

Respondents, however, may deem other information that the Commission does not disclose as valuable to the respondents' defense. Note that this practice can cause delay because, upon receiving these documents and depositions, respondents' counsel often seek an extension of time since counsel must submit the reply brief within 15 days of receiving the General Counsel's probable cause brief. Should counsel have access to all documents prior to the probable cause stage?

The Commission's practice in providing depositions and documents to respondents contrasts with the practice of some other civil law enforcement agencies during the investigative stage of their proceedings, in which the only deposition transcript supplied to the respondent is the respondent's own deposition. Further, during the pendency of an investigation, section 6b of the APA, 5 U.S.C. 555(c), grants investigative agencies the right to deny the request of a witness for copies of transcripts of his or her own testimony based on "good cause," such as concerns that witnesses still to be examined might be coached. *Commercial Capital Corp. v. SEC*, 360 F.2d 856, 858 (7th Cir. 1966). On the other hand, it can be suggested the Commission's practice contrasts with procedural rights afforded in litigation matters under the Federal Rules of Civil Procedure, which give litigants the right to attend the depositions of all persons deposed in their case and obtain copies of all deposition transcripts.

The Commission would like comments on whether and when the respective depositions (respondent, other respondents, and witness) should be released and to whom the depositions should be released. Should respondents be allowed full access to the depositions of all other respondents, including those with the same and those with competing interests, prior to the Commission's decision to sue in court? If so, should this occur only at the probable cause stage or at some point during the investigation? If the latter, when? Would full access to the deposition transcripts of all other respondents increase the likelihood of a public disclosure in violation of 2 U.S.C. 437g(a)(12)? If full access were to be granted prior to the probable cause stage, would it compromise the effectiveness of the Commission's investigations? Should respondents be allowed to attend depositions of other respondents, including those with the same and those with competing interests? If so, in what circumstances? One change in practice to make transcripts of a respondent's own

testimony more readily available would be for the Office of General Counsel routinely to allow deponent-respondents to procure immediately a copy of their own transcript unless on a case-by-case basis the General Counsel concludes (or the Commission concludes, on the recommendation of the General Counsel) that it is necessary to the successful completion of the investigation to withhold the transcript until completion of the investigation.

Similarly, the Commission seeks comments on whether all relevant documents that would be required to be disclosed in civil litigation pursuant to Federal Rule of Civil Procedure 26(a) should be provided with the probable cause brief. Would it be practical to do so in cases involving voluminous records and multiple respondents? Who should bear the costs of copying documents and ordering deposition transcripts from court reporters? Would providing all such materials and allowing time for their review further delay the submission of responsive briefs? Would doing so compromise investigations? Should this be done on a case-by-case basis? Would some standard other than Rule 26(a) of the Federal Rules of Civil Procedure provide a more workable standard?

The Commission seeks comments on these or other approaches to balancing its need to conduct effective investigations with the interests of respondents seeking to support their positions before the Commission.

#### 5. Extensions of Time

Under what circumstances, if any, should extensions of time be granted to respondents to respond to the probable cause brief? Are there particular situations in which extensions of time should be denied? If extensions are granted, should they be contingent on respondents' agreements to toll the statute of limitations for the extension period?

#### 6. Appearance Before the Commission

Pursuant to the FECA, Respondents are permitted to present their position through written submissions in response to the complaint and the General Counsel's probable cause brief, and may also do so at the reason-to-believe stage pursuant to Commission practice. Neither the FECA nor the APA specifically provide that respondents also be permitted the opportunity to appear and present their positions in person, and the Commission has no procedure allowing such appearances in

the context of MURs.<sup>2</sup> The Commission seeks comment on whether respondents should be entitled to appear before the Commission, either *pro se* or through counsel, at the probable cause stage and on motions to quash subpoenas. If so, should appearances be limited to certain types of hearings and cases? If so, what should be the limiting criteria? What should be the scope and form of the personal appearance? Should the Commission be permitted to draw an adverse inference if respondents decline to answer certain questions or do not fully answer them? Allowing counsel to appear would add an additional procedural right, but would also lengthen the enforcement process. How would this additional step be balanced with the timeliness of completing a MUR? Is the Commission justified in prolonging the process? Would this complicate the process or add unnecessary time constraints? What would respondents achieve that they are not already afforded by the statutory process? Would affording the opportunity to appear in person before the Commission at the probable cause stage diminish respondents' interest in conciliating at an earlier stage? Would it place respondents with limited resources, or those located far from Washington, at a comparative disadvantage, and if so, is this a valid reason to restrict personal appearances for all respondents? In cases involving multiple respondents, how would the Commission protect the confidentiality of other respondents also wishing to appear? The Commission would also benefit from hearing about whether other civil law enforcement agencies provide for personal appearances before agency decision-makers.

#### 7. Releasing Documents or Filing Suit Before an Election

The Commission's practice is to release to the public closed enforcement matters in the normal course of business, even if this occurs immediately prior to, or following, an election that may involve one of the respondents in the matter. Upon resolution of an enforcement matter, the Commission could not deny a FOIA request for disclosure of conciliation agreements or other dispositions simply because of the proximity of an upcoming election. Furthermore, the FECA provides for expedited conciliation immediately prior to an election, which allows voters to

<sup>2</sup> However, the Office of General Counsel, which may be recommending action adverse to the respondent, is present to answer questions of law and fact for the Commission.