August 5, 2020

Richard C. Miadich, Chair
Fair Political Practices Commission

VIA EMAIL

Re: FEC Enforcement Process

Dear Chair Miadich:

I understand that you are looking for information regarding the FEC's enforcement process to be presented at Friday's Law and Policy Committee meeting. Between 2008 to 2017, I was an attorney in the Enforcement Division of the FEC's Office of General Counsel for seven years and counsel to an FEC commissioner for two years. Unfortunately, I will not be able to attend Friday's meeting but offer the attached summary of the FEC's enforcement process and FEC policy statements for your consideration. If your time is limited, I particularly commend for your reading Attachment 4, which is the FEC's policy regarding the provision of relevant and exculpatory information to respondents in the enforcement process before settlement or in connection with the probable cause briefing process. Please feel free to email or call if you would like to discuss any of this information.

Sincerely,

Michael A. Columbo
mcolumbo@nmgovlaw.com
(415) 634-6850

Attachments:
1. FEC Enforcement Process Summary
2. FEC Notice 2009-18, Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters
3. Notice 2007–6, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process
4. FEC Notice 2011–06, Agency Procedure for Disclosure of Documents and Information in the Enforcement Process
5. FEC Notice 2007–21, Procedural Rules for Probable Cause Hearings
6. FEC Notice 2009–24, Amendment of Agency Procedures for Probable Cause Hearings
7. FEC Notice 2011–15, Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel

Attachment 1

THE FEC ENFORCEMENT PROCESS

The commissioners of the Federal Election Commission have consistently enacted bipartisan reforms to enhance due process protections in its enforcement process. Although due process cannot guarantee that the commissioners will agree on how to resolve any given matter, it can ensure that the enforcement process is both fair to those involved and that the agency's staff and the commissioners make informed decisions in what can be highly sensitive and consequential matters.

The Initiation of an FEC Enforcement Matter

As with the FPPC, there are a variety of ways that an FEC enforcement matter may be initiated. A member of the public may file a complaint, FEC staff in the FEC's Reports Analysis Division may observe what may be a violation in the course of reviewing a committee's reports, staff in the Audit Division may discover what may be a violation in course of committee audits, Enforcement Division staff may discover additional respondents or violations in the course of an investigation, another government agency may refer a suspected violation to the FEC, and the commissioners have, in rare instances, initiated an enforcement matter themselves.

A key safeguard that the FEC's enforcement process includes, which is not currently part of the FPPC's enforcement process, is a *requirement* for a sworn complaint, that is, the FEC enforcement process does not permit anonymous or unsworn complaints, *see* 52 U.S.C. 30109(a)(1); 11 C.F.R. § 111.4, even though it allows those sworn complaints to rely on information from unnamed sources, as is frequently the case with complaints based on press articles.

Allegation and Response

One essential reform the Commission adopted was to provide everyone accused of a violation with notice and an opportunity to respond to the allegation at the outset of the matter. Under the Federal Election Campaign Act (FECA) and the Commission's regulations, the FEC is only *required* to afford a person accused of a violation through a complaint of an opportunity to respond to the allegation. *See* 52 U.S.C. 30109(a)(1); 11 C.F.R. § 111.6. The FEC's Commissioners, however, determined that every

person accused of violating the FECA had a right to notice and an opportunity to respond before the Commission decides whether to investigate or seek punishment of their political activity. *See FEC Notice 2009-18, Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters*, 74 Fed. Reg. 38617 (Aug. 4, 2019) (Attachment 2).

Two benefits and justifications are clear: First, notwithstanding the agency's anti-corruption motivation, the fundamental work of the FEC, like much of the work of the FPPC, includes regulating the public's political activities and, if warranted, punishing them for it. These activities are often at the core of political rights protected by the Federal and California constitutions and the risks of agency power being abused or manipulated are significant and real. Reputations can be irreparably harmed, elections can be influenced, and careers ended by a mishandled allegation. For that reason, both the FEC and the FPPC have a variety of safeguards to protect the public—from the composition of each commission to the power of the commissioners to supervise the enforcement process and the rules of that process. The opportunity to respond to an allegation *before* a government finding of a potential violation or *before* becoming the subject of a government investigation into one's political activities is essential to a fair process.

Second, the FEC and the FPPC each have a quasi-judicial function as well as a quasi-prosecutorial function. It is this quasi-judicial duty that, in some cases, involves a separation of the Commission from its staff in order to provide necessary oversight and accountability. That quasi-judicial function, to determine facts and set punishments, depends on complete information to achieve just outcomes. Therefore, at each juncture in the enforcement process, the commissions benefit from hearing both sides of a story, or from hearing a more complete story. The active primacy of the commissioners over the agency is also necessary to maintain the democratic check on staff's power through the commissioners' appointments by elected officials.

This right to be notice and an opportunity tpo respond to an allegation in every case and for the Commission to hear from both sides in a matter ——before a decision is made that a case warrants the pursuit of an government investigation or punishment—differs from the FPPC's enforcement process, which permits an investigation to be launched based

on only an allegation, even an anonymous allegation, without providing the accused notice and an opportunity to respond.

Initial Case Evaluation / The Reason to Believe Stage

Once the FEC has a Complaint and a Response, staff can evaluate the matter and recommend how the Commission should proceed—but whether and how to proceed are Commission decisions. Options include: diversion of the matter to the FEC's Alternative Dispute Resolution Office (ADRO), summary dismissal through the FEC's Enforcement Priority System, or a finding of reason to believe a violation occurred and authorizing the Enforcement Division to investigate or attempt settlement. Additionally, the Commission has published a policy statement that transparently informs the public and its staff of the standards that are to be used to make this initial decision. *See Notice 2007–6, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process,* 72 Fed. Reg. 12545 (Mar. 16, 2007) (Attachment 3).

Investigation or Settlement Effort

For those matters that are not dismissed, or sent to the ADRO, the Enforcement Division will investigate, if more information is needed, or proceed to seek a settlement (pre-probable cause conciliation), if sufficient facts are already known. Respondents are permitted to file a motion to the Commission to quash or modify an Enforcement Division subpoena. *See* 52 U.S.C. 30107(a)(3), (4); 11 C.F.R. § 111.15. Though not the subject of a formal regulation, the Commission also may entertain other motions and requests, such as motions to reconsider its reason to believe findings.

Once an investigation is completed, staff may either seek the Commission's permission to engage in a pre-probable cause settlement effort or serve upon the respondent a notice that it will recommend that the Commission find probable cause and a brief explaining the factual and legal basis for that conclusion. *See* 52 U.S.C. 30109 (a)(3); 11 C.F.R. § 111.16.

Mandatory Information Disclosure

In 2011, the Commission adopted a formal policy requiring Staff to produce information—especially exculpatory information—upon the respondent's request when the Commission authorizes a conciliation effort or when staff proceeds to probable cause briefing. *FEC Notice 2011–06,*

Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34986, 34991 (June 15, 2011) (Attachment 4). The FEC's notice of the policy summarizes constitutional, legal, professional, and ethical duties that compel the disclosure of exculpatory evidence in criminal cases. It further lists other federal administrative agencies that have chosen to incorporate this requirement into their enforcement processes. The policy states:

> the Office of General Counsel shall make available to a respondent all relevant documents gathered by the Office of General Counsel 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. This includes any documents that contain exculpatory information, as defined herein. This shall not include any documents created internally by a Commissioner or by a member of a Commissioner's staff.

Id. at 34990. This policy essentially requires disclosure of all information gathered in the investigation *if requested*, with certain exceptions. The policy defines ''exculpatory information'' as "information gathered by the Office of General Counsel 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.*

For this policy to work, staff must know how to identify exculpatory evidence. It is not only evidence that conclusively exonerates a person. It may include the statement of a witness or a document that somehow supports the respondent's defense or differs from the allegation in a complaint, or information undermining the credibility of the person making the allegation, such as contradictory statements by that person.

In practice, the disclosure required by this policy is rarely triggered because most FEC enforcement matters are either resolved through diversion to ADRO, dismissed, or settled without a request for this information. This is not surprising considering that most alleged violations are routine matters where the proof of the violation is objectively observable, such as faulty ad disclaimers or errors on filed

reports. Even in more complex matters, respondents likely have a comprehensive understanding of their own activities such that no third party is in possession of exculpatory information. The high costs of defending an enforcement matter also discourage unnecessary litigiousness.

However, in complex and contested matters where much is at stake, due process is critical and the agency's investigation may indeed reveal information undercutting a disputed allegation. In those cases, this rule is an essential requirement for due process and the avoidance of agency error, that is, it is an essential safeguard to help achieve just results.

Probable Cause

If staff serves a probable cause brief, the respondent will then have an opportunity to reply with a brief of its own. At this stage, under a reform instituted in 2007 following a one-year pilot program, a respondent may also request that it have a probable cause hearing before the Commission. *See FEC Notice 2007–21, Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64919 (Nov. 19, 2007) (Attachment 5). At the hearing, the Commission may ask questions of both the respondents and staff. *See FEC Notice 2009–24, Amendment of Agency Procedures for Probable Cause Hearings*, 74 Fed. Reg. 55443 (Oct. 28, 2009) (Attachment 6).

Following the exchange of briefs, and a hearing if one is granted, staff then submits to the Commission a statement as to whether it maintains its belief that there is probable cause to believe a violation occurred. If Staff includes new facts or legal arguments in this statement, the Respondent may seek the Commission's permission to reply to them. *FEC Notice 2011–15, Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel*, 76 Fed Reg. 63570 (Oct. 13. 2011) (Attachment 7). The Commission then decides if there is probable cause.

Post-Probable Cause Conciliation & Suit Authorization

By statute, the Commission must attempt a final effort at settlement, *see* 52 U.S.C. 30109(a)(4); 11 C.F.R. § 111.18, before deciding whether to file suit in court. 52 U.S.C. 30109(a)(6); 11 C.F.R. § 111.19.

Attachment 2

SYSTEM MANAGER(S) AND ADDRESS:

Director, Office of Management Services, Farm Credit Administration, McLean, VA 22102–5090.

NOTIFICATION PROCEDURE:

Direct all inquiries about this system of records to: Privacy Act Officer, Farm Credit Administration, McLean, VA 22102–5090.

RECORD ACCESS PROCEDURES:

Same as above.

CONTESTING RECORD PROCEDURES:

Same as above.

RECORD SOURCE CATEGORIES:

Information in this system of records either comes from the individual to whom it applies or comes from information supplied by Agency officials.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: July 30, 2009.

Roland Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. E9–18603 Filed 8–3–09; 8:45 am]

BILLING CODE 6705–01–P

FEDERAL ELECTION COMMISSION

[NOTICE 2009–18]

Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters

AGENCY: Federal Election Commission.

ACTION: Agency procedure.

SUMMARY: The Federal Election Commission (''Commission'') is establishing a new agency procedure that will provide respondents in certain enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (''FECA'') with notice of a non-complaint generated referral and an opportunity to respond thereto, prior to the Commission's consideration of whether it has reason to believe that a violation of the Act has been or is about to be committed by such respondent. This program will provide respondents in non-complaint generated matters procedural protections similar to those of respondents in complaint-generated matters. Further information about the procedures for providing notice to respondents in non-complaint generated matters is provided in the supplementary information that follows.

DATES: Effective August 4, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Shonkwiler, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

I. Background

On June 11, 2003, the Commission held a hearing concerning its enforcement procedures. The Commission received public comments, many of which argued for increased transparency in Commission procedures and expanded opportunities to contest allegations. Comments and statements for the record are available at: *http://www.fec.gov/agenda/agendas2003/notice2003–09/comments.shtml.* In response to issues raised at the hearing, the Commission issued new agency procedures. *See* Statement of Policy Regarding Deposition Transcripts in Nonpublic Investigations, 68 FR 50688 (Aug. 22, 2003); Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 FR 3 (Jan. 3, 2005).

