials should tell the submitter that the formal *sua sponte* submission should contain a full account of the purported violations and include:

- A complete recitation of the facts along with all relevant documents that explain how each violation was discovered;
- An admission as to each violation, with names and contact information, as appropriate;
- A description of any actions taken in response to the violation, such as a report of an internal investigation or audit; and
- A list of any other agencies that are investigating the violation or the facts underlying the violation.

In cases involving violations that span many years or are very complex, it may be helpful to invite a RAD official to attend the meeting to help determine which filings are required to satisfy the committee's reporting obligation. In cases involving embezzlement from a political committee, the OGC officials should ask about the committee's internal controls and whether the committee has reported the embezzlement to the proper authorities for possible criminal prosecution. For more information about internal controls, refer to the Commission's Statement of Policy Regarding the Safe Harbor for Misreporting Due to Embezzlement, 72 Fed. Reg. 16,695 (April 5, 2007), *available at* http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-9.pdf.

The OGC officials should ask the submitter when the formal submission will likely be filed and should inform CELA. *Sua sponte* submissions often involve activity that occurred many years before and may be SOL-sensitive or even partially expired, so the officials should urge the submitter to make the

formal written submission as soon as possible. The officials should also seek a tolling agreement to preserve as much of the activity from the expiration of the SOL as possible. *See* Section 3.2.9.2. It is also appropriate to ask the submitter to waive the SOL as to any activity that was previously concealed or not timely disclosed. *See* Sua Sponte Policy, 72 Fed. Reg. at 16,697.

The OGC officials should write a detailed summary of the matters discussed and provide it to CELA for placement in the permanent file. If the submitter presented documents at the meeting, the officials should provide them to CELA as well. The attorney assigned to handle the *sua sponte* submission should review the meeting notes and documents carefully.

3.3.4 Following Up with Respondent

If the submitter does not file the formal *sua sponte* submission by the estimated time, the OGC officials should contact the submitter and ask why it has not been filed and when it can be expected. After the formal *sua sponte* submission is filed, the attorney should follow up with the submitter to obtain any missing information or documents related to the submission. If necessary, the attorney may remind the submitter that making a complete, prompt, and accurate account of the violations is critical and helps demonstrate that the respondent has been cooperative and could receive greater benefit under the policy. Conversely, the submitter may receive lesser or no benefit under the policy if the submitter (1) refuses to provide all requested information; (2) fails to provide requested information within a reasonable time; or (3) provides information in a way that requires the attorney to do substantial follow-up work.

3.4 Fact Development and Legal Research

At this pre-RTB stage, the attorney relies on information provided by the parties, internally generated information, information from external referrals or reports from other agencies, and information available to the general public, including disclosure reports. Formal investigation methods may be used only after the Commission has found RTB that a violation of the Act has occurred. *See* 2 U.S.C. § 437g(a)(2); Section 5 (Investigations). Often, publicly available information will provide facts that are important in making a correct recommendation to the Commission. For example, information filed with the Commission in disclosure reports or other committee filings with the Commission can be compared with information presented by a candidate and his or her authorized committee in a response. Likewise, public filings may help determine whether an entity is a corporation or a partnership, whether it is foreign or domestic (or has officers or members that may be foreign nationals), and whether it is a parent or a subsidiary, all of which could have a significant effect on the recommendation in a matter.

3.4.1 Fact Development

3.4.1.1 Complaint, Referrals, *Sua Sponte* Submissions, and Responses

In an externally generated matter, the attorney should first look to the complaint to determine the facts relating to a potential violation of the Act. The attorney should attempt to differentiate between statements based on the complainant's personal knowledge, those based on information and belief or those based on speculation. Statements not based on personal knowledge should identify the source of the information. If the allegations in the complaint are based on information contained in an advertisement, news article, or website, the attorney should review those sources to confirm the factual allegations and to identify additional relevant information.

The attorney's responsibilities in internally generated matters are similar. For example, the attorney should study any internal referral document and learn the basis for the referral. It is a good practice to discuss the referral document with RAD or the Audit Division. Similarly, the attorney reviews

a *sua sponte* submission to determine if it is factually complete or whether the attorney needs to follow up with the submitter.

A response to a complaint, referral, or pre-RTB notification letter should provide the attorney with further information about the facts surrounding the alleged violation. A response should address each allegation and provide relevant documentation, such as affidavits from persons with first-hand knowledge of the facts. The response is the respondent's opportunity to demonstrate why the Commission should not pursue any enforcement action. The response may also clarify, correct, or supplement the information in the complaint, referral, or notification letter; ask for early settlement consideration; or supply mitigating information.

3.4.1.2 Public Information Sources

The following is a non-exhaustive list of public sources available for factual research.

- Westlaw: In addition to legal research, attorneys may use Westlaw to search for news articles and to find public information about corporations and individuals.

- Dun & Bradstreet: This service provides comprehensive information on most U.S. businesses. Due to the cost involved in running the report, this service is available only through the Library.

- Commercial search engines can generate a list of potential information sources relevant to the facts of a matter.

- IRS Official Website (www.irs.gov): The "Charities and Non-Profits" section of the website provides information on "Political Organizations." This section contains copies of all reports that the IRS requires political organizations and other non-profit organizations to file publicly.

- YouTube (www.youtube.com): YouTube can be used to locate video advertisements or other information that might be at issue in a complaint.

- Candidate, Party, or Political Committee Websites: In any case involving a candidate or a candidate's principal campaign committee, the candidate's website may provide relevant information. The websites of the major national party organizations can also be helpful, as can the websites of any political committee involved in the alleged violation.

- News Articles: News articles may provide useful background information or reports of recent developments in a matter.

- PACER: This website contains information and documents from federal court actions, including briefs, plea agreements, and opinions.

- Social Media Sources: Most candidates have pages on Facebook, and many use Twitter.

- State Corporate Divisions: Information concerning corporations and partnerships is maintained publicly and is often accessible online at the state level.

- State Ethics/Political Reporting Agencies: Information pertaining to state campaign reports and financial disclosure statements may be available from these entities.

For more information about public sources, consult the Librarian.

3.4.1.3 Agency Information Sources

Attorneys may find relevant facts from these portions of the FEC website:

- Audit Report Search System: Contains all Final Audit Reports approved by the Commission since its inception. The search can be based on information about the audited committee (Name, FEC ID Number, Type, and Election Cycle) or the issues covered in the report.

- RAD webpage: Contains reports filed by committees and other entities, RFAIs, and an explanation of the RAD review process.

- Information Division Publications: The division produces publications available to the general public that provide information on various aspects of campaign finance law, including Campaign Guides, brochures, and *The Record.*

In addition to information on the Agency's website, the following sources are available to attorneys and staff:

- CMS: Includes information about opened and closed matters. For example, an attorney can search CMS to determine whether the respondents in the assigned matter are involved in other similar matters.

- E-View: This tool is available to search the Commission's disclosure database (including reports of receipts and expenditures filed by political committees).

- Colleagues: Attorneys are strongly encouraged to discuss assigned cases with colleagues. It is possible that a colleague is either working on, or has handled, a similar case and can identify helpful precedents or resources.

3.4.1.4 Other Law Enforcement Agencies

At times, another agency may have a pending or closed matter involving the same respondent as in a pending Commission matter. For example, DOJ or the Office of Congressional Ethics ("OCE") may be investigating an entity or individual that is also a respondent in an FEC matter. *See* Section 1.2.5. Similarly, state or local entities may be prosecuting a respondent who is also the subject of an FEC matter and may have relevant information or documents, such as news about an impending plea agreement or the plea agreement itself. The attorney must consult with the AGC (and General Counsel, as appropriate) and the team leader before contacting federal, state, or local law enforcement entities or OCE.

3.4.1.5 Clarification of Response

In some cases, the attorney may wish to seek clarification from the respondent because the response to a complaint's allegations may be confusing, imprecise, or silent as to a material fact. Clarification requests usually take the form of a pre-RTB letter, and the decision to send such a letter should be made as early in the process as possible. Attorneys should consult with the team leader and the AGC or Deputy AGC before preparing such a letter. The pre-RTB letter, which the AGC or Deputy AGC signs, should state that: (1) OGC is providing the respondent with an opportunity to clarify the factual record; (2) there is no legal obligation to respond; and (3) no adverse inference will be drawn from the lack of a response.

3.4.2 Legal Research

3.4.2.1 FEC Website

The FEC's website has a number of legal resources. Normally, the following areas are helpful when handling enforcement cases:

- EQS: Documents from closed MURs, AF matters, and ADR matters are available through EQS. Also, by searching certain key words, the attorney may be able to identify relevant statutory and regulatory provisions. Attorneys should be aware that portions of some documents on EQS may be redacted due to statutory confidentiality requirements or exemptions to disclosure under FOIA. Further, documents from Pre-MURs, ARs, and RRs in which the Commission declined to open a MUR are not on EQS.

- AO search page: An AO is an official Commission response to a question relating to the application of the federal campaign finance laws to a specific set of facts. AOs help clarify the Act and Commission regulations, and may provide guidance in matters where there may be little or no MUR authority. AOs are also available on Westlaw.

- Explanations and Justifications ("E&Js") for Commission regulations: E&Js, which are prepared by OGC and approved by the Commission before being published in the Federal Register, are Congressional documents and Federal Register notices containing supplemental information on technical amendments to Commission regulations. The Commission writes an E&J whenever it submits to Congress a new regulation or amends an old one. In cases where a regulation has been amended, E&Js for that regulation remain valid, unless a revision represents a reversal in Commission policy. Thus, for a regulation that has been modified more than once, several E&Js will be relevant.

- Commission Policy Statements and Directives

3.4.2.2 CMS

In addition to using CMS to locate relevant facts, attorneys may also use it to identify similar matters addressing the statutory and regulatory provisions at issue in an assigned case.

3.4.2.3 ECM

Unredacted versions of GCRs and other documents are available on ECM. Consult the relevant training manuals for instructions on searching this system.

3.4.2.4 Campaign Guides

The four campaign guides published by the Information Division provide direction to the regulated community and the public. Supplements to these guides summarize recent rules and opinions. The guides are useful summaries of the law, but they are not the law themselves, and they do not replace the law or change its meaning. There are guides for: (1) Congressional Candidates and Committees; (2) Corporations and Labor Organizations; (3) Nonconnected Committees; and (4) Political Party Committees.

3.4.2.5 Westlaw

Westlaw can be used to find court cases relating to campaign finance law and other laws. AOs are also on Westlaw.

3.4.2.6 Other Sources

A list of research tools, including the sources described above, is maintained by the Division's special projects team and is available to attorneys and staff.

3.5 Planning the First GCR

After reviewing the case file, the publicly available and Commission-generated resources, and the relevant legal authorities, the attorney meets with the AGC or Deputy AGC, the team leader, and the team's paralegal and investigator to discuss the case and decide which recommendations to include in the First GCR. At the meeting, the AGC or Deputy AGC sets a production schedule to ensure timely circulation of the First GCR to the Commission. Depending on the case, this schedule should include time for the attorney to consult with other divisions, and for the GC or Deputy General Counsel for Law to review or sign the report.

To avoid delays in processing First GCRs, the following matters should be resolved at this point:

- Have all the respondents been notified? If not, work with CELA to have those respondents notified as soon as possible. *See* Sections 3.2.4; 3.2.5.

- Is the case SOL-sensitive, that is, will any of the potential violations expire within 12 months? If so, under Directive 68, the First GCR is due to the Commission within 30 days of activation. *See* Sections 3.2.9; 3.6.3.

- Is a pre-RTB letter needed? If so, it should be prepared and sent as soon as possible. *See* Sections 3.2.3; 3.4.1.5.

- Does the attorney need to: (1) consult with staff from another OGC division, RAD, or Audit to determine the proper resolution of an issue; or (2) have an attorney or staff member from another OGC division or Agency office review the draft of the First GCR before circulation? If so, time for such consultation or review must be built into the production schedule.

3.6 Miscellaneous Matters

3.6.1 RFAIs in Activated Matters

RAD sends RFAI notices to registered committees when its review of their reports reveals possible violations, errors, or a need for clarification. If RAD generated RFAIs to the committee before the case was activated and the committee became a respondent in an open MUR, the notices may be found either in the prep file or on the FEC's website. If, however, the committee is a respondent in an open MUR at the time RAD generates the RFAI notice, RAD sends an e-mail with a link to the generated notice to the team leader and attorney assigned to the case. This e-mail asks if RAD should send the notice to the committee. The e-mail includes a link to the RFAI notice and requests a response within three business days. The attorney or team leader responds by clicking a button either to "Approve" or "Reject" the RFAI, as appropriate. If the potential RFAI involves issues pending in the MUR, the

attorney should "Reject" the RFAI. These e-mails require prompt attention because OGC's approval is assumed if there is no response by the deadline in the e-mail.

3.6.2 Termination Requests in Activated Matters

If a committee registered with the Commission wishes to stop filing reports, it submits a termination report or a request that RAD approve its termination as a reporting entity. If a committee that is a respondent in a pending enforcement proceeding files a termination report or request to terminate, and the request could be approved under RAD's internal policy, RAD sends an e-mail to the team leader and the attorney with a link to the draft letter granting a committee's request to terminate as a reporting entity. The e-mail requests a response within three business days. The attorney or team leader should immediately "Reject" the letter granting termination to the committee because it is a respondent in an ongoing matter. The attorney should also prepare and send a letter to the committee (or counsel, if represented) denying the termination request. OGC, not RAD, sends the letter, because RAD correspondence is placed on the public record, and a letter from RAD denying termination would disclose the confidential fact that the committee is a respondent in an open matter. Finally, the attorney should forward a hard copy of the letter denying termination to the RAD Compliance Branch Chief. The attorney should respond promptly to RAD's e-mail notification requests.

3.6.3 Statute of Limitations

The SOL to pursue a civil penalty in federal court for a violation of the Act or regulations is five years from the date the claim first accrued. *See* 28 U.S.C. § 2462; *see also Gabelli v. SEC*, ___ U.S. ___, No. 11-1274, slip op. at 11 (Feb. 27, 2013) (holding that discovery rule does not apply to governmental enforcement actions seeking civil penalties). Attorneys must always be aware of the date when potential violations will expire under the SOL and plan accordingly. Under Directive 68, OGC is required to expedite the activation of matters and the circulation of First GCRs. OGC is also required to bring matters before the Commission for a vote on PCTB no later than six months before any SOL expires as to any violation. These procedures are designed to allow sufficient time for the Commission to complete the administrative process and, if appropriate, authorize suit before the SOL expires. *See* Section 3.2.9 (Procedures for SOL-Sensitive Cases).

When handling an SOL-sensitive (or partially expired) matter, the attorney should keep the SOL in mind when planning how the case should proceed. For example, an attorney may decide not to recommend an investigation in an SOL-sensitive matter if PPCC is a viable option and would not cause harmful delay. Also, the attorney may sometimes ask the respondent to sign a tolling agreement in an SOL-sensitive matter if the respondent asks for an extension or seeks to enter into PPCC. All tolling agreements must be in writing. Enforcement Forms 131-33 provide templates for tolling agreements.

It is not unusual for *sua sponte* submitters to self-report some violations that have already expired under the SOL, particularly in cases involving embezzlement or contributions in the names of others. When some activity in a *sua sponte* submission is expired on receipt, the *sua sponte* policy makes clear that it is appropriate for OGC to ask the respondent to waive or toll the SOL as to activity that was concealed or not timely disclosed. 72 Fed. Reg. at 16,697.

Finally, the SOL applies only to the Commission's ability to seek a civil penalty; it does not prevent the Commission from seeking non-monetary, equitable forms of relief against a respondent, such as disgorgement, filing missing reports, or agreeing to cease and desist from such activity in the future. Further, the fact that the SOL may have expired as to some violations does not prevent the Commission from seeking a civil penalty as to the violations that have not expired.

INSERT PRACTICE TIP PULL-OUT BOX HERE

Initial Actions Checklist

_____ Complaint/Referral/*Sua sponte* submission proper; reviewed

_____ Complainant and all respondents properly notified

_____ Confirm if DOC received

_____ Verify CMS entries; First GCR Due Date, Names, Addresses, SOL (earliest and latest)

_____ Extension of Time requests answered and noted in CMS (*See* Section 2.6)

_____ All responses received and reviewed (or confirm that responses were not filed)

_____ Relevant Agency and Public sources reviewed

_____ SOL (earliest and latest) checked (*See* Section 3.6.3)

_____ Prep File received and reviewed (*See* Section 3.2.2)

_____ Plan the First GCR (*See* Section 3.5)

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4 THE REASON TO BELIEVE STAGE AND THE FIRST GENERAL COUNSEL'S REPORT

This section provides guidance on issues relevant to the initial stage of the enforcement process, known as the RTB stage, and the drafting of the First GCR. This section also discusses the Commission's voting procedures, preparing for and attending Executive Sessions, and notifying parties of the Commission's findings at the RTB stage.

4.1 Statutory Framework and Overview

The Act requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a precondition to opening an investigation into the alleged violation. 2 U.S.C. § 437g(a)(2); *see also* 11 C.F.R. §§ 111.9-.10. An RTB finding is not a finding that the respondent violated the Act, but instead means that the Commission believes a violation may have occurred based on the available information. An RTB finding is generally followed by either an investigation or PPCC. For example, an RTB finding followed by an investigation would be appropriate when there is reason to believe a violation may have occurred, but an investigation is required to determine whether a violation occurred and, if so, the scope of the violation. If, however, it appears the Commission has sufficient information regarding the alleged violations, including potentially exculpatory or mitigating facts, the Commission may immediately authorize OGC to enter into conciliation and approve a proposed CA. *See* 11 C.F.R. § 111.18; *see also* Sections 5 (Investigations); 6 (PPCC).

After the attorney, the team leader, and the AGC or Deputy decide which recommendations to make to the Commission, *see* Section 3.5, the attorney prepares the First GCR. The First GCR presents the relevant facts, allegations, and issues; it sets forth and analyzes the relevant law; and it makes recommendations to the Commission regarding the initial disposition of a matter.

4.2 Time Goals

When the matter is assigned to an attorney, CELA "tags" the matter with a circulation deadline after considering several factors. The AGC occasionally changes the "tag" if, after further review, the case proves to be more or less complicated than initially thought. The AGC or Deputy sets internal deadlines for submitting the draft First GCR to the team leader, AGC or Deputy, and the General Counsel. *See* Section 3.5.

4.3 Purpose and Organization of the First GCR

The First GCR is the first report OGC prepares in a matter for circulation to the Commission. The First GCR presents information relevant to the determination of whether there is RTB that a violation of the Act or Commission regulations occurred and recommends an appropriate course of action to the Commission. This report includes: (1) a caption; (2) an introduction stating how the matter was generated and identifying the issues in the matter; (3) an analysis of the relevant facts and the law; (4) a discussion of the proposed CA and civil penalty calculation, if applicable; (5) a discussion of the proposed investigation, if applicable; and (6) formal recommendations for Commission action. The templates for First GCRs are Enforcement Forms 68 (internally generated matters) and 70 (externally generated matters).

After the Commission considers the First GCR in a complaint-generated matter, it will usually take one of the four following actions as to each potential violation: (1) find RTB; (2) find no RTB; (3) dismiss as a matter of prosecutorial discretion; or (4) dismiss with an admonishment (*but see* Section 4.4.4 regarding dismissal with a caution). Statement of Policy Regarding Commission

Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007), *available at* http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-6.pdf ("Initial Stage Policy"). In internally generated matters, the Commission also decides whether to open a MUR at this stage.

In most cases, the attorney should organize the First GCR as set forth below. If a different organization seems more appropriate in a particular case, the attorney should discuss it with the team leader before drafting the report.

4.3.1 Introduction

The introduction should be a concise statement of the matter and provide a summary of the recommendations made in the report. The introduction should: (1) identify the parties (complainant, referring agency, respondents, *etc.*), noting any changes to the name of any respondent political committee or its treasurer since the complaint was filed; (2) provide a brief description of the basic allegations; and (3) state the recommendations being made to the Commission in the report. If the matter is internally generated, the attorney should reference the referral document, *sua sponte* submission, or other relevant material. The introduction should also summarize the basis for the recommendations.

4.3.2 Factual Background

This section of the First GCR provides the relevant facts needed to analyze whether RTB exists. This section should not be a recitation of every available fact or a *verbatim* restatement of every claim the parties made. Instead, the background section should include only necessary facts and concise summaries of the parties' claims, arranged in a way so that a reader unfamiliar with the case can understand what happened and what the issues are. The facts should be presented objectively and include all potentially exculpatory and inculpatory information.

Usually, the primary sources for the facts will be the complaint, referral materials or *sua sponte* submission, and the response. The attorney should also review any relevant reports from the Commission's disclosure database and other relevant publicly available information, such as the respondents' websites, filings at other governmental agencies, and news sources. See Section 3.4 for a more complete list of available resources. (In some *sua sponte* cases, the attorney may have to contact the submitter to ask for additional documents or clarification of statements in the submission. For more information regarding *sua sponte* cases, refer to Section 3.3). In appropriate circumstances, the attorney may also give respondents an opportunity to clarify responses. *See* Section 3.4.1.5.

4.3.3 Legal Analysis

This section should set forth and apply the relevant law to the facts of the case. Usually, this section is organized by issue, but at times, a different format may be more appropriate. For example, in cases with many respondents, organizing the analysis by respondent may be preferable. If the report is relatively complex, it may be helpful to begin this section with a brief summary. For any First GCR longer than 25 pages, consider inserting a table of contents at the beginning of the report.

For each issue, the attorney should begin by discussing the applicable sections of the Act and Commission regulations. The attorney should include a discussion of other relevant legal authorities, such as:

- closed or pending MURs;
- AOs;

- legislative histories;
- E&Js;
- court records; and
- court decisions.

Before relying on GCRs or F&LAs from other MURs to establish the Commission's prior determinations, the attorney must check the certifications in the matter to make sure that the Commission accepted the recommendations OGC made in the GCR and did not make an inconsistent finding later in the case. Because an F&LA is the Commission's document, it is preferable to cite to an F&LA to establish a Commission determination rather than a GCR.

After the statement of the law, the attorney should apply the law to the facts, discuss possible violations, and conclude with recommendations. If the response presents a legal interpretation that differs from OGC's, the First GCR should also discuss that contrary interpretation.

4.3.4 Discussion of Proposed Investigation (If Applicable)

If the First GCR recommends that the Commission find RTB and open an investigation, it should include a section titled "Proposed Investigation." This section should briefly discuss the facts that need to be established to determine the existence and scope of the violations. This section should also describe the investigative plan and state whether the proposed investigation will likely be conducted informally, through compulsory process, or both. For a more thorough discussion of investigative plans, refer to Section 5.2.1. Every First GCR that recommends an investigation contains a recommendation to authorize the use of compulsory process. This recommendation is necessary in case informal means of investigation fail or are not appropriate. If the attorney anticipates using compulsory process, the report should identify the proposed recipients.

