

DOCUMENT ISSUE

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[Applicability of 44 U.S.C., sec. 3512 to the Federal Election Commission]. B-130961. April 20, 1977. 7 pp.

Decision by Elser B. Staats, Comptroller General.

Issue Area: Federal Regulatory Activities (3000).

Contact: Office of the General Counsel: General Government Matters.

Budget Function: General Government: Other General Government (806).

Organization Concerned: Federal Election Commission.

Authority: Federal Reports Act, as amended (P.L. 93-153, sec. 409; 87 Stat. 593; 44 U.S.C. 3512 (Supp. V)). Federal Election Campaign Act Amendments of 1976 (P.L. 94-283; 90 Stat. 475); 2 U.S.C.A. 437c(e) (1). 44 U.S.C. 3507. 2 U.S.C.A. 437d. 2 U.S.C.A. 438. 44 U.S.C. 3502. B-180224 (1974). S. Rept. 94-677, 1. 38 Fed. Reg. 24345-24347.

A determination was requested as to whether the Federal Elections Commission's information gathering activities are subject to review and clearance by GAO, pursuant to an amendment to the Federal Reports Act. Under criteria agreed to by the GAO and the Office of Management and Budget, the Commission is an independent Federal regulatory agency for the purposes of 44 U.S.C. 3512. Nothing in the Federal Election Campaign Act, as amended, or its legislative history suggests that Congress intended the Commission to be exempt from this law. (Author/SC)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

*Levin
GGM*

FILE: B-130001

DATE: APR 20 1977

**MATTER OF: Applicability of 44 U.S.C. § 3512 to Federal
Election Commission**

DIGEST: Under general criteria agreed to by the General Accounting Office and the Office of Management and Budget, the Federal Election Commission is an "independent Federal regulatory agency" for purposes of 44 U.S.C. § 3512, as the Commission is not subject to direct and ongoing control or supervision by the executive, and is responsible for policy formulation and enforcement of the Federal Election Campaign Act, as amended. Nothing in the Federal Election Campaign Act, as amended, or its legislative history suggests that Congress intended the Commission to be exempt from 44 U.S.C. § 3512.

This decision is in response to a request by the Federal Election Commission (Commission) that we determine whether the Commission's information gathering activities are subject to review and clearance by the General Accounting Office (GAO) pursuant to section 409 of Pub. L. No. 95-188, approved November 18, 1978, 87 Stat. 808, 44 U.S.C. § 3512 (Supp. V, 1978), an amendment to the Federal Reports Act. Section 3512 provides in pertinent part:

"(a) In complying with this section, an independent regulatory agency shall not conduct or sponsor the collection of information upon an identical item from ten or more persons, other than Federal employees, unions, in advance of adoption or revision of any plans or forms to be used in the collection--

"(1) the agency submitted to the Comptroller General the plans or forms, together with the copies of pertinent regulations and of other related materials as the Comptroller General has specified; and

"(2) the Comptroller General has advised that the information is not presently available

to the independent agency from another source within the Federal Government and has determined that the proposed plans or forms are consistent with the provision of this section. The Comptroller General shall maintain facilities for carrying out the purposes of this section and shall render such advice to the requesting independent regulatory agency within forty-five days.

"(d) While the Comptroller General shall determine the availability from other Federal sources of the information sought and the appropriateness of the forms for the collection of such information, the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information. If no advice is received from the Comptroller General within forty-five days, the independent regulatory agency may immediately proceed to obtain such information."

By letter to the Director, Office of Management and Budget, dated February 8, 1974, B-188314, we set forth the general criteria, agreed upon by both offices, to be applied in determining which agencies are subject to GAO's review under the above-quoted provisions:

"General Criteria

"The language of section 400 of Public Law 93-153 [44 U.S.C. § 2613] and its legislative history suggest the following general criteria for determining what additional agencies constitute "independent Federal regulatory agencies" for purposes of that section:

"Independent. One purpose of section 400, as stated at page 51 of the conference report, is 'to preserve the independence of the regulatory agencies to carry out the quasi-judicial functions which have been entrusted to them by the Congress.' Considering this purpose, as well as the nature of the seven agencies specifically listed in the conference report, it appears that the term 'independent' as used in section 400

is intended to denote substantive independence from direct and ongoing supervision or control by the executive. Thus the fact that an agency is described formally as 'independent' or is independent in the sense that it is not organized within or under an executive department would not, of itself, indicate coverage by section 400. It is necessary, in addition, to identify some element in an agency's charter or structure affording particular freedom from direct control or supervision. The most significant element is provision of tenure for the person or persons heading the agency.

"Federal. Under this term, section 400 is limited to wholly Federal agencies; and would not therefore include joint Federal-State agencies or similar entities.

"Regulatory. This term requires exclusion of agencies which have only advisory, reporting, fact-finding, or review functions, even though they have investigative powers. The clearest examples of regulatory agencies are those which promulgate substantive regulations in the administration of a statute, and/or effectively influence conduct and the development of an area of law through adjudicative and enforcement functions (particularly if the agency has authority to initiate actions on its own motion).

"Agencying. There is no indication that section 400 is designed to enlarge the scope of the Federal Reports Act in terms of agencies covered. Thus agencies which were wholly or partially exempt from the act prior to its amendment by section 400 of Public Law 85-155 would retain the same status at present. For example, the basic act exempts " * * * the obtaining by a Federal bank supervisory agency of reports and information from banks as authorized by law and in the proper performance of the agency's functions in its supervisory capacity." 44 U.S.C. 3507. Accordingly, agencies whose information collection activities for regulatory purposes are exempt under 44 U.S.C. 3507 would not be included under section 400."