On December 8, 2008, the Commission issued a notice of public hearing and request for public comment on the compliance and enforcement aspects of its agency procedures. Agency Procedures (Notice of public hearing and request for public comments), 73 FR 74495 (Dec. 8, 2008). On January 14–15, 2009, the Commission received comment and testimony. The comments received by the Commission, as well as the transcript of the hearing are available at: *http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml.*

The Commission received numerous comments regarding respondents in non-complaint generated matters not receiving notice when a matter has been referred to the Commission's Office of General Counsel (''OGC'') for enforcement. One commenter opined that the Commission should never find reason to believe (''RTB'') that a violation occurred without first giving the respondent the opportunity to respond. Another commenter recommended instituting a program whereby potential respondents in non-complaint generated matters are given a written summary of the matter and an opportunity to respond in writing before the Commission makes an RTB finding, in order to put respondents on notice about the potential outcome of the proceeding. Other commenters urged the Commission to adopt procedures to notify committees of any internal referral, and to implement procedures to provide respondents with the opportunity to review and respond to any adverse course of action recommended by OGC before the Commission considers such recommendation.

II. Procedures for Notice to Respondents in Non-Complaint Generated Matters

The Commission is issuing a new agency procedure to provide notification to respondents of enforcement proceedings based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities (*i.e.*, non-complaint generated matters). *See* 2 U.S.C. 437g. In matters generated by complaints, the Commission may take no action on the complaint (other than dismissal) until respondents have at least 15 days after notification of the allegations contained in the complaint to answer the allegations. *See* 2 U.S.C. 437g(a)(1). However, the statute does not afford respondents the same opportunity to answer allegations in non-complaint generated matters. This agency procedure is intended to provide respondents in non-complaint generated enforcement matters with notice of the basis of the allegations, and an opportunity to respond.

For matters arising from a referral from the Commission's Reports Analysis Division or Audit Division (''internal referrals''), respondents will be notified of the referral within five days of receipt of the referral by OGC. The notice will contain a copy of the referral document and a cover letter setting forth the basis of the referral and potential violations of the Act and/or Commission regulations that arise based upon the referral. The respondent will then be given an opportunity to demonstrate that no action should be taken based on the referral, by submitting, within 15 days from receipt of the referral document and cover letter, a written explanation of why the Commission should take no action. The Commission will not take any action, or make any RTB finding against a respondent based on an internal referral unless it has considered such response or unless no such response has been served upon the Commission within 15 days.

Under current Commission practice, non-complaint generated matters based on referrals from the U.S. Department of Justice or any other law enforcement or governmental agency (''external referrals'') are also deemed to be matters based on information ascertained in the normal course of carrying out its supervisory responsibilities. Under the new procedures, if OGC intends to initiate an enforcement proceeding based on an external referral, notice of

the referral will be provided to respondents in the same manner as an internal referral. However, where immediate notification to a respondent of an external referral is deemed inappropriate, OGC will notify the Commission of the referral within 5 days of receipt of the referral from the governmental agency. In cases where, due to law enforcement purposes, the referral document may not be provided to a respondent, OGC will provide the respondent with a letter containing sufficient information regarding the facts and allegations to afford the respondent an opportunity to demonstrate that no action should be taken. Absent exercise of the Commission's discretion (by the affirmative vote of four Commissioners), OGC will not proceed with an enforcement proceeding based on an external referral until the referral or substitute informational letter is provided to the respondent.

III. Conclusion

This notice establishes agency practices or procedures. This notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedures Act (''APA''). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable. The above provides general guidance concerning notice to respondents in non-complaint generated matters and announces the general course of action that the Commission intends to follow. This notice sets forth the Commission's intentions concerning the exercise of its discretion in its enforcement program. However, the Commission retains that discretion and will exercise it as appropriate with respect to the facts and circumstances of each matter it considers. Consequently, this notice does not bind the Commission or any member of the general public.

On behalf of the Commission.
Dated: July 29, 2009.

Steven T. Walther,

Chairman, Federal Election Commission.

[FR Doc. E9–18542 Filed 8–3–09; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL HOUSING FINANCE AGENCY

[No. 2009–N–10]

Federal Home Loan Bank Collateral for Advances and Interagency Guidance on Nontraditional Mortgage Products

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of study and recommendations and request for comment.

SUMMARY: Section 1217 of the Housing and Economic Recovery Act of 2008 (HERA) requires the Director of the Federal Housing Finance Agency (FHFA) to conduct a study on the extent to which loans and securities used as collateral to support Federal Home Loan Bank (FHLBank) advances are consistent with the interagency guidance on nontraditional mortgage products. The study must be submitted to the Committee on Banking, Housing and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives no later than July 30, 2009, one year after the date of the HERA enactment. Further, the study (the HERA Section 1217 Study) must consider and recommend any additional regulations, guidance, advisory bulletins, or other administrative actions necessary to ensure that the FHLBanks are not supporting loans with predatory characteristics. Section 1217 of HERA also requires that the public have an opportunity to comment on any recommendations made as a result of the study. This Federal Register Notice is intended to inform the public about the HERA Section 1217 Study and provide the public with the requisite opportunity to comment.

DATES: Comments must be received on or before October 2, 2009.

ADDRESSES: You may submit your comments on the HERA Section 1217 Study, identified by a subject line of ''HERA Section 1217 Study,'' by any of the following methods:

- *U.S. Mail, United Parcel Post, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/HERA Section 1217 Study, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552.
- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/HERA Section 1217 Study, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- *E-mail:* Comments to Alfred M. Pollard, General Counsel, may be sent by e-mail at *RegComments@fhfa.gov*. Please include ''HERA Section 1217 Study'' in the subject line of the message.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the agency. Please include ''HERA Section 1217 Study'' in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Louis M. Scalza, Associate Director, (202) 408–2953 or Linda L. Campbell, Senior Bank Examiner, (202) 408–2586, Division of Federal Home Loan Bank Regulation; or Neil R. Crowley, Deputy General Counsel, Office of General Counsel, (202) 343–1316, Federal Housing Finance Agency, 1625 Eye Street, NW., Washington, DC 20006. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

SUPPLEMENTARY INFORMATION: Section I of this Notice provides background on FHFA, the FHLBank System, and the collateral securing FHLBank advances. Section II summarizes the provisions of the interagency guidance and three Federal Housing Finance Board (FHFB) advisory bulletins relating to nontraditional, subprime, and anti-predatory lending. Section III describes the resources used to complete the HERA Section 1217 Study, including a collateral data survey that FHFA conducts annually, in-depth secured credit reviews performed during recent examinations, and a specific questionnaire related to the HERA Section 1217 issues that FHFA sent to the FHLBanks. Sections IV and V of this report present FHFA's analysis and conclusions from the HERA Section 1217 Study and Section VI requests comments on specific related questions.

The HERA Section 1217 Study reports that FHLBanks' reliance on collateral described as nontraditional, subprime or Alt-A declined during 2008, accounting for about one-fifth of collateral securing advances as of December 31, 2008. Some portion of this collateral predates the issuance of the interagency guidance, but the FHLBanks need to manage and mitigate the risks associated with all of the collateral supporting advances.

FHFA, through advisory bulletins issued by the prior regulator of the

Attachment 3

Rules and Regulations

Federal Register
Vol. 72, No. 51
Friday, March 16, 2007

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2007–6]

Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process

AGENCY: Federal Election Commission.

ACTION: Statement of Policy.

SUMMARY: The Federal Election Commission (''Commission'') is issuing a Policy Statement to clarify the various ways that the Commission addresses Matters Under Review (''MURs'') at the initial stage of enforcement proceedings. The Commission may take any of the four following actions at this stage: find ''reason to believe,'' ''dismiss,'' ''dismiss with admonishment,'' and find ''no reason to believe.''

DATES: *Effective Date:* March 16, 2007.

FOR FURTHER INFORMATION CONTACT: Mark Shonkwiler, Assistant General Counsel, or Lynn Tran, Attorney, Enforcement Division, Federal Election Commission, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* (''FECA'' or ''the Act''), grants the Commission ''exclusive jurisdiction with respect to civil enforcement'' of the provisions of the Act and Chapters 95 and 96 of Title 26. 2 U.S.C. 437c(b)(1). Enforcement matters come to the Commission through complaints from the public; information ascertained in the ordinary course of the Commission's supervisory responsibilities, including referrals from the Commission's Reports Analysis and Audit Divisions; referrals from other government agencies; and self-reported submissions.

The FECA provides that ''upon receiving a complaint'' or upon the basis of information ascertained in the course of carrying out its supervisory responsibilities, the Commission ''shall make an investigation of such alleged violation'' of the Act where the Commission, with the vote of four members, determines that there is ''reason to believe that a person has committed, or is about to commit'' a violation of the Act. 2 U.S.C. 437g(a)(2); *see also* 11 CFR 111.10(f). Commission ''reason to believe'' findings have caused confusion in the past because they have been viewed as definitive determinations that a respondent violated the Act. In fact, ''reason to believe'' findings indicate only that the Commission found sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred. Indeed, the Commission has recommended that Congress modify the FECA to clarify this point. *See* Legislative Recommendations in 2003 and 2004 FEC Annual Reports. Other kinds of dispositions at this preliminary stage would also benefit from clarification to ensure consistency and promote understanding of the Commission's reasons for taking action. Thus, the Commission is issuing this policy statement to assist complainants, respondents, and the public in understanding the Commission's findings at this stage of the enforcement process.

Generally speaking, at the initial stage in the enforcement process, the Commission will take one of the following actions with respect to a MUR: (1) Find ''reason to believe'' a respondent has violated the Act; (2) dismiss the matter; (3) dismiss the matter with admonishment; or (4) find ''no reason to believe'' a respondent has violated the Act. This policy statement is intended to clarify the circumstances under which the Commission uses each of these dispositions.

A. ''Reason To Believe''

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 predicate to opening an investigation into the alleged violation. 2 U.S.C. 437g(a)(2). The Commission will find ''reason to believe'' in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation. A ''reason to believe'' finding will always be followed by either an investigation or pre-probable cause conciliation. For example:

- A ''reason to believe'' finding followed by an investigation would be appropriate when a complaint credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope.
- A ''reason to believe'' finding followed by conciliation would be appropriate when the Commission is certain that a violation has occurred and the seriousness of the violation warrants conciliation.

A ''reason to believe'' finding by itself does not establish that the law has been violated. When the Commission later accepts a conciliation agreement with a respondent, the conciliation agreement speaks to the Commission's ultimate conclusions. When the Commission does not enter into a conciliation agreement with a respondent, and does not file suit, a Statement of Reasons, a Factual and Legal Analysis, or a General Counsel's Report may provide further explanation of the Commission's conclusions.

The Commission has previously used the finding ''reason to believe, but take no further action'' in cases where the Commission finds that there is a basis for investigating the matter or attempting conciliation, but the Commission declines to proceed for prudential reasons. As discussed below, the Commission believes that resolving these matters through dismissal or dismissal with admonishment more clearly conveys the Commission's intentions and avoids possible confusion about the meaning of a reason to believe finding.

B. Dismissal and Dismissal With Admonishment

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 has exercised its prosecutorial discretion under *Heckler* to dismiss matters that do not merit the additional expenditure of Commission

resources.[1] As with other actions taken by the Commission, dismissal of a matter requires the vote of at least four Commissioners.

