

1. The new "Office" or "Board" is expressly authorized to take up matters on its own initiative and to conduct interviews and obtain testimony in its "review" of such matters. See Section 1(c)(1)(A). This raises several concerns, listed below:

As the Committee noted in its earlier feedback to the task force, the interview of witnesses by both the new entity and the Committee might result in conflicting statements that would undermine the value of testimony from that witness.

Statements from witnesses would also likely be obtained prematurely due to the time deadlines imposed on the new entity. Sometimes there are valid investigative reasons not to reveal the existence of an investigation to a witness until other witnesses are interviewed or other evidence obtained. In the course of its proceedings, the new entity might reveal critical evidence or information to key witnesses. The failure of those witnesses to keep this information confidential may be very harmful to the integrity of any future Committee inquiry.

The "self-initiation" discretion could undermine current rules that limit complaints to those filed by Members. An agent could provide information to the new entity that would trigger review under its rules. There is no accountability as to the source of information, unlike with respect to "complainants," who must certify that the "information is submitted in good faith and warrants the review and consideration of the Committee," and who must provide a copy of the complaint and all attachments to the respondent. See Committee Rules (d) and (e).

2. The new entity must "transmit to the individual who is the subject of the second-phase review the written report and findings of the board[.]" See Section 1(c)(2)(C)(ii). In addition, the report will include "findings of fact," "a description of any relevant information that it was unable to obtain or witnesses whom it was unable to interview [] and the reasons therefore," and a

recommendation for the issuance of subpoenas where appropriate."

It is a bad idea for the Committee's purposes that the "written report and findings of the board" be transmitted both to the Committee and to the individual under review. This will provide information to a potential respondent at an inappropriate stage, including alerting the respondent as to witnesses who have been identified as potential recipients of subpoenas. At a minimum, this would provide opportunities for the coordination (or appearance of coordination) of testimony. Potential respondents would also be alerted as to difficulties encountered in obtaining information from certain witnesses. This could discourage negotiated outcomes if a respondent knows that certain individuals are not cooperating witnesses.

This process is not sensitive to the need for confidentiality of witness information at the early stages of an investigation. Members, staff, and private individuals should be able to provide information in confidence, at least at the initial stages. The new rules may have an anti-whistleblower effect and possibly employment ramifications for individuals as well. For example, what if it is revealed that a current employee is providing or refusing to provide information about his or her employing Member? A previous ethics task force was "mindful" of the need to "protect the confidentiality of a witness prior to publicly disclosing" a statement of alleged violation. Report of the Ethics Reform Task Force on H. Res. 168, 105th Cong., 1st Sess. at 25 (June 17, 1997).

The proposal is also inconsistent with Committee rules and practices that keep investigative information confidential. Under Committee Rule 26(f), evidence gathered by an Investigative Subcommittee that would potentially be used to prove a violation "shall be made available to the respondent and his or her counsel only after each agrees, in writing, that no document, information, or other materials shall be made public until" a Statement of Alleged Violation is made public by the Committee or an adjudicatory hearing is commenced.

There is no rule or precedent in effect for the new entity for dealing with concerns of the Department of Justice in cases of concurrent

jurisdiction. As noted, under the proposed process, there is considerable potential for the making of inconsistent statements by witnesses and for the release of confidential information. If this occurs, it could easily undermine active criminal investigations.

The Board may make "findings of fact" as part of their submission. This is generally a function for a trier of fact after an opportunity for a defendant/respondent to cross-examine witnesses or challenge the evidence. What if the findings differ from those reached by the Committee?

3. There appears to be a requirement that the Committee publicly disclose Board submissions to the Committee. See Section 3(2). This would occur if the Committee declines to empanel an Investigative Subcommittee or if one year has passed from the date of the referral from the new entity.

This means that the Committee must release the Board's findings, even if the Committee has already determined to handle the matter non-publicly. This is inconsistent with the discretion now with the Committee (and investigative bodies generally) to exercise judgment as to what matters to address in a non-public fashion. With the possibility of review by the new entity and public disclosure of conduct, there will be greatly reduced incentive for witnesses and investigated parties to cooperate with the Committee or to do so with complete cooperation and candor.

This procedure also may place artificial pressure on an Investigative Subcommittee to complete its work in well less than a year, regardless of the impact on the investigation. While such a time period may be sufficient, neither the Department of Justice nor other law enforcement entities and regulatory bodies, are subject to such limitations as they would generally impact adversely on the completeness of an inquiry.

4. A provision in the proposal provides that the Office will cease its review of a matter on the request of the Committee "because of the ongoing investigation of such matter by the Committee." See Section 1(d).

This rule should be clarified to make clear that it includes informal fact-finding efforts by the Chair and Ranking Member of the Committee. Otherwise, this important rule may only have effect in the unusual case of empanelled subcommittees. New language could

be ``because of the ongoing review of this matter by the Committee in accordance with the Committee's rules." Section 1(d) and Section 3(3) should be revised.

5. If the new entity ceases such review at the request of the Committee it will ``so notify any individual who is the subject of the review." See Section 1(d).

There are valid circumstances under which the Committee would not want to notify an individual that it is undertaking review of a matter until it is ready to do so for valid investigative and privacy reasons. In general, it is not the routine practice of law enforcement entities to notify individuals. Such disclosures could trigger protective behaviors that might undermine an investigation, as well as lead individuals to hire of attorneys (perhaps unnecessarily and at considerable expense). [By analogy, would it be appropriate in all cases to notify a respondent that the Committee has referred evidence of criminal conduct to the Department of Justice? In many cases, it is in the interests of criminal law enforcement that such referrals be made in confidence.]

6. The new entity must adopt a ``rule requiring that there be no ex parte communications between any member of the board and any individual who is the subject of any review by the board." See Section 1(c)(2)(E)(iv).

This provision should be revised to prohibit communications from any interested persons and any member of the board, as well as make explicit that ex parte contacts include those made by counsel. A useful provision to examine in considering ex parte prohibitions is the provision contained in Federal Election Commission regulations pertaining to contacts with any Commissioner. See 11 C.F.R. §201.2.

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