4.3.5 Discussion of Conciliation and Civil Penalty (If Applicable)

If the First GCR recommends that the Commission offer PPCC to a respondent, it should describe significant features of the proposed CA, such as the admissions clause and the proposed civil penalty. When discussing the proposed civil penalty, commonly referred to as the "opening settlement offer," the attorney should show specifically how it was calculated and discuss prior matters in which the Commission calculated opening settlement offers for this type of violation. If applicable, this section should discuss how the opening settlement offer is affected by mitigating factors, such as a respondent's corrective actions, and aggravating factors, such as the egregiousness of the violation or prior similar violations by the same respondent. This section should also discuss the effect of any applicable discounts. For further guidance, see Section 6.4.3 (Calculating Proposed Opening Settlement Offers).

If there are multiple respondents, this section of the report usually addresses each respondent individually. Similarly, a separate CA is usually necessary for each respondent, unless the respondents are represented by the same counsel. If multiple respondents are represented by the same counsel and there are no conflicts of interest, consider a global conciliation and civil penalty.

4.3.6 Recommendations

The recommendations section is the final section of any report and, if approved by the Commission, will appear *verbatim* in the certification of the Commission's vote. Attorneys should take particular care when drafting and proofreading this section. If the certification is not correct, the attorney may have to prepare and circulate a memorandum containing the correct recommendations so that the Commission Secretary can issue an amended certification. Attorneys should ensure that the final recommendations correspond with recommendations in the introduction and legal analysis, that all citations in the recommendations are complete and correct, and that the final recommendations address all respondents and every violation raised in the matter. If the First GCR recommends that a complaint-generated matter terminate at this stage, this section should include a recommendation to close the file. For information about specific recommendations and certifications, refer to Sections 4.4 and 4.7, respectively.

4.3.7 Signature Block and Signature Lines

The signature block should always include the General Counsel, the AGC or the Deputy AGC, the team leader, and the attorney. The attorney should always include a signature line for the team leader and the attorney, and usually should include a signature line for the AGC or Deputy AGC. After reviewing the First GCR, the General Counsel or Deputy General Counsel for Law may choose to sign the report and will direct the attorney to add a signature line.

4.3.8 Attachments

Just below the final signature line, the attorney lists any attachments to the First GCR. Attachments include any exhibits to the report, a draft F&LA for each respondent as to whom the First GCR makes recommendations, and draft CAs. Refer to Section 4.5.1 for guidance on drafting F&LAs and Section 6.3 for guidance on drafting CAs. Attachments should be consecutively numbered, and the pages of each attachment should also be consecutively numbered, such as "Attachment 1, Page 1 of 6."

4.4 Types of Recommendations

As stated above, the First GCR makes recommendations for Commission action in a matter. The Commission reviews the First GCR, and, with four affirmative votes, it may approve the recommendations or make different findings. The recommendations mentioned in this section are not always exclusive and can be made in concert with others. At the RTB stage, the First GCR will almost always make one of four recommendations to the Commission regarding the disposition of each potential violation in a complaint-generated matter: (1) RTB; (2) no RTB; (3) dismissal as a matter of prosecutorial discretion; or (4) dismissal with caution (*see* Practice Tip at Section 4.4.4). In an internally generated matter, the report always makes a recommendation whether or not to open a MUR.

4.4.1 Reason to Believe

According to the Commission's Initial Stage Policy, a recommendation that the Commission find RTB is appropriate when the available information regarding the matter is at least sufficient to warrant conducting an investigation, and when the seriousness of the alleged violation warrants either further investigation or immediate conciliation. An RTB finding is merely a threshold determination and by itself does not indicate that the Commission has concluded that the law has been violated. An RTB recommendation is always accompanied by either a recommendation to open an investigation or a recommendation to enter into PPCC. 72 Fed. Reg. at 12,545.

- RTB/Investigation: As the Initial Stage Policy provides, when a complaint credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation occurred, and if so, its exact scope, the appropriate recommendation is that the Commission "find reason to believe that [Respondent's name] violated 2 U.S.C. § ___ and 11 C.F.R. § ___," followed by a recommendation to "authorize the use of compulsory process."

- RTB/Conciliation: As the Initial Stage Policy also provides, when it appears that sufficient facts necessary to establish that a violation has occurred are known, and where the seriousness of the violation warrants conciliation, the appropriate recommendation is that the Commission "find reason to believe that [Respondent's name] violated 2 U.S.C. § ___ and 11 C.F.R. § ___" followed by a recommendation to "enter into conciliation with [Respondent's name] prior to a finding of probable cause to believe." A recommendation must then be made to "approve the attached conciliation agreement."

4.4.2 No Reason to Believe

A no-RTB recommendation is appropriate when the complaint, any response filed by the respondent, and any publicly available information, fail to give rise to a reasonable inference that a violation has occurred, or when, even if the allegations are true, they would not constitute a violation of the Act. For example, a no-RTB recommendation is appropriate when: (1) a violation has been alleged, but the respondent's response to the complaint persuasively demonstrates that no violation has occurred; (2) a complaint alleges a violation, but is either not credible or is so vague that an investigation would be effectively impossible; or (3) a complaint simply fails to describe a violation of the Act. 72 Fed. Reg. at 12,546.

4.4.3 Dismissal as a Matter of Prosecutorial Discretion

Under *Heckler v. Chaney*, 470 U.S. 821 (1985), the Commission has broad discretion to determine how to proceed with respect to complaints or referrals. The Commission may exercise its prosecutorial discretion under *Heckler* to dismiss matters that do not merit the additional expenditure of Commission resources. *See also* 2 U.S.C. § 437g(a)(1); 11 C.F.R. §§ 111.6(b), 111.7(b). A dismissal recommendation may be appropriate when the matter does not merit the further use of Commission resources because of factors such as the small amount or significance of the alleged violation, the vagueness or weakness of the information, or likely difficulties with an investigation.

4.4.4 Dismissal with Caution

Dismissal with caution is the appropriate recommendation when it appears that a violation of the Act did occur or appears to have occurred, but the size or significance of the apparent violation or the resulting monetary penalty is not sufficient to warrant further pursuit by the Commission or use of the Commission's resources. In such cases, the Commission sends a letter to the respondents informing them that the Commission has dismissed the matter, but cautioning them regarding their obligations under the law.

PRACTICE TIP PULL-OUT BOX:

Dismissal with Caution versus Dismissal with Admonishment

The direction in the Commission's Initial Stage Policy to dismiss with admonishment is still in effect. 72 Fed. Reg. at 12,545-46. In practice, however, the current Commission has chosen to send

letters cautioning respondents instead. Accordingly, OGC has been recommending that the Commission "dismiss but send a cautionary letter" instead of recommending admonishment.

END PRACTICE TIP PULL-OUT BOX

4.4.5 Take No Action at this Time

This recommendation may be appropriate in cases involving multiple allegations and respondents, and when there are grounds to recommend RTB as to at least one respondent and to investigate at least some of the allegations. After investigating the respondent against whom RTB has been found, the General Counsel may develop a broader factual basis for determining what recommendation to make at a later time regarding the other allegation or respondent.

On a related note, there may also be circumstances in which it may be appropriate for the First GCR expressly not to make any recommendations as to a particular individual that may seem involved in the conduct at issue, but for which there is no basis at that time for that person or entity to be named as a respondent.

4.4.6 Internally Generated Matters: Opening or Declining to Open a MUR

Until the Commission makes an RTB finding in an internally generated matter, it is referred to by its Pre-MUR, AR, or RR number. If the Commission finds RTB in such a case, the Commission opens a MUR and assigns a new MUR number to it. When such a case is eventually closed, the Commission puts appropriate documents from the case on the public record. Accordingly, if the First GCR recommends that the Commission find RTB in an internally generated matter, the report must also include a recommendation to "Open a MUR."

If, however, the First GCR in an internally generated matter concludes that there is no violation or pursuit of the violation does not merit further use of Commission resources, the First GCR should recommend that the Commission "Decline to Open a MUR." When the Commission declines to open a MUR, documents from the case file will not be placed on the public record. For more information about documents placed on the public record, refer to Section 8.4.

4.4.7 Enter Into Conciliation Prior to Finding Probable Cause to Believe

In any matter in which OGC is recommending PPCC, the recommendation section of the report must include a recommendation to "enter into conciliation with [Respondent's name, or "all Respondents"] prior to a finding of probable cause to believe." For more information about PPCC, refer to Section 6.

4.4.8 Knowing and Willful Violations

If there is sufficient information available to support such a recommendation, OGC may recommend that the Commission find that there is reason to believe that a respondent may have "knowingly and willfully" violated provisions of the Act. The Act provides for enhanced civil penalties and potential criminal liability for "knowing and willful" violations of its provisions. 2 U.S.C. §§ 437g(a)(5)(B), 437g(d). The phrase "knowing and willful" indicates that a respondent acted "with full knowledge of all the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. 12197, 12199 (May 3, 1976). The government may prove a knowing and willful violation of the Act by demonstrating a respondent's "'knowledge that the conduct is unlawful,' as opposed to specific 'knowledge of the law'. . . ." *United States v. Danielczyk*, ___ F. Supp. 2d ___, 2013 WL 124119, *5

(E.D. Va. Jan. 9, 2013) (quoting *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish a willful violation, the government need show only that the defendant acted with knowledge that conduct was unlawful, not knowledge of the specific statutory provision violated)).

If the Commission does not make a knowing and willful finding at the RTB stage, it is not precluded from making such a finding at a later stage. The knowing and willful aspect of a violation may not be fully apparent until the investigation is complete. Therefore, if the proposed investigation will inquire into potential knowing and willful conduct, the First GCR and F&LA should so state, even if the attorney believes that making a knowing and willful recommendation in the First GCR would be premature. By including this language in the F&LA, the respondent will be on notice that the Commission may make a knowing and willful finding at a later stage.

Given the serious nature of a knowing and willful violation, the Act calls for enhanced civil penalties, and a respondent may also be subject to criminal prosecution. *See* 2 U.S.C. § 437g(a)(5)(B), (d); *see also* Section 6.4.1. Accordingly, before making a knowing and willful recommendation, the attorney should consult with the team leader and the AGC or Deputy AGC.

4.4.9 Authorize the Use of Compulsory Process

If the First GCR recommends that the Commission open an investigation, the report must include a recommendation that the Commission "authorize the use of compulsory process." This recommendation is necessary so that OGC has the authority to serve orders to submit written answers to questions and subpoenas for documents and depositions. All compulsory process documents must be reviewed by the AGC and approved by the Commission before they are served. For more information about investigations, refer to Section 5.

4.4.10 Recommending Audits or Seeking Assistance from the Audit Division

OGC may recommend that the Commission authorize an audit of a committee pursuant to 2 U.S.C. § 437g(a)(2) as part of its investigation. In matters in which OGC needs only limited assistance, the report may state that OGC intends to ask the Audit Division for an "audit analysis" of discovery responses obtained in a matter. For either type of assistance from the Audit Division, the attorney should consult with the team leader and then coordinate with the Audit Division before circulating the First GCR to the Commission.

4.4.11 Referral to Alternative Dispute Resolution Office

The Commission established ADRO to promote compliance with the federal election laws by encouraging settlements separate from the formal enforcement process. CELA usually decides before a matter is activated whether it should be handled through the Enforcement process or by ADRO. Sometimes after review of an activated Enforcement matter, the attorney may recommend in the First GCR that some or all of the matter be referred to ADRO. Such referrals are appropriate if both the respondent's liability and the scope and gravity of the violation are clear and there is no dispute as to the material facts, and it appears that the respondent needs significant assistance in meeting its compliance responsibilities. It is usually inappropriate to recommend a referral to ADRO if an investigation is needed, the amount in violation is large, or if the violation is knowing and willful. Refer to Section 1.2.4.1 for more information about the ADR process.

4.4.12 Merger

The general rule is to handle cases concurrently, but separately. OGC may recommend, however, that the Commission merge two or more matters that involve overlapping allegations and respondents. Matters may be merged to save Commission resources or to ensure that cases are uniformly resolved. The attorney should discuss any merger recommendation with the team leader and the AGC or Deputy AGC when planning the First GCR. *See* Section 3.5.

A respondent may also request merger. The attorney should examine the similarity of the matters and determine whether a merger recommendation is appropriate. There are several factors that may weigh against merging matters. The attorney should not recommend merger if it would unduly delay the resolution of one matter. For example, if one matter requires considerable investigation while the other matter is near completion, it is usually improper to recommend merger.

Any merger recommendation must be specific. As illustrated below, the recommendation must list the MUR number of the newly merged matter. Ordinarily, the lower-numbered MUR should be merged into the higher-numbered MUR. Circumstances may warrant merging the higher-numbered MUR into the lower-numbered MUR, such as when there are numerous respondents. Note that a new MUR is not opened when Pre-MURs, ARs, or RRs are merged into existing MURs. In addition, the merger recommendation should precede the other recommendations in the First GCR.

INSERT PRACTICE TIP PULLOUT BOX HERE:

Example Language for Merging two MURs

1. Merge MUR 9000 into MUR 9005.

Example Language for Merging a RAD Referral into an Existing MUR

1. Merge RAD Referral 20L-10 into MUR 9025.

END PRACTICE TIP HERE

4.4.13 Severance

In some cases, certain respondents may need to be severed from the MUR and dealt with under a separate MUR number. For example, severance may be appropriate in cases where the complaint alleges the same general violation against several respondents who have no connection other than having allegedly violated the law in the same way. In such cases, it may be appropriate for OGC to recommend that the Commission sever certain respondents from the existing MUR and open a new MUR as to each respondent. A recommendation to sever may also be appropriate where there is a good reason to close the file as to one or more respondents and place documents from the case file on the public record quickly. For example, the Commission may wish to sever certain respondents because the Commission has resolved the matter as to all but a few respondents. When severance is appropriate, the first recommendation should be to "open a MUR," and the next two recommendations are to sever the respondent from the existing MUR and place that respondent in the new MUR. As with merger, the attorney should consult the AGC or Deputy AGC and the team leader before recommending severance.

INSERT PRACTICE TIP PULL-OUT BOX HERE:

Notifying Respondents of Mergers or Severances

After the Commission votes to merge or sever matters or respondents, the attorney should send a letter to the appropriate respondents to inform them of any new MUR number and to direct that they use the correct MUR number on any correspondence with the Commission.

END PRACTICE TIP PULL-OUT BOX

4.4.14 Reporting Violations to Another Entity

At any time during the enforcement process, the Commission may report apparent violations to the appropriate law enforcement authorities. 2 U.S.C. § 437d(a)(9). On a related note, if the Commission finds PCTB regarding a knowing and willful violation of the Act, it may refer the matter to DOJ. 2 U.S.C. § 437g(a)(5)(C). One difference between a report and a referral is that the Commission may report apparent violations at any time, but generally only refers matters after making a PCTB finding in a matter involving knowing and willful violations.

4.4.15 Close the File

A recommendation to "close the file" may be made as to all respondents at the conclusion of a case, or as to only certain respondents during the course of the matter. If OGC is recommending that the Commission close the file as to certain respondents, the recommendation should include the phrase "close the file with respect to [Respondents' Names]." Otherwise, the recommendation is simply to "close the file." If the Commission closes the file only as to some respondents, the attorney sends each of those respondents a letter notifying them of the Commission's action, informing them that the matter is open as to other respondents, and cautioning them that the Act's confidentiality provisions apply until the case is completely closed. The attorney should use Enforcement Form 25A as a template for this letter.

4.4.16 Approve the Appropriate Letters

Virtually every GCR recommending that the Commission take some specific action or make some specific finding regarding a respondent will require a recommendation to "approve the appropriate letter(s)." This recommendation gives OGC the authority to draft and send the appropriate notification letter(s).

4.5 Attachments and the Final Package

After finalizing the First GCR, the attorney may need to draft or include a number of attachments. Each attachment should be referenced in the report. All attachments are labeled on each page with an attachment number and page number (for example, "Attachment 2, Page 3 of 10"). This section discusses the types of attachments that may be included with a First GCR.

4.5.1 Draft Factual and Legal Analysis

The F&LA sets forth the factual and legal basis for the Commission's action. The template for the draft F&LA is Enforcement Form 69. After the Commission approves an F&LA, the attorney will send it to the respondent to explain the Commission's determinations as to that respondent. The complainant, if there is one, will also receive the F&LA after the case closes.

In most cases, the attorney drafts a separate F&LA for each respondent as to which OGC is making a recommendation in the First GCR. The primary exception is that a committee and its treasurer should receive a combined F&LA if the treasurer does not have separate counsel and the Commission has

not also found the treasurer personally liable. Also, the attorney may include all respondents in one F&LA if: (1) the Commission dismisses or finds no RTB as to all respondents, and these respondents are represented by the same counsel; or (2) all of the respondents have waived confidentiality. The latter situation is unusual. Finally, the attorney does not draft an F&LA in an internally generated matter if the recommendation is to decline to open an MUR.

The text of the draft F&LA is identical to the language in the First GCR in many respects. An approved F&LA, however, is the Commission's document, so the attorney should always use "the Commission" when discussing any action by the Commission. Likewise, the F&LA should conclude with the phrase "Therefore, the Commission finds" or "the Commission has determined." Further, the F&LA does not include references to other open matters, referrals from other federal agencies, investigative plans, calculations of civil penalties, or findings against other respondents in the same matter (unless the First GCR is recommending that the Commission close the matter as to all respondents). The F&LA does not include such references because 2 U.S.C. §§ 437g(a)(4) and (12) and other confidentiality safeguards apply at this stage. *See* Section 2.8 (Confidentiality Considerations in the Enforcement Process).

If the Commission's findings as to one respondent are based on information provided by another respondent, the F&LA should not identify the source of the information, unless the report recommends that the Commission close the file as to all respondents. Instead, the F&LA should preface any statement based on such information with the phrase "The Commission possesses information that..." or other similar language.

Additional F&LAs may be necessary after the RTB stage when the Commission is taking some dispositive action in the case other than executing a CA (which is itself a dispositive document) or authorizing litigation against a respondent.

4.5.2 Proposed Conciliation Agreement

If OGC recommends that the Commission enter into PPCC with a respondent, the proposed CA is referenced in the body of the First GCR and appears as an attachment. See Section 6.3 for more information on drafting a CA.

4.5.3 Other Attachments

For internally generated matters, the attorney should in most cases attach the referral itself and related relevant materials, such as a Final Audit Report. Each document should appear as an attachment and should be referenced in the introduction section of the First GCR. An exception to the above rule involves RAD Referrals. These referrals do not have to be attached, as CELA will already have circulated them to the Commission. It is not necessary to attach the complaint and the responses in externally generated matters.

Depending on the nature of the case, the attorney may choose to attach documents other than those discussed above. For example, it may be helpful to attach particular advertisements or pages from disclosure reports cited in the First GCR. In addition, the attorney may learn of publicly available information while preparing the First GCR that the Commission should consider and that should be attached.

INSERT PRACTICE TIP PULL OUT BOX HERE

Checklist for Preparing First GCRs

1. Are the caption and matter numbers correct? Is the matter number correct in the header on each page? Are all relevant statutes and regulations listed in the caption?

2. Does the report contain the correct citations throughout?

3. Does the report contain the correct spellings of names throughout?

4. If the respondent is a committee, has the current treasurer been named? Normally, that person should be named in his or her official capacity. *See* Section 3.2.5.1.

5. Have recommendations been made on all issues (including procedural recommendations such as "open (or decline to open) a MUR," "approve the appropriate letters," and "close the file")?

6. Does the report address all respondents?

7. Do the recommendations conform to the text of the report?

8. Does the report have the proper signature lines?

9. Are all necessary attachments listed at the end of the report? Are they marked properly, ordered correctly, and actually attached?

10. Do all *supra* and *infra* cross references in the text reflect the final pagination? (As the pagination of the report often changes during the editing process, the better practice is to use "as discussed [above or below]" rather than using internal page references).

11. Are page numbers and line numbers located correctly, and is each section of the report numbered sequentially?

12. Has the attorney checked a final time for any current matters addressing the same issues as in the assigned matter? Is the analysis in the First GCR consistent with the analyses in reports from those matters?

13. If citing a GCR or an F&LA from another matter, has the attorney checked all of the certifications in that matter to ensure that the Commission approved OGC's recommendations and did not make a later, inconsistent finding in the matter?

14. If the report recommends the Commission approve an opening settlement offer, does the report cite similar matters in which the Commission approved opening settlement offers that were calculated in the same way?

15. Has the attorney spell-checked, cite-checked, and proofread the final drafts of the First GCR, F&LAs, and CAs? Has the attorney also asked the team paralegal or administrative assistant to proofread the documents?

16. Has the attorney confirmed that all appropriate case documents are placed in the VBM folder, including DOC forms with name and contact information for respondents' counsel?

17. Does the report follow the conventions in the Style Guide? Is the report concise, well-organized, and polished?

END PRACTICE PULL OUT BOX

4.5.4 The Review Schedule

When planning the First GCR, the AGC or Deputy establishes a schedule for review of the First GCR by the team leader, the AGC or Deputy, and the General Counsel. If the First GCR concerns an internal referral, include time in the schedule for RAD or the Audit Division to review the report, as appropriate.

4.5.5 Transmitting the Final Package to CELA

When the final package is signed and ready for circulation, the attorney should make a copy of the package and submit the original and the copy to CELA for processing and circulation by the Secretary's Office. Currently, there are two times each day that the Secretary circulates documents to the Commission.

4.5.5.1 Government in the Sunshine Act Form

The attorney must attach a form consistent with the Government in the Sunshine Act ("Sunshine Act"), 5 U.S.C. § 552b, to every GCR circulated to the Commission. The Commission's regulations regarding the Sunshine Act can be found at 11 C.F.R. Part 2. The Sunshine Act form is necessary to protect the confidentiality of ongoing enforcement matters. It informs the Commission that the matter is excepted under the Sunshine Act due to the Act's confidentiality considerations, and is therefore appropriate for consideration at Executive Session. On the Sunshine Act form attached to the GCR, the attorney should include the matter number and check "Executive Session" and the instruction that "Discussion would involve compliance matters which would be confidential under 2 U.S.C. § 437g."

4.5.5.2 SOL-Sensitive Matters

If the attorney determines that the SOL will expire as to any activity in a matter within 18 months or fewer after activation, the attorney should flag the report for all reviewers, and send follow-up reminders to reviewers as appropriate. (Note: this 18-month standard should not be confused with what the Commission has formally determined to be SOL-sensitive under Directive 68, that is, 12 months. See Sections 3.2.9 and 3.6.3 for more information about Directive 68 and the SOL). To help the staff keep track of approaching SOLs, the AGC's special assistant maintains a log of SOL-sensitive matters. The attorney should obtain and refer to this document.