Pursuant to the exercise of its prosecutorial discretion, the Commission will dismiss a matter when the matter does not merit further use of Commission resources, due to factors such as the small amount or significance of the alleged violation, the vagueness or weakness of the evidence, or likely difficulties with an investigation, or when the Commission lacks majority support for proceeding with a matter for other reasons. For example, a dismissal would be appropriate when:

- The seriousness of the alleged conduct is not sufficient to justify the likely cost and difficulty of an investigation to determine whether a violation in fact occurred; or
- The evidence is sufficient to support a ''reason to believe'' finding, but the violation is minor.

The Commission may also dismiss when, based on the complaint, response, and publicly available information, the Commission concludes that a violation of the Act did or very probably did occur, but the size or significance of the apparent violation is not sufficient to warrant further pursuit by the Commission. In this latter circumstance, the Commission will send a letter admonishing the respondent. For example, a dismissal with admonishment would be appropriate when:

- A respondent admits to a violation, but the amount of the violation is not sufficient to warrant any monetary penalty; or
- A complaint convincingly alleges a violation, but the significance of the violation is not sufficient to warrant further pursuit by the Commission.

C. ''No Reason To Believe''

The Commission will make a determination of ''no reason to believe'' a violation has occurred when the available information does not provide a basis for proceeding with the matter. The Commission finds ''no reason to believe'' when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law. For example, a ''no reason to believe'' finding would be appropriate when:

- A violation has been alleged, but the respondent's response or other evidence convincingly demonstrates that no violation has occurred;
- A complaint alleges a violation but is either not credible or is so vague that an investigation would be effectively impossible; or
- A complaint fails to describe a violation of the Act.

If the Commission, with the vote of at least four Commissioners, finds that there is ''no reason to believe'' a violation has occurred or is about to occur with respect to the allegations in the complaint, the Commission will close the file and respondents and the complainant will be notified.

D. Conclusion

This policy enunciates and describes the Commission's standards for actions at the point of determining whether or not to open an investigation or to enter into conciliation with respondents prior to a finding of probable cause to believe. The policy does not confer any rights on any person and does not in any way limit the right of the Commission to evaluate every case individually on its own facts and circumstances.

This notice represents a general statement of policy announcing the general course of action that the Commission intends to follow. This policy statement does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedures Act (''APA''). As such, it does not bind the Commission or any member of the general public. The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.

Dated: March 7, 2007.

Robert D. Lenhard,

Chairman, Federal Election Commission.

[FR Doc. E7–4868 Filed 3–15–07; 8:45 am]

BILLING CODE 6715–01–P

[1] The FECA and Commission regulations also recognize the Commission's authority to dismiss enforcement matters. *See* 2 U.S.C. 437g(a)(1); 11 CFR 111.6(b) and 111.7(b).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–26166; Directorate Identifier 2006–CE–58–AD; Amendment 39–14992; AD 2007–06–11]

RIN 2120–AA64

Airworthiness Directives; EADS SOCATA Model TBM 700 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

> Cracks on a vertical stabilizer attachment fitting due to corrosion, have been found on an aircraft in service.

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective April 20, 2007.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of April 20, 2007.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Albert J. Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri, 64106; telephone: (816) 329–4119; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Streamlined Issuance of AD

The FAA is implementing a new process for streamlining the issuance of ADs related to MCAI. The streamlined process will allow us to adopt MCAI safety requirements in a more efficient manner and will reduce safety risks to the public. This process continues to follow all FAA AD issuance processes to meet legal, economic, Administrative Procedure Act, and **Federal Register** requirements. We also continue to meet

Attachment 4

FEDERAL ELECTION COMMISSION

[Notice 2011–06]

Agency Procedure for Disclosure of Documents and Information in the Enforcement Process

AGENCY: Federal Election Commission.

ACTION: Notice of Agency Procedure.

SUMMARY: The Federal Election Commission (''Commission'') is establishing an agency procedure to formally define the scope of documents that will be provided to respondents by the agency, and to formalize the agency's process of disclosing such documents, during the Commission's investigation in enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (the Act).

DATES: Effective June 30, 2011.

FOR FURTHER INFORMATION CONTACT: William A. Powers or Ana J. Pena-Wallace, Attorneys, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

I. Recent Changes to the Commission's Enforcement Procedures

The Commission has, in recent years, adopted several changes to its enforcement process in an effort to provide complainants, respondents and the public with greater transparency with respect to the Commission's process.

On May 1, 2003, the Commission published a Notice of Public Hearing and Request for Public Comment concerning its enforcement procedures.[1] The Commission received written comments from the public, many of which urged increased transparency in Commission procedures and expanded opportunities to contest allegations.[2] On June 11, 2003, the Commission held an open hearing on its enforcement procedures during which the Commission considered written comments received and oral testimony from several witnesses. In response to issues raised in written comments and at the hearing, the Commission issued several new agency procedures.[3]

On December 8, 2008, the Commission issued a Notice of Public Hearing and Request for Public Comment regarding the compliance and enforcement aspects of its agency procedures.[4] There were numerous written comments filed in response to the Notice and on January 14–15, 2009, the Commission received testimony at a public hearing.[5]

Some commenters proposed alternative procedures with respect to information and documents in the possession of the Commission. One commenter recommended instituting a program whereby potential respondents in internally generated matters[6] would be given a written summary of the matter and an opportunity to respond in writing before the Commission makes a reason to believe (RTB) finding and to provide earlier notice to respondents about the Office of General Counsel's (OGC) recommendation to the Commission.[7] Other commenters urged the Commission to adopt procedures to provide respondents with the opportunity to review and respond to any adverse course of action recommended by the Commission's Office of General Counsel before the Commission considers such recommendation.[8] Still others requested even more general access by respondents to documents and information held by the Commission.[9]

The Commission has since updated and augmented several of its procedures including the adoption of: (1) A pilot program providing opportunity to persons requesting an advisory opinion to appear before the Commission to answer questions,[10] (2) a pilot program providing audited committees with an opportunity to request a hearing before the Commission prior to the Commission's adoption of a Final Audit Report,[11] and (3) a procedure providing respondents with notice of a non-complaint generated referral[12] and an opportunity to respond prior to the Commission's consideration of whether it has reason to believe that a violation has occurred.[13] Further, in December 2009, the Commission issued a Guidebook for Complainants and Respondents on the FEC Enforcement Process, which provides a step-by-step guide to assist and educate complainants, respondents and the public concerning the Commission enforcement process.[14]

The procedure set forth herein formalizes the Commission's policy on disclosure to respondents of relevant information gathered by the Commission in the investigative stage of its enforcement proceedings.

II. Disclosure of Exculpatory Information

A. Criminal Proceedings: The Constitutional Obligation Under Brady—the Government's Duty To Disclose

One issue that must inform the Commission in its consideration of any procedure regarding the disclosure of documents and information to respondents in the enforcement process is whether, and to what extent, there are relevant requirements or constraints imposed by the United States Constitution. The seminal Supreme Court case involving the Constitutional

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[1] *See Enforcement Procedures,* 68 FR 23311 (May 1, 2003), available at *http://www.fec.gov/agenda/agendas2003/notice2003-09/fr68n084p23311.pdf.*

[2] Comments and statements for the record are available at *http://www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml.*

[3] *See Statement of Policy Regarding Deposition Transcripts in Nonpublic Investigations,* 68 FR 50688 (Aug. 22, 2003), available at *http://www.fec.gov/agenda/agendas2003/notice2003-15/fr68n163p50688.pdf; Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings,* 70 FR 3 (Jan. 3, 2005), available at *http://www.fec.gov/law/policy/2004/notice2004–20.pdf; Procedural Rules for Probable Cause Hearings,* 72 FR 64919 (Nov. 19, 2007), available at *http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-21.pdf.*

[4] *See Agency Procedures,* 73 FR 74495 (Dec. 8, 2008), available at *http://www.fec.gov/law/policy/enforcement/notice_2008-13.pdf.*

[5] The comments received by the Commission, as well as the transcript of the hearing are available at *http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml.*

[6] Enforcement matters may be internally generated based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. 437g. These non-complaint generated matters can arise from internal referrals to the Office of General Counsel from the Commission's Reports Analysis Division or Audit Division.

[7] *See* Comment of Scott E. Thomas dated January 5, 2009, available at *http://www.fec.gov/law/policy/enforcement/2009/comments/comm15.pdf.*

[8] *See* Comments of Perkins Coie LLP Political Law Group dated January 5, 2009, available at *http://www.fec.gov/law/policy/enforcement/2009/comments/comm25.pdf.*

[9] *See* Comments of Election Law and Government Ethics Practice Group of Wiley Rein LLP dated January 5, 2009, available at *http;//www.fec.gov/law/policy/enforcement/2009/comments/comm33.pdf;* Comments of Perkins Coie LLP Political Law Group dated January 5, 2009, available at *http://www.fec.gov/law/policy/enforcement/2009/comments/comm25.pdf;* Comments of Laurence E. Gold dated January 5, 2009, available at *http://www.fec.gov/law/policy/enforcement/2009/comments/comm20.pdf;* Comments of Robert K, Kelner dated January 5, 2009, available at *http://www.fec.gov/law/policy/enforcement/2009/comments/comm10.pdf.*

[10] *See Advisory Opinion Procedures,* 74 FR 32160 (July 7, 2009), available at *http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-11.pdf.*

[11] *See Procedural Rules for Audit Hearings,* 74 FR 33140 (July 10, 2009), available at *http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-12.pdf.*

[12] Non-complaint generated referrals, also referred to as ''internally generated matters,'' are based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. *See* 2 U.S.C. 437g and note 6 above.

[13] *See Procedural Rule for Notice to Respondents in Non-Complaint Generated Matters,* 74 FR 38617 (August 4, 2009), available at *http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-18.pdf.*

[14] This Guidebook is available at *http://www.fec.gov/em/respondent_guide.pdf.*

parameters required by, and imposed upon, the government, in the context of criminal proceedings, is *Brady* v. *Maryland*.[15] *Brady* held that the Due Process Clause of the Fifth Amendment to the United States Constitution requires the government to provide criminal defendants with exculpatory evidence—*i.e.,* ''evidence favorable to an accused,'' that is ''material to guilt or punishment''—known to the government but unknown to the defendant.

As noted, the Supreme Court in *Brady* held that the Due Process Clause requires the government to provide criminal defendants with exculpatory or potentially exculpatory evidence that is ''material to guilt or punishment.'' ''The rationale underlying *Brady* is not to supply a defendant with all the evidence in the Government's possession which might conceivably assist in the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence known only to the Government.'' [16] *Brady* is a rule of disclosure, not of discovery.[17] Therefore, *Brady* obligations apply even when a defendant does not request the evidence.[18] The obligations also apply regardless of the good faith of the prosecutor.[19] However, no constitutional duty exists under *Brady* to provide evidence already in the defendant's possession or which can be obtained with reasonable diligence.[20]

In *Giglio* v. *United States,* 405 U.S. 150, the Supreme Court went one step further by requiring disclosure in criminal proceedings ''[w]hen the 'reliability of a particular witness may well be determinative of guilt or innocence,' '' and the prosecution has evidence that impeaches that witness' testimony.[21] ''Such [impeachment] evidence is 'evidence favorable to an accused' so that if disclosed and used effectively, it may make the difference between conviction and acquittal.'' [22] For example, courts have held that impeachment evidence for a key testifying witness includes but is not limited to the following: Prior statements by a witness that are materially inconsistent with the witness's trial testimony; [23] a conviction of perjury; [24] prosecutorial intimidation of a witness; [25] and plea bargains and informal statements by the prosecution that a witness would not be prosecuted in exchange for his testimony.[26]

Because *Brady* disclosure in criminal proceedings is required under the Due Process Clause, legal privileges against discovery such as attorney-client, work-product, or deliberative process do not allow the government in criminal proceedings to avoid disclosure on these grounds.[27] However, courts have recognized that *Brady* does not apply to attorney strategies, legal theories, and evaluations of evidence because they are not ''evidence.'' [28]

B. The Legal, Professional, and Ethical Duties To Disclose—the Lawyer's Independent Obligations in Criminal Proceeding

In addition to, and quite separate from, the Constitutional requirements in criminal cases, there is broad acceptance in the legal and judicial professions that there is also an ethical obligation to provide exculpatory or incriminating information to respondents and litigants that, if not provided, may negatively impact the ability of a respondent or litigant to obtain a just result through a fair and impartial proceeding with the government.

