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Mr. Stephen Gura
Deputy Associate General General

Mr. Mark Shonkwiler
Assistant General Counsel

Federal Election Commission
999 E Street NW
Washington, DC 20463

SUBMISSION BY EMAIL (Adobe Acrobat .pdf format)

Dear Mr. Gura and Mr. Shonkwiler:

I am writing in response to the Commission's request for public comments on policies and procedures of the Federal Election Commission (FEC) promulgated in the Federal Register on Monday, December 8, 2008. I would be glad to provide testimony to the Commissioners at the hearing scheduled for January 14, 2009.

As a professional specializing in financial compliance and public disclosure for political committees for the last twenty-five years, I have worked in all areas of disclosure and enforcement with the FEC staff on behalf of numerous clients. I have worked with numerous authorized committees, connected and non-connected political committees, and national, state and local party committees registered with the FEC. I have also worked with federal committees with nonfederal accounts, and non-federal political organizations not registered with the FEC.

The comments presented below concern the review and enforcement process and standards with respect to the Reports Analysis Division, the Alternative Dispute Resolution, and the Audit Division. I have direct experience working with all three entities. The request is clear that comments should be limited to "structural, procedural and policy issues" and should not address individual staff members or specific cases. I note that in practice the regulated community is often judged based on the subjective opinions and biases of the staff rather than on compliance with the standards presented in the applicable statues and the Commission's regulations, particularly a committee that has been selected for an enforcement action.

My first general comment concerns the lack of public access to standards the Commission's divisions and programs use to judge compliance. My second general comment concerns a committee's lack of recourse when selected for enforcement action when there are substantive disagreements on basic factual information and legal interpretation between a committee and the Commission's staff. Once a committee is in an enforcement program, the Commission's staff controls the dissemination of the committee's communications and responses to the Commission and other branches of the FEC.

Reports Analysis Division (RAD)

In recent years, RAD Requests for Additional Information (RFAI) have become more consistent across the board, but remain deficient in three regards. First, requests are not always clear to the regulated community, or contain misleading or incorrect text. Often it is not until a later enforcement stage that a committee learns or recognizes an analyst was expecting an answer to a question that was not evident to the recipient from the words printed on paper. Second, RFAIs may request information not required by the applicable statutes or governing regulation, or contain information that is misleading or incorrect about the requirements as set out in the statutes and regulations. Both of these situations permit committees unknowingly to file detailed responses that may be considered inadequate by analysts and lead to misapplication of later enforcement actions.

Third, the tone in RFAI language is unnecessarily inflammatory and presumes serious violations of the law when the premise of a RFAI is to seek clarification or notify a committee that there may be a deficiency in the data reported. Since RFAIs are published on the internet at the time they are issued, and often before a committee has received the mailed letter, much less evaluated and begun to prepare a response, this has the effect of publicly disseminating negative information about a committee prior to providing the committee a sufficient time to post a response.

Frequently RAD directs a committee to a campaign guide for more information, yet there are areas in which the campaign guides contain information that is not consistent with the disclosure regulations, despite Commission approval. This puts a committee in the position of either complying with the regulation or complying with a campaign guides. RAD should not score RFAI responses based on the campaign guide, particularly if a committee indicates in a response that a transaction conforms to a specific regulation that appears inconsistent with the campaign guide.

This being said, there are several regulations that are so poorly constructed, for example Sec. 110.6(c)(2)(ii)(B) concerning reporting earmarked contributions by recipient committees, that they defy a method of practical compliance. Senior RAD staff members are generally in agreement that this particular regulation and other specific regulations that pose reporting problems. The Commission is to be commended for seeking this inquiry on procedures and policies, and I would humbly suggest that a next step would be to address these regulations and determine if a rulemaking process in order. These problematic regulations periodically create a lot of RFAI traffic and lead to enforcement actions for (often minor) infractions that might be avoided with better worded or more practical regulations.

It is impossible for the public to make informed comment concerning RAD referral policies because the internal standards guidelines are not available to the public. From a practitioner's perspective it appears to be hit or miss, based on some combination of "audit points," inadequate responses to RFAIs per an analyst's opinion, the number of and substantive nature of amendments filed, and RAD staff subjectivity. It would be helpful if the regulatory community had access to the standards, and I think it could be presented in a manner as to avoid what the comment request notice terms "without providing committees a road map on how to violate the law just enough to avoid being audited…" Furthermore,

I believe that more communication by RAD with the regulated community as a whole about its expectations (one avenue could be through the FEC Record) would foster a higher general standard of compliance and more accurate and complete reports.