INSERT PRACTICE TIP PULL-OUT BOX HERE:

Checking the Voting Ballot Matters Folder

Before circulating any GCR, the attorney should ensure that all appropriate documents are in VBM. The attorney should be especially mindful to include documents that did not arrive through CELA, such as e-mails the attorney received from counsel. In that case, the attorney must provide the document to CELA for scanning and placement in VBM. The attorney may provide CELA with a PDF version of the document to be placed in VBM.

END PRACTICE TIP PULL-OUT BOX

4.5.5.3 Instructions Regarding Circulations in SOL-Sensitive Matters

Attorneys must take the Commission's voting procedures and meeting schedule into account when handling SOL-sensitive matters. As mentioned in Section 4.6.1, the Commissioners have at least one week to vote on the recommendations in GCRs, and the Commission will usually consider a matter at the next Executive Session after the voting period for that matter has closed. Commission Directives 17, 52. The Commission, however, may change the voting period for a particular meeting, and it may choose to postpone its consideration of a matter to a later Executive Session. Accordingly, if the attorney is relying on the Commission considering a matter at a particular Executive Session, he or she must confirm the voting deadline for that meeting, ensure that the GCR circulates ahead of the circulation deadline for that meeting, and tell the AGC to inform the Commission that for SOL purposes, the matter needs to be considered at that meeting. On a similar note, the attorney should also give CELA and the Secretary's Office sufficient advance notice when the attorney anticipates circulating a report package close to any deadline.

For further information regarding Commission voting procedures and the appropriate bases on which to circulate documents to the Commission, refer to Section 4.6.1 and Commission Directives 17 and 52, which are available at http://www.fec.gov/directives/CommissionDirectives.shtml. The attorney may wish to consult with the Commission Secretary if it is not clear on which basis a document should circulate to the Commission.

4.5.5.4 Technical Amendments, Supplements, and Withdrawals

There will be times when an error in a report or a new development in a matter will be discovered after a report has circulated. In general, if the error or development is minor enough that it would not significantly change the substance of the report or the recommendations being made to the Commission, circulating a technical amendment (also known as an "erratum") or supplement with a substitution page or two is appropriate. If, however, the error or development results in any type of change to the recommendations or requires a substantial reworking of a report, it is generally better to withdraw and recirculate the report. The template for a technical amendment is Enforcement Form 99B, and the template memorandum for withdrawing a report is Enforcement Form 99.

The decision whether to submit an amendment or supplement to the report, or to withdraw and recirculate the report, must be made in conjunction with the team leader, Deputy AGC (if applicable), and the AGC. While the AGC and Deputy AGC may not actually review an amendment or supplement involving a minor change, the team leader must notify them. If the report is to be withdrawn, the attorney should notify the General Counsel, the AGC, and Deputy AGC before withdrawing it and provide the reason for the withdrawal.

4.6 Executive Sessions

4.6.1 Voting Procedures

The Commission's voting procedures are outlined in Commission Directives 17 and 52. After the GCR is circulated to the Commission, the Commissioners vote to approve the recommendations in the GCR, object to the recommendations, object for the record to the recommendations, or submit a "no vote by ballot." The attorney can check on the status of Commissioners' votes through the Secretary's electronic Document and Voting System. The Commissioners have at least one week to vote on the recommendations in GCRs, and the voting deadline is currently 4:00 p.m. on Wednesdays, although the Commission can set a different voting deadline for a particular Executive Session. If the recommendations in a report do not pass on tally (see next section), the Commission will usually consider

the matter at the next Executive Session after the voting period for that matter closes. Commission Directives 17, 52. Accordingly, in the ordinary case, the attorney must give the report package to CELA by Tuesday evening of the preceding week in order for it to be voted on by the Wednesday deadline of the following week and placed on the next Executive Session agenda. The Commission can place a late-submitted matter directly on the Executive Session agenda, and the General Counsel can ask that reports be considered on a tally shorter than a week, but these are unusual steps. *Id.* For special instructions for SOL-sensitive cases, see Section 4.5.5.3.

4.6.2 Approval on Tally

Normally, the recommendations in a First GCR are considered approved if, at the voting deadline, four or more Commissioners voted to approve them and no Commissioner has objected. *See* Commission Directive 52.I(D). In such an instance, the Secretary will prepare a certification of this vote shortly after the voting period, and the attorney notifies the respondent of the Commission's determinations and, if the case is closing, notifies the complainant as well. *See Id.;* Section 4.8.

4.6.3 Objections and Agenda Placement

If one or more Commissioners object to the GCR, or the GCR receives fewer than four approvals by the voting deadline, the matter will be placed on an agenda for an Executive Session, during which the Commission discusses and votes on the recommendations. If a matter is placed on an Executive Session agenda, the attorney appears before the Commission to answer factual and legal questions regarding the matter and the First GCR's recommendations.

Upon learning of an objection to the GCR, and in preparation for the Executive Session discussion, the attorney should contact the objecting Commissioner's office to discuss the basis for the objection. This outreach helps the attorney prepare to discuss the matter at the Executive Session. The attorney should consult with the team leader in preparing for his or her presentation to the Commission.

4.6.3.1 Opening Statement

The attorney should present a brief opening statement. The substance of the opening statement will depend on the matter. In some matters, it may be enough to summarize the facts and OGC's recommendations. In other matters, it may be beneficial to note objections and preview OGC's responses. The attorney should discuss this issue with the team leader, the AGC, and the General Counsel before the Executive Session.

4.6.3.2 Revisions to F&LA

As previously discussed, the F&LA is a dispositive Commission document that explains the basis for the Commission's findings. Therefore, although OGC prepares a draft of the F&LA and attaches it to the First GCR, the Commission may alter the draft. If the changes are minor, the Commission may simply direct OGC to make the changes.

In instances in which the Commission approves an F&LA subject to revisions consistent with a discussion at the Executive Session, the Commission may direct the attorney to revise the F&LA and, if the Commission requests it, send it to the Commissioners informationally via e-mail to give the Commissioners an opportunity to review the changes before the F&LA is sent to respondents. The cover e-mail should include a date — at least two business days — by which the Commissioners should let the attorney know if they have objections or corrections to the revised F&LA.

In other instances, the Commission will ask that the F&LA be circulated on a different basis, such as a 48-hour no-objection circulation.

The attorney must listen carefully when the Commission gives oral directions for changes to the draft F&LA. If unclear as to the Commission's directions, the attorney should ask the Commission for clarification before the Commission moves on to the next matter on the agenda.

Similarly, the attorney must be ready to explain to the Commission the effect that a finding different than one recommended in the First GCR will have on the rest of the recommendations in the report. For example, if a Commissioner objects to the civil penalty calculation in the First GCR, the attorney should be ready to tell the Commission what the opening settlement offer amount would be according to the objecting Commissioner's position. The attorney should prepare for the Commission discussion by reviewing or anticipating Commissioners' objections and discussing them with the Commissioners' Executive Assistants before the Executive Session.

4.6.3.3 Drafting a Statement of Reasons

An SOR is required in a complaint-generated matter in which the Commission does not adopt OGC's recommendation to find RTB or move to the next stage of the enforcement process. The Commissioners who voted against the recommendation are required to issue an SOR to provide the rationale for their votes. If an SOR is required, the attorney sends an e-mail to the Commission immediately after the vote reminding the Commission that an SOR is necessary and "cc's" OGC's Administrative Law staff. The e-mail should state which Commissioner or Commissioners are responsible for issuing the SOR.

If four or more Commissioners vote against OGC's recommendation to move to the next stage of the enforcement process, OGC composes the first draft of the SOR and circulates it to the Commission for approval on a 48-hour no-objection basis within ten days of the Commission vote. If fewer than four Commissioners vote against OGC's recommendation, the Commissioners who voted against OGC's recommendation prepare the SOR. Commissioners may also issue an SOR when it is not required but when they wish to make public the rationale for their votes.

Commissioners may provide SORs before the case is made public, in which case the document will be attached to the closing correspondence sent to the complainant and the respondent. When Commissioners provide SORs after a matter has been closed and made public, the attorney will provide the SORs to the complainant and the respondent. *See* Enforcement Forms 58 and 58A. For more information about closing letters and SORs, see Sections 8.3.2 and 8.3.4.4.

4.7 Commission Secretary's Certification

Shortly after the Commission's vote in a matter, the Commission Secretary will issue a signed certification reflecting the Commission's vote. The attorney must not notify any parties of a Commission finding until actually receiving and reviewing the written, signed certification. Upon receipt, the attorney should verify that the certification matches the recommendations in the First GCR or the discussion at the Executive Session, as well as other communications from the Commission. If there are any errors in the certification, whether typographical or substantive, the attorney must notify the Commission Secretary. The Commission Secretary and the attorney should work together to determine how best to have the certification corrected. If the Commission Secretary's Office made an error, or the error is very minor, that office will prepare and issue an amended certification. If OGC made an error in the First GCR's recommendations that resulted in an inaccurate certification, it may be necessary for the attorney to draft a memorandum to the Commission to correct the error. The memorandum must be approved by the team

leader before it is circulated to the Commission on a no-objection basis. Usually, the Commission has 48 hours to consider the memorandum, and if there are no objections, the Secretary issues an amended certification. Thus, to avoid delays and extra work, attorneys should take particular care when drafting and proofreading the recommendations section of reports.

4.8 Notifications

When the attorney receives the certification, the attorney notifies the respondents of the Commission's determinations (and the complainant, if there is one and the case is closing). The Commission's actions dictate the appropriate notification correspondence to use; template letters are available in ECM. The attorney may have to modify the form letter to address particular circumstances of the case, especially in cases involving multiple respondents. See Section 8.3.2 for specific instructions regarding notifications when the Commission has voted to close the file. The notification letters should attach the F&LA or SOR, if there is one, as well as the proposed CA in matters in which the Commission has authorized PPCC.

4.8.1 Letters Explaining Calculation of Opening Settlement Offers

Notification letters should explain how the Commission calculated any opening settlement offer. For more information about these types of letters, see Section 6.5.2.

4.8.2 Deadlines for Sending Notifications

Immediately after the Executive Session, or upon learning that the matter has passed on a tally vote, the attorney should work with the paralegal and the administrative assistant to prepare notification letters. It is a good practice to begin drafting these letters while the First GCR is on circulation. In cases in which the Commission has found RTB, within two days of OGC's receipt of the certification of the Commission's vote, the attorney gives the notification letters (with the attachments and the mailing envelopes) to CELA staff, who will send the letters to the Commission Chair for signature. After the Chair signs the letters, they are delivered to CELA for mailing and a copy of the letter is sent via e-mail to the Enforcement attorney. If there is a fax number available for the recipient, the attorney should also fax the notification letters. The attorney can also consider e-mailing the letter to the respondent – or, if represented, to respondent's counsel – if a current e-mail address is on file.

If, however, the Commission directs OGC to revise and recirculate the F&LAs, the notification letters should be sent without the F&LAs. The attorney sends the F&LAs after they are approved. In matters where the Commission has indicated that it will vote to close the file but requests that OGC revise and recirculate the F&LAs, the Commission will vote to close the matter only after it has approved the F&LAs. In all matters, once the Commission votes to close an entire matter, the attorney must send the closing letters and F&LAs within two days of OGC's receipt of the final certification of the Commission's vote.

5 INVESTIGATIONS

Once the Commission finds RTB, it may authorize OGC to conduct an investigation. This section discusses investigations and is divided into four parts: (1) general procedures; (2) planning the investigation; (3) conducting the investigation; and (4) concluding the investigation.

5.1 General Procedures

5.1.1 Statutory and Regulatory Authority

The Commission has the authority to conduct investigations pursuant to 2 U.S.C. §§ 437d(a) and 437g(a)(2). The corresponding regulation to Section 437g(a)(2) is 11 C.F.R. § 111.10. Other sections of 11 C.F.R. Part 111 pertain to investigations. *See, e.g.*, 11 C.F.R. §§ 111.11-.12 (authorizing the issuance of orders to submit written answers to questions and the issuance of document and deposition subpoenas).

5.1.2 Purpose of an Investigation

The purpose of an investigation is to determine whether a violation of the Act or a Commission regulation has occurred, and if so, the scope of the violation. The goals of an investigation may include:

- Identifying witnesses and unknown respondents;
- Obtaining relevant documentary and physical evidence through informal requests or document subpoenas;
- Obtaining relevant information through interviews, orders to submit answers to written questions, or depositions;
- Reviewing, analyzing, and evaluating the evidence to determine the facts;
- Documenting the events and evidence; and
- Preserving the evidence.

5.1.3 Role of Investigators and Paralegals

The investigators help attorneys plan, prepare for, and execute investigations. The attorney should ask the team's investigator for help as early in the process as possible.

Investigators may assist in investigations in some of the following ways:

- Performing background research;
- Recovering, collecting, and preserving evidence;
- Reviewing and analyzing documentary evidence and records;
- Creating timelines, charts, and other visual aids;
- Creating spreadsheets containing financial data or other information;

- Identifying and locating respondents and witnesses;
- Helping to conduct field interviews and taking sworn statements;
- Attending depositions;
- Acting as a liaison to other law enforcement agencies; and
- Advising attorneys regarding interviews, depositions, and investigative strategies.

Paralegals may also assist in investigations in some of the following ways:

- Performing background research;
- Compiling data from disclosure reports and other sources;
- Creating document logs;
- Creating timelines, charts, and other visual aids; and
- Reviewing and analyzing documentary evidence.

5.1.4 Documenting the Investigation

The attorney must document what takes place during an investigation and keep the team leader and AGC or Deputy AGC apprised of any significant developments. The attorney must record all events during the investigation and place such records in an electronic folder to which other Enforcement attorneys and staff have access. Attorneys and staff should make contemporaneous records of events and conversations. Among other things, these records should include notes from phone calls and in-person conversations. These records should include details such as the date and time of the event or conversation, the identities of all parties to any conversation, contact information (including phone numbers or e-mail addresses), and the substance of any matter discussed.

The attorney should store all case related e-mails in a separate e-mail folder dedicated to the assigned case. E-mails that are material to the Commission's consideration of the matter should be converted to PDF format and forwarded to CELA for placement in the permanent file and VBM as soon as possible.

The attorney must also ensure that all evidence received during the investigation is properly logged and preserved. It is a good practice to ask the investigator and paralegal for advice and help with these tasks.

5.1.4.1 Document Logs

CELA logs documents and other materials received during the investigation. CELA either copies them for the attorney and team leader or, in the case of voluminous submissions, notifies the attorney that they are available in CELA for the attorney's review. *See* Section 5.1.6 (Custody and Handling of Evidence). It is a good practice to have a paralegal organize the documents and create a detailed log for the attorney's use during the investigation.

5.1.5 Representation Issues

As mentioned in Section 3.2.6, attorneys and staff should contact represented parties or witnesses only through their counsel. Service of subpoenas, orders, and notifications must be made to a represented party's counsel. 11 C.F.R. § 111.13(b). Before making initial contact with a respondent or witness, attorneys and staff should check the case file to see if there is a DOC or letter indicating the respondent or witness has counsel.

Even if a respondent has not filed a DOC, the attorney should ask a respondent at the beginning of the investigation if he or she has retained counsel. If the respondent indicates that he or she has counsel, the attorney should direct the respondent to file a DOC. The attorney may inform the respondent that the retained attorney can fax or e-mail an advance copy of the DOC to expedite the process. The attorney should request contact information for that counsel but must then end the conversation, make a note in CMS, and direct CELA to add counsel's name to CMS.

In addition, even if there is no DOC on file for a witness or deponent, the attorney should always ask at the beginning of an interview or deposition if the witness or deponent has counsel. If so, the attorney should follow the advice in the preceding paragraph and end questioning.

Often, witnesses and deponents are current or former employees or members of a respondent organization that has counsel. If the witness or deponent is a current employee or member of such an organization, the attorney should contact the witness or deponent through the organization's counsel. If the respondent organization is unrepresented, consult with the team leader to determine whether to contact the witness directly or through the organization. If the witness or deponent is an unrepresented former employee or member, states that follow the American Bar Association ("ABA") Model Rules of Professional Conduct will usually allow direct contact with the witness or deponent. *See* Model Rules of Prof'l Conduct R. 4.2 cmt. 7 (2011) ("Consent of the organization's lawyer is not required for communication with a former constituent.").

A represented entity or person may have counsel present during an interview or deposition. If an unrepresented person asks to consult with a lawyer during an interview or deposition, the attorney should end questioning and instruct the witness or deponent to file a DOC and have counsel contact the attorney. If the witness or deponent asks if representation is necessary, the attorney should respond that he or she cannot provide advice. The attorney may then ask permission to continue with questioning. The attorney should neither discourage nor encourage a person to seek legal counsel.

If a represented person approaches the attorney to discuss a matter under investigation without counsel, the attorney should respond that the attorney may only talk to counsel, and the attorney must notify counsel of the incident. If the person states that he or she no longer has counsel, the attorney should confer with the team leader before continuing the conversation. At a minimum, the attorney must obtain a signed statement from the witness or deponent that he or she no longer has counsel, and the attorney must attempt to confirm this fact with former counsel.

If counsel appears during an interview or deposition and claims to represent the witness or deponent, the attorney should stop questioning, inform the witness or deponent of counsel's presence, and give the witness or deponent the opportunity to have counsel represent him or her. All discussions or events concerning representation issues must be documented in CMS and should be described in a memo to the file.

5.1.6 Custody and Handling of Evidence

All original evidence, whether obtained through formal or informal means, must be logged through CELA and kept in the permanent file when not being examined or copied. When working on an investigation, the attorney should use a copy of original evidence, not the original itself. The attorney must protect recorded evidence from alteration or deletion, and it is good practice to ask the investigator for help in doing so.

5.1.7 Confidentiality of Investigations

All active investigations are confidential pursuant to 2 U.S.C. § 437g(a)(12) and 11 C.F.R. §§ 1.14, 111.21, and 111.24(b). The attorney should warn all respondents and witnesses that while they may discuss the underlying facts of the case with others, they may not discuss the fact that the Commission has contacted them concerning an investigation or the nature and circumstances of the contact unless they have received the written consent of all respondents. Any person who violates confidentiality may be subject to fines. 2 U.S.C. § 437g(a)(12)(B).

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Suggested Confidentiality Warning:

> There is a federal statute, 2 U.S.C. § 437g(a)(12), requiring all persons to keep investigations conducted by the Federal Election Commission confidential, except with the written consent of all persons who are subjects of the investigation. This warning means that unless you have such written consent, you should not publicly disclose the existence of an ongoing FEC investigation or the fact that the FEC has contacted you in connection with this matter. This restriction, however, does not prevent you from discussing the underlying facts and circumstances of the matter with any person, including any subject of the investigation or counsel for the subject.

END PRACTICE TIP HERE

If a respondent or witness asks about making any aspect of the investigation public, the attorney should give no advice except to refer the respondent or witness to 2 U.S.C. § 437g(a)(12) and the associated regulations. *See also* Section 2.8 (Confidentiality Considerations in the Enforcement Process).

5.1.8 Use of Credentials and Employee IDs

Attorneys and staff must carry and use Agency-issued credentials or employee ID cards when conducting official business outside the Agency's offices and when meeting with non-FEC personnel in the FEC building. Never show identification displaying personal information, such as a driver's license, to anyone while on official business. Although attorneys and staff may allow brief examinations of credentials or ID cards while on official business, they should never surrender them, relinquish possession or allow anyone to scan or copy them.

5.2 Planning the Investigation

This section discusses investigative planning and SOL concerns. Proper planning and preparation are essential elements of a successful investigation.

Investigative Plans

An investigative plan is the written framework of the investigation. The plan sets out the investigation's goals and how those goals will be achieved. The content and format of the plan vary according to the case; plans may be simple for a short investigation or highly detailed for a complex investigation. The attorney, team leader, investigator, and paralegal should discuss the proposed investigative plan and decide on a format as early as possible. As mentioned in Section 4.3.4, the First GCR should contain a summary of the investigative plan.

The attorney should complete the investigative plan and provide it to the team leader no later than two weeks after the Commission authorizes the investigation. Once approved, the attorney should send the plan to the AGC or Deputy AGC for review or discussion and to CELA so that a copy of the approved plan is placed in the permanent file.

The first step in developing an investigative plan is to determine what violations are at issue in the matter. The attorney should refer to the Commission's certification authorizing the investigation and any further direction the Commission may have given during any Executive Session at which the matter was discussed. The attorney should then develop a plan to obtain the evidence relevant to the Commission's findings and directions. The attorney should consult with colleagues when developing an investigative plan, especially when other staff members have conducted similar investigations.

The plan must also include a proposed schedule. Although the attorney should set specific time goals, investigative plans must be flexible enough to adapt to changing circumstances. Thus, attorneys should review and revise the investigative plan regularly.

The following should be included in the investigative plan:

- Goals of the investigation;
- List of alleged violations under investigation and their elements;
- List of evidence needed to analyze or prove each element;
- Methods of gathering necessary evidence (letter, subpoena, interview, *etc.)*;
- List of persons to interview or depose;
- List of responsibilities assigned to investigators, paralegals, or other staff in the investigation;
- List of anticipated legal and practical issues and proposals for resolving them; and
- Projected timeline of the investigation with an estimated target for completion.

5.2.2 SOL Considerations

When planning an investigation, the attorney must determine when the SOL expires as to all the violations being investigated, and whether there are different expiration dates for different activities in the same matter. The attorney should plan backward from the earliest SOL expiration date to establish the timeline for the investigation, leaving sufficient time to complete all of the required steps in the enforcement process before the activity falls outside the SOL. As noted, absent extenuating

circumstances, the Commission requires that OGC present matters for a vote on PCTB no fewer than six months before the expiration of the limitations period. For further guidance, see Sections 3.2.9 (Procedures for SOL-Sensitive Cases) and 3.6.3 (Statute of Limitations).

5.3 Conducting the Investigation

This phase of the investigatory process involves obtaining evidence using informal means or compulsory investigative tools.

5.3.1 Informal (Non-Compulsory) Investigative Methods

Depending on the circumstances of the case, the attorney and team leader may decide to use non-compulsory methods to gather information before, or in lieu of, compulsory methods. Generally, the attorney should exhaust informal means before moving on to compulsory methods, although the attorney should not use informal means when doing so would be futile, such as when the respondent insists on receiving a subpoena or order before providing information or documents. Using informal means is especially appropriate if the respondent or witness has offered or agreed to cooperate with the investigation. Informal means are also typically used in small, straightforward investigations to conserve resources.