For example, Rule 3.8(d) of the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules), imposes an ethical duty on criminal prosecutors that is separate and independent from the Constitutional disclosure obligations addressed in *Brady.* The ABA Model Rules are in force in most State courts and many Federal Courts. Specifically, Rule 3.8(d) requires that a criminal prosecutor ''make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense'' so that the defense can make meaningful use of the evidence and information in making such decisions as whether to plead guilty and how to conduct its defense.[29]

The Supreme Court has also referred to the status of a U.S. Attorney in the ''Federal system'' as ''the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'' [30] Therefore, both Constitutional issues and ethical issues must be considered when a procedure such as the one enunciated here today is formulated and adopted.

C. Disclosure in Governmental Civil Proceedings

Courts have held that the Due Process Clause does not require application of *Brady* in administrative proceedings.[31] Nevertheless, some Federal agencies recently have applied *Brady* principles to their civil administrative enforcement proceedings. For example, the Federal Energy Regulatory Commission (FERC) recently issued a policy statement that provides respondents with access to certain exculpatory evidence during that agency's investigations and adjudications.[32] Under FERC's regulations, FERC can conduct either an informal or formal investigation. The new FERC Policy Statement provides, in relevant part that ''[d]uring the course of an investigation * * *, Enforcement staff will scrutinize materials it receives

[15] *Brady* v. *Maryland,* 373 U.S. 83, 87–88 (1963) (*Brady*).

[16] *United States* v. *LeRoy,* 687 F.2d 610, 619 (2d Cir. 1983) (citations omitted).

[17] *See United States* v. *Bagley,* 473 U.S. 667, 675 n.7 (1985) (*Bagley*).

[18] *See United States* v. *Agurs,* 427 U.S. 97, 107–10 (1976).

[19] *Brady,* 373 U.S. at 87.

[20] *See, e.g., United States* v. *Meros,* 866 F.2d 1304, 1308 (11th Cir 1989); *Hoke* v. *Netherland,* 92 F.3d 1350, 1355–56 (4th Cir. 1996); *United States* v. *Beaver,* 524 F.2d 963, 966 (5th Cir. 1975).

[21] *Giglio* v. *United States,* 405 U.S. 150, 154–55 (1972) (*Giglio*).

[22] *Bagley,* 473 U.S. at 676 (quoting *Brady,* 373 U.S. at 87).

[23] *Id.* at 677.

[24] *United States* v. *Cuffie,* 80 F.3d 514, 517–19 (D.C. Cir. 1996).

[25] *Simmons* v. *Beard,* 581 F.3d 158, 169 (3rd Cir. 2009).

[26] *Giglio,* 405 U.S. at 154–55; *United States* v. *Edwards,* 191 F. Supp. 2d 88, 90 (D.D.C. 2002); *United States* v. *Buettner-Janusch,* 500 F. Supp. 1287, 1288 (S.D.N.Y. 1980).

[27] *See* Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure 254 (4th ed. 2009); *United States* v. *Goldman,* 439 F. Supp. 337, 350 (S.D.N.Y. 1977).

[28] *Morris* v. *Ylst,* 447 F.3d 735, 742 (9th Cir. 2006); *U.S.* v. *NYNEX Corp.,* 781 F. Supp. 19, 25–26 (D.D.C. 1991); *see Williamson* v. *Moore,* 221 F.3d 1177, 1182 (11th Cir. 2000).

[29] *See* American Bar Association, Model Rules of Professional Conduct, Rule 3.8, Special Responsibilities of a Prosecutor, available at *http://www.abanet.org/cpr/mrpc/rule_3_8.html. See also* Formal Opinion 09–454, Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense, American Bar Association, Standing Committee on Ethics and Professional Responsibility, available at *http://www.nacdl.org/public.nsf/whitecollar/ProsecutorialMisconduct/$FILE/09-454.pdf.*

[30] *Berger* v *United States,* 295 U.S. 78, 88 (1935); *see also* Statement of Attorney General Eric Holder Regarding *United States* v. *Theodore F. Stevens,* available at *http://www.justice.gov/opa/pr/2009/April/09-ag-288.html.*

[31] *Mister Discount Stockbrokers* v. *SEC,* 768 F.2d 875, 878 (7th Cir. 1985) (no right to exculpatory evidence in National Association of Securities Dealers (NASD) proceedings which are treated the same as administrative agency action); *Sanford* v. *NASD,* 30 F. Supp. 2d 1, 22 n.12 (D.D.C. 1998) (same); *NLRB* v. *Nueva Eng'g, Inc.,* 761 F.2d 961, 969 (4th Cir. 1985) (''[W] e find *Brady* inapposite and hold that the ALJ properly denied Nueva's demand for exculpatory materials.'').

[32] *See* FERC Policy Statement on Disclosure of Exculpatory Materials, Docket No. PL10–1–000, 129 FERC 61,248 (Dec. 17, 2009) (FERC Policy Statement), available at *http://www.ferc.gov/whats-new/comm-meet/2009/121709/M-2.pdf.*

from sources other than the investigative subject(s) for material that would be required to be disclosed under *Brady.* Any such materials or information that are not known to be in the subject's possession shall be provided to the subject.'' [33]

Similarly, the Securities and Exchange Commission (SEC) adopted a rule of practice in 1995 for its civil enforcement proceedings whereby its Division of Enforcement shall make available for inspection and copying ''documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings.'' [34] The SEC rule permits certain documents to be withheld by the agency, including those documents that are privileged, pre-decisional or work product, a document that would identify a confidential source, or documents identified to a hearing officer as being properly withheld for good cause.[35]

However, SEC rule 201.230(b)(2) specifically states that nothing in the rule ''authorizes the [SEC's] Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady,* * * * documents that contain material exculpatory evidence.'' [36] Although the SEC has limited the application of rule 201.230 to require the ''production of examination and inspection reports to circumstances where the Division of Enforcement intends to introduce the report into evidence, either in reliance on the report to prove its case, or to refresh the recollection of any witness,'' this limitation ''does not alter the requirement that the Division produce documents containing material exculpatory evidence as required by *Brady* v. *Maryland.''* [37]

As with FERC and the SEC, the Commodity Futures Trading Commission (CFTC) also provides for disclosure of certain information during the ''discovery'' phase of its formal adjudications.[38] In addition to a prehearing exchange of documents, identities of witnesses, and an outline of its case, the CFTC's Division of Enforcement ''shall make available for inspection and copying by the respondents'' certain documents.[39] These documents include all documents subpoenaed by the CFTC and all transcripts of investigative testimony and exhibits to those transcripts.[40] However, the Division of Enforcement may withhold, for example, the identity of a confidential source, confidential investigatory techniques, and other confidential information, such as trade secrets.[41] Privileged documents and information may also be withheld by CFTC's Division of Enforcement.[42]

In the case of this Commission, as a Federal agency engaged in proceedings to find liability of persons under Federal laws, whose conduct can lead to civil penalties and potentially has the reach of the criminal system, it has been the Commission's practice to provide certain types of information to respondents. The Commission is formalizing its practice to ensure effective and fair enforcement of the Act.

The Commission recognizes that *Brady* was decided in the context of a criminal proceeding and that its holding, therefore, does not extend, by its own terms, to a Federal agency civil enforcement agency proceeding. However, the Commission is empowered (a) To civilly pursue matters that may have potential criminal consequences, and (b) to engage respondents in the enforcement process, and possibly in litigation if the Commission and respondents are unable to reach a mutually acceptable voluntary conciliation agreement, where a Court may impose a civil monetary penalty, injunctive, or other relief. *See* 2 U.S.C. 437g(a)(6)(A).

The Commission has also entered into a Memorandum of Understanding with the Department of Justice (DOJ) whereby the Commission will refer certain matters to the DOJ for criminal prosecution review and whereby DOJ will refer matters to the Commission.[43] Nothing in the procedure adopted herein is intended to impact in anyway the Commission's conduct with respect to, and relationship with, the DOJ, including any agreement between the Commission and the DOJ whereby the Commission agrees not to disclose information obtained from the DOJ. The procedure adopted herein provides for mandatory withholding of information by the Office of General Counsel of any documents or information submitted to the Commission by the DOJ either pursuant to an agreement between the Commission and the DOJ or simply upon request from the DOJ not to disclose the information.[44] Moreover, the procedure adopted herein protects from disclosure not only the information submitted by the DOJ but also any information that was derived from such information, including all separate documents quoting, summarizing, or otherwise using information provided by the DOJ.[45]

Accordingly, the Constitutional and ethical principles of fairness and due process in *Brady,* as well as the procedures adopted by other Federal agencies, inform the Commission's adoption of the procedure announced today in its civil administrative enforcement process.

In summary, while the Commission does not believe that the Constitution requires the agency to institute a procedure requiring disclosure of documents and information, including exculpatory information, to respondents in its civil enforcement process, the Commission's enforcement proceedings may, in some instances, inform potential or concurrent criminal proceedings. Accordingly, adopting a formal internal procedure requiring disclosure of information to respondents will (1) Eliminate uncertainty regarding the Commission's position on this issue, (2) serve the Commission's goal of providing fairness to respondents, and (3) set forth a written procedural framework within which disclosures are made.

III. Current Disclosure Process

Before the Commission may determine that there is probable cause to believe a violation of the Act has occurred or is about to occur, the Act permits respondents to present directly to the Commission their interests and positions on the matter under review.

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[33] *See* FERC Policy Statement at paragraph 9.

[34] *See* 17 CFR 201.230(a)(1) (2010), available at *http://edocket.access.gpo.gov/cfr_2010/aprqtr/pdf/17cfr201.230.pdf.*

[35] 17 CFR 201.230(b)(1).

[36] 17 CFR 201.230(b)(2).

[37] *See* Securities and Exchange Commission, Explanation and Justification: Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission, 69 FR 13166, 13170 (Mar. 19, 2004), available at *http://www.sec.gov/rules/final/34-49412.htm.*

[38] *See* 17 CFR 10.42 (2010), available at *http://edocket.access.gpo.gov/cfr_2010/aprqtr/pdf/17cfr10.42.pdf.*

[39] *See* 17 CFR 10.42(a)(1) & (2); 17 CFR 10.42(b)(1).

[40] *Id.* See also *In re First National Monetary Corp.,* Opinion and Order, CFTC No. 79–56, CFTC No. 79–57 (Nov. 13, 1981) (Any material * * * known to the Division of Enforcement, or which by the exercise of due diligence may become known to the Division, that is arguably exculpatory and material to guilt or punishment within the meaning of *Brady* [and its progeny] should be either provided to respondent directly, or provided to the [ALJ], for his determination as to whether it is productible [sic] or not).

