



February 21, 2017

Via Certified Mail

Lynne A. McFarland
Inspector General
Office of Inspector General
Federal Election Commission
999 E Street, NW
Room 940
Washington, DC 20463

Designated Agency Ethics Officer
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Request for Investigation

Dear Inspector General McFarland and FEC Designated Agency Ethics Officer,

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.¹ In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability.

CoA Institute requests that you open an investigation² to determine whether Ellen Weintraub, a Commissioner of the Federal Election Commission (“FEC”), violated applicable ethics regulations when she used government property and official time to call on President Trump to provide evidence of his claims of voter fraud in New Hampshire and then continued to promote her statement after it was issued. We also urge you to determine whether it is appropriate for the FEC website to continue to host Commissioner Weintraub’s statement.

Factual Background

On February 9, 2017, President Trump was reported to have stated that voter fraud in New Hampshire cost him and former Senator Kelly Ayotte electoral victories in that state in

¹ See CAUSE OF ACTION INSTITUTE, *About*, www.causeofaction.org/about/.

² CoA Institute was unable to determine the identity of the FEC’s designated agency ethics officer; as such, we ask that this request for investigation be forwarded to the appropriate ethics officials.

November 2016.³ In response to that news report, Commissioner Weintraub issued a statement, currently hosted on the FEC website, calling “upon President Trump to immediately share his evidence with the public and with the appropriate law-enforcement authorities so that his allegations may be investigated promptly and thoroughly.”⁴ Her statement also claimed that the “scheme the President of the United States alleges would constitute thousands of felony criminal offenses under New Hampshire law.”⁵ Commissioner Weintraub subsequently appeared on CNN⁶ and NPR⁷ to discuss her statement.

When subsequently asked her about her statement, Commissioner Weintraub answered that “[a]s a commissioner on the Federal Election Commission, I fight every day to build the faith of the American people in our elections. . . . It’s absolutely my right to raise public questions about another public official’s statements about the integrity of our elections.”⁸ In October 2016, however, Commissioner Weintraub took the exact opposite stance, stating through her Twitter account that matters of voter fraud were beyond FEC jurisdiction.⁹ Specifically, in response to the question “What is the FEC doing abt [sic] recent reports of voter fraud?” Commissioner Weintraub replied, “That’s outside the @FEC’s jurisdiction. We do campaign finance *only*. The elections themselves are handled by the states.”¹⁰

Discussion of the Ethics Violations

FEC regulations provide that FEC members and employees are covered by the Office of Government Ethics (“OGE”) rules governing, *inter alia*, the proper use of government property and official time.¹¹ An “employee” for the purposes of these OGE rules includes “any officer or employee of an agency, including a special Government employee.”¹² An “agency” is defined as “an executive agency as defined in 5 U.S.C. § 105.”¹³ In turn, an executive agency is defined as “an Executive Department, a Government corporation, and an independent establishment.”¹⁴

³ See, e.g., Erica Werner, *Trump revived voter fraud claims in lunch with senators*, ABC NEWS (Feb. 10, 2017), <http://abcn.ws/2kXKFBR>.

⁴ Fed. Election Comm’n, Statement of Comm’r Ellen L. Weintraub (Feb. 10, 2017) (Ex. 1), *available at* <http://bit.ly/2lmPnKe>.

⁵ *Id.*

⁶ @EllenLWeintraub, Twitter (Feb. 13, 2017, 9:57 PM), <http://bit.ly/2kONH8U> (“Get the scoop on my request for #voterfraud proof from @POTUS with @ErinBurnett on @OutFrontCNN”) (Ex. 2).

⁷ Morning Edition, *Trump Claims Voter Fraud, FEC Commissioner Wants Administration’s Evidence*, NAT’L PUB. RADIO (Feb. 15, 2017), <http://n.pr/2lTtBLU> (Ex. 3); see also @EllenLWeintraub, Twitter (Feb. 15, 2017, 10:32 AM) (promoting appearance on NPR) (Ex. 5).

⁸ Joe Schoffstall, *Dem FEC Commission Potentially Violated Federal Ethics Laws With Trump Demand*, WASH. FREE BEACON (Feb. 15, 2017), <http://bit.ly/2kOJsu1>.