5.3.1.1 Informal Requests for Documents and Information

To make an informal request for documents or for answers to questions about the case, the attorney should draft a letter, or the attorney can use Enforcement Form 83 as a template. Before sending such a letter, the attorney should ask the respondent or witness – or their counsel, if represented – whether he or she will comply with an informal request or will only respond to a subpoena or Commission order. *See* Practice Tip at Section 5.3.2.3.

5.3.1.2 Interviews

5.3.1.2.1 Arranging the Interview

The attorney should always confer with the team leader before selecting witnesses or respondents for interviews. In cases with many witnesses or respondents, the attorney and team leader may choose to interview only select individuals and to interview them in a particular order. The attorney should review and analyze all relevant information before deciding whether to interview a witness.

Normally, an attorney and an investigator conduct the interview together, especially an in-person interview. Ordinarily, the attorney should take the lead in questioning, and the investigator will suggest follow-up questions and provide other support during the interview. The better practice is for the attorney to ask questions and for the investigator to take notes. In some situations, however, a sole attorney or investigator may conduct brief telephone interviews when there are many people to contact or when only a short follow-up from a previous interview is necessary.

It is preferable to conduct interviews at the Agency's offices. Interviews may also be conducted in the field or at the office of witness's counsel. For practical reasons, telephone interviews may be appropriate, such as when the witness is not in the Washington, D.C., area, or the information sought is background. Additionally, before conducting the interview, the attorney should ask the witness for relevant documents so that the attorney can discuss them with the witness during the interview. If the witness reveals the existence of additional documents during the interview, the attorney should ask the

witness to describe them and to provide copies, and should make arrangements to contact relevant witnesses again to discuss them.

5.3.1.2.2 Planning the Interview

The attorney and investigator should prepare an outline of the topics to be covered during the interview. It is a good practice to list the elements of the violations about which information is being sought and then list the events, persons, facts, and other issues to be covered during the interview.

The assigned team should collaborate in advance on the substance of the proposed questioning. The interview outline or plan should be structured, but flexible. Over-reliance on highly scripted questions can prevent the attorney from asking logical follow-up questions after receiving an unexpected answer or new evidence, and it may interrupt a witness as he or she is about to reveal important information.

5.3.1.2.3 Conducting the Interview

At the beginning of the interview, whether in-person or by phone, the attorney must warn the witness or respondent that he or she could be prosecuted under 18 U.S.C. § 1001 for knowingly and willfully making a material false statement or representation during the interview. The attorney should also give a proper confidentiality warning such as the one discussed in the Practice Tip in Section 5.1.7. If conducting a phone interview, the attorney should always ask the witness or respondent at the beginning of the conversation if there are other people on the call or in the room and have those people identify themselves. As a general matter, telephone interviews should not be conducted with additional people present, other than counsel for the witness or respondent. If a witness or respondent declines to answer questions, the attorney may state that while informal interviews are preferable, OGC may seek the issuance of a subpoena to compel testimony. If the witness or respondent does not wish to continue, the attorney should end the interview.

If the witness expresses concern about his or her name or statement becoming public, the attorney may state that FEC investigations are confidential by law while the matter is proceeding and that the Commission does not reveal the identities of, or information from, witnesses or respondents at this stage in the investigation. The attorney, however, should not tell a witness that his or her name or statement will never become public or known to a third party. Once the Commission closes the matter, public records and FOIA laws apply. In addition, under the Commission's document disclosure procedures, it is possible that a witness's identity will be revealed during the pendency of the matter.

5.3.1.2.4 Documenting the Interview

The results of an interview must be documented promptly and thoroughly. The interview is recounted in a Report of Investigation ("ROI"). Though the investigator drafts the ROI, the attorney should confer with the investigator to confirm that all material facts from the interview are adequately and correctly covered in the ROI before it is final. The attorney ensures that the ROI is placed in the permanent file and maintains custody of all interview notes.

5.3.1.3 Affidavits

The attorney may request affidavits — sworn written statements — from respondents and witnesses. Usually, the attorney drafts an affidavit (Enforcement Form 110) for the respondent or witness to execute. The affidavit should be detailed and specific. A witness or respondent may request language changes to a draft affidavit; consult with the team leader before agreeing to language changes.

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When to request affidavits

Affidavits should usually be obtained in these circumstances:

- When the person has personal knowledge of key information pertaining to a violation;
- When a witness's verbal account is improbable, inconsistent, or appears to be exaggerated or motivated by bias;
- When it appears that the witness might change his or her statement for any reason;
- When the witness's statements are complex or confusing, and disputes may arise over what was said or intended; or
- When the witness provides significant information, and it appears likely that the witness may become unavailable for health or other reasons.

Seeking a deposition subpoena is also an option in the above situations.

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5.3.2 Compulsory Investigative Methods

The attorney should use compulsory investigative methods when informal investigative methods are inappropriate, or when informal methods have not yielded the needed information. These methods include subpoenas for depositions, subpoenas to produce documents, and orders to submit written answers.

The AGC must approve all proposed compulsory process documents before they are circulated to the Commission. Further, the Commission must approve, and the Chair must sign, any compulsory process before it is served on a respondent or witness. After preparing subpoenas and orders for circulation, the attorney should prepare a cover memorandum to the Commission describing the relevant case history and the need for the particular subpoena or order. The AGC and Deputy AGC review and approve this memorandum. Once the AGC approves the memorandum and draft documents, the attorney circulates them to the Commission on a 48-hour no-objection basis.

5.3.2.1 Statutory Authority and Legal Framework

The Commission has statutory and regulatory authority to compel any person to submit written answers to questions under oath, to produce documents and other evidence, and to give testimony by deposition. 2 U.S.C. §§ 437d(a)(1), (3)-(4); 11 C.F.R. §§ 111.11-.12. The compulsory methods used by the Commission are investigative and not governed by the Federal Rules of Civil Procedure, with one exception. The Commission has adopted Fed. R. Civ. P. 30(e) with respect to the opportunity to review and sign deposition transcripts. 11 C.F.R. § 111.12(c). A provision of the Administrative Procedure Act also applies to "ancillary matters," which includes certain aspects of Commission investigations. 5

U.S.C. § 555. Service of subpoenas, orders, and notifications must be made pursuant to 11 C.F.R. § 111.13.

5.3.2.2 Extensions of Time

As mentioned in Section 2.6, the Commission has delegated to OGC certain authority to grant extensions of time, including extensions of time to respond to compulsory process. *See* 11 C.F.R. § 111.15(c) (OGC and subpoenaed person may agree to change time, date, or place of deposition or document production). Requests for extensions must be in writing and should state the reasons for the request and a proposed date for compliance. The attorney should discuss any extension request received with the team leader. If the extension sought is reasonable and supported by good cause, it should usually be granted. The attorney may negotiate an extension shorter than the one requested. Also, the attorney may discuss with counsel of person to whom the subpoena is directed whether an agreement to provide subpoenaed documents on a rolling basis would eliminate the need for an extension. Any agreed-upon extension must be confirmed in writing. 11 C.F.R. § 111.15(c). The attorney should use Enforcement Form 17 as a template for the confirmation letter.

If the SOL will expire as to any violation within two years of a respondent's request for an extension, the attorney should make any agreement to an extension contingent on the respondent signing a tolling agreement (Enforcement Form 131). It is important to remember that a non-respondent witness cannot agree to toll the SOL as to a respondent, and a respondent cannot toll the SOL as to other respondents. If the respondent agrees to tolling, the attorney should send the respondent a letter granting an extension of time. The letter should state specifically that the grant of the extension is conditioned upon the execution and return of the tolling agreement.

The Commission must approve lengthy extension requests, and any such extension it grants will likely not be for a long period so the matter is not unduly delayed. Upon receipt of such a request, the attorney should inform the requestor that the Commission generally does not grant lengthy extension requests and ask whether a shorter extension would be sufficient. If the requestor refuses to withdraw or modify the request, the attorney should confer with the team leader and prepare a memorandum concerning the request to be circulated to the Commission on a 48-hour basis (Enforcement Form 97). If the requestor is a respondent rather than a witness, the memorandum should recommend that the respondent sign a tolling agreement as a condition for the extension. The attorney should communicate the Commission's decision to the requestor through a letter and, if appropriate, the letter should include a tolling agreement and a statement in the letter that the extension is granted on the condition that the respondent signs and returns the tolling agreement, and is not valid until signed and delivered.

5.3.2.3 Subpoenas to Produce Documents and Orders to Submit Written Answers

The Commission can issue a subpoena for the production of documents and order the provision of written answers to questions, and to provide those written answers under oath. For individuals, depending on the circumstances of the case and the information sought, the attorney may use either a Subpoena to Produce Documents (Enforcement Form 80), an Order to Submit Written Answers (Enforcement Form 81), or a combination Subpoena to Produce Documents and Order to Submit Written Answers (Enforcement Form 82). Standard instructions and definitions for use with compulsory process are found in Enforcement Form 84, and may be adapted as necessary. The cover letter for compulsory process to a respondent is Enforcement Form 40, and the letter for a witness is Enforcement Form 41. Attorneys must serve subpoenas and orders by certified mail, return receipt requested. To obtain responses more quickly, the attorney should also consider faxing or e-mailing an advance copy of the subpoena or order once the Commission approves it.

Document requests and questions should seek information that is relevant to the investigation and reasonable in scope. *See* 5 U.S.C. § 555(d). The attorney should refer back to the investigative plan and the evidence already gathered to determine which documents to request and what questions to ask. Investigators are helpful in making such choices. For general guidance, the attorney may also review subpoenas and orders in other MURs and talk with the attorneys who handled them.

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Seeking Information from Businesses Entities and Other Organizations

While it is appropriate to make noncompulsory requests for information to businesses entities and other organizations, they will often request that the Commission issue a subpoena before providing information or records. To save time, the attorney should call the legal department at the company or other organization to learn who will be handling the request and in what form the entity would prefer the request. Many companies will begin processing an approved subpoena once they receive an advance copy of it by fax or e-mail.

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The attorney should ensure that the compulsory process is directed to the correct person or entity in possession of the information or evidence sought. Occasionally, the address of the respondent or witness will be unknown; in these instances, an investigator can help locate the proper party.

5.3.2.4 Reviewing the Responses or Documents Produced

As discussed above, CELA maintains all original documents and other evidence (including non-paper items such as videotapes and DVDs), including responses to compulsory process. Ordinarily, the attorney must personally review all of the documents produced. If the attorney expects to receive many documents, the attorney should alert CELA. It is a good practice for the attorney to direct the team paralegal to create a log for the documents, and to highlight any particularly important documents.

If the investigation has previously identified documents that the recipient of the subpoena should have produced, the attorney should contact the producing party to determine if the party withheld the documents for any reason. A recipient's failure to produce expected documents could indicate that the recipient did not carefully oversee the document production or is purposefully withholding documents. The attorney should contact the recipient (or counsel, if applicable) as soon as possible to discuss any omissions and try to resolve the matter informally. If the matter cannot be resolved informally and the missing documents are important to the investigation, refer to Section 5.3.2.8 (Failure to Comply with Compulsory Process) for guidance.

The standard instructions accompanying document subpoenas request that the recipient mark all documents produced with consecutive document control numbers, otherwise known as "Bates-stamping." If the attorney receives documents that have not been Bates-stamped by the producing party, the attorney should direct the team paralegal or administrative assistant to Bates-stamp the documents as soon as possible.

If a recipient withholds documents based on a claim of privilege, the attorney should require the recipient to provide a complete privilege log identifying each record withheld, the date of the record's creation, its author and who received it, the number of pages, and the basis of privilege. If withheld documents can be redacted to address an assertion of privilege, the recipient should be asked to produce redacted versions until the claim of privilege can be challenged or is established. The team leader and

AGC or Deputy AGC should be informed about any privilege claims raised in response to compulsory process.

5.3.2.5 Subpoenas to Financial Institutions and the Right to Financial Privacy Act

Subpoenas to financial institutions for account records of customers may trigger special requirements under the Right to Financial Privacy Act of 1978 ("RFPA"). RFPA requires that federal agencies follow specific steps when seeking information from banks and financial institutions regarding accounts of individuals or partnerships of five or fewer individuals. 12 U.S.C. §§ 3401, 3405. The RFPA does not apply to corporate accounts or accounts of partnerships larger than five individuals; an investigator can help the attorney determine if the RFPA applies. Further, if the attorney is not sure whether the bank account in question is a personal account, the attorney should contact the bank's legal representative before preparing subpoenas to determine whether RFPA applies.

The subpoena and order template in Enforcement Form 86F and the cover letter template in Enforcement Form 86E contain the required RFPA language. If appropriate, the subpoena and order may be modified to request only documents or answers to written questions and not customer account information. When the attorney sends the cover letter, subpoena, and order to the financial institution, the attorney also must notify the person whose financial information is being sought of the existence of the subpoena and order (using Enforcement Form 86A for a person or small partnership represented by counsel and Enforcement Form 86B for an unrepresented person). A Motion to Quash the Subpoena (Enforcement Form 86C) and supporting affidavit (Enforcement Form 86D) must be enclosed with the notice. The person whose financial records are being sought then has either ten days from the date of service or 14 days from the date of mailing to object to the subpoena and order by filing the Motion to Quash and supporting affidavit in the appropriate United States District Court, and to serve the Commission. If the customer does not object to the subpoena, the attorney must then send the financial institution an RFPA certificate of compliance and cover letter (Enforcement Form 86G).

5.3.2.6 Costs Associated with Responding to Subpoenas

In some instances, the Electronic Communications Privacy Act of 1986 ("ECPA") and the RFPA obligate the government to reimburse reasonable costs incurred by electronic communications providers and financial institutions when complying with Commission subpoenas. *See* 18 U.S.C. § 2706 (reimbursement of costs under ECPA); 12 C.F.R. § 219.3 (reimbursement of costs under RFPA). OGC is required to obtain pre-approval from the FEC's Procurement Office for reimbursement of any such costs of compliance.

Accordingly, when serving a subpoena for records to a covered financial institution, an electronic communications provider, or commercial internet service provider, the attorney should include in the cover letter a request that the recipient contact the attorney before incurring expenses and provide an estimate of the amount necessary to comply. To save time, the attorney may also contact the recipient by phone to obtain an approximate cost estimate. The attorney should convey the estimate to the team administrative assistant immediately to begin the authorization process. If the amount is large, discuss the issue with the team leader.

5.3.2.7 Depositions

Depositions seek sworn oral testimony. As with interviews, *see* Section 5.3.1.2, the attorney must prepare extensively for depositions. The attorney should consult with the team leader and the investigator to decide whether a deposition is necessary or if an interview (and affidavit summarizing the relevant facts, if sworn testimony is needed) should be attempted first. The attorney must be familiar with all

aspects of the case because there may be little time to react to a deponent's answers. The attorney should review the entire case file, including all evidence and background information, before identifying the deponents, determining deposition strategy, and developing lines of questions. When deciding whom to depose, the attorney should consider various factors, such as the scope of the investigation, the resources available, the expiration date of the SOL, and what a particular deponent's testimony may add to the Commission's understanding of the alleged violations.

5.3.2.7.1 Deposition Subpoenas and Logistics

To prepare a deposition subpoena, the attorney should use Enforcement Form 79. The subpoena should indicate the date, time, and location for the deposition. Attorneys may reschedule a deposition to accommodate a deponent or counsel; the attorney must document all changes in a letter or e-mail to respondent or counsel. 11 C.F.R. § 111.15(c). Repeated requests to postpone a deposition without good cause should be denied. Serve only the deponent or, if represented, deponent's counsel; the attorney should not notify a respondent unless that particular respondent is the deponent.

If the deponent is located in the Washington, D.C., area, the deposition should usually take place at the FEC's offices. The attorney should ask the administrative assistant to reserve a room for the deposition and secure a court reporter, including obtaining budget authority for the court reporter's services. If the deponent is located outside the Washington area, the attorney should usually schedule the deposition close to the deponent's home, place of business, or the office of deponent's counsel, especially if there are a number of other deponents in the same area. United States Attorney's Offices for the district where the deposition will occur sometimes provide conference rooms for depositions, and court reporters often permit attorneys to conduct depositions at their offices. Coordinate all travel with the team's administrative assistant, including travel of deponents if they need assistance making arrangements. Deponents are also entitled to witness fees and mileage, as well as reasonable travel costs. 2 U.S.C. § 437d(5); 28 U.S.C. § 1821; 11 C.F.R. § 111.14. The attorney should use Enforcement Form 114.

To compel the deponent to produce documents in advance of the deposition, use a subpoena *duces tecum*; Enforcement Form 79A is the subpoena template for individuals. If the subpoena is directed to a corporation, union, partnership, committee, or other entity other than a natural person, the attorney should direct the entity to designate a person or persons to testify on its behalf as to the topics to be covered at deposition. The attorney may serve this subpoena on counsel, provided counsel agrees to accept service. More than one person can serve as deponent under such a subpoena. Use Enforcement Form 79B for this purpose. The cover letter template for a deposition subpoena to a respondent is Enforcement Form 40, and the cover letter template for a non-respondent witness is Enforcement Form 41. Even if the attorney already has documents produced by a respondent organization, the attorney may want to serve subpoenas *duces tecum* to individual employees of the organization for additional documents or drafts of documents that the employees may possess. The attorney should always try to obtain documents through a subpoena *duces tecum* as far in advance of the deposition as possible, leaving ample time to review the documents before the deposition occurs.

If a witness or respondent tries to avoid service of a subpoena, the attorney can seek help from the U.S. Marshal's Service at no cost or from a professional process server for a fee. Only arrange this more formal service after consulting with the AGC and the Deputy AGC. The attorney should ask the administrative assistant to get a cost estimate for a process server, and must prepare a memorandum. The template letter to the Marshal's Service is Enforcement Form 43. If the attorney experiences difficulty locating a witness or respondent, the attorney or investigator may request help from the Postal Service using Enforcement Form 44.

5.3.2.7.2 Planning and Conducting the Deposition

The attorney, in consultation with the team leader and investigator, should develop an overall deposition strategy based on the circumstances of the matter and the alleged violations. While the method of preparing for the deposition will vary based on individual preferences and the circumstances of each case, any deposition outline or plan should address all elements of the violations being investigated of which the deponent may have knowledge. The outline or plan should be flexible enough to cover all the required elements and still follow new lines of investigation in case the deponent provides unexpected but important testimony.

The outline or plan should be organized and flexible; it should not become a rigid script. Precisely drafted questions should be reserved for important issues as to which questions must be asked in a particular way. Over-reliance on scripted questions can prevent the attorney from asking logical follow-up questions after receiving an important answer or new evidence, and it may interrupt a witness as he or she is about to reveal additional information. Further, an overly-scripted outline can result in choppy and disjointed testimony.

The attorney should make short statements at the beginning and the end of the deposition. After the court reporter swears in the deponent, the attorney should state his or her name, the names of other FEC personnel in the room, the deponent's name, the counsel's name, and the date, time, and place of the deposition. The attorney should ask for the spelling and full name, date of birth, business and residential addresses, and telephone numbers of the deponent at the beginning of the deposition. The attorney should tell the deponent to ask for clarification of questions that the deponent does not understand. In addition, the attorney should warn the deponent that he or she could be prosecuted under 18 U.S.C. § 1001 for knowingly and willfully making a false statement or representation during the deposition. The closing statement must include a confidentiality warning, as discussed above at Section 5.1.7. At the close of the deposition, the attorney should provide a copy of the Commission's policy on deposition transcripts, as discussed in Section 5.3.2.7.4.

5.3.2.7.3 Representation, Objections, and Related Issues

The deponent has the right to be represented by counsel at the deposition. 5 U.S.C. § 555(b). Other than the deponent's counsel (including assisting attorneys or law clerks) and a court reporter, only FEC staff should attend the deposition. The attorney should allow relevant, limited cross-examination upon request at the end of the deposition. The deponent's counsel is allowed to object or instruct a deponent not to answer a question, but may not instruct or coach the deponent. Further, because the Federal Rules of Civil Procedure do not apply, investigative depositions conducted by the Enforcement Division are not subject to the seven-hour time limit set forth in Fed. R. Civ. P. 30(d)(2), although overly long depositions are usually inadvisable. If the deponent asks to take a break when a question is pending, ask the deponent to answer the question before allowing the break unless there is a compelling reason not to do so.

5.3.2.7.4 Deposition Transcripts

Although the court reporter usually provides an electronic copy of the deposition transcript to OGC as a matter of course, the attorney should ask for one as well as a hard copy.

The deponent may review the transcript before it becomes final, and may also ask to purchase a copy. 11 C.F.R. §111.12(c) (adopting Fed. R. Civ. P. 30(e) regarding reviewing deposition transcripts and signing *errata* sheets); Commission Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations, 68 Fed. Reg. 50,688 (Aug. 22, 2003) *available at*

http://www.fec.gov/agenda/agendas2003/notice2003-15/fr68n163p50688.pdf. At the conclusion of the deposition, the court reporter will give the deponent the choice to review the transcript or waive this option. If a deponent waives the option, the deponent may ask to purchase a copy as soon as the transcript becomes available. If the deponent does not waive this option, OGC does not act on a deponent's request to purchase the transcript until the review process is over.

If a deponent elects to review the transcript, the attorney should notify the deponent once it is available and schedule a date and time for the deponent to appear at the Agency's offices to review it. If the deponent is far from Washington, D.C., the attorney should make appropriate arrangements, such as sending the transcript with specific instructions to a court reporter's office near the deponent's place of residence.

The deponent has 30 days after notification to review the transcript, but the Commission may grant extensions. *See* Fed. R. Civ. P. 30(e). The deponent's counsel may accompany the deponent. The attorney should have the team's administrative assistant reserve a room for the deponent to use, and the Enforcement attorney or a designee should stay in the room with the deponent and counsel for the entire time they have access to the transcript. The deponent and counsel may take notes while reviewing the transcript, but may not copy it, including writing down any part of it *verbatim*. The attorney should tell the deponent to make any changes on an *errata* sheet, give a reason for each change, such as correcting a typographical error, and sign the *errata* sheet. Fed. R. Civ. P. 30(e). Once the deponent has completed the *errata* sheet, the attorney should copy it for the permanent file and send it back to the court reporter. If it appears the deponent has made material, substantive changes to the testimony — especially if the changes contradict the deponent's testimony — the attorney should consult with the team leader, the AGC and Deputy AGC, and possibly the Litigation Division, to determine a course of action. There are a number of options for handling this situation, including noting in a post-investigative GCR that a deponent tried to change testimony in a way that would make it inconsistent with prior testimony.