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We have reviewed the legislation establishing the Commission in accordance with the criteria set forth above and have concluded that the Commission is among the "independent Federal regulatory agencies" subject to GAO's review and clearance under 44 U.S.C. § 3512.

The Commission, as presently constituted, was established by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-202, approved May 11, 1976, 90 Stat. 673. Under section 101 of that Act:

"* * * the Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and six members appointed by the President of the United States, by and with the advice and consent of the Senate * * *"
3 U.S.C.A. § 437c(k)(1).
(Emphasis added.)

The section also establishes a 6-year term for the members of the Commission, except for the six members first appointed, whose termination dates are fixed by statute. The Senate Report on the Act, S. Rep. No. 94-877, 1 (1976), explains that this provision was designed to reconstitute the Commission as an independent executive branch agency. As such, the Commission meets our criteria for "independent" and "Federal" for purposes of 44 U.S.C. § 3512.

The Commission's functions and responsibilities also meet our criteria for "regulatory" as set forth above. The Commission is conferred subpoena power and is authorized, *inter alia*, to initiate investigations and proceedings in the execution of its duties under the Act; to initiate civil proceedings to enforce the Act; to render advisory opinions; and to formulate general policy in administering the Act. See 3 U.S.C.A. § 437d. The Commission is also required to prescribe suitable rules and regulations, subject to congressional disapproval, to carry out the provisions of the Act. 3 U.S.C.A. § 438.

Nevertheless, in a memorandum dated February 3, 1977, Commission attorneys assert that most of the Commission's information gathering activities are not subject to the requirements of 44 U.S.C. § 3512. They contend that this section appears principally applicable to agencies regulating business activities, while the Commission generally has no authority or reason to gather information from any commercial organizations. In support of this

contention, they suggest that the term "person" as used in 44 U.S.C. § 3512 is defined in 44 U.S.C. § 3502 primarily in terms of commercial and political organizations, and that the agencies which GAO has determined are subject to 44 U.S.C. § 3512 are principally involved in business activities. They further argue that since the Commission's information gathering activities are fixed by statute, the information sought can be neither burdensome nor available from another source within the Federal Government; and that Congress intended that the Commission be solely responsible and answerable to Congress if it is found that the Commission forms are burdensome or duplicative.

We cannot agree with the foregoing contentions. As quoted above, 44 U.S.C. § 3512 prohibits independent Federal regulatory agencies from sponsoring or collecting identical information from 15 or more agencies unless prior to adoption of the collections forms or plans the agencies submit them to the Comptroller General for review. The term "person" is defined for purposes of the Federal Reports Act in 44 U.S.C. § 3502 (2)(7), as meaning:

" * * * an individual, partnership, association, corporation, business trust, or legal representative, an organized group of persons, a State or territorial government or branch, or a political subdivision of a State or territory or a branch or a political subdivision."

Thus the definition of "person" as quoted is quite broad, including individuals and organized groups of persons, as well as various commercial and political entities. We fail to see how inclusion of reference to commercial organizations as one element in this definition limits the scope of an otherwise comprehensive term. Nothing in this definition or in section 3512 expressly or implicitly restricts applicability of GAO's clearance jurisdiction to agencies engaged in regulation of business activities, notwithstanding the fact that most agencies subject to GAO's jurisdiction deal primarily with business organizations.

Nor do we agree with the Commission attorneys' contention that since the Commission's information gathering activities are fixed by statute the information it sponsors or collects is not subject to GAO review for burden and availability from another source within the Federal Government. This contention was also advanced by several other independent Federal regulatory agencies commenting upon our notice of proposed rulemaking to establish policies, requirements, and procedures under 44 U.S.C. § 3512. In our statement of consideration to the regulations as adopted, 39 Fed Reg.

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24545 (July 2, 1974), we explained that our review responsibilities were not inconsistent with a regulatory agency's statutorily mandated collection requirements. We also specifically rejected the contention that information gathering requirements mandated by law should be exempted from clearance:

"* * * neither the language nor the legislative history of the Federal Reports Act in its original form or as amended by Pub. L. 88-153 provides any basis for the exemptions suggested. On the contrary, the legislative history of the original Federal Reports Act of 1942 specifically supports the inclusion of information required by law. This legislation, as passed by the House, exempted from its application 'any information now required by law to be given * * *.' However, this provision was deleted in conference and was omitted from the version enacted in 1942.

"We understand that, consistent with this legislative history, the Office of Management and Budget (and the predecessor Bureau of the Budget) has always considered such information collection to be covered by the act. Also the exemptions suggested would severely limit the coverage of information collection by regulatory agencies. Since enactment of section 400 of Pub. L. 88-153 reaffirms the applicability of the Federal Reports Act to the regulatory agencies, it seems reasonable to conclude that, if such significant exemptions had been intended, they would have been specified." Id., at 24546.

Finally, the attorneys contend that the Congress intended that the Commission be solely responsible and answerable to Congress with respect to the Commission's forms. However, neither the Federal Election Campaign Act, as amended, nor its legislative history conveys any intent to exempt the Commission from GAO review, and we see no conflict between our clearance function and congressional oversight with respect to the Commission.

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Accordingly, we conclude that the provisions of 44 U.S.C. § 2012 are applicable to the Commission's information gathering activities. 1/

SIGNED ELMER B. STAATS

Comptroller General
of the United States

1/ We would also point out for the Commission's future guidance our disagreement with their attorneys' suggestions that the validity of an agency information collection requirement is not affected by the failure to obtain GAO clearance. By the terms of 44 U.S.C. § 2012(a), an agency has no authority to promulgate an information collection requirement prior to its submission for clearance. Further, it is our position that GAO's determination, within its statutory 45-day review period, that an information collection proposal fails to satisfy the section 2012 clearance criteria is legally binding on the agency. See 39 Fed. Reg. at 24247 (July 2, 1974).