⁹ @EllenLWeintraub, Twitter (Oct. 7, 2016, 7:08 AM), <http://bit.ly/2kXoUSK> (Ex. 4).

¹⁰ *Id.*

¹¹ 7 C.F.R. § 7.1 (FEC “members and employees . . . are subject to the following regulations . . . 5 CFR part 2635”).

¹² 5 C.F.R. § 2635.102(h).

¹³ *Id.* § 2635.102(a).

¹⁴ 5 U.S.C. § 105.

The FEC likely qualifies as “an independent establishment”¹⁵ and Commissioner Weintraub is an “officer” because of her leadership position and Senate confirmation.¹⁶ These definitions notwithstanding, the FEC provides that its “members and employees” are subject to OGE rules.¹⁷

OGE regulations regarding the use of government property provide that “[a]n employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.”¹⁸ Such purposes are limited to those “for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation.”¹⁹ Similarly, OGE regulations limit the use of official time to “to perform[ing] official duties.”²⁰ An employee is prohibited from “encourage[ing], direct[ing], coerc[ing], or request[ing] a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.”²¹ Pursuant to these rules, Commissioner Weintraub may only use FEC property and act in her official capacity for purposes that advance the FEC mission as authorized by law.

Consistent with Commissioner Weintraub’s October 2016 Twitter statement, FEC jurisdiction is limited to the administration of federal campaign finance law. The FEC’s authorizing authority provides that it “shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act [*i.e.*, the Federal Election Campaign Act, as amended] and chapter 95 and chapter 96 of Title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.”²² The cited chapters of Title 26 of the U.S. Code relate to the Presidential Election Campaign Fund and primary matching accounts.

In compliance with its authorizing statute, the FEC website describes its jurisdiction as being limited to “the financing of campaigns for the U.S. House, the U.S. Senate, the Presidency and the Vice Presidency. Federal campaign finance law covers three broad subjects . . . : [1] public disclosure of funds raised and spent to influence federal elections; [2] restrictions on contributions and expenditures made to influence federal elections; and [3] the public financing of Presidential campaigns.”²³ As evidenced by her tweet in October 2016, Commissioner Weintraub was and is aware of the boundaries of the FEC’s authority.²⁴

¹⁵ See *id.* § 104(1) (An independent establishment is “an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment[.]”).

¹⁶ See generally *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510–13 (2010) (discussing principal and inferior officers and collecting cases).

¹⁷ 7 C.F.R. § 7.1.

¹⁸ 5 C.F.R. § 2635.704(a).

¹⁹ *Id.* § 2635.704(b)(2).

²⁰ *Id.* § 2635.705(a).

²¹ *Id.* § 2635.705(b).

²² 52 U.S.C. § 30106(b)(1).

²³ FED. ELECTION. COMM’N, THE FEC AND THE FEDERAL CAMPAIGN FINANCE LAW (updated Feb. 2017), <http://bit.ly/2116P66>.

²⁴ See Ex. 4.

Despite her knowledge of the FEC's limited jurisdiction, the two subjects discussed in Commissioner Weintraub's February 2017 statement — investigating alleged voter fraud and New Hampshire felony criminal violations — go beyond that jurisdiction. In addition, the statement was issued on FEC letterhead and remains, as of the time of this letter, posted on the FEC website.²⁵ Commissioner Weintraub also used her official time and status to prepare the statement, direct her staff to format and publish the statement, and promote the statement on CNN and NPR. For these reasons, Commissioner Weintraub's use of government property to issue the statement and the time she took to defend that statement in national media outlets are violations of the ethics regulations to which she is subject.

Conclusion

The public must have confidence that federal agency employees are acting within their ethical requirements and that taxpayer dollars are being used for the purposes for which they are appropriated by Congress. Commissioner Weintraub's behavior threatens the public's faith in both of these important principals. CoA Institute therefore requests that you open an investigation to determine whether and to what extent she has violated her ethical obligations in this matter. We further urge you to remove the offending statement from the FEC website.

If you have any questions about this request for investigation, please contact me at (202) 499-4232 or james.valvo@causeofaction.org. Thank you for your attention to this matter.



R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR

²⁵ See Ex. 1.