Pursuant to the Commission's deposition transcript policy, after the court reporter has appended any changes noted by the deponent to the transcript, or if the deponent has waived review, the deponent may generally purchase a copy. 68 Fed. Reg. at 50,688-89. According to the policy, a deponent makes a written request to OGC to purchase a copy of the transcript. *Id.* OGC will review the request and, absent good cause, give the deponent permission to obtain a copy of the transcript at his or her own expense from the court reporter once the reporter makes the final version available. *Id.*; 5 U.S.C. § 555(c). One example of good cause to deny such a request is a concern that witnesses yet to be examined might be coached. 68 Fed. Reg. at 50,689.

Absent good cause, the attorney should notify the deponent or counsel in writing when the transcript is available for purchase, and should draft a letter for the AGC to sign and then send to the court reporter (Enforcement Form 122). If there is good cause to deny the deponent a copy of the transcript, the attorney should consult with the team leader and draft a denial letter (Enforcement Form 123) for the AGC to sign and send to the deponent or counsel. If the AGC agrees there is good cause, the attorney prepares a memorandum to the Commission explaining the reason for denying the deponent's request and circulates it on an informational basis. Even though good cause exists to deny the deponent's request to purchase a copy of the transcript, the deponent shall still be allowed to inspect the official version of the transcript. 5 U.S.C. § 555(c).

5.3.2.8 Failure to Comply with Compulsory Process

Sometimes, recipients of compulsory process will refuse to comply with a Commission subpoena or order, or comply only in part. As mentioned earlier, the attorney should always review a response to compulsory process as soon as possible to ensure that it is complete. If the recipient answered a question

only partially or provided only some of the documents subpoenaed, the attorney should inform the recipient of any deficiencies by letter and telephone and set a date for full compliance. In many cases, partial compliance may be the result of misunderstanding or oversight and can be resolved informally. If, however, the producing party still does not completely comply with compulsory process, the attorney should inform the refusing party that the Commission could seek a court order to enforce compliance. Most of the time, the attorney will reach an agreement with the compelled party or counsel. In some cases, however, the attorney may need to ask the Commission for approval to seek a court order to enforce a subpoena or order. In these situations, the attorney drafts a GCR recommending suit authorization (Enforcement Form 96A). The attorney should contact the Litigation Division as soon as it appears the Commission may need a court order to enforce compulsory process.

Occasionally, a respondent or witness will refuse to comply with a subpoena or order based on privilege. Respondents may assert the Fifth Amendment privilege against self-incrimination as the basis for their refusal to comply. Any Fifth Amendment assertion must be specific, not a blanket refusal to comply. If a respondent or witness makes a Fifth Amendment claim of privilege, the attorney should provide a form of affidavit (Enforcement Form 85) and cover letter (Enforcement Form 85A) requesting that the respondent or witness state specifically and under oath the matters as to which the privilege is being claimed and the grounds for the claim.

A respondent or witness may also make privilege claims on other grounds. In such cases, the attorney should send a letter directing the respondent or witness to document all claims of privilege on a privilege log. For each document as to which a party asserts privilege, the log should include a brief description of the nature of privilege asserted sufficient to assess the privilege claim, as well as the author, recipient, and date of the document. Similarly, the privilege log should include any other matters or discussions as to which the recipient of compulsory process is claiming privilege.

The Commission may draw an adverse inference from a refusal to comply with compulsory process, and the attorney should warn any person who refuses to comply with compulsory process for any reason of this possibility. The Commission may draw an adverse inference even when the refusal to comply is based on Fifth Amendment grounds. The Commission may also draw an adverse inference when a Committee is unable to produce records that it is required to maintain pursuant to the Act's record retention requirements.

5.3.2.9 Motion to Quash

The recipient of compulsory process may move the Commission to quash or modify a subpoena or order. 11 C.F.R. § 111.15(a). The recipient must make such a motion within five days of receipt of the subpoena. *Id.* When the recipient or counsel expresses an intent to file a Motion to Quash, the attorney should discuss the dispute with the team leader to determine if it is appropriate to try to resolve the dispute informally by modifying the subpoena or order. If it is appropriate, and the attorney and counsel can agree to a modification, the attorney should document the agreement in a letter to counsel and counsel should confirm the terms of that agreement in writing.

If, however, it is not appropriate to modify the subpoena, or the Commission receives a formal motion to quash or modify a subpoena, the attorney should prepare a memorandum with a recommendation to the Commission. An administrative agency's subpoena or order will be enforced provided that it was issued for a proper purpose, the information sought is reasonably relevant to the purpose, and the statutory procedures were observed. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950); *Government of Territory of Guam v. Sea-Land Serv.*, 958 F.2d 1150, 1154-55 (D.C. Cir. 1992). If, after review of a motion to quash or

modify, OGC agrees that a modification would be appropriate, the attorney should send an informational memo to the Commission informing it of the modification.

5.3.3 Completing the Investigation

The attorney should carefully review and analyze all of the relevant evidence. If the attorney concludes that further material evidence must be obtained to complete the factual record regarding the potential violations, the attorney should meet with the team leader and decide how to obtain it. If the investigation has yielded sufficient information to make a recommendation to the Commission, the attorney, team leader, and AGC or Deputy AGC will meet to discuss the results and determine which recommendations to make to the Commission. Generally, these recommendations will be to enter into PPCC, to find PCTB that a violation occurred (following briefing, as described in Section 7), or to take NFA, or some combination of the foregoing if the case involves multiple violations or respondents. After this meeting, the attorney should promptly begin work on a GCR or a General Counsel's Brief on PCTB, whichever is appropriate. For guidance on drafting GCRs recommending entering into PPCC, see Section 6; for guidance on drafting a General Counsel's Brief, see Section 7.

Finally, at the end of the investigation, the attorney should once again ensure that all documents and evidence obtained during the investigation are in the permanent file and VBM and that all CMS entries are current and accurate, including an entry for the date the investigation ended.

6 PRE-PROBABLE CAUSE CONCILIATION ("PPCC")

6.1 Introduction, Regulatory Authority, and General Considerations

This section contains information about (1) general considerations regarding PPCC; (2) drafting GCRs recommending the Commission enter into PPCC; (3) drafting CAs; (4) civil penalties; (5) conciliating matters; and (6) processing civil penalty payments.

At any time after the Commission finds RTB, but before it finds PCTB, the Commission and the respondent may enter into PPCC to try to resolve the matter. *See* 11 C.F.R. § 111.18(d). As explained in Section 3.3.2, the Commission may also conciliate a matter before an RTB finding in some *sua sponte* matters. A CA reached through PPCC and approved by at least four Commissioners "shall have the same force and effect as a conciliation agreement reached after a Commission finding of probable cause to believe." *See* 11 C.F.R. § 111.18(d).

PPCC conserves resources for both the Commission and respondents, and it furthers the Commission's goal of compliance by allowing the Commission to resolve violations of the Act and to make them public. The Commission's goal is that PPCC should be completed within 60 days.

6.1.1 Determining if PPCC is Appropriate

Generally, the Commission offers PPCC when it appears likely that the respondent and the Commission can agree that a particular violation of the Act occurred, agree on the basic facts surrounding that violation, and agree on the amount in violation. OGC most often recommends PPCC either concurrently with an RTB finding or after completing an investigation. For additional guidance on when it is appropriate to recommend PPCC in matters where the five-year SOL is approaching, see Sections 3.6.3 (SOL) and 6.1.2 (Tolling Agreements).

6.1.1.1 PPCC Concurrent with an RTB Finding (Prior to Investigation)

The Commission may authorize PPCC concurrently with an RTB finding if the facts are sufficiently known to establish violations of the Act and there is little expectation of finding additional violations through an investigation.

When OGC recommends that the Commission enter into PPCC concurrent with an RTB finding, the attorney includes the PPCC recommendation in the First GCR (*see* Sections 4.3.6 and 4.4.7; Enforcement Forms 68 and 70) and attaches a proposed CA (*see* Section 6.3; and Enforcement Form 76A). If the Commission approves OGC's recommendations, the attorney offers PPCC to the respondent in the RTB notification letter (Enforcement Forms 27A and 28A). The respondent has seven days from the date of receipt of the letter to contact the attorney and begin PPCC. If a respondent fails to respond to the Commission's offer or declines PPCC, OGC will notify the respondent that the Commission may either conduct an investigation or proceed to the PCTB stage (Enforcement Forms 38 and 38A). If the respondent does not respond or refuses PPCC, the attorney should consult with the team leader and the AGC to discuss the next action.

6.1.1.2 PPCC After an Investigation

The Commission often offers PPCC after an investigation. OGC's recommendation should be included in a GCR with a proposed CA attached (Enforcement Forms 74 and 76A; *see* Sections 6.2-3 for guidance on drafting these documents). If the Commission approves entering into PPCC, the attorney

notifies the respondent, and, if the respondent wishes to conciliate, negotiations proceed as described in Section 6.5.

6.1.1.3 PPCC at the Request of a Respondent

The respondent may request PPCC at any point before a PCTB finding, and this request must be in writing. The attorney should consider recommending that the Commission enter into PPCC if there is sufficient information to establish the extent and scope of the violations at issue, and will not unduly delay the enforcement process in the event a settlement is not reached. If the attorney, team leader, and AGC or Deputy AGC agree to recommend PPCC, the attorney should circulate a GCR making that recommendation and attaching a proposed CA (Enforcement Forms 74 and76A). See Sections 6.2-3 for guidance on drafting these documents. If the Commission approves PPCC, the attorney notifies the respondent (Enforcement Form 37), and the negotiations proceed.

If OGC decides that PPCC is not appropriate at the time a respondent requests it, the attorney should inform the respondent. PPCC might not yet be appropriate because an investigation is needed to establish the facts, or, if an investigation has begun, it may not have reached a point at which the full extent of the respondent's violation has been established. Unless the respondent withdraws the request, the attorney, after consultation with the AGC or Deputy AGC and the team leader, should circulate a GCR informing the Commission of the request and explaining why the Commission should not authorize PPCC. Use Enforcement Form 75 as a template for this report. If the request is submitted in response to the complaint, that request can be addressed in the First GCR. If the respondent submitted a proposed CA, the attorney should attach it to the memorandum and explain why the Commission should not accept it. The Commission then decides what action is appropriate.

6.1.2 Tolling Agreements and PPCC; SOL-Sensitive Matters

In appropriate cases, OGC may ask a respondent to toll the SOL in connection with PPCC. The attorney should consult with the team leader to determine whether to request that the respondent sign a tolling agreement. Generally, if the SOL will expire as to any violation within two years, the attorney should seek tolling. Refer to Sections 3.2.9 and 3.6.3 for more information about the SOL and the handling of SOL-sensitive cases. In *sua sponte* matters, it is appropriate to request that the respondent waive or toll the SOL for activity that was concealed or not timely disclosed. *See* Section 3.3.3.

Special guidelines apply in SOL-sensitive matters, that is, matters in which any of the violations at issue will expire within 12 months or fewer. Commission Directive 68 directs that OGC develop a plan to bring SOL-sensitive matters to the Commission for a vote on PCTB no later than six months before the expiration of the SOL for any violation. Accordingly, the attorney should adhere to the following guidelines if the report recommending PPCC will be circulated within 12 months of the date the SOL begins to expire as to any violation.

1. Attorneys should insist on tolling from the respondent for at least the length of the 60-day PPCC negotiation period. The tolling agreement should also include time for the Commission to consider the GCR recommending PPCC and the memorandum to accept the negotiated CA. If the respondent agrees to tolling, and PPCC is otherwise appropriate, the attorney should draft a GCR recommending PPCC. Directive 68 requires all tolling agreements to be in writing and signed by the respondent or counsel. Use Enforcement Form 133 as a template for the tolling agreement.

2. If the respondent does not agree to tolling, the attorney should consult with the team leader and AGC or Deputy AGC to determine whether recommending PPCC is appropriate. If negotiating

without tolling will not allow the Commission to vote on PCTB at least six months before the SOL begins to expire as to any violation, proceeding to the PCTB stage is warranted, except in exceptional circumstances.

6.2 General Counsel's Reports Recommending PPCC

When recommending that the Commission enter into PPCC, the attorney should circulate a GCR. For guidance on drafting a First GCR that recommends PPCC, refer to Section 4 and use Enforcement Forms 68 or 70 as a template.

6.2.1 Reports Recommending PPCC after a Reason to Believe Finding

For all GCRs recommending the Commission enter into PPCC after an RTB finding, use Enforcement Form 74 as a template. Post-RTB reports that recommend PPCC generally contain the sections in the order discussed below, but the report's format is flexible and can be changed for a particular matter.

6.2.1.1 Actions Recommended

Each post-RTB GCR begins with OGC's recommendations to the Commission. Here, the correct recommendation is "enter into conciliation with [name of one or more respondents, or 'all respondents'] prior to a finding of probable cause to believe." Do not include technical recommendations, such as "approve the appropriate letter" here.

6.2.1.2 Background

Include a history of the case, including a summary of all RTB findings and responses, as well as a concise summary of the investigative steps taken. Discuss any changes in the respondents' identities, such as a change in treasurer since the RTB finding.

The report should contain a summary of the respondent's request for PPCC, including the date of the request and any key facts the respondent is willing to admit.

6.2.1.3 Factual Summary

The factual summary should include only facts relevant to the violations at issue, not every fact learned in an investigation. The summary must include exculpatory or mitigating facts. Although the summary's organization may differ from case to case, the facts should be grouped logically.

6.2.1.4 Legal Analysis

The legal analysis should set out the relevant law, apply the law to the facts, and state whether the results of the investigation are consistent with the earlier RTB findings. When applying the law to the facts, include a discussion of any prior relevant MURs, AOs, SORs, or other legal authorities. If the respondent has raised legal arguments that are contrary to OGC's conclusions, the attorney should discuss those arguments accurately and objectively, and explain why OGC did not find them persuasive.

6.2.1.5 Discussion of Conciliation and Civil Penalty

This section should state why PPCC is appropriate and summarize the proposed CA, particularly the admissions clause, the proposed civil penalty, and any proposed remedial measures, such as filing or amending reports, or making refunds or disgorgements. Discuss the penalty that would apply per the

standard formula without any adjustments being made. This section should also explain how OGC calculated the proposed civil penalty, including any adjustments being made to a Commission-approved formula, and discuss prior matters that are relevant to this calculation.

6.2.1.6 Recommendations

This section should be identical in substance to the recommendations made in the first section of the report and include all procedural recommendations, that is, to enter into PPCC, approve the proposed CA, and approve the appropriate letters. The recommendations should be sequentially numbered to assist the Commissioners in framing motions during Executive Sessions.

6.2.1.7 Conciliation Agreements

Label the proposed CA as an attachment to the GCR and include it for the Commission's review and approval. See Section 6.3 for guidance on drafting CAs.

6.3 Drafting Conciliation Agreements

Enforcement Form 76A is the template for the standard PPCC agreement and should be followed as closely as possible. The agreement usually contains the sections discussed below. In FTR matters, the attorney should use Enforcement Form 77. See Section 3.3.2 for more information about FTR.

6.3.1 Caption

In the caption, the attorney should list only those respondents involved in the particular agreement. If a CA concerns multiple respondents, all of those respondents must be listed in the caption, and each respondent should be clearly identified and differentiated from the others throughout the CA. If the respondent is a political committee, ensure that the CA names the current treasurer in his or her official capacity.

6.3.2 Preamble

The preamble states how the matter was generated and sets out the Commission's previous findings.

6.3.3 Standard Agreements

The next section encompasses the agreement of the parties. Paragraphs I-III contain important standard language regarding jurisdiction, the respondent's opportunity to present information, and the respondent's voluntary participation in conciliation. The attorney should not alter this language.

6.3.4 Discussion of Pertinent Law and Facts

Under Paragraph IV, the attorney should set out the relevant law and facts in as many separately numbered subsections as necessary. This section should start with an identification of the respondents and other involved persons, present the relevant law, and state the relevant facts. Because the Commission speaks through any CA it approves, attorneys should resist including facts at the request of the Respondent that, although perhaps not inaccurate, either create a misleading impression or undermine the purpose of entering into the agreement. A Respondent's desire to include facts can be addressed instead through inclusion of contention language, as discussed below.

Paragraph IV is the section in the CA in which the attorney should include any of the respondent's assertions, commonly known as "contention language." Inclusion of contention language is not routine but is appropriate when such language is necessary to reach a settlement and does not undermine the Commission's findings. Because contention language consists of the respondent's assertions, not the Commission's factual findings, sentences containing contention language must begin "The respondent contends . . . ." The attorney should not agree to place contention language anywhere other than in Paragraph IV.

Pursuant to the Act's confidentiality provisions, the attorney should not identify any other individual as a respondent who is not a party to the CA. Rather than identify other respondents as the sources of information, the attorney should instead use language such as "evidence in the Commission's possession demonstrates that . . . ." There are some instances, however, when a respondent that is not a party to the particular CA is so inextricably tied to the conciliating respondent that the respondent must be identified in the CA. In those instances, the agreement may identify the non-conciliating person or entity involved, but may not identify the person or entity as a respondent. For instance, it may be necessary to identify a non-conciliating corporate respondent if the conciliating respondents' violations are tied to their status as officers of that corporation.

6.3.5 Admissions Clause; Cease and Desist Clause

Every CA must contain an admissions clause (usually paragraph V). The clause should state that the respondents admit that they committed certain acts "in violation of" particular provisions of the Act and regulations. The CA must also contain a provision stating that "respondents will cease and desist from violating" the relevant provisions of the Act and regulations. In rare circumstances, it may be appropriate to recommend approval of clauses with different wording, but the AGC or Deputy AGC must approve such language.

6.3.6 Actions to Be Taken by the Respondents

In some matters, the only action to be taken by the respondent under the CA may be the payment of a civil penalty. In other cases, however, the respondent may agree to take other types of actions, as described below.

6.3.6.1 Payment of Civil Penalty

The payment clause should state the amount the respondent will pay as a civil penalty. In most cases the respondent must pay the civil penalty in full within 30 days from the effective date of the agreement.

Respondents sometimes request to make installment payments. Installment payments are not preferred and are appropriate only in extraordinary circumstances. If the respondent demonstrates an inability to pay the entire civil penalty in one installment, it may be appropriate to negotiate payment in multiple installments. Generally, these plans should run no more than three months, and the AGC must approve such plans. Proper language for installment payment provisions is set forth in Enforcement Form 76A. See Sections 6.5.3.1.3 (Installments) and 6.5.6.2 (Paying a Civil Penalty by Credit Card) for more information.

If a respondent demonstrates with accurate data and documents that it does not have the financial ability to pay an appropriate civil penalty, or the respondent cannot pay any civil penalty, the Commission may consider accepting a substantially reduced civil penalty or resolving the matter without requiring payment of a civil penalty. In those circumstances, the attorney should include language in the CA reflecting the

rationale for the reduction or waiver of the civil penalty. Enforcement Form 76A contains the appropriate language. See Section 6.5.3.1.2 for further information on demonstrating an inability to pay.

6.3.6.2 Remedial Measures

The following are examples of commonly used remedial clauses in CAs.

6.3.6.2.1 Refunds or Disgorgements

If a respondent committee received an excessive or prohibited contribution but has not refunded or disgorged it, the attorney should include a refund or disgorgement requirement in the CA. If a respondent committee that is not seeking to terminate does not have sufficient funds to refund or disgorge, the attorney should include language that requires the committee to use the first available funds it raises for refunds and disgorgements. If a respondent committee is terminating, however, the committee will not be raising additional funds and therefore this clause is usually not appropriate. In addition, if a committee has prepared and sent a refund check to the contributor, but the contributor has failed to negotiate the check, the attorney should require that the committee disgorge the amount of the contribution.

If the respondent is the source of a prohibited or excessive contribution, the attorney should ask the source to: (1) waive the right to a refund; and (2) send the recipient committee a letter instructing it to disgorge the money to the United States Treasury. This remedy is often used in 2 U.S.C. § 441f matters.

A disgorgement clause should read that the respondent shall disgorge monies "to the United States Treasury," not the FEC.

6.3.6.2.2 Filing Amended or Missing Reports; Registering with the FEC

If the respondent committee has filed incorrect reports or has not filed required reports, the attorney should include a clause requiring the committee to amend the reports or file the missing reports. If the matter involves a committee that has failed to register with the Commission, the clause should also require the respondent to register. In cases involving many missing or incorrect reports, the attorney should consult with RAD to determine which filings are required to bring the committee into compliance.

6.3.6.2.3 Restrictions on Campaign Activity

If an individual respondent engaged in criminal or other egregious conduct while employed by a political committee, such as embezzling committee funds, the attorney should consider including a clause restricting the respondent from working on a campaign in a financial capacity for an appropriate number of years.

6.3.6.2.4 Participation in Commission-Sponsored Training

If a committee that intends to remain politically active has shown considerable difficulty complying with the law or has committed the same or similar violations before, the attorney may include a requirement that the committee send its treasurer (and possibly other appropriate personnel) to an FEC Conference for compliance training.

6.3.6.2.5 Internal or External Audits

Additionally, where a committee engages in a significant amount of activity and has shown considerable difficulty complying with the law, OGC has asked committees to submit to annual audits by internal or external auditors for an appropriate period of time.

6.3.6.2.6 Establishment of Internal Controls

In a matter in which a political committee filed incorrect reports due to embezzlement, the attorney may include a requirement that the committee establish or implement certain internal controls to prevent future embezzlement (if it has not done so already). *See* Statement of Policy; Safe Harbor for Misreporting Due to Embezzlement, 72 Fed. Reg. 16,695 (April 5, 2007), *available at* http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-9.pdf.

6.3.6.3 Compliance Clauses

Paragraphs VI through IX contain the terms for compliance with the agreement and the right of the Commission to file suit to enforce the agreement, and these clauses should be included in every CA. The attorney should not modify this language without consulting with the team leader and the AGC or Deputy AGC.

6.3.6.4 Signatures

If the respondent wishes to accept the CA offered by the Commission, the attorney should have the respondent sign, date, and return the agreement. The CA becomes effective after the Commission accepts it and the AGC signs it on the Commission's behalf. See Section 6.5.5.1.1 for guidance on drafting a memorandum to the Commission recommending acceptance of a CA.

Absent extraordinary circumstances, individual respondents must personally sign CAs involving knowing and willful violations. For other violations, counsel may sign on the respondent's behalf. For organizational or corporate respondents, the chief executive officer, president, treasurer, or other appropriately senior officer or organizational representative must sign the CA.

6.4 Civil Penalties

6.4.1 Statutory and Regulatory Authority to Require Payment of Civil Penalty

In matters that do not involve knowing and willful violations, the Act provides that the Commission may include a requirement in the CA that the respondent pay a civil penalty "which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved." 2 U.S.C. § 437g(a)(5). The $5,000 amount has been adjusted for inflation; the current amount is set forth in 11 C.F.R. § 111.24(a)(1). This amount is commonly referred to as the "statutory civil penalty."