[41] 17 CFR 10.42(b)(2).

[42] 17 CFR 10.42(b)(3).

[43] *See* Department of Justice and Federal Election Commission, *Memorandum of Understanding,* 43 F 5441 (Feb. 8, 1978).

[44] *See* Updated Formal Procedure at paragraph (b)(1)(v), below.

[45] *Id.*

The Commission's General Counsel shall notify respondents prior to any recommendation to the Commission by the General Counsel to proceed to a vote on probable cause.[46] Included in this notification is a written brief stating the position of the General Counsel on the legal and factual issues of the case to which respondents may reply.[47] This allows the Commission to be informed not only by the recommendations of its General Counsel, but also by the factual presentations and legal arguments of respondents. By requirement of the Act, or by its discretion, the Commission has similar procedures at various stages of the enforcement process to keep the Commissioners informed both by its staff and by respondents.

In addition, while the Commission may attempt to conciliate matters with respondents at any time, the Act requires the Commission to attempt conciliation after it finds probable cause.[48] If the Commission determines that there is probable cause, the Act requires that, for a period of at least 30 day (or at least 15 days, if the probable cause determination occurs within 45 days of an election), the Commission must attempt to correct or prevent the violation through conference, conciliation, and persuasion.[49]

The General Counsel provides a probable cause brief to respondents presenting OGC's analysis of the information and may address any available exculpatory evidence. The Commission's current practice at the probable cause stage has generally been to provide respondents, upon request, with information cited or relied upon (whether or not cited) in the General Counsel's probable cause brief. Where possible, this has included documents containing the information upon which OGC is relying to support its recommendation to the Commission that there is probable cause to believe a violation of the Act has occurred. This production of documents is subject to all applicable privileges and confidentiality considerations, including the confidentiality provisions of the Act. Where such considerations apply, OGC has generally provided only the relevant information derived from the document, and not the document itself. Examples of the types of documents OGC has provided at this stage are deposition transcripts, responses to formal discovery, and documents obtained in response to requests for documents. In instances where OGC obtains factual information from a source other than the respondent that tends to exculpate the respondent, OGC may note the existence of the information in its brief, particularly if OGC does not know whether a respondent is already aware of the information.[50] In instances where OGC provides mitigating or exculpatory information, OGC provides any documents cited to in connection with that information, such production is also subject to the same privilege and confidentiality concerns noted above.

In two limited instances, OGC may provide information to respondents earlier than the probable cause stage in the enforcement process. First, pursuant to the Commission's Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations, all deponents, including respondent deponents, may obtain a copy of the transcript of their own deposition, including any exhibits that may have been obtained from sources other than the respondent, provided there is no good cause to limit the deponent's access to the transcript.[51] Second, OGC may share information, including documents, with respondents during the post-investigative pre-probable cause conciliation process to assist in explaining the factual basis for a violation. That information may include documents not already in the respondent's possession. This practice is used solely for the purpose of facilitating conciliation.

As the current practice has demonstrated, the Commission's probable cause considerations and subsequent conciliation efforts are furthered when, in presenting their respective positions, respondents have the greatest practicable access to documents and information gathered by the agency, including certain information that might be favorable to the respondent. This allows both the Commission's Office of General Counsel and the respondents that are under investigation to present fully informed submissions and frame legal issues for the Commission's consideration.

At the same time, however, the Act and other laws restrict information that the Commission may make public without the consent of persons under investigation.[52] Investigations that involve multiple respondents, each of whom may be at different stages of the enforcement process, raise questions as to what documents and information the Commission may disclose to any given respondent before determining probable cause.

The procedure adopted herein is not intended to expand the disclosure of information regarding a co-respondent as to any such information that is subject to existing confidentiality requirements under the Act. In order to reconcile the Commission's interests in permitting respondents to present fully their positions without compromising the Commission's confidentiality obligations, the Commission is formalizing its procedure. This agency procedure clarifies how the Commission will, consistent with the confidentiality provisions of 2 U.S.C. 437g(A)(12), enhance its enforcement process by permitting increased access to documents and information held by the Commission.

This procedure will allow efficient, fair and just resolution of issues regarding disclosure of exculpatory information and avoid unnecessary consumption of respondent and Commission staff resources in future proceedings.

IV. The Updated Formal Procedure

The Commission is formalizing its agency procedure to provide respondents in enforcement proceedings with relevant information ascertained by the Commission as the result of an investigation. The Commission believes that, while not mandated by the Constitution, the principle of *Brady,* and its judicial progeny, should apply following investigations conducted under Section 437g of the Act and Subpart A of Part 111 of the Commission's regulations.[53]

The Commission believes that formalizing the procedure will promote fairness in the Commission's Section 437g enforcement process. The Commission also believes the procedure articulated in this Notice will promote administrative efficiency and certainty, and will contribute to the Commission's goal of open, fair and just investigations and enforcement proceedings.

For purposes of this procedure, the term ''documents'' includes writings, drawings, graphs, charts, photographs, recordings and other data compilations, including data stored by computer, from which information can be obtained.

[46] *See* 2 U.S.C. 437g(a)(3).

[47] *See* 2 U.S.C. 437g(a)(3); *see also* 11 CFR 111.16.

[48] *See* 2 U.S.C. 437g(a)(4).

[49] *Id.*

[50] When advising the Commission on whether OGC intends either to proceed with its probable cause recommendation or to withdraw the recommendation, OGC will also provide and discuss the potentially exculpatory evidence, as well as any available mitigating evidence. *See* 11 CFR 111.16(d).

[51] *See Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations,* 68 FR 50688 (Aug. 22, 2003), available at *http://www.fec.gov/agenda/agendas2003/notice2003-15/fr68n163p50688.pdf.*

[52] *See, e.g.,* 2 U.S.C. 437g(a)(4)(B)(i) and (a)(12).

[53] *See generally* 2 U.S.C. 437g and 11 CFR part 111.

For purposes of this procedure, the term ''exculpatory information'' means information gathered by the Office of General Counsel 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.

The procedure is as follows:

(a) Documents To Be Produced or Made Available

(1) Subject to paragraphs (b) through (e) of this procedure, and unless otherwise directed by the Commission, by an affirmative vote of four or more Commissioners,[54] the Office of General Counsel shall make available to a respondent all relevant documents gathered by the Office of General Counsel 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. This includes any documents that contain exculpatory information, as defined herein. This shall not include any documents created internally by a Commissioner or by a member of a Commissioner's staff. This shall be done either by producing copies in electronic format or permitting inspection and copying of such documents. The documents covered by this procedure shall include:

(i) Documents, not in possession of a respondent, turned over in response to any subpoenas or other requests, written or otherwise;

(ii) All deposition transcripts and deposition transcript exhibits; and

(iii) Any other documents, not otherwise publicly available and not in possession of a respondent, gathered by the Commission from sources outside the Commission.

(2) Nothing in this paragraph (a) shall limit the authority of the Commission, by an affirmative vote of four or more Commissioners, to make available or withhold any other document, or shall limit the capacity of a respondent to seek access to, or production of, a document through timely written requests to the Commission subsequent to the production of documents pursuant to paragraph (d) below. If respondent submits such a written request, respondent must, if requested to do so by the Commission, sign a tolling agreement for the time necessary to resolve the request.

(3) Nothing in this procedure requires the Office of General Counsel to conduct any search for materials other than those it receives in the course of its investigatory activities. This procedure does not require staff to conduct any search for exculpatory materials that may be found in the offices of other agencies or elsewhere.

(b) Documents That May Be Withheld

(1) Unless otherwise determined by the Commission, as provided in subparagraph (2) below, the Office of General Counsel shall withhold a document or a category of documents from a respondent if:

(i) The document contains privileged information, such as, but not limited to, attorney-client communications, attorney-work product, staff-work product or work product subject to the deliberative process privilege; provided, however, if the document contains only a portion of material that should not be disclosed, if possible to do so effectively, the Office of General Counsel shall excise or redact from such document any information that prevents disclosure if the remaining portion is informative and otherwise qualifies for disclosure as provided herein, prior to disclosing the document or information contained therein;

(ii) The document or category of documents is determined by the General Counsel to be not relevant to the subject matter of the proceeding;

(iii) The Commission is prevented by law or regulation from disclosing the information or documents, including, under certain circumstances, information obtained from, or regarding, co-respondents; [55]

(iv) The document contains information only a portion of which prevents disclosure as provided herein, and that portion cannot be excised or redacted without affecting the main import of the document; or

(v) The Commission obtained the information or documents from the Department of Justice or another government entity, either pursuant to a written agreement with the Department of Justice, or the other government entity, not to disclose the information, documents or category of documents or upon written request from the Department of Justice, or the other government entity. Withholding any such information obtained from the Department of Justice also includes withholding any information that was derived from such information, including all separate documents quoting, summarizing, or otherwise using information provided by the other government entity.

(2) For any document withheld by the General Counsel pursuant to subparagraphs (1)(i)–(1)(iv) above, the Commission may, pursuant to a timely written request by the respondent or otherwise, consider whether to make available such document and, after consideration of relevant law and regulation, by an affirmative vote of four or more Commissioners, may determine, consistent with relevant law and regulation, whether or not it is appropriate to produce such document. If respondent submits such a written request, it must be within 15 days of the Commission's production of documents and respondent must, if requested to do so by the Commission, sign a tolling agreement for the time necessary to resolve the request.

(3) For any document withheld by the General Counsel pursuant to a written agreement with, or written request from, the Department of Justice or the other government entity under subparagraph (1)(v) above, the General Counsel shall provide a report to the Commission identifying the documents and information that has been withheld and providing the Commission with a copy of the written agreement with, or request from, the Department of Justice or the other government entity.

(c) Withheld Document List

(1) Within ten business days of receipt of documents disclosed pursuant to paragraph (d) below, a respondent may request in writing that the Commission direct the General Counsel to produce to the respondent a list of documents or categories of documents withheld pursuant to paragraph (b)(1) of this procedure. If respondent submits such a written request, respondent must sign a tolling agreement for the time necessary, not to exceed 60 days, for the General Counsel to provide the list of documents, unless the Commission, by an affirmative vote of four or more Commissioners, determines that a tolling agreement is not required. Requests for a list of documents or categories of documents shall be granted, unless the Commission, by an

[54] In any instance in which the Office of General Counsel has concerns that disclosure of information pursuant to this procedure would lead to a result that is materially inconsistent with either the Commission's administrative responsibilities or with the promotion of fairness and efficiency in the Commission's enforcement process, the Office of General Counsel may seek formal guidance from the Commission on how it should proceed.

[55] *See* paragraph (e) of this procedure addresses issues regarding documents and information that may be subject to confidentiality pursuant to sections 437g(a)(4)(B)(i) and 437g(a)(12) of the Act. 2 U.S.C. 437g(a)(4)(B)(i) and 437g(a)(12).

affirmative vote of four or more Commissioners, denies the request, in whole or in part. Once the Commission has voted upon the written request, respondent may not seek reconsideration of that decision.

(2) When similar documents are withheld pursuant to paragraph (b)(1), those documents may be identified by category instead of by individual document.

(d) Timing of Production or Inspection and Copying

(1) The disclosure of documents and information referenced herein shall be made pursuant to a timely written request by the respondent filed within fifteen days of the dates specified in subparagraphs (i) and (ii) below, and subject to paragraph (e), or unless otherwise determined by the Commission by an affirmative vote of four or more Commissioners. The General Counsel shall produce in electronic format, or commence making documents available to a respondent for inspection and copying pursuant to this procedure, at the earlier of the following:

(i) The date of the General Counsel's notification to a respondent of a recommendation to the Commission to proceed to a vote on probable cause; or

(ii) No later than seven days after certification of a vote by the Commission to conciliate with a respondent.