Committees that are referred by RAD for enforcement should be provided with clear and precise reasons for the referral, and there should be a process for a committee to challenge the referral if there is a substantive difference concerning the alleged areas of inadequate compliance or reporting.

Alternative Dispute Resolution (ADR)

This program is not helpful and should not be expanded. It currently appears to be a mechanism for punishing minor reporting infractions and generating inequitable fines to permit the FEC to measure the quality of enforcement in simple quantitative dollar signs. It would be more useful if it the program was structured to be a process whereby committees are encouraged to correct compliance rather than to punish past problems.

Once a committee is offered the opportunity to participate in the ADR program, the committee is in the basic position to admit violations and pay up or risk the expense of being audited. The ADR program does provide a committee with specific areas of alleged non-compliance or inadequate reporting compiled from the RAD referral, but negotiations begin with the assumption that the alleged violation is valid. Unlike the RAD RFAI process or the audit process, which invite committees to explain perceived violations, committees in ADR are discouraged from providing mitigating factual and legal information. This puts a committee in the position of negotiating a fine and future compliance requirements for a violation that the committee does not believe to be well-substantiated. If agreement is not reached with ADR, there is no recourse for the committee except move on to a more costly stage of enforcement.

There do not appear to be standards or guidelines in setting the fines or compelling other forms of compliance. The fines seem to be purely subjective, and can jump up based on unexplainable factors after a committee has come to terms with a verbal agreement. Committees that have self-corrected processes and procedures after an infraction or violation occurs, but prior to referral, seem to receive harsher treatment since there is no new easy corrective action to implement to improve future compliance. Frequently I have been asked to come up with a "creative" remedy. I would like ADR to require that referred committees to be compliant and file complete reports in the future. ADR has become more amenable to considering committee edits to the conciliation agreements. But on the whole, there does not appear to be adequate oversight of this program by the Commission.

Audit

Audits are very costly for committees. The audit division should provide committees selected based on an internal referral a clear rationale as to why it was selected for audit. As with other internally generated enforcement actions, the committee has no recourse to challenge the referral, and unlike the ADR process whereby specific information is provided, a committee has no information to even understand the assumptions that generated an audit referral. As an interested member of the public and an experienced practitioner I have no sense of what the standards for referral are. And echoing my earlier concerns, there is no way to judge whether the referral process is neutral or fair because we do not know what it is. However, referral standards are primarily a RAD function, and the audit begins after the referral.

Findings are alleged violations of law. And regardless as to whether a finding is considered "enforcement" or not, the Conciliation Agreement that comes from the Office of General Counsel (OGC) with a fine attached after Commission approval of an audit is certainly enforcement.

If the Commission approves a limited scope audit, the committee should be apprised of the scope and the audit should be focused on that area. Increasingly audits seem to become fishing expeditions to uncover every flaw in a report and a committee's financial management, rather than to assess if the reports, as amended, are reasonably correct.

The audit process breaks down when there is substantive disagreement between the committee and the audit staff concerning factual and legal matters. The audit staff controls the board, and the committee has no recourse to object to any audit demands deemed unreasonable, and are subject to penalization. The standards that the auditors require a committee to meet in response to their requests and the burden of proof of challenging findings do not appear to be set by consistent internal policies or adherence to the regulations, but by whim.

The audit division is also in control of a committee's responses to the IAR, and can totally disregard a committee's position or misinterpret the contents. A committee's response to the potential findings presented at an exit conference and the response to the IAR contain important and detailed information that should be available to the Commission as the FAR is considered. Frequently the FAR will state "the committee had no response" concerning a matter that the committee expounded on at length, or will summarize a complex narrative into a sound bite that misrepresents the committee's position through omission, or will completely misstate a committee's response on a finding because of a disagreement or a misinterpretation of the committees position.

The committee has no sanctioned method of communicating its positions to the Commission, and risks violating *ex parte* regulations if it does. In an audit more so than other enforcement procedures, a committee's investment in the process should not be diminished or disregarded because an auditor determined it wasn't significant. The Commission should rectify this lapse in the process, first so that the Commissioners receive the unedited views and presentation submitted by a committee, and secondly, if there is still substantial disagreement with the findings and language in the FAR, that the committee has the opportunity to bring these matters to the Commission's attention and receive a fair hearing.

Thank you for this opportunity to comment.

Sincerely,

Whitney Burns