For knowing and willful matters, 2 U.S.C. § 437g(a)(5)(B) provides that for almost all violations, the statutory penalty amount may not exceed the greater of 200% of the amount in violation or $10,000. The $10,000 amount is adjusted for inflation every election cycle; the current amount is set forth in 11 C.F.R. § 111.24(a)(2)(i).

Violations under 2 U.S.C. § 441f are treated differently. In those matters, the statutory civil penalty may be no less than 300% of the amount in violation, and no more than the greater of $50,000 or 1,000% of the amount in violation. 2 U.S.C. § 437g(a)(5)(B). The $50,000 figure is also adjusted for inflation; the current figure is set forth in 11 C.F.R. § 111.24(a)(2)(ii).

When identifying the correct statutory civil penalty, use the penalty that applied on the date the violation occurred, not the current date.

6.4.2 Roles of the Commission and OGC Regarding Civil Penalties

OGC makes recommendations to the Commission regarding the appropriate terms of an agreement, including the civil penalty. The Commission ultimately decides whether to accept or reject those terms. Accordingly, if a respondent makes a counter-offer that OGC is willing to recommend that the Commission accept, the attorney must emphasize to the respondent that no terms are final until the Commission accepts them.

In addition, the attorney should inform the respondent that the AGC must also agree to changes to a Commission-approved proposed CA. Thus, as the 60-day PPCC period nears its end, the attorney, the team leader, and the Deputy AGC should discuss potentially acceptable settlement amounts and language with the AGC.

6.4.3 Calculating Proposed Opening Settlement Offers

When calculating a proposed opening settlement offer ("OSO"), the attorney should take into account the Act's provisions, Commission-approved formulas, and Commission calculations in similar cases. Many factors will guide the calculation of an appropriate proposed OSO, including, but not limited to, the nature of the violation, the amount in violation, aggravating and mitigating factors, and appropriate discounts. The Commission must approve the calculation of the civil penalty in every matter, and it has the discretion to vary from the amount the Act, a formula, or precedent might suggest. Once approved, the OSO is the starting point for negotiations.

6.4.3.1 Statutory Civil Penalty Provisions; Civil Penalty Formulas

When determining the amount of a civil penalty to recommend for inclusion in a CA, the attorney should start by identifying the applicable statutory civil penalty and any formula for calculating the civil penalty that the Commission has used in matters involving the same or similar violations. As a general rule, in non-knowing and willful matters where the amount in violation is known and the Commission has approved a method for the calculation of the violation in question, the attorney should apply the method approved by the Commission. If the amount in violation is unknown but likely not substantial, or if an amount different from the amount derived from a Commission-approved formula appears to be more appropriate in a particular case, the attorney should recommend that the Commission apply the statutory civil penalty. These formulas are merely guidance; the attorney should research similar cases to determine whether a statutory civil penalty, a formula-calculated penalty, or some other calculation is most appropriate.

6.4.3.2 Mitigating and Aggravating Factors

Attorneys should consider all mitigating or aggravating factors that might support a lesser or greater civil penalty.

PRACTICE TIP PULL-OUT BOX

Common Mitigating and Aggravating Factors

The following are non-exhaustive lists of common mitigating and aggravating factors:

Mitigating factors

- Violation was only a small percentage of the overall activity;
- Respondent took corrective action, such as making subsequent refunds and filing amended reports;
- Respondent's involvement in the violation was minor;
- Violation is respondent's first violation; or
- Respondent was cooperative during Commission proceedings, such as an audit or investigation.

Aggravating Factors

- The violation involved egregious or knowing and willful activity, and respondent was a central actor in the activity;
- The attorney discovers that the scope of the violation is wider than the facts on which the Commission found RTB and approved an OSO;
- Respondent failed to take corrective action when advised of the violation;
- Commission found respondent engaged in unlawful conduct in a prior matter (including ADR) for same violation; or
- Respondent obstructed or misled an investigation.

END PRACTICE TIP PULL-OUT BOX

6.4.3.3 Discounts: PPCC Discount; *Sua Sponte* Discount

During PPCC, the Commission applies a 25% discount to the civil penalty because early settlements conserve Commission resources. The attorney should not include this discount after the case has moved to the PCTB stage.

As mentioned in Section 3.3, the Commission may offer favorable treatment in *sua sponte* matters as an incentive to self-report violations, including offering a civil penalty 25-75% lower than the Commission would have sought in an otherwise identical matter. The amount of the reduction depends on the facts and circumstances of a particular case. According to the Commission's *sua sponte* policy, absent unusual circumstances, the Commission will grant a civil penalty reduction of 50% to a respondent that meets certain criteria. 72 Fed. Reg. at 16,697.

The Commission may grant a civil penalty reduction of up to 75% to respondents for violations in *sua sponte* submissions based on factors such as violations that were uncovered as a result of independent experts that were hired by respondents to conduct a thorough review, investigation, or audit, or an equally comprehensive internal review, investigation, or audit. In order to receive this reduction, respondents must meet the criteria for a 50% reduction and provide the Commission with all documentation of the experts' review, investigation, or audit. *Id.* During PPCC, it is appropriate to apply both the *sua sponte* and PPCC discounts together.

6.4.3.4 Double Counting

In some matters, more than one violation may result from a single activity or transaction. To avoid double counting, the attorney should review prior precedents to determine whether the statutory civil penalty, a calculated civil penalty, or no penalty, should be applied to the secondary violation.

6.4.3.5 Rounding Off Civil Penalties

Opening settlement offers should be rounded up or down as follows:

- Penalties Below $5,000: round to the nearest $100 increment (for example, $3,480 should be rounded up to $3,500);
- Penalties between $5,000 and $9,999: round to the nearest $500 increment (for example, $7,350 should be rounded up to $7,500); and
- Penalties of $10,000 and above: round to the nearest $1,000 increment (for example, $34,450 should be rounded down to $34,000).

6.5 Conciliating

6.5.1 Duration

The Commission's goal is that PPCC should be completed within 60 days. If the matter has not conciliated after 45 days, the attorney and team leader should consult with the AGC or Deputy AGC to determine the best course of action. Where circumstances warrant – and if substantial progress is being made – the 60-day period may be extended. If so, the attorney should consider whether to seek a tolling agreement or an extension of a current tolling agreement. *See* Section 6.1.2. If it appears that further negotiations would be unsuccessful, it may be best to proceed to the PCTB stage. *See* Section 6.5.5.2 (Unsuccessful Conciliation).

6.5.2 Notifications; Disclosure Procedure

As stated in 6.1.1.1, after the Commission authorizes PPCC, the attorney sends the respondent a letter transmitting the proposed CA and offering the respondent the opportunity to engage in negotiations concerning the proposed CA. This letter will also explain how the Commission calculated the OSO. The respondent's reply is due within seven days of the receipt of the offer.

If the Commission's offer to conciliate comes after an investigation, the notification letter also must inform the respondent of the opportunity to request OGC to make available documents from the Commission's investigative file. *See* Disclosure Procedure, 76 Fed. Reg. at 34,991. The respondent then has 15 days from the date of the notification to submit a written request for documents. If the respondent requests documents, the attorney should consult with the team leader to determine which documents should be made available. For more information on the Disclosure Procedure, see Section 2.9.

6.5.3 Negotiations

Negotiations may be conducted in writing, by telephone, or in person. If negotiations are conducted by telephone or in person, the attorney must memorialize the main points of the negotiations in a letter or e-mail to the respondent with a notation in CMS. The attorney must also instruct CELA to place the letter or e-mail in the permanent file. Further, as with all contacts with respondents or counsel, the attorney must outline the discussions in a log and place it in an electronic folder accessible to other Enforcement personnel.

If the respondent and OGC agree on the terms of the CA, the attorney presents the final proposed CA to the Commission. As discussed above, the Commission decides whether to accept or reject any negotiated agreement; OGC cannot bind the Commission to the terms of any CA.

6.5.3.1 Negotiating the Civil Penalty

6.5.3.1.1 New Mitigating and Aggravating Factors

As discussed in Section 6.4.3.2, the Commission considers mitigating and aggravating factors when calculating an OSO. During PPCC, respondents may present additional potentially mitigating factors to demonstrate that the OSO should be reduced, and the attorney should consider them if they have not already been factored into the OSO. Examples of additional mitigating factors include: (1) a candidate's willingness to take personal responsibility for the obligations of his or her authorized committee; and (2) a respondent's inability to pay the civil penalty. See next section for further discussion of inability to pay.

The attorney also may discover additional aggravating factors during negotiations that may indicate that a reduction of the OSO is not justified, or even that a civil penalty greater than the OSO is appropriate. For example, the attorney may discover during negotiations that the respondent did not previously produce material information or documents indicating that the amount in violation was greater than the amount on which the Commission based the OSO. In that situation, the attorney should prepare an informational memorandum to the Commission describing the new information and recalculating the OSO amount based on the new information. The memorandum should inform the Commission that OGC intends to continue negotiations based on the higher amount unless the Commission directs otherwise.

6.5.3.1.2 Inability to Pay

If an individual respondent claims an inability to pay all or any of an approved OSO because of financial hardship, the attorney should direct the respondent to complete a financial disclosure form (Enforcement Form 129) and submit supporting documentation. The attorney must review any financial information the respondent submitted and, in consultation with the team leader and AGC or Deputy AGC, determine whether the respondent has sufficiently established inability to pay the approved OSO. If a respondent establishes inability to pay, the attorney should modify the proposed CA to include language reflecting the reason for the reduction or waiver of the civil penalty. Enforcement Form 76A contains appropriate language. If the respondent refuses to complete a financial disclosure form and supply relevant documents, the attorney should tell the respondent that OGC will not recommend that the Commission reduce the civil penalty.

A registered political committee is not required to provide a financial disclosure statement because its financial activities appear on its disclosure reports, assuming the reports are accurate. If there is a question as to the accuracy of such reports, the attorney may request confirming bank statements or documents, or a sworn affidavit from the respondent committee that attests to its financial condition. If a respondent committee that is not seeking to terminate demonstrates that it is currently unable to pay the OSO, but it appears to have the ability to raise additional funds, the attorney should consider including a clause directing the committee to pay the civil penalty from the first funds it raises in the future. The attorney should also determine whether a respondent committee that engages in cyclical activity and is not seeking to terminate has experienced a recent downturn in funds and therefore may be able to raise funds in the future.

6.5.3.1.3 Installments

Generally, civil penalties are due and payable in full within 30 days of the CA's effective date. Installment payments are not preferred, but the Commission has approved some respondents' requests to make installment payments rather than a lump sum payment when respondents have demonstrated they cannot pay the entire penalty in a lump sum.

A respondent that requests permission to make installment payments must justify the request. The payment plan generally should not exceed three months. The AGC must approve all proposed installment plans.

The CA must show the amount of each payment to be made and when it is due. The terms of such a plan should usually require that the first installment equal a significant portion of the total civil penalty. Failure to make a required payment constitutes a violation of the CA. A violation of an installment agreement may be subject to enforcement by the Commission in a civil suit or referral to the U.S. Treasury for collection. The attorney should use Enforcement Form 104A as a template for a letter to a respondent that fails to submit a required installment payment and Enforcement Form 104 for a respondent who fails to pay a civil penalty.

If the Commission approves an installment payment plan, it is the attorney's responsibility to monitor compliance with the terms of the agreement and take appropriate action if the respondent defaults. *See* Section 6.5.6.3.

6.5.4 Counteroffers

The respondent may make one or more counteroffers to the OSO. If OGC is willing to recommend to the Commission that it accept a CA based on the counteroffer (or after a series of counteroffers), the attorney mails the agreement to the respondent for signature along with a cover letter. That letter must state that OGC will recommend that the Commission accept the respondent's counteroffer, but only the Commission can accept it.

Even if OGC informs a respondent that it will not recommend that the Commission accept a counteroffer, the respondent may request that OGC present it to the Commission. The attorney should make clear to the respondent that OGC will recommend that the Commission reject the counteroffer. In some cases, the respondent chooses to continue negotiating. If, however, the respondent insists on having OGC present the counteroffer, the attorney prepares a memorandum to the Commission. The appropriate form for this memorandum is Enforcement Form 95, and should:

- State OGC's recommendation to the Commission;
- Include a background section, which provides a chronology of conciliation efforts;
- Specify those portions of the respondent's counteroffer that OGC deems acceptable and those OGC does not recommend, and provide reasons; and
- State whether respondent attached a check for the civil penalty, and if so, attach a copy of the check.

If OGC proposes to make a counteroffer, discuss its details, including any new language or any change in the proposed civil penalty.

If the Commission agrees with OGC's recommendation to reject the counteroffer, the attorney notifies the respondent of the Commission's decision and whether the Commission wishes to continue conciliation or to proceed to the PCTB stage. (Enforcement Forms 39 or 39B).

6.5.5 Concluding PPCC

6.5.5.1 Successful Conciliation

As mentioned above, if negotiations succeed and result in a CA that is acceptable to the respondent and OGC, the Commission must accept the agreement before the AGC may sign the agreement on the Commission's behalf. The attorney prepares and circulates a memorandum to the Commission recommending acceptance of the CA. As described in the next section, the memorandum should describe any significant changes to the original Commission-approved agreement and attach the proposed CA as well as the redlined version of the original CA with the proposed changes.

PRACTICE TIP PULL-OUT BOX

Original Signatures

Sometimes, respondents send advance copies of a signed CA by fax or e-mail, but the attorney must also obtain the hard copy of the CA with the original signature of the respondent or respondent's counsel. The original copy need not be received in order to circulate the memorandum to the Commission, but the original must be executed by the AGC.

END PRACTICE TIP PULL-OUT BOX

6.5.5.1.1 Memorandum Recommending Commission Accept Signed Conciliation Agreement

The attorney should forward the negotiated CA to the Commission as an attachment to a brief memorandum — usually no longer than two pages — recommending that it accept the CA. The attorney should prepare this memorandum immediately after the respondent signs the CA. In general, the memorandum should:

- Be addressed *to* the Commission, *from* the General Counsel and AGC or Deputy AGC, and *by* the team leader and attorney. On the "Subject" line, it is important to include the MUR number and the full name of the respondent who is a party to the CA at issue, not the lead respondent (unless they are the same party);

- Begin with a brief summary of the case; describe any changes relative to the proposed CA the Commission approved; include an explanation of why the changes are acceptable; state the percentage of the approved OSO that was ultimately negotiated; and state who signed the agreement on behalf of the Respondent;

- Conclude with numbered recommendations, including recommendations to accept the CA and send the appropriate letters. If the CA has been signed by or on behalf of only some of the respondents in the matter, the report should recommend that the Commission close the file only as to those respondents. If the CA will resolve the matter as to all remaining respondents, the attorney should recommend that the Commission close the entire file;

- Attach both the signed version of the negotiated agreement and a redlined version showing the differences between the agreement that the Commission initially approved and the negotiated CA. If there are no changes between the approved and negotiated versions of the CA, attach only the signed agreement;

- Address any contention language that the respondents requested and any factors that OGC considered relevant to negotiating the civil penalty; and

- While the respondent is not required to present a check for the civil penalty before the Commission accepts the CA, if the respondent does so, the attorney should attach a copy of the check to the memorandum. Generally, full payment is due within 30 days from the CA's effective date.

Once the attorney completes the memorandum and the team leader approves it, the team leader sends it to the AGC or Deputy AGC for expedited review and circulation.

6.5.5.1.2 Obtaining the AGC's Signature and Notifying Respondents of the Finalized Agreement

If the Commission votes to accept a negotiated CA, the attorney presents the original CA and the certification of the Commission's vote to the AGC for signature. The AGC's administrative assistant logs in the CA, and the AGC signs it and returns it to the attorney. The attorney then prepares the closing letters and submits the letters and a copy of the CA to CELA for mailing. See Section 8 for more information about closing a matter.

6.5.5.2 Unsuccessful Conciliation

If conciliation negotiations have reached an impasse with no realistic possibility of a final agreement within the 60-day PPCC period, the attorney should discuss with the team leader and AGC or Deputy AGC whether to withdraw from PPCC. If OGC decides to withdraw from PPCC, OGC should circulate an informational memorandum notifying the Commission of its intention to withdraw from PPCC and proceed to the PCTB stage.

PRACTICE TIP PULL-OUT BOX

CMS Entries during PPCC

The attorney should enter in CMS the date on which the notification letter stating that the Commission approved PPCC with a proposed CA was sent to the respondent. This entry starts the 60-day period for conciliation. To signify the end date of successful PPCC, the attorney must enter the date on which the memorandum recommending acceptance of the CA circulates to the Commission. If the AGC circulates the memorandum, the AGC's administrative assistant enters the circulation date. To signify the end date for unsuccessful PPCC, the attorney must enter the date on which work begins on drafting the informational memorandum to the Commission regarding the failure of PPCC.

END PRACTICE TIP PULL-OUT BOX

6.5.6 Processing Civil Penalty Payments

6.5.6.1 Routing the Civil Penalty Check within the Agency

Respondents usually pay civil penalties by check. The attorney may recommend that the respondent send a registered or certified check. The correct payee for all civil penalties is the United States Treasury, not the FEC. When the payment arrives, it is assigned a control number and forwarded to the Finance Office. OGC staff may not hold a check for any reason, even if the respondent requests it; all checks must be given to the Finance Office immediately.

The Finance Office sends a memorandum to CELA for placement in the permanent file with a copy of the check and the original correspondence accompanying the check. The top portion of the memorandum is addressed to CELA and lists the name on the check and the check's number and date, and it requests that CELA provide certain information to the Finance Office. CELA enters the MUR number and the respondent's name on the lower part of the memorandum and designates the account into which the check will be deposited. CELA then returns the memorandum to the Finance Office and sends a copy to the attorney.

If a bank returns a check to the Finance Office, the Finance Office sends a memorandum to CELA stating the reasons the check was returned along with a copy of the canceled check. Upon notification by CELA, the attorney must follow up with the respondent and ensure that the respondent makes the proper payment. A returned check constitutes a failure to pay the civil penalty and, therefore, a violation of the CA.

6.5.6.2 Paying a Civil Penalty by Credit Card

A respondent may ask to pay the civil penalty by credit card. The attorney should tell the respondent that he or she will have to provide the following information to the Public Records Office: (1) a credit card number; (2) the matter number; and (3) a mailing address. The attorney also sends an e-mail to the Public Records Office and the Office of the Chief Financial Officer alerting them to the impending credit card payment and providing: (1) the MUR number; (2) the respondent's name; (3) the civil penalty amount; and (4) the expected transaction date. The attorney should copy CELA's Supervisory Attorney and Paralegal Specialist on the e-mail. The Public Records Office processes the transaction and mails the respondent a receipt.

6.5.6.3 Monitoring Civil Penalty Payments and Remedial Measures

Attorneys are responsible for monitoring performance of all provisions contained in CAs in their matters, including civil penalty payments and timely completion of remedial measures. Information regarding civil penalty payments can be found in the "Remedies" section of CMS. CMS also tracks civil penalties paid pursuant to an installment schedule. If a respondent fails to remit the full civil penalty amount within the allotted time frame, the attorney should inform the team leader and AGC or Deputy AGC to determine the next appropriate step. Enforcement Form 104 is the letter template to send a respondent that defaults on an obligation to pay a civil penalty.

In 2010, the Commission approved a Final Rule to Implement the Debt Collection Improvement Act of 1996, which requires that all non-tax debts owed to the United States for 180 days be referred to the U.S. Treasury for collection. *See* 11 C.F.R. §§ 111.50-.55; *see also* http://www.fec.gov/law/cfr/ej_compilation/2010/notice_2010-10.pdf. Consult these regulations should a respondent fail to timely pay a civil penalty.

6.5.6.4 Payment Refund to Respondent

Occasionally, OGC must refund all or part of a civil penalty payment because the respondent paid the penalty in advance of a Commission vote on the CA, but the Commission did not accept the agreement. If this occurs, the attorney should obtain and complete the necessary refund form from the Commission's Finance Office and prepare a cover memorandum to that office to memorialize the refund request.

7 THE PROBABLE CAUSE TO BELIEVE STAGE

7.1 Introduction

This section discusses the probable cause stage of the enforcement process, including: the General Counsel's Brief, the respondent's Reply Brief, the hearing on PCTB, the OGC Notice, the respondent's Supplemental Reply Brief, Commission determinations, and notifications. It also discusses probable cause conciliation ("PCC") and GCRs recommending civil suit authority.

7.2 Statutory and Regulatory Framework and Relevant Commission Procedures

After the Commission finds RTB, OGC may recommend that the Commission proceed to a vote on PCTB. 2 U.S.C. § 437g(a)(3). OGC usually makes this recommendation after an investigation or when PPCC was unsuccessful. 11 C.F.R. § 111.16(a). In SOL-sensitive matters, OGC may recommend that the Commission find PCTB soon after an RTB finding if the respondent's liability is apparent and the respondent either does not want to participate in PPCC or refuses to toll the SOL, or it appears that PPCC is unlikely to result in a settlement. To begin the process, OGC notifies the respondent of its intent to make a PCTB recommendation to the Commission and includes a brief setting forth the legal basis for the recommendation with the notification. 2 U.S.C. § 437g(a)(3); 11 C.F.R. § 111.16(a), (b).
The notification also informs the respondent of the opportunities to request a hearing on probable cause and to obtain relevant documents from the investigatory file. Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64,919 (Nov. 19, 2007) ("PCTB Hearing Procedure") *available at* http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-21.pdf; Disclosure Procedure, 76 Fed. Reg. at 34,986.

The respondent has 15 days from receipt of the General Counsel's Brief ("GC's Brief") to file a reply brief. 2 U.S.C. § 437g(a)(3); 11 C.F.R. § 111.16(c). After receipt of the reply brief and the probable cause hearing, if one is granted, OGC notifies the Commission in writing whether it intends to proceed with the recommendation in the GC's Brief or is withdrawing the recommendation, and it serves this notice on the respondent. 11 C.F.R. § 111.16(d). This document is known as the OGC Notice. *See* Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel, 76 Fed. Reg. 63,570 (Oct. 13, 2011) ("Post-briefing Procedure") *available at* http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-15.pdf. The respondent may ask to file a supplemental reply brief to address only new facts or legal arguments in the OGC Notice. *Id.* After the filing of any such brief, the Commission makes appropriate findings, and OGC notifies the respondent. 11 C.F.R. § 111.17. The Commission is required to attempt conciliation for at least 30 days if it finds PCTB. 2 U.S.C. § 437g(a)(4)(A). If PCC succeeds, the case ends; if not, OGC may recommend that the Commission file a civil action against the respondent in federal district court. *Id.*, 2 U.S.C. § 437g(a)(6)(A).