(e) Issues Respecting Documents Provided by, or Relating to, Co-respondents

(1) If there is more than one respondent that is under investigation in the same matter, or in related matters, before the General Counsel may produce documents, other than exculpatory information or documents cited or relied on in the General Counsel's brief that accompanies its notice of a recommendation to vote on probable cause, to one co-respondent that either (a) have been provided to the Commission by another co-respondent or (b) that relate to another co-respondent, the General Counsel must obtain a confidentiality waiver from the co-respondent who provided the document or about whom the document relates. Additionally, the respondent receiving such documents may be required to sign a nondisclosure agreement to keep confidential any document or information it obtains from the Commission.

(2) If the co-respondent who provided the document or about whom the document relates does not agree to provide a confidentiality waiver, the General Counsel shall, if it is possible to do so effectively, in accordance with 2 U.S.C. 437g(a)(4)(B)(i) and 437g(a)(12), summarize or redact those portions of the document or documents that are subject to confidentiality under the Act, or are determined to be in the category of documents to be withheld under paragraph (b) in order to remove that portion of material that may not be disclosed.

(3) If the co-respondent who provided the document or about whom the document relates does not agree to provide a confidentiality waiver and it is not possible to effectively summarize or redact those portions of the document or documents that are subject to confidentiality, the General Counsel shall seek direction from the Commission, by an affirmative vote of four or more Commissioners, regarding how to balance the competing concerns of disclosure and confidentiality. In any event, the General Counsel shall produce complete or appropriately redacted copies of those documents cited or relied on in the brief that accompanies its notice of a recommendation to vote on probable cause, whether or not the documents have been specifically identified in the brief.

(4) If the confidentiality issue cannot be resolved with respect to a co-respondent (*e.g.,* lack of waiver, ineffective redaction, *etc.*), the General Counsel may, in an appropriate case make a recommendation to the Commission for segregation of the matters under review.

(5) If any document or information provided to the Commission by a one co-respondent contains exculpatory information, or is cited or relied on in the General Counsel's brief that accompanies its notice of a recommendation to vote on probable cause for another co-respondent, that information or document will be provided to the other co-respondent, which shall be subject to the same redactions described in paragraph (b)(1)(i).

(6) Before disclosing any portion of the document that raises an unresolved confidentiality issue, the General Counsel shall seek a determination by the Commission, by an affirmative vote of four or more Commissioners, that disclosure of a document containing exculpatory information (redacted, summarized, or in any other way altered) conforms to the confidentiality provisions of 2 U.S.C. 437g(a)(4)(B)(i) and 437g(a)(12).

(f) Place of Inspection and Copying Costs and Procedures

(1) Documents subject to inspection and copying pursuant to this procedure shall be made available to the respondent for inspection and copying at the Commission's office, or at such other place as the Commission, in writing, may agree. A respondent shall not be given custody of the documents or leave to remove the documents from the Commission's offices pursuant to the requirements of this procedure unless formal written approval is provided by an affirmative vote of four or more Commissioners.

(2) The respondent may obtain a photocopy of any documents made available for inspection. The respondent is responsible for all costs related to photocopying of any documents.

(g) Continuing Obligation To Produce During Conciliation

(1) If, prior to the completion of an investigation, the Commission votes to enter into conciliation, the General Counsel shall take reasonable and appropriate steps to limit any further formal investigation related to that respondent, so long as the respondent enters into a tolling agreement of the applicable statute of limitation. If there is no such tolling agreement, the formal investigation and conciliation may take place simultaneously. The tolling agreement must have a specific time for its duration approved by the Commission, by an affirmative vote of four or more Commissioners, and shall not be open-ended. If there is more than one respondent under investigation in the same matter, or in related matters, and the Commission votes to enter into conciliation with one or more respondents prior to the completion of a formal investigation, the General Counsel shall take reasonable and appropriate steps to limit any further formal investigation as to those respondents in conciliation, so long as the respondents enter into a tolling agreement of the applicable statute of limitation. If the Commission receives documents in the course of the formal investigation as to respondents not in conciliation that would otherwise be required to be produced under this procedure during such investigation, the Commission shall promptly produce them to the respondent in conciliation pursuant to this procedure.

(2) If the Commission receives documents during such conciliation, from whatever source, the General Counsel shall within a reasonable period of time inform the respondent of any documents obtained that would

otherwise be required to be produced under this procedure, and as to such documents, the General Counsel shall timely produce them to the respondent, consistent with the statutory confidentiality provision preventing disclosure of any information derived in connection with conciliation attempts. 2 U.S.C. 437g(a)(4)(B).

V. Failure To Produce Documents as Required Herein—Remedies and Consequences

In the event that a document required to be made available to a respondent pursuant to this procedure is not made available, no reconsideration by the Commission is required, unless the Commission concludes, by an affirmative vote of four or more Commissioners, that there is a reasonable likelihood that the decision of the Commission or result of the conciliation would have been different than the one made had such disclosure taken place. Any failure by the Commission to make a document available does not create any rights for a respondent to seek judicial review, nor any right for a defendant in litigation to request or receive a dismissal or remand or any other judicial remedy. A respondent may not request reconsideration by the Commission more than ten days after the conclusion of conciliation.

VI. Consequences of Disclosure

Disclosure of documents pursuant to this procedure is not an admission by the Commission that the information or document exculpates or mitigates respondent's liability for potential violations of the Act.

VII. Applicability During Civil Litigation

In any civil litigation with the respondent, the discovery rules of the court in which the matter is pending, and any order made by that court, shall govern the obligations of the Commission. The intention of the Commission is for this procedure to serve as internal guidance only and the procedure adopted herein does not create any rights that are reviewable or enforceable in any court.

VIII. Annual Review

No later than June 1 of each year, the General Counsel shall prepare and distribute to the Commission a report describing the application of the procedure adopted herein over the previous year. This annual report shall include the General Counsel's assessment of whether, and to what extent, the procedure has provided an appropriate balance between the Commission's interest in providing respondents with relevant documents and information and the confidentiality provisions of the Act, consistent with the Commission's goal of maintaining open, fair and just investigations and enforcement proceedings, along with any recommendations from the General Counsel regarding how the Commission could better accomplish that goal.

IX. Conclusion

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

This notice establishes an internal agency procedure for disclosing to respondents documents and information acquired by the agency during its investigations in the enforcement process. This procedure sets forth the Commission's intentions concerning the exercise of its discretion in its enforcement program. However, the Commission retains that discretion and will exercise it as appropriate with respect to the facts and circumstances of each enforcement matter it considers. Consequently, this procedure does not bind the Commission or any member of the general public, not does it create any rights for respondents or third parties. As such, this notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedure Act (APA). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.

On behalf of the Commission.

Dated: June 2, 2011.

Caroline C. Hunter,

Vice Chair, Federal Election Commission.

[FR Doc. 2011–14096 Filed 6–14–11; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov*.

Agreement No.: 012093–001.

Title: CSAV/K-Line Space Charter and Sailing Agreement.

Parties: Compania Sud Americana de Vapores and Kawasaki Kisen Kaisha, Ltd.

Filing Parties: Walter H. Lion, Esq.; McLaughlin & Stern, LLP; 260 Madison Avenue; New York, NY 10016.

Synopsis: The amendment adds Greece to the geographic scope of the Agreement and changes the Agreement's name.

Agreement No.: 201211.

Title: Marine Terminal Lease and Operating Agreement between Broward County and H.T. Shipping, Inc., and Hybur Ltd.

Parties: Broward County; H.T. Shipping, Inc.; and Hybur Ltd.

Filing Party: Candace J. Running; Broward County Board of County Commissioners; Office of the County Attorney; 1850 Eller Drive, Suite 502; Fort Lauderdale, FL 33316.

Synopsis: The agreement provides for the lease and operation of terminal facilities at Port Everglades, Florida.

By Order of the Federal Maritime Commission.

Dated: June 10, 2011.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2011–14836 Filed 6–14–11; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. chapter 409 and 46 CFR 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by e-mail at *OTI@fmc.gov*.

Allround Forwarding Co., Inc. (NVO & OFF), 134 West 26th Street, New

Attachment 5

Rules and Regulations

Federal Register
Vol. 72, No. 222
Monday, November 19, 2007

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2007–21]

Procedural Rules for Probable Cause Hearings

AGENCY: Federal Election Commission.

ACTION: Rule of Agency Procedure.

SUMMARY: The Federal Election Commission (''Commission'') is making permanent a program that allows respondents in enforcement proceedings under the Federal Election Campaign Act, as amended (''FECA''), to have a hearing before the Commission. Hearings will take place prior to the Commission's consideration of the General Counsel's recommendation on whether to find probable cause to believe that a violation has occurred. The Commission will grant a request for a probable cause hearing if any two commissioners agree to hold a hearing. The program will provide respondents with the opportunity to present arguments to the Commission directly and give the Commission an opportunity to ask relevant questions. Further information about the procedures for the program is provided in the supplementary information that follows.

DATES: Effective November 19, 2007.

FOR FURTHER INFORMATION CONTACT: Mark D. Shonkwiler, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Federal Election Commission is making permanent a program to afford respondents in pending enforcement matters the opportunity to participate in hearings (generally through counsel) and present oral arguments directly to the Commissioners, prior to any Commission determination of whether to find probable cause to believe respondents violated FECA.[1]

I. Background

On June 11, 2003, the Commission held a hearing concerning its enforcement procedures. The Commission received comments from those in the regulated community, many of whom argued for increased transparency in Commission procedures and expanded opportunities to contest allegations.[2] In response to issues raised at the hearing, the Commission has made a number of changes and clarifications. These changes and clarifications include allowing respondents to have access to their deposition transcripts, *See Statement of Policy Regarding Deposition Transcripts in Nonpublic Investigations,* 68 FR 50688 (August 22, 2003), and clarifying questions concerning treasurer liability for violations of the FECA, *See Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings,* 70 FR 3 (January 3, 2005).

On December 8, 2006, the Commission published a proposal for a pilot program for probable cause hearings, and sought comments from the regulated community. *See Proposed Policy Statement Establishing Pilot Program for Probable Cause Hearings,* 71 FR 71088 (Dec. 8, 2006). The comment period on the proposed policy statement closed on January 5, 2007. The Commission received four comments, all of which endorsed the proposed pilot program for probable cause hearings. These comments are available at *http://www.fec.gov/law/policy.shtml#proposed* under the heading ''Pilot Program for Probable Cause Hearings.''

On February 8, 2007, the Commission decided by a vote of 6–0 to institute the pilot program. The program went into effect on February 16, 2007. The pilot program was designed to remain in effect for at least eight months, after which time a vote would be scheduled on whether the program should continue. The Commission finds that the pilot program has been successful and hence, is issuing this notice to announce that the Commission has determined to make the program permanent.

II. Procedures for Probable Cause Hearings

A. Opportunity To Request a Hearing

A respondent may request a probable cause hearing when the enforcement process reaches the probable cause determination stage (see 11 CFR 111.16–111.17) and the respondent submits a probable cause response brief to the Office of General Counsel. The General Counsel will attach a cover letter to its probable cause brief to inform the respondent of the opportunity to request an oral hearing before the Commission. *See* 11 CFR 111.16(b). Hearings are voluntary and no adverse inference will be drawn by the Commission based on a respondent's request for, or waiver of, such a hearing. The respondent must include a written request for a hearing as a part of the respondent's filed reply brief under 11 CFR 111.16(c). Each request for a hearing must state with specificity why the hearing is being requested and what issues the respondent expects to address. Absent good cause, to be determined at the sole discretion of the Commission, late requests will not be accepted. Respondents are responsible for ensuring that their requests are timely received. All requests for hearings, scheduling and format inquiries, document submissions, and any other inquiries related to the probable cause hearings should be directed to the Office of General Counsel.