7.3 The General Counsel's Brief

7.3.1 Writing the General Counsel's Brief

The GC's Brief sets out the case for a recommendation that the Commission find PCTB that the respondent either violated or is about to violate the Act and Commission regulations. The GC's Brief will be provided to the respondent who is the subject of the PCTB proceeding. Enforcement Form 90 is the template for the brief. The headings in that form — Statement of the Case, Analysis, and General Counsel's Recommendations — are suggestions, not requirements. In some cases, it may be preferable to

use argument headings as in an appellate brief. In the usual case, though, the brief starts with a short summary of the procedural aspects of the matter. The GC's Brief should not contain a discussion of PPCC efforts. In addition, the GC's Brief should not refer to other parties as respondents or disclose investigations, recommendations, or findings with respect to other parties. *See* 2 U.S.C. § 437g(a)(12) (providing that notifications or investigations shall not be made public without the written consent of the person receiving such notification).

The analysis portion of the GC's Brief sets forth the case that a violation occurred or is about to occur and cites to relevant, probative evidence. As with all other OGC reports, exculpatory and inculpatory information, whether provided by the respondent or gathered by OGC from another source, must be discussed. *See* Disclosure Procedure, 76 Fed. Reg. at 34,990 (defining "exculpatory information"); *see also* Sections 4.3.2 and 6.2.1.3. The GC's Brief does not discuss civil penalties.

7.3.2 Signature and Circulation

The General Counsel, the AGC or Deputy, the team leader, and the attorney sign the GC's Brief. After the brief is signed, CELA circulates it to the Commission on an informational basis.

7.3.3 Notification Letter to Respondent

The attorney also prepares a notification letter to the respondent. *See* 11 C.F.R. § 111.16(B). Use Enforcement Form 45 if the Commission made a non-knowing and willful RTB finding and Enforcement Form 45A if the Commission made a knowing and willful RTB finding. This letter also informs the respondent of the opportunities to request a probable cause hearing and to obtain documents from the investigative file. The Commission Secretary circulates a copy of this letter to the Commission along with the GC's Brief.

INSERT PRACTICE TIP PULL-OUT BOX

Supplemental Briefs Regarding Successor Treasurers

Any change of treasurer should be explained in a footnote in the GC's Brief. If the treasurer is replaced after the Commission finds PCTB against the former treasurer in the treasurer's official capacity, the attorney should serve a notification and supplemental brief on the successor treasurer. The supplemental brief should refer to the Commission's previous PCTB findings against the Committee and the former treasurer and recommend that the Commission find PCTB against the new treasurer in his or her official capacity. *See* Treasurer Policy, 70 Fed. Reg. 3 (Jan. 3, 2005). The supplemental brief should incorporate the GC's Brief by reference, and the attorney should include a copy of the GC's Brief with the notification to the new treasurer. For further guidance regarding the Treasurer Policy, see Section 3.2.5.1.

END PRACTICE TIP

7.3.4 Serving the General Counsel's Brief and Notification

The regulations provide for various means of serving the GC's Brief and notification, *see* 11 C.F.R. § 111.13, but OGC typically serves the brief by certified mail, return receipt requested, and sends a courtesy copy by e-mail.

7.3.4.1 Personal Service

If the respondent is represented by counsel who maintains an office in or near Washington, D.C., the GC's Brief can be served by handing a copy to respondent's counsel or leaving a copy at counsel's office with the person in charge of the office. 11 C.F.R. § 111.13(b), (c). The person serving the brief should have counsel or the person accepting delivery sign an acknowledgement of receipt (Enforcement Form 120).

If the respondent is not represented by counsel, the brief can be served by handing a copy to the respondent, or leaving a copy at his or her dwelling place or usual place of abode with some person of suitable age and discretion residing therein. 11 C.F.R. § 111.13(c). The person serving the brief should have the person accepting delivery sign an acknowledgement of receipt. Refer to Section 5.3.2.7.1 for guidance regarding service by the U.S. Marshal or a private process server.

7.3.4.2 Postal Service; Certified Mail

The attorney may also serve the brief by mailing it to counsel or to the respondent, if not represented by counsel. If the brief is served by mail, the 15-day time period to file a Reply Brief is extended by 3 days. 11 C.F.R. § 111.2(c). The attorney should mail the GC's Brief by certified mail, return receipt requested. The attorney is responsible for ensuring that the receipt card is placed in the permanent file and VBM.

If the respondent is an unrepresented political committee, the brief can be served by mailing a copy to the committee's treasurer or its designated agent. 11 C.F.R § 111.13(d). Mailing addresses for the committee's treasurer and designated agent can be found in the committee's Statement of Organization.

If the respondent is an unrepresented corporation, partnership, or other entity, the brief can be served by mailing a copy to the registered agent or to any officer, director, or agent in charge of any office of the corporation, partnership or entity. 11 C.F.R. § 111.13(d). Check the website of the Secretary of State for the state where the corporation, partnership, or other entity does business to determine the name and address of the registered agent or other person to be served.

7.3.5 Requests for Disclosure of Documents

After receiving the notification and the GC's Brief, the respondent may make a written request to receive or review relevant documents gathered during an investigation. The respondent must make this request within 15 days of the notification letter, which should advise the respondent of this opportunity and the deadline for responding. See Section 2.9 for details on the Commission's disclosure procedure.

7.3.6 Notice to Litigation Division

If a case is proceeding to the PCTB stage, the attorney should inform the Litigation Division as soon as possible because the Commission may authorize OGC to file a civil suit if the case does not ultimately settle. The attorney should also send an e-mail to the AGC for Litigation and the Litigation team leaders when the GC's Brief is served so that they can assign staff to follow the case and, if necessary, be prepared to file a complaint.

7.4 The Reply Brief

A respondent has 15 days after receipt of the GC's Brief to file a Reply Brief. 2 U.S.C. § 437g(a)(3). There is no requirement that respondent file a reply brief.

Respondents sometimes ask for an extension of time to file a Reply Brief. The attorney may grant an extension for a reasonable period of time, ordinarily not more than 20 days, but should also request that respondent sign a tolling agreement in exchange for the extension in SOL-sensitive cases. Tolling agreements must be in writing and signed by both respondent (or counsel) and the Enforcement attorney. Use Enforcement Form 132 as a template for the tolling agreement. *See* Section 2.6 for more information about handling extension requests.

The respondent may request a probable cause hearing, and the respondent must include the request for a hearing in the Reply Brief. PCTB Hearing Procedure, 72 Fed. Reg. 64,919 (Nov. 19, 2007). See the next section for details about probable cause hearings.

7.5 The Probable Cause Hearing

7.5.1 Overview

In the Reply Brief, a respondent may request a hearing to present argument directly to the Commission before any decision whether there is PCTB that a violation of the Act or Commission regulations occurred or is about to occur. The respondent must state specifically why the hearing is being requested and what issues the respondent expects to address. Requesting a hearing is optional, and the respondent's decision whether to request one will not influence the Commission's decision regarding PCTB.

The Commission will grant a hearing if 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. *Id.* at 64,919. If a hearing is granted, the Commission may request that the respondent agree to toll the SOL. *Id.* at 64,920. If the respondent refuses to sign a tolling agreement, the attorney should inform the Commission and make an appropriate recommendation, taking into account the amount of time remaining before the SOL expires as to any potential violations. *See* Commission Directive 68.

At the hearing, the respondent may discuss any issues presented in either brief, including potential liability and the amount of any civil penalty. Hearings are confidential; generally, in addition to agency staff, respondents, counsel, and a court reporter are the only people from outside the Agency who may attend. The Commission determines the format and time allotted for each hearing at its discretion. The Commissioners, the General Counsel, and the Staff Director may ask the respondent questions relevant to the matter and may request that the respondent supplement the record within a set time. The Commissioners may also ask questions designed to elicit clarification from the General Counsel and the Staff Director. Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55,443 (Oct. 28, 2009), *available at* http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-24.pdf.

A court reporter will transcribe the proceedings, and the respondent may purchase a copy of the transcript from the court reporter. The transcript of the hearing, with appropriate redactions, will be made part of the public record when the case is closed. For more guidance on the logistics of a Probable Cause Hearing, refer to the next section.

7.5.2 Probable Cause Hearing Procedure: A Checklist

Upon receipt of a request for a probable cause hearing:

- The attorney should direct the team paralegal or administrative assistant to make a PDF of the hearing request. The attorney should send an e-mail to the Commissioners' offices, the Commission Secretary, the General Counsel, the AGC and Deputies, the team leader, and the Supervisory Attorney in CELA that informs them of the request and the voting deadline and attaches the PDF. In the e-mail, the attorney should advise the Commissioners if the matter is SOL-sensitive and, if appropriate, recommend that the Commission request that the respondent execute a tolling agreement. Use Enforcement Form 64 as a template for the e-mail.

If after 30 days from receipt of the reply brief fewer than two Commissioners vote to grant the request for a hearing:

- The attorney should send an e-mail to the Commissioners informing them that the deadline for granting the request has passed and that the attorney will notify the respondent that the Commission has not granted the request for a hearing. In this e-mail, the attorney also reminds the Commission that OGC will soon advise whether it intends to proceed with its earlier recommendation, or whether it intends to withdraw it. *See* 11 C.F.R. § 111.16(d). The attorney should use Enforcement Form 64A as a template for the e-mail. The attorney then informs the respondent. Use Enforcement Form 64B as a template for the letter.

If the hearing request is granted:

- The attorney should contact the Chair's Office to obtain a proposed date and time for the hearing.

After the date and time for the hearing are set:

- The attorney should send a letter to the respondent stating that the Commission has granted the hearing request, providing the date and time of the hearing, and informing the respondent of the procedures for the hearing. Use Enforcement Form 65 as a template for the letter. The letter should also include a proposed tolling agreement if the Commission is requesting that the respondent sign one. The attorney should adapt Enforcement Form 132 to create the tolling agreement.

- If the respondent is not available on the date set by the Commission, the attorney should inform the AGC and contact the Chair's Office to determine if the Commission wishes to conduct the hearing on another date or proceed without a hearing. The attorney then notifies the respondent accordingly.

If the respondent agrees to the hearing date:

- The team paralegal or administrative assistant should secure a court reporter and obtain budgetary authority for the court reporter's services.

- The attorney should provide the court reporter with a caption page for the transcript and a list of names of those attending the hearing, including the Commissioners, the Staff Director, the General Counsel, the respondent, and respondent's counsel.

- The attorney should make sure that all relevant documents are in VBM. The attorney should work with CELA to add any missing documents as quickly as possible.

- If the respondent or respondent's counsel has indicated that he or she intends to use audio-visual aids at the hearing, the attorney should contact the Commission Secretary to make the necessary arrangements.

- The attorney should inform the Commission by e-mail of the names of the respondents and counsel attending the hearing. If the respondent has more than one attorney appearing at the hearing, the attorney informs the Chair's office which counsel will speak on behalf of the respondent. The attorney also provides the names of all non-FEC employees expected to attend the hearing to the Commission Secretary, the Commission receptionist, and the security guards. The attorney is responsible for seeing that visitors are escorted to the Commission hearing room and escorted out of the building after the hearing.

Preparing the General Counsel and AGC for the Hearing:

The attorney and team leader, with assistance from the team paralegal or administrative assistant and the administrative assistants to the AGC and General Counsel, prepare briefing books for the General Counsel and the AGC containing relevant case materials, such as:

- GC's Brief
- Reply Brief
- All relevant GCRs
- Complaint
- Response
- Materials cited in the Complaint and the Response
- All authorities cited in the GC's Brief and Reply Brief

The attorney should also prepare a briefing memorandum for the General Counsel and provide an oral briefing to the General Counsel.

After the hearing:

- The attorney sends a letter to the respondent stating that the respondent may purchase a copy of the hearing transcript, and sends a copy of this letter to the court reporter. Use Enforcement Form 66 as a template for this letter. Additionally, the attorney ensures that CELA places the transcript in the permanent file and VBM.

- If, at the hearing, the Commission requests additional information or supplemental briefing from the respondent, the attorney should forward to the Commission any information or documents received from the respondent.

7.6 The OGC Notice

7.6.1 Introduction

After reviewing the reply brief, or after the Commission has held a PCTB hearing, whichever applies, OGC advises the Commission in writing whether it continues to recommend that the Commission find PCTB that the respondent has violated or is about to violate the Act or regulations, or whether it is withdrawing its prior recommendation. 11 C.F.R. § 111.16(d). This document is known as the OGC Notice. In most cases, this document will simply state that OGC continues to recommend that the Commission find PCTB, but occasionally, it will be necessary to include additional facts and argument, especially if OGC is recommending that the Commission make a finding other than PCTB. *See* Section 7.6.3. The attorney should discuss the contents of the OGC Notice with the team leader and the AGC and Deputy AGC. Regardless of its contents, the attorney serves the OGC Notice on the respondent. Post-Briefing Procedure, 76 Fed. Reg. at 63,570. The attorney should use Enforcement Form 92 as a template for the OGC Notice.

Because the attorney must serve the OGC Notice on the respondent, and because OGC's conciliation analyses are confidential, the notice should not contain a discussion of PCC. Instead, the attorney should draft and circulate a separate, contemporaneous memorandum to the Commission regarding PCC that contains a discussion of what, in the General Counsel's opinion, is the appropriate civil penalty and attaches a draft CA. The attorney should use Enforcement Form 92A for this memorandum. These documents are not served on the respondent. If the Commission approves the recommendations in the OGC Notice, as well as the recommendations in the memorandum regarding PCC, the attorney sends respondent a letter notifying it that the Commission found PCTB and approved a CA, which the attorney attaches to the letter. The letter also explains how the Commission calculated the opening settlement offer. The same process is followed if the Commission declines to approve the General Counsel's recommendation.

7.6.2 Timing

There is no statutory or regulatory deadline for the OGC Notice, and the circulation date will depend on whether the Commission holds a probable cause hearing. Even so, the attorney should prepare the notice as soon as possible after receipt of the Reply Brief (if there is no hearing) or receipt of the PCTB hearing transcript. The attorney circulates the notice on a one-week tally vote basis.

INSERT PRACTICE TIP PULL-OUT BOX HERE

Timing of OGC Notice in SOL-Sensitive Cases

The attorney should strive to circulate the OGC Notice so that there will be enough time before the expiration of the SOL as to any violation for: (1) the Commission to consider the notice at two Executive Sessions; (2) OGC to conciliate with respondent for 30 days; (3) OGC to circulate a GCR recommending civil suit authority; (4) the Commission to consider and vote on that report; and (5) the Litigation Division to prepare and file a complaint in U.S. District Court.

END PRACTICE TIP HERE

7.6.3 Recommendations

As mentioned in Section 7.6.1, the OGC Notice usually will recommend that the Commission find PCTB, but occasionally, the recommendations described below will be more appropriate. The

attorney should discuss any recommendation to be included in an OGC Notice with the team leader and the AGC and Deputy AGC.

7.6.3.1 Probable Cause to Believe; No Further Action

On occasion, OGC may recommend that the Commission find PCTB that respondent violated the Act and Commission regulations, but take NFA based on factors set forth by OGC. This recommendation is appropriate if there is sufficient evidence demonstrating respondent violated the Act and regulations, but further enforcement action is unwarranted.

7.6.3.2 No Probable Cause to Believe

OGC may occasionally recommend "no PCTB." This recommendation is warranted where information provided in the Reply Brief demonstrates that respondent has not violated the Act and Commission regulations. This recommendation would most likely pertain to only a portion of the activity at issue rather than the entire matter.

7.6.3.3 No Further Action

If, after receiving the respondent's brief, OGC determines that there is some, but not sufficient, evidence to recommend that the Commission find PCTB, OGC will recommend that the Commission take NFA and close the file.

7.6.3.4 Referral to DOJ

OGC may or may not recommend that the Commission refer knowing and willful violations to DOJ for criminal prosecution. 2 U.S.C. § 437g(a)(5)(C). The OGC Notice may recommend that the Commission find PCTB on a knowing and willful basis if the GC's Brief also made this recommendation. Conversely, if the GC's Brief recommended the Commission make knowing and willful PCTB findings, the OGC Notice may recommend the Commission make non-knowing and non-willful PCTB findings based on information in the reply brief.

7.6.3.5 Report to Law Enforcement Authorities

OGC may recommend that the Commission report apparent violations of laws to the appropriate law enforcement authorities. 2 U.S.C. § 437d(a)(9). Unlike referrals to DOJ, reporting does not suspend PCC. *See* next section.

7.6.4 Memorandum Regarding Probable Cause Conciliation

If the Commission finds PCTB that a violation occurred, the Commission must attempt to conciliate with respondent. 2 U.S.C. § 437g(a)(4)(A)(i). This requirement is stayed when the Commission refers knowing and willful PCTB findings to DOJ for criminal prosecution. 2 U.S.C. § 437g(a)(5)(C).

As mentioned in Section 7.6.1, for confidentiality reasons, the OGC Notice should not discuss PCC. Instead, the attorney should draft a separate memorandum to the Commission discussing PCC, including the significant provisions of the proposed CA and the calculation of the proposed civil penalty. The attorney should use Enforcement Form 92A as a template for this memorandum and attach a proposed CA to this memorandum. It is appropriate for the memorandum to discuss PPCC efforts if they have an impact on the PCC analysis. The attorney should circulate this memorandum simultaneously with the OGC Notice, but should not serve the memorandum on the respondent. Instead, the attorney should send respondent a notification letter after the Commission makes its PCTB findings. If the Commission finds PCTB, the letter should attach the CA the Commission approved and explain how it calculated the opening settlement offer.

7.6.5 Serving the OGC Notice

The attorney should serve the OGC Notice at the same time it is circulated to the Commission. Post-Briefing Procedure, 76 Fed. Reg. at 63,570. The notice is served on the respondent in the same manner as the GC's Brief. *See* Section 7.3.4.

7.7 Respondent's Supplemental Reply Brief

If the OGC Notice contains new facts or new legal arguments that were not contained in the GC's Brief, or were raised by OGC at the probable cause hearing, the respondent may submit a written request through the Commission Secretary's office asking to address the new points in a Supplemental Reply Brief. The respondent's written request must specify the new points that the respondent seeks to address and must be submitted within five business days of the respondent's receipt of the OGC Notice. Within five business days of receipt of the respondent's written request, the Commission may approve it with four affirmative votes. If the request is granted, the respondent must submit the Supplemental Reply Brief by the date specified by the Commission, which will not exceed ten calendar days from the date that OGC notifies the respondent that the Commission has approved the request. Where necessary, the Commission may request an agreement from the respondent tolling the SOL. Any request to file a Supplemental Reply Brief that the Commission has not approved within five business days of the Commission's receipt of the request will be deemed denied without further action by the Commission. For further information, refer to the Post-briefing Procedure, 76 Fed. Reg. at 63,570.

7.8 Vote on PCTB

After reviewing the GC's Brief, the Reply Brief, the OGC Notice, and the Supplemental Reply Brief, if one was filed, the Commission votes on whether there is PCTB that a violation occurred or is about to occur. Neither the Act nor the Commission's regulations defines the standard of proof for PCTB, but OGC has taken the position that the PCTB standard means that it is more likely than not the violation occurred. If the Commission finds PCTB, the case proceeds to PCC. If the Commission does not find PCTB, or decides to take NFA, the case is closed and the parties are notified. In complaint-generated matters in which the Commission does not approve OGC's recommendation to find PCTB, the Commissioners who voted against the recommendation are required to issue an SOR providing the basis for their rejection of the recommendation. The SOR will appear on the public record. For further information about SORs, refer to Section 8.3.4.4.

7.9 PCC

7.9.1 Introduction

If the Commission finds PCTB and is not referring knowing and willful violations to DOJ, the Commission is required to attempt to conciliate a matter for a period of not less than 30 days, but not more than 90 days following the Commission's vote. 2 U.S.C. § 437g(a)(4)(A)(i). Under 2 U.S.C. § 437g(a)(5)(C), the Commission is not required to conciliate with a respondent before referring a matter to DOJ. If the PCTB finding occurs during the 45-day period immediately preceding any election, the required minimum conciliation period is 15 days. 2 U.S.C. § 437g(a)(4)(A)(ii).

The attorney should discuss the status of conciliation with the team leader at least two weeks before the conciliation period expires. Occasionally, PCC extends beyond 90 days when settlement prospects are promising. *See FEC v. Adams*, 558 F. Supp. 2d 982, 988 (C.D. Cal. 2008) ("Given that Congress intended the Act to encourage settlement . . . there is nothing in the Act that prevents the parties from entering into a conciliation agreement finalized more than ninety days after the FEC's finding of probable cause.") (citing *FEC v. Nat'l Rifle Ass'n of Am.*, 553 F. Supp. 1331, 1341 n.2 (D.D.C. 1983)). The attorney may request that the respondent sign a tolling agreement in exchange for extending the conciliation period. Use Enforcement Form 133 as a template.

7.9.2 Conciliation

For a discussion of conciliation issues, refer to Section 6 (PPCC). During PCC, the attorney may wish to inform respondents that matters that were discussed during PPCC may no longer be negotiable. For example, the 25% PPCC civil penalty discount does not apply to PCC because that discount is an inducement to conserve Commission resources by settling the case before the PCTB stage. Further, in appropriate circumstances, the attorney can explain to the respondent that mitigating factors that the respondent previously raised have already been incorporated into the Commission's opening PCC offer. Similarly, although a respondent may re-argue the merits of the case during PCC, the attorney may respond that the Commission considered and rejected these arguments.

7.9.3 Drafting the Conciliation Agreement

The template for the CA for PCC is Enforcement Form 93. If the Commission previously attempted PPCC in the matter, the attorney may also create the CA for PCC by adapting the CA used during PPCC. To do so, the attorney should follow the following steps.

1. If the matter is complaint-generated, language in the first paragraph of the preamble that reads "The Federal Election Commission ('Commission') found reason to believe" should be changed to "[An investigation was conducted and] the Federal Election Commission ('Commission') found probable cause to believe." If no investigation was conducted, omit the phrase in brackets. If the matter is internally generated, language in the first paragraph of the preamble should be changed to read "the Commission found probable cause to believe."

2. In all cases, language in the second paragraph of the preamble that reads "having participated in informal methods of conciliation, prior to a finding of probable cause to believe" should be changed to read "having entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i)."

3. Language in Paragraph I which reads "and this agreement has the effect of an agreement entered pursuant to 2 U.S.C. § 437g(a)(4)(A)(i)" should be deleted.

4. The civil penalty should be revised to omit the PPCC discount. *See* Section 6.4.3.3.

5. If PPCC was not attempted, follow the basic steps outlined in Section 6, with the changes noted above that are appropriate for PCC.