The Commission will grant a request for an oral hearing if any two Commissioners agree that a hearing would help resolve significant or novel legal issues, or significant questions about the application of the law to the facts. The Commission will inform the respondent whether the Commission is granting the respondent's request within 30 days of receiving the respondent's brief.

B. Hearing Procedures

The purpose of the oral hearing is to provide a respondent an opportunity to present the respondent's arguments in person to the Commissioners *before* the Commission makes a determination as to whether there is ''probable cause to believe'' that the respondent violated

[1] The Commission is appending to this statement a general description of its enforcement procedures (''Basic Commission Enforcement Procedure''). These procedures are prescribed by statute and regulation. See 2 U.S.C. 437g; 11 CFR part 111.

[2] The comments from these 2003 proceedings are available online at *http://www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml.*

the Act or Commission regulations. Consistent with current Commission regulations, a respondent may be represented by counsel, at the respondent's own expense, or may appear *pro se* at a probable cause hearing. *See* 11 CFR 111.23. Respondents (or their counsel) will have the opportunity to present their arguments, and Commissioners, the General Counsel, and the Staff Director will have the opportunity to pose questions to the respondent, or respondent's counsel, if represented.

At the hearing, respondents are expected to raise only issues that were identified in the respondent's hearing request. Such issues must have been previously presented during the enforcement process, either in the response, during the investigation or pre-probable cause conciliation, or in the reply brief. Respondents may discuss any issues presented in the enforcement matter, including potential liability and calculation of a civil penalty, and should be prepared to address questions related to the complaint, their initial response, and any other material they have submitted to the Commission. The reply brief should include specific citations to any authorities (including prior Commission actions) on which the respondent is replying or intends to cite at the hearing. If respondents discover new information after submission of the reply brief, or need to raise new arguments for similarly extenuating circumstances, they should notify the Commission as soon as possible prior to the hearing. Commissioners may ask questions on any matter related to the enforcement proceedings and respondents are free to raise new issues germane to any response.

Hearings are confidential and not open to the public; generally only respondents and their counsel may attend. Attendance by any other parties must be approved by the Commission in advance.

The Commission will determine the format and time allotted for each hearing at its discretion. Among the factors that the Commission may consider are agency time constraints, the complexity of the issues raised, the number of respondents involved, and the extent of Commission interest. The Commission will determine the amount of time allocated for each portion of the hearing, and each time limit may vary from hearing to hearing. The Commission anticipates that most hearings will begin with a brief opening statement by respondent or respondent's counsel, followed by questioning from the Commissioners, General Counsel, and Staff Director. Hearings will normally conclude with the respondent or respondent's counsel's closing remarks.

Third party witnesses or other co-respondents may not be called to testify at a respondent's oral hearing, nor may a respondent's counsel call the respondent to testify. However, the Commission may request that the respondent submit supplementary information or briefing after the probable cause hearing. The Commission discourages voluminous submissions. Supplementary information may be submitted only upon Commission request and no more than ten days after such a request from the Commission, unless the Commission's request for information imposes a different, Commission-approved deadline. Materials requested by the Commission, and materials considered by the Commission in making its ''probable cause to believe'' determination, may be made part of the public record pursuant to the Commission's *Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files,* 68 FR 70426 (Dec. 18, 2003).

The Commission will have transcripts made of the hearings. The transcripts will become a part of the record of the enforcement matter and may be relied upon for determinations made by the Commission. Respondent may be bound by any representations made by respondent or respondent's counsel at a hearing. The Commission will make the transcripts available to the respondent as soon as practicable after the hearing, and the respondent may purchase copies of the transcript. Transcripts will be made public after the matter is closed in accordance with Commission policies on disclosure.[3]

C. Cases Involving Multiple Respondents

In cases involving multiple respondents, the Commission will decide on a case-by-case basis whether to structure any hearings separately or as joint hearings for all respondents. Respondents are encouraged to advise the Commission of their preferences. Co-respondents may request joint hearings if each participating co-respondent provides an unconditional waiver of confidentiality with respect to other participating co-respondents and their counsel and a nondisclosure agreement. If separate hearings are held, each respondent will have access to the transcripts from the hearing of that respondent, but transcripts of other co-respondents' hearings will not be made available unless co-respondents specifically provide written consent to the Commission granting access to such transcripts.

D. Scheduling of Hearings

The Commission will seek to hold the hearing in a timely manner after receiving respondents' request for a hearing. The Commission will attempt to schedule the hearings at a mutually acceptable date and time. However, if a respondent is unable to accommodate the Commission's schedule, the Commission may decline to hold a hearing. The Commission reserves the right to reschedule any hearing. Where necessary, the Commission reserves the right to request from a respondent an agreement tolling any upcoming deadline, including any statutory deadline or other deadline found in 11 CFR part 111.

E. Conclusion

Probable cause hearings are optional and no negative inference will be drawn if respondents do not request a hearing. Currently, the majority of the Commission's cases are settled through pre-probable cause conciliation. Proceeding to probable cause briefing requires a substantial investment of the Commission's limited resources. Consistent with the goal of expeditious resolution of enforcement matters, the Commission encourages pre-probable cause conciliation. The Commission has a practice in many cases of reducing the civil penalty it seeks through its opening settlement offer in pre-probable cause conciliation. However, once pre-probable cause conciliation has been terminated, this reduction (normally 25%) is no longer available and the civil penalty will generally increase.

This notice establishes rules of agency practice or procedure. This notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedures Act (''APA''). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.

Dated: November 5, 2007.

Robert D. Lenhard,

Chairman, Federal Election Commission.

Note: The following Appendix will not appear in the Code of Federal Regulations.

[3] The Commission's *Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files,* 68 FR 70426 (Dec. 18, 2003) is hereby amended to include disclosure of transcripts from probable cause hearings.

Appendix: Basic Commission Enforcement Procedure

The Commission's enforcement procedures are set forth at 11 CFR part 111. An enforcement matter may be initiated by a complaint or on the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. 11 CFR 111.3. If a complaint substantially complies with certain requirements set forth in 11 CFR 111.4, within five days of receipt the Office of General Counsel notifies each party determined to be a respondent that a complaint has been filed, provides a copy of the complaint, and advises each respondent of Commission compliance procedures. 11 CFR 111.5. A respondent then has 15 days from receipt of the notification from the Office of General Counsel to submit a letter or memorandum to the Commission setting forth reasons why the Commission should take no action on the basis of the complaint. 11 CFR 111.6.

Following receipt of such letter or memorandum, or expiration of the 15-day period, the Office of General Counsel may recommend to the Commission whether or not it should find ''reason to believe'' that a respondent has committed or is about to commit a violation of the Act or Commission regulations. 11 CFR 111.7(a).[4] With respect to internally-generated matters (*e.g.*, referrals from the Commission's Audit or Reports Analysis Divisions), the Office of General Counsel may recommend that the Commission find ''reason to believe'' that a respondent has committed or is about to commit a violation of the Act or Commission regulations on the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities, or on the basis of a referral from an agency of the United States or any state. If the Commission determines by an affirmative vote of four members that it has ''reason to believe'' that a respondent violated the Act or Commission regulations, the respondent must be notified by letter of the Commission's finding(s). 11 CFR 111.9(a).[5] The Office of General Counsel will also provide the respondent with a Factual and Legal Analysis, which will set forth the bases for the Commission's finding of reason to believe.

After the Commission makes a ''reason to believe'' finding, an investigation is conducted by the Office of General Counsel, in which the Commission may undertake field investigations, audits, and other methods of information-gathering. 11 CFR 111.10. Additionally, the Commission may issue subpoenas to order any person to submit sworn written answers to written questions, to provide documents, or to appear for a deposition. 11 CFR 111.11–111.12. Any person who is subpoenaed may submit a motion to the Commission for it to be quashed or modified. 11 CFR 111.15.

Following a ''reason to believe'' finding, the Commission may attempt to reach a conciliation agreement with the respondent(s) prior to reaching the ''probable cause'' stage of enforcement (i.e., a pre-probable cause conciliation agreement). See 11 CFR 111.18(d). If the Commission is unable to reach a pre-probable cause conciliation agreement with the respondent, or determines that such a conciliation agreement would not be appropriate, upon completion of the investigation referenced in the preceding paragraph, the Office of General Counsel prepares a brief setting forth its position on the factual and legal issues of the matter and containing a recommendation on whether or not the Commission should find ''probable cause to believe'' that a violation has occurred or is about to occur. 11 CFR 111.16(a).

The Office of General Counsel notifies the respondent(s) of this recommendation and provides a copy of the probable cause brief. 11 CFR 111.16(b). The respondent(s) may file a written response to the probable cause brief within fifteen days of receiving said brief. 11 CFR 111.16(c). After reviewing this response, the Office of General Counsel shall advise the Commission in writing whether it intends to proceed with the recommendation or to withdraw the recommendation from Commission consideration. 11 CFR 111.16(d).

If the Commission determines by an affirmative vote of four members that there is ''probable cause to believe'' that a respondent has violated the Act or Commission regulations, the Commission authorizes the Office of General Counsel to notify the respondent by letter of this determination. 11 CFR 111.17(a). Upon a Commission finding of ''probable cause to believe,'' the Commission must attempt to reach a conciliation agreement with the respondent. 11 CFR 111.18(a). If no conciliation agreement is finalized within the time period specified in 11 CFR 111.18(c), the Office of General Counsel may recommend to the Commission that it authorize a civil action for relief in the appropriate court. 11 CFR 111.19(a). Commencement of such civil action requires an affirmative vote of four members of the Commission. 11 CFR 111.19(b). The Commission may enter into a conciliation agreement with respondent after authorizing a civil action. 11 CFR 111.19(c).

[FR Doc. E7–22524 Filed 11–16–07; 8:45 am]

BILLING CODE 6715–01–P

[4] The Office of General Counsel may also recommend that the Commission find no ''reason to believe'' that a violation has been committed to is about to be committed, or that the Commission otherwise dismiss a complaint without regard to the provisions of 11 CFR 111.6(a). 11 CFR 111.7(b).

[5] If the Commission finds no ''reason to believe,'' or otherwise terminates its proceedings, the Office of General Counsel shall advise the complainant and respondent(s) by letter. 11 CFR 111.9(b).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1306

[Docket No. DEA–287F]

RIN 1117–AB01

Issuance of Multiple Prescriptions for Schedule II Controlled Substances

AGENCY: Drug Enforcement Administration (DEA), Department of Justice

ACTION: Final rule.

SUMMARY: The Drug Enforcement Administration (DEA) is finalizing a Notice of Proposed Rulemaking published on September 6, 2006 (71 FR 52724). In that document, DEA proposed to amend its regulations to allow practitioners to provide individual patients with multiple prescriptions, to be filled sequentially, for the same schedule II controlled substance, with such multiple prescriptions having the combined effect of allowing a patient to receive over time up to a 90-day supply of that controlled substance.

DATES: *Effective Date:* This rule is effective December 19, 2007.

FOR FURTHER INFORMATION CONTACT: Mark W. Caverly, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Telephone (202) 307–7297.