7.9.4 Concluding Conciliation

7.9.4.1 Counteroffers

If the respondent makes a counteroffer to the Commission's OSO, and the offer is one that OGC recommends the Commission accept, or the respondent asks that the Commission consider the offer, the attorney prepares a memorandum to the Commission that discusses the offer and makes a recommendation as to what action the Commission should take. If OGC recommends that the Commission accept a CA that contains only minor changes to the Commission's OSO, the attorney should use Enforcement Form 94 as a template for the memorandum. If OGC recommends that the Commission reject the respondent's counteroffer and make a counterproposal including a new civil penalty, language changes, or both, use Enforcement Form 95 as a template for the GCR. If the Commission rejects the counteroffer but suggests further conciliation, use Enforcement Form 53 as a template for the notification letter. The letter usually encloses a revised CA containing the counterproposal.

7.9.4.2 Final Offers

In the event that the respondent did not make an acceptable counteroffer during the mandatory 30-day PCC period, the attorney should draft and circulate a GCR that describes the conciliation efforts and transmits the respondent's best offer, if applicable. This report may also recommend that the Commission make a "final offer" to the respondent, which is good for a short period of time, usually ten days, and is non-negotiable. The report may also inform the Commission that OGC will likely recommend that the Commission authorize suit if the respondent does not accept the final offer. Use Enforcement Form 95 as a template for this GCR.

The attorney should consult with the team leader and the AGC and Deputy AGC before preparing this report. OGC is not required to recommend that the Commission make a final offer, especially if the respondent has clearly refused to participate in PCC. A "final offer" recommendation reflects what OGC considers to be an acceptable minimum civil penalty. The report to the Commission should provide details of the final offer and should include an appropriate recommendation, such as "Inform [respondent] that the Commission will conciliate this matter with a civil penalty of $X, but in the event that respondent fails to sign and return the proposed agreement within ten days of receipt, the offer will expire and OGC will recommend that the Commission proceed to the next stage of the enforcement process."

If the Commission approves making a final offer, the attorney sends a letter to the respondent informing the respondent of the offer and enclosing a copy of the CA. Use Enforcement Form 54 as a template for the letter.

After sending the final offer letter, the attorney should contact the respondent to emphasize the letter's meaning and to ask if an agreement can be reached. The attorney does not have to engage in further negotiations. The attorney must prepare a memorandum to the file regarding the conversation or any messages left for the respondent and provide it to CELA for inclusion in the permanent file and VBM.

7.9.4.3 Receipt and Processing of Civil Penalty Payments

The procedures for receipt and processing of a civil penalty payment at the PPCC and PCC stages are identical. Section 6.5.6 discusses how to handle civil penalty payments.

7.10 Civil Suit

7.10.1 Report Recommending Civil Suit Authority

If the case does not settle during PCC and further enforcement action is warranted, the attorney drafts a GCR recommending that the Commission authorize OGC to file a civil suit. Factors to consider when deciding whether to seek litigation authority include, but are not limited to, the amount in violation, the importance of the legal principles involved, and the likelihood of success in civil litigation. The attorney should use Enforcement Form 96 as a template for this report. As the legal and factual issues have already been fully briefed, the suit authority report should be short but fully explain why OGC believes that filing suit is an appropriate use of the Commission's resources. The attorney should discuss this report with Litigation staff before drafting it, and send the AGC for Litigation a copy of the report when it is circulated to the Commission.

If the Commission approves the recommendations, the attorney should inform the respondent that the Commission has authorized OGC to file a civil suit. Use Enforcement Form 61 as a template for this letter. From this point forward, Litigation attorneys, not Enforcement attorneys, communicate with the respondent or counsel.

7.10.2 Transferring the MUR to the Litigation Division

When a case is transferred to the Litigation Division, the attorney informs CELA, and CELA provides the case file to the Litigation attorney assigned to the case. The Enforcement attorney is responsible for making entries in CMS regarding the end of PCC and the transfer to Litigation.

8 CLOSING THE MATTER

8.1 Introduction and Purpose

This section explains closing procedures, identifies each phase of the enforcement process at which a case may close, and lists the appropriate forms to use as templates for the closing letters and the documents that should be attached to those letters. This section also provides guidance relating to CAs and SORs, and it describes the handling of the case file during the closing process, including the process by which documents are placed on the public record.

8.2 Procedures

8.2.1 Matter Closing Overview

At any stage of the enforcement process, the Commission may close the entire file or close it only as to some of the respondents. After the Commission votes to close the file as to any respondent, there are a number of administrative steps that need to be taken in order to: (1) ensure that the parties are timely notified of the outcome of the matter; (2) archive the file for future internal reference; and (3) prepare the file for dissemination to the public on the Commission's website. After the Commission votes to close the entire file, the attorney notifies any remaining respondents as to whom the file is open within two days of that vote. In externally generated matters, the attorney also notifies the complainant, and in external referrals, the attorney notifies the referring entity. After the attorney sends the notification letters, OGC has 30 days to make public appropriate documents from the case file. 11 C.F.R. §§ 5.4(a)(4), 111.20. Making this release helps fulfill the Commission's core disclosure and clarification functions. *See* Section 1.2.2. For the Commission to make an accurate, timely public release of those documents from the case file, various Enforcement, CELA, and administrative law staff members must perform a number of tasks, which are described below. While the Enforcement attorney may delegate some tasks to support staff, the attorney is responsible for ensuring that all of the Enforcement Division's closing tasks are completed properly.

8.2.2 Closing Process

8.2.2.1 Before Circulating the Final GCR

When preparing a GCR that recommends that the Commission close the entire file, the attorney should ensure that: (1) all of the respondents as to which the case is still open are addressed in the text and recommendations section of the final GCR; (2) there is a recommendation to close the file; and (3) if it is required, there is an F&LA for each remaining respondent. For guidance in situations when the case is closing as to only some of the respondents, see Sections 4.4.15 and 8.3.1.

8.2.2.2 After Circulating the Final GCR

The attorney notifies the team paralegal and administrative assistant of the impending case closure so they will be ready to provide assistance. The attorney should notify the Administrative Law team if a case involves many respondents or contains numerous GCRs that the team may need to redact. Finally, the attorney may begin drafting closing letters and preparing closing packages.

8.2.2.3 After the Commission Votes to Close the Matter

When the Commission votes to close a case, CELA gives the complete hard copy permanent file, including the Commission certification, to the attorney along with: (1) a blue or red routing sheet that the

attorney will use for the notification letters; (2) a pink closed MUR case file routing slip; and (3) a white form memorandum to the AGC's Special Assistant. The pink case file routing slip will show the date CELA transferred the file to the attorney.

Upon receipt of the case file:

- **Check the Certification**

  The attorney compares the certification with the recommendations in the final GCR and the Commission's actions at the Executive Session. If there are discrepancies in the certification, the attorney notifies the Commission Secretary, who will amend the certification. If, however, there is an error or omission in the final GCR's recommendations that resulted in an inaccurate certification, the attorney must notify the Commission Secretary, the AGC or Deputy AGC, and the team leader, and draft a brief memorandum to the Commission to correct the certification. This memorandum should identify the error or omission, provide contextual information to re-acquaint the Commission with the case, and include recommendations that resolve the error or omission and close the file. Once the AGC or Deputy AGC and team leader approve it, the memorandum is circulated on a 48-hour no-objection basis to the Commission. After 48 hours have expired and absent objection, the Commission Secretary will issue an amended certification.

- **Execute the CA (if applicable)**

  If the Commission approved OGC's recommendation to accept a CA, the attorney must obtain the original CA from CELA and send it to the AGC for signature. The attorney should route the CA through the AGC's administrative assistant, who will make the appropriate CMS entries.

- **Prepare the closing packages**

  If the attorney has not already begun drafting the closing letters, the attorney works with the team paralegal or other support staff to select the appropriate templates for the closing letters for all respondents, including respondents who were previously notified that the case was closed as it pertained to them, and the complainant. *See* Section 8.3. The attorney also includes the required documents, such as F&LAs and signed CAs. *Id.* A complainant will get copies of all F&LAs and signed CAs.

- **Review the permanent case file**

  The attorney reviews the hard copy case file and compares it to VBM and the permanent file in ECM to ensure that all required documents are included. If documents are missing, the attorney should provide them to CELA for inclusion in the permanent file. The attorney should send the permanent file, along with a copy of the final certification, to the Administrative Law team for review and appropriate redactions. The attorney should endeavor to give the Administrative Law team the file before mailing the closing letters, although doing so may not be possible in every case. The Administrative Law team then reviews the case file and redacts information that must be kept confidential under the Act and information that is exempted from disclosure under FOIA.

  After the Administrative Law team has reviewed the case file and made appropriate redactions, it forwards the redacted file to the attorney and team leader by e-mail for review. The attorney and the team leader review the file and send comments regarding the redactions by e-mail to the Administrative Law team attorney or paralegal assigned to the matter. The attorney and team

leader should send any comments to the Administrative Law Team within two to three business days.

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Internally Generated Matters

In internally generated matters in which the Commission declines to open a MUR, the matter will not appear on the public record. The attorney, however, will still receive the case file. After reviewing the case file and preparing the closing packages, the attorney sends the case file to the Administrative Law team.

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- **Notify the Commission**

  Before sending any closing correspondence, the attorney should send an e-mail to the Commissioners' offices, the General Counsel, the AGC, Enforcement staff, and OGC's Administrative Law staff. The e-mail notifies the recipients that the case is closed and that the closing correspondence will be sent shortly. This e-mail also reminds the Commission if any SORs are required, identifies which Commissioners are responsible for writing SORs, and states that the file will be made public within 30 days. See Section 8.3.4.4 for information about SORs. Use Enforcement Form 60D as a template for this e-mail. If the attorney sends the e-mail in the morning, the closing letters may be mailed late in the afternoon. If the attorney sends the e-mail in the afternoon, the letters should not be mailed until the next day.

- **Statistical and Administrative Tasks**

  The attorney enters the case information requested on the white memorandum and sends it to the Special Assistant to the AGC. The attorney completes the top portion of the pink case routing sheet and returns it to CELA.

8.2.2.4 Additional Tasks

- **Update CMS; Check the Electronic Permanent File**

  At the close of a matter, the attorney must review and edit all CMS fields for accuracy, including "players," "calendar," "findings," "final violations," and "final to Commission." The attorney directly revises or completes calendar events in the Case Notebook; for other entries in the Case Notebook, and for the Entity Notebook, the attorney directs CELA to make the necessary changes. The attorney must also review the electronic permanent file and work with CELA staff to ensure that all documents are included and that the documents are named correctly.

- **Review the draft press release**

  The Press Office issues a weekly press release on Fridays that includes, among other things, a summary of all closed enforcement cases from the week. A short time before the press release issues, the Press Office sends a draft of the press release for each closed case to the assigned attorney for review. The attorney reviews the draft, makes appropriate revisions, and returns it to

the Press Office. The Press Office will e-mail a draft press release to the Press Committee (consisting of two Commissioners from different parties), and sends copies to the rest of the Commissioners. The Press Committee is responsible for reviewing and approving the press release in a timely manner.

8.3 Closing Letters to Complainants, Respondents, and Referring Agencies

The Commission's findings determine the appropriate closing letters. The form letters are identified below. The attorney may need to modify form letters to address particular circumstances. For example, modifications may be necessary for closing letters to complainants in matters involving multiple respondents in which the Commission made different determinations as to each.

Before mailing any closing letters, the attorney should send an e-mail to the Commissioners' offices, the General Counsel, the AGC, Enforcement staff, and the Administrative Law staff notifying them that the case is closing, whether an SOR is required, and when documents will go on the public record. *See* Section 8.2.2.3.

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Closing letters and complaints under 2 U.S.C. § 437g(a)(8)

Complainants who are aggrieved by a Commission decision to dismiss a complaint may file suit in the U.S. District Court for the District of Columbia challenging the decision within 60 days of the Commission's vote. Therefore, absent extraordinary circumstances, attorneys must send closing letters within two business days of the date of the Commission's vote to close the entire case so that complainants will get notice of the date of that vote.

END PRACTICE TIP PULL-OUT BOX

8.3.1 Previously Closed-Out Respondents

As discussed in Sections 4.4.15 and 8.2.1, the Commission may close the file as to some respondents and proceed as to others. When the Commission later closes the file as to all respondents, the attorney sends a letter to the respondents that were previously "closed out" informing them that the Commission has now closed the entire file and the confidentiality provisions at 2 U.S.C. § 437g(a)(12) no longer apply. Use Enforcement Form 60 for this letter.

8.3.2 Newly Closed-Out Respondents and Complainants

This section groups the closing letters by categories of possible Commission actions that close a case entirely, and it identifies the appropriate template letters and attachments.

8.3.2.1 Dismissals Handled by CELA

CELA ordinarily handles closing responsibilities for low-rated cases that are not transferred to ADRO. See Section 1.3 for information about EPS. On occasion, however, Enforcement attorneys handle EPS matters and are responsible for ensuring that the case is closed properly.

8.3.2.2 No Reason to Believe Findings and Dismissals

The attorney uses the following form letters and attaches the indicated documents when the Commission approves OGC's recommendations to find no RTB or dismiss the matter.

- Notification Letter to Respondent (externally generated matter) – No RTB; Entire case closed
  - Enforcement Form 22
  - Attachment: F&LA

- Notification Letter to Respondent (internally generated matter) – Decline to open a MUR; Entire case closed
  - Enforcement Form 23

- Notification Letter to Complainant – No RTB; Entire case closed
  - Enforcement Form 24
  - Attachment: F&LA (addressing each respondent)

- Notification Letter to Respondent (externally generated matter) – Dismissal, with or without caution; Entire case closed
  - Enforcement Form 31
  - Attachment: F&LA

- Notification Letter to Complainant – Dismissal; Entire case closed
  - Enforcement Form 32B
  - Attachment: F&LA (addressing each respondent)

8.3.2.3 Reason to Believe Recommendation Receiving Fewer Than Four Approvals

When OGC recommends the Commission find RTB in an externally generated matter, but fewer than four Commissioners vote to approve the recommendation, the attorney uses the following form letters and attaches the indicated documents.

- Notification Letter to Respondent – Insufficient votes to find RTB; Entire case closed
  - Enforcement Form 25
  - Attachment: SOR (or note in letter that SOR will follow)

- Notification Letter to Complainant – Insufficient votes to find RTB; Entire case closed
  - Enforcement Form 26
  - Attachment: SOR (or note in letter that SOR will follow)

8.3.2.4 No Further Action, After Reason to Believe Finding

The attorney uses the following form letters and attaches the indicated documents for matters in which the Commission takes NFA. The attachment to these letters depends on whether OGC recommended that the Commission take NFA.

- Notification Letter to Respondent – NFA after previous RTB finding; Entire case closed
  - Enforcement Form 34

  - Attachment: GCR (if OGC recommended NFA);
    SOR, or note in letter that SOR will follow (if OGC recommended further enforcement action)

- Notification Letter to Complainant – NFA after previous RTB finding; Entire case closed
  - Enforcement Form 35A
  - Attachment: GCR or SOR, or a notation that SOR will follow

PRACTICE TIP PULL-OUT BOX HERE

Closing letters to respondents as to which the Commission previously deferred action

As explained in Section 4.4.5, the Commission may make RTB findings as to one respondent and take no action at that time as to another. If OGC previously sent the latter respondent a pre-RTB notification stating that there was a possible violation, but the Commission ultimately took no action as to that respondent, the attorney sends that respondent a closing letter stating that the Commission took no action regarding that respondent.

END PRACTICE TIP HERE

8.3.2.5 Probable Cause to Believe; No Further Action

The attorney uses the following forms when the Commission finds PCTB but also decides to take NFA. The appropriate attachments to these letters will depend on whether OGC recommended that the Commission take NFA.

- Notification Letter to Respondent – PCTB and NFA; Entire case closed
  - Enforcement Form 50
  - Attachment: OGC Notice (if OGC recommended Commission take NFA) or SOR, or a notation in letter that SOR will follow (if OGC recommended further enforcement action)

- Notification Letter to Complainant – PCTB and NFA; Entire case closed
  - Enforcement Form 51
  - Attachment: OGC Notice or SOR, or a notation that SOR will follow, as indicated above

8.3.2.6 Matter Closed After Conciliation

When a case closes through successful PPCC or PCC, the attorney uses the following form letters and attaches the indicated documents.

- Notification Letter to Respondent – Case Closed with signed CA; Entire case closed
  - Enforcement Form 55
  - Attachment: CA

- Notification Letter to Complainant – Case Closed with signed CA after PPCC
  - Enforcement Form 56
  - Attachment: CA

- Notification Letter to Complainant – Case Closed with signed CA after PCC
  - Enforcement Form 57
  - Attachment: CA

- Notification Letter to Referring Agency – Case Closed with signed CA
  - Enforcement Form 59
  - Attachment: CA

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Closing letters to referring agencies in matters that did not conciliate

If the Commission closes an externally referred matter that did not conciliate, the attorney should send the referring agency a closing letter. The attorney should adapt Enforcement Form 59 for this letter.

END PRACTICE TIP HERE

8.3.3 Closing Procedures After Transfer to Litigation

When the Commission authorizes OGC to file a civil suit in a matter, the matter is transferred to the Litigation Division. *See* Section 7.10. While the MUR is not actually closed, it is considered closed for Enforcement's statistical purposes. The attorney should send notification letters and prepare the file as usual. The attorney should use the following form letter when a matter is transferred to the Litigation Division.

- Notification Letter to Respondent – Civil Suit Authorized
  - Enforcement Form 61

When the matter is resolved through litigation, or is settled after the case is transferred to the Litigation Division but before suit is filed, Litigation staff will send a memorandum to the Commission describing the resolution of the matter and recommending that the case be closed. The memorandum does not make a recommendation to send the appropriate letters because the Enforcement attorney remains responsible for notifying all respondents and the complainant that the matter has closed. Litigation staff sends an e-mail to the Enforcement attorney and team leader advising that the case has closed, and provides copies of the court order or settlement agreement to the attorney and team leader. At that point, the Enforcement attorney notifies the complainant.

- Notification Letter to Complainant – Matter resolved by Litigation
  - Enforcement Form 60B

8.3.4 Additional Requirements and Information

8.3.4.1 Conciliation Agreements

The attorney is responsible for monitoring a respondent's compliance with a CA's requirements, particularly those regarding payments of civil penalties and disgorgements. The attorney must be particularly watchful when an agreement provides for the payment of a civil penalty in installments. *See* Section 6.5.3.1.3. The payment of civil penalties can be tracked in CMS in the Remedies notebook, which is updated by CELA staff upon receipt of civil penalty payments.

8.3.4.2 Cautions

As explained in Section 4.4.4, when the Commission dismisses a matter or takes NFA, it may also instruct OGC to caution the respondent. The attorney includes cautionary language in the closing correspondence. *See* Enforcement Forms 31, 34, 50.

8.3.4.3 Closing Letters to Complainants—Certified Mail

All letters notifying complainants that a file has closed must be sent by Certified Mail, Return Receipt Requested, within two days of the Commission's vote to close the file. The returned receipt will be a record that the complainant actually received the notification, which may be helpful should the complainant file an action under 2 U.S.C. § 437g(a)(8) to challenge the Commission's action in the administrative matter. Under that provision, a complainant has 60 days after the date of the dismissal to file the complaint. The 60-day period runs from the date the Commission actually votes to close the case and not the date the complainant actually receives this notice. *Spannaus v. FEC*, 990 F.2d 643, 644-45 (D.C. Cir. 1993) (overruling *Common Cause v. FEC*, 630 F. Supp. 508, 512 (D.D.C. 1985)).

8.3.4.4 Statement of Reasons

As noted in Section 4.6.3.3, an SOR is required in complaint-generated matters in which OGC recommends that the Commission proceed to the next stage of the process, but fewer than four Commissioners vote to approve that recommendation, resulting in the dismissal of an entire matter, a respondent, or a particular allegation. The SOR is required to provide the reasons for the dismissal or case closure, which will not be found in the GCR or an F&LA. Commissioners may also issue SORs when they wish to express publicly the rationale for their votes or their views on the case or a particular issue.

If a majority of the six Commissioners vote against OGC's recommendation to proceed, OGC writes the first draft of the SOR and circulates it to the Commission for editing or approval. If there is no such majority in opposition to OGC's recommendation, but the recommendation still fails to garner four affirmative votes — if, for example, the Commission votes 3-3 on OGC's recommendation — the Commissioners who voted against OGC's recommendation will prepare an SOR in order to provide a rationale for their votes.

Commissioners may provide SORs before the case is made public, in which event the document will be attached to the closing letters. When Commissioners provide SORs after a matter has been closed and made public, the attorney provides the SOR to the complainant and respondent when it issues. *See* Enforcement Forms 58 and 58A.

PRACTICE TIP – INSERT PULL BOX HERE:

Reviewing SORs

Draft SORs prepared by the Commissioners are circulated to the attorney for review. The attorney should ensure that the SOR is accurate and does not refer to open respondents, open enforcement matters, or to conciliation attempts, information which must be kept confidential under 2 U.S.C. § 437g(a)(4) and (12).

END PRACTICE TIP HERE

8.4 Matter File Preparation for the Public Record

The Commission places documents related to closed matters on the public record within 30 days of sending notifications to respondents and complainant that the file is closed. *See* 11 C.F.R. §§ 5.4(a)(4), 111.20. The public record portions of MUR files are available on EQS. If the Commission declined to open a MUR in an internally generated matter, the Commission does not place documents from that matter on the public record.

8.4.1 What is Placed on the Public Record?

As indicated in Section 8.2.2.2, OGC's Administrative Law team reviews the case file to redact it as necessary for the public record. Under the Commission's policy, certain categories of documents from closed enforcement cases will be placed on the public record. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) *available at* http://www.fec.gov/agenda/agendas2003/notice2003-25/fr68n243p70426.pdf. The Commission does not place on the public record certain other materials from its case files, such as subpoenaed records, deposition transcripts, and other records produced in discovery, as such placement may infringe upon the First Amendment associational rights of respondents and witnesses. *See id.* at 70,427; *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003). Information in the case file may also be exempted from disclosure under FOIA. The Commission regulations regarding FOIA are found at 11 C.F.R. Part 4.

8.4.2 How Does the Matter File Get on the Public Record?

After the Administrative Law team finishes its review of the case file, it delivers the file to the Public Records Division Processing Branch to be scanned for the FEC website. The documents related to the file are available to the public through EQS. The team also provides a copy of the file to the Press Office and to the Office of the Staff Director. After the case file is placed on the public record, the attorney should review it and immediately inform the Administrative Law team if information that should have been redacted appears publicly.

8.4.3 What Happens to the Public Record Matter File and the Permanent File?

The Public Records Division Processing Branch returns the original copy of the public record file to CELA, where it is retained, along with the permanent file, for up to a year. Staff seeking access to these files should see the Docket Manager or Docket Technician. After one year, matter files are sent from CELA to an offsite storage facility where they are archived for at least ten years.