SUPPLEMENTARY INFORMATION:

Background

On September 6, 2006, the Drug Enforcement Administration (DEA) published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) (71 FR 52724) proposing to amend its regulations to allow practitioners to provide individual patients with multiple prescriptions, to be filled sequentially, for the same schedule II controlled substance, with such multiple prescriptions having the combined effect of allowing a patient to receive over time up to a 90-day supply of that controlled substance.

Comments Received

DEA received 264 comments regarding the NPRM. Two hundred thirty-one commenters supported the NPRM, 33 commenters opposed the rulemaking. Commenters supporting the NPRM included six physician associations, including those representing anesthesiologists, pediatricians, and psychiatrists, and three state level licensing organizations;

Attachment 6

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2009–24]

Amendment of Agency Procedures for Probable Cause Hearings

AGENCY: Federal Election Commission.

ACTION: Agency procedure; amendment.

SUMMARY: On November 19, 2007, the Federal Election Commission (''Commission'') published a procedural rule making permanent a program allowing respondents in enforcement proceedings under the Federal Election Campaign Act, to have a hearing before the Commission. The Commission is now amending its procedures to provide that the Commissioners may ask questions of the General Counsel and the Staff Director, and their staff, during probable cause hearings. This amendment will conform the procedures for enforcement hearing with the Commission's procedures for audit hearing published earlier this year.

DATES: The amended hearing procedures will be effective on October 28, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Mark D. Shonkwiler, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Federal Election Commission is amending its procedures to provide that Commissioners may ask questions of the General Counsel and the Staff Director, and their staff, during probable cause hearings.

I. Background

On October 25, 2007, the Commission adopted an agency procedure that made permanent a program that allows respondents in enforcement proceedings under the Federal Election Campaign Act (''FECA''), to have a hearing before the Commission prior to the Commission's consideration of the General Counsel's recommendation on whether to find probable cause to believe that a violation has occurred. *See* Procedural Rules for Probable Cause Hearings, 72 FR 64919 (Nov. 19, 2007) (''PC Hearing Procedures''). In PC Hearing Procedures, the Commission indicated that during probable cause hearings, ''[r]espondents (or their counsel) will have the opportunity to present their arguments, and Commissioners, the General Counsel, and the Staff Director will have the opportunity to pose questions to the respondent, or respondent's counsel, if represented.'' PC Hearing Procedures, 72 FR at 64920. The PC Hearing Procedures did not specifically address whether Commissioners could pose questions to the General Counsel and the Staff Director during probable cause hearings.

On June 25, 2009, based in part upon its experience with the probable cause hearing program, the Commission adopted a new agency procedure providing committees that are audited by the Commission, pursuant to the FECA, with the opportunity to have a hearing before the Commission prior to the Commission's adoption of a Final Audit Report. *See* Procedural Rules for Audit Hearings, 74 FR 33140 (July 10, 2009) (''Audit Hearing Procedures''). In Audit Hearing Procedures, the Commission indicated that during audit hearings, ''Commissioners will have the opportunity to pose questions to the audited committee, and Commissioners may ask questions designed to elicit clarification from the Office of General Counsel or Office of the Staff Director.'' Audit Hearing Procedures, 74 FR at 33142.

II. Amendment of Agency Procedures for Probable Cause Hearings

Consistent with the recently adopted agency procedures for audit hearings, the Commission is amending its procedures for probable cause hearings to specifically provide that Commissioners may ask questions during probable cause hearings designed to elicit clarification from the Office of General Counsel or Office of the Staff Director. The Commission is not making any other changes to its procedures for probable cause hearings.

Conclusion

This document amends an agency practice or procedure. This document does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public comment, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedure Act (''APA''). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.

On behalf of the Commission.

Dated: October 22, 2009.

Steven T. Walther,

Chairman, Federal Election Commission.

[FR Doc. E9–25900 Filed 10–27–09; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM416; Special Conditions No. 25–393–SC]

Special Conditions: Bombardier Model Challenger CL–600–2B16 (CL–605, Ref. Note 9 of TC No. A21EA); Enhanced Flight Vision System (EFVS)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Bombardier Model CL–600–2B16 (CL–605) airplane. This airplane, as modified by Rockwell Collins Aerospace & Electronics, Inc., will have an Enhanced Flight Vision System (EFVS). The EFVS is a novel or unusual design feature which consists of a head-up display (HUD) system modified to display forward-looking infrared (FLIR) radar imagery. The airworthiness regulations applicable to pilot compartment view do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is October 9, 2009. We must receive your comments by December 14, 2009.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM–113), Docket No. NM416, 1601 Lind Avenue, SW., Renton, Washington 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM416. You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Dale Dunford, FAA, ANM–111, Airplane and Flight Crew Interface, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2239; fax (425) 227–1320; e-mail: *dale.dunford@faa.gov.*

SUPPLEMENTARY INFORMATION: The FAA has determined that the substance of these special conditions has previously

Attachment 7

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2011–15]

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

AGENCY: Federal Election Commission.

ACTION: Notice of agency procedure.

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

DATES: Effective October 28, 2011.

FOR FURTHER INFORMATION CONTACT: Kathleen Guith, Acting Associate General Counsel, or Joshua Smith, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Election Commission (Commission) is establishing an agency procedure to formalize the agency's practice in the latter stages of the Probable Cause process when, pursuant to 11 CFR 111.16(d) of the Commission's regulations, the Office of General Counsel (OGC) advises the Commission in writing as to whether or not it intends to proceed with a Probable Cause recommendation.

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

When OGC makes its recommendation on whether or not the Commission should find probable cause, such recommendation is accompanied by a brief (Probable Cause Brief) supporting the recommendation. A copy of the Probable Cause Brief is provided to each respondent. 11 CFR 111.16(b). The Probable Cause Brief must comport with the disclosure procedures adopted by the Commission on June 2, 2011. *See* Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 FR 34986 (June 15, 2011).

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

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

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

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

1. The OGC Notice provided to the Commission by OGC following the Reply Brief (or if there was a Probable Cause Hearing, following the hearing), *see* 11 CFR 111.16(d), shall contemporaneously be provided to the respondent.

2. The OGC Notice may include information that replies to, or argues facts or law in response to, the respondent's Reply Brief, or arising out of the Probable Cause Hearing, if any.

3. If the OGC Notice contains new facts or new legal arguments raised by OGC and not contained in the Probable Cause Brief, or raised at the Probable Cause Hearing, if any, the respondent may submit a written request to address the new points raised by OGC. Any such written request must specify the new points that the respondent seeks to address and must be submitted to the Secretary of the Commission within five business days of the respondent's receipt of the OGC Notice.

4. Within five business days of receipt of a written request from a respondent, the Commission may, in its sole discretion, exercised by four affirmative votes, allow the respondent to address in writing the new points raised by the OGC Notice. If the Commission approves the request, the Commission shall provide the respondent with a date by which the Supplemental Reply Brief must be filed, which shall in no event exceed 10 calendar days from notification to the respondent of the Commission's approval. Where necessary, the Commission reserves the right to request from a Respondent an agreement tolling any deadline, including any statutory or other deadline found in 11 CFR part 111. Any request that is not approved by the Commission within five business days of the Commission's receipt of the request shall be deemed denied without further action by the Commission.

5. All requests and Supplemental Reply Briefs should be directed to the Commission Secretary via e-mail (*secretary@fec.gov*) or fax (202–208–3333). Upon receipt of a request, the Commission Secretary shall forward the request or brief to each Commissioner and the General Counsel. Absent good cause, to be determined at the sole discretion of the Commission, exercised by four affirmative votes, late requests will not be accepted.

III. Conclusion

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

This notice establishes agency practices or procedures. This procedure sets forth the Commission's intentions concerning the exercise of its discretion in its enforcement program. However, the Commission retains that sole discretion and may or may not exercise it as appropriate with respect to the facts and circumstances of each enforcement matter it considers, with or without notice. Consequently, this procedure does not bind the Commission or any member of the general public, nor does it create any rights for respondents or third parties. As such, this notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay of effective date under 5 U.S.C. 553 of the Administrative Procedure Act (APA). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and

comment are required by the APA or another statute, are not applicable.

Dated: October 6, 2011.

On behalf of the Commission.

Cynthia L. Bauerly,

Chair, Federal Election Commission.

[FR Doc. 2011–26415 Filed 10–12–11; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0199; Directorate Identifier 2011–CE–005–AD]

RIN 2120–AA64

Airworthiness Directives; Eclipse Aerospace, Inc. Airplanes Equipped With Pratt & Whitney Canada, Corp. PW610F–A Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to revise an existing airworthiness directive (AD) that applies to all Eclipse Aerospace, Inc. Model EA500 airplanes equipped with Pratt & Whitney Canada, Corp. (P&WC) Model PW610F–A engines. The existing AD currently requires incorporating an operating limitation of a maximum operating altitude of 30,000 feet into Section 2, Limitations, of the airplane flight manual (AFM). Since we issued that AD, P&WC has developed a design change for the combustion chamber liner assembly. This proposed AD would retain the requirements of the current AD, clarify the engine applicability, and allow the option of incorporating the design change to terminate the current operating limitation and restore the original certificated maximum operating altitude of 41,000 feet. We are proposing this AD to correct the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by November 28, 2011.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Pratt & Whitney Canada, 1000 Marie-Victorin Blvd., Longueuil, Quebec, J4G 1A1 Canada; *telephone:* (800) 268–8000; *Internet: http://www.P&WC.ca*. You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (*phone:* 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Eric Kinney, Aerospace Engineer, FAA, Fort Worth Aircraft Certification Office, 2601 Meacham Blvd., Fort Worth, Texas 76137; *telephone:* (817) 222–5459; *fax:* (817) 222–5960; *e-mail: eric.kinney@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–0199; Directorate Identifier 2011–CE–005–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On March 3, 2011, we issued AD 2011–06–06, amendment 39–16631 (76 FR 13078, March 10, 2011), for all Eclipse Aerospace, Inc. Model EA500 airplanes equipped with Pratt & Whitney Canada, Corp. (P&WC) Model PW610F–A engines. That AD superseded AD 2008–24–07, amendment 39–15747 (73 FR 70866, November 24, 2008) and requires incorporating an operating limitation of a maximum operating altitude of 30,000 feet into Section 2, Limitations, of the AFM. That AD resulted from several incidents of engine surge due to hard carbon build up blocking the static vanes at maximum operating altitude of 37,000 feet. We issued that AD to prevent hard carbon buildup on the static vane, which could result in engine surges. Engine surges may result in a necessary reduction in thrust and decreased power for the affected engine. In some cases, this could result in flight and landing under single-engine conditions.

Actions Since Existing AD Was Issued

Since we issued AD 2011–06–06, amendment 39–16631 (76 FR 13078, March 10, 2011), P&WC has issued a new service bulletin that incorporates a design change to the combustion chamber liner assembly. The current design of the combustion chamber liner assembly is a one-piece configuration. The new design change involves replacing the combustion chamber liner assembly with one that has inner and outer liner assemblies that are held by cast heat shields.

Upon replacing the combustion chamber liner assembly on both engines with the new design combustion chamber assemblies, the operating limits of the airplane can be restored to the original certificated maximum operating altitude of 41,000 feet.

We have been informed that all new P&WC Model PW610F–A engines manufactured for new production Eclipse Aerospace, Inc. Model EA500 airplanes will incorporate the new combustion chamber liner assembly. The serial numbers for these new engines will start after PCE–LA0583. Therefore, to make it clear that this proposed AD will not be applicable to the new production airplanes, we need to clarify the engine applicability to include an end serial number.

Relevant Service Information

We reviewed Pratt & Whitney Canada Service Bulletin P&WC S.B. No. 60077, dated June 1, 2011. The service information describes procedures for