basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(f) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(j) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

* * * * *

Dated: December 31, 2012.

Jonathan R. Cantor,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2013–00800 Filed 1–17–13; 8:45 am]

BILLING CODE 9111–14–P

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2013–01]

Request for Comment on Enforcement Process

AGENCY: Federal Election Commission.

ACTION: Request for comments.

SUMMARY: The Federal Election Commission is requesting comment on certain aspects of its enforcement process. First and foremost, the Commission welcomes public comment on whether this agency is doing an effective job in enforcing the Act and Commission regulations. Additionally, the Commission is currently reviewing and seeks public comment on: Its policies, practices, and procedures during the enforcement process stage set forth in 2 U.S.C. 437g(a)(1), prior to the Commission's determination of whether there is ''reason to believe'' that a person has committed, or is about to commit, a violation of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. (''FECA'' or ''the Act'') and/or the Commission's implementing regulations; and the Commission's authority under 2 U.S.C. 437g(a)(5) to seek civil penalties from respondents pursuant to a finding of ''probable cause to believe'' that a respondent has violated the Act and/or Commission regulations, as well as the Commission's practice of seeking civil penalties prior to a finding of probable cause.

DATES: Comments must be received on or before Friday, April 19, 2013. The Commission will determine at a later date whether to hold a hearing.

ADDRESSES: All comments must be in writing. Comments may be submitted electronically via email to *process@fec.gov.* Commenters are encouraged to submit comments electronically to ensure timely receipt and consideration. Alternatively, comments may be submitted in paper form. Paper comments must be sent to the Federal Election Commission, Attn.: Commission Secretary, 999 E Street NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter, and of each commenter if filed jointly, or they will not be considered. The Commission will post comments on its Web site at the conclusion of the comment period.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen A. Gura, Deputy Associate General Counsel for Enforcement, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Background

I. Past Commission Hearings and Enforcement Process Reforms

The Commission is currently reviewing, and seeks public comment on, certain enforcement policies, practices, and procedures. The Commission will use the comments received to determine whether its policies, practices, or procedures should be adjusted, and whether rulemaking in these areas is advised. The Commission has made no decisions in these areas and may choose to take no action. The Commission last conducted a comprehensive review of its enforcement policies, practices, and procedures, among other issues, in late 2008 and early 2009. *See* Agency Procedures, 73 FR 74494 (Dec. 8, 2008). Comments filed in the 2008/2009 review, as well as a transcript of the public hearing, are available on the Commission's Web site at *http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml.* Subsequent to that review, the Commission adopted or formalized several procedures

pertaining to the advisory opinion, audit, enforcement, and reports analysis processes, as well as providing greater transparency of the agency's enforcement procedures. These procedures include, in chronological order:

- The Commission instituted a program that provides political committees that are audited pursuant to the Act with the opportunity to have a hearing before the Commission prior to the Commission's adoption of a Final Audit Report. Similar to the Commission's program for hearings at the probable cause stage of the enforcement process, audit hearings provide audited committees with the opportunity to present oral arguments to the Commission directly and give the Commission an opportunity to ask relevant questions prior to adopting a Final Audit Report. *See* Commission's Procedural Rules for Audit Hearings, 74 FR 33140 (July 10, 2009), available at *http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-12.pdf.*
- The Commission adopted a new agency procedure that provides respondents in internally generated enforcement matters brought under the Act with notice of the referral and an opportunity to respond thereto, prior to the Commission's consideration of whether there is reason to believe that a violation of the Act has been or is about to be committed by such respondent. This program provides respondents procedural protections similar to those of respondents in complaint-generated matters. *See* Commission's Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 FR 38617 (Aug. 4, 2009), available at *http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-18.pdf.*
- The Commission amended its procedures for probable cause hearings to provide that Commissioners may ask questions designed to elicit clarification from the Office of General Counsel (''OGC'') or Office of the Staff Director during the hearings. These hearings, if the request is granted, take place before the Commission considers the General Counsel's recommendation on whether or not to find probable cause to believe a violation has occurred. *See* Amendment of Agency Procedures for Probable Cause Hearings, 74 FR 55443 (Oct. 28, 2009), available at *http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-24.pdf.*
- The Commission resumed its practice of placing all First General Counsel's Reports on the public record, whether or not the recommendations in these First General Counsel's Reports are adopted by the Commission. The Commission will place all First General Counsel's reports on the public record in closed matters prospectively and retroactively, while allowing the Commission to reserve the right to redact portions as necessary. *See* Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 FR 66132 (Dec. 14, 2009), available at *http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-28.pdf.*
- The Commission adopted, made public, and recently updated a ''Guidebook for Complainants and Respondents on the FEC Enforcement Process'' (''Current Enforcement Guidebook''). This guide was first approved and placed on the Commission's Web site in December 2009 and updated in May 2012. *See http://www.fec.gov/em/respondent_guide.pdf.* The Current Enforcement Guidebook summarizes the Commission's general enforcement policies and procedures and provides a step-by-step guide through the Commission's enforcement process. It is designed to assist complainants and respondents and to educate the public concerning FEC enforcement matters.
- The Commission issued a directive providing written guidelines on providing status reports to respondents and the Commission in enforcement matters and accelerating the processing of matters that are statute of limitations-sensitive. *See* FEC Directive 68, Enforcement Procedures (Dec. 31, 2009), available at *http://www.fec.gov/em/directive_68.pdf.*
- The Commission issued a directive on how the Office of Compliance may seek formal or informal legal guidance from OGC regarding questions of law that arise from the review of reports filed with the Commission or in the course of an audit of a political committee. *See* FEC Directive 69, FEC Directive on Legal Guidance to the Office of Compliance, available at *http://www.fec.gov/directives/directive_69.pdf.*
- The Commission issued a directive on how the Audit staff prepares and the Commission considers audit reports produced during the various stages of an audit. *See* FEC Directive 70, FEC Directive on Processing Audit Reports (Apr. 26, 2011), available at *http://www.fec.gov/directives/directive_70.pdf.*
- The Commission established a formal procedure to provide respondents in enforcement matters with relevant documents and other information obtained as a result of an investigation during the enforcement process. These documents and information are generally available by request from the respondent when the Commission enters into conciliation or proceeds to the probable cause stage of the enforcement process. *See* Agency Procedure for Disclosure of Documents in the Enforcement Process, 76 FR 34986 (June 15, 2011), available at *http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-06.pdf.*
- The Commission adopted a procedure providing for a means by which persons and entities may have a legal question considered by the Commission earlier in both the report review process and the audit process. Specifically, when the Office of Compliance requests that a person or entity take corrective action during the report review or audit process, if the person or entity disagrees with the request based upon a material dispute on a question of law, the person or entity may seek Commission consideration of the issue pursuant to this procedure. *See* Commission's Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 FR 45798 (Aug. 1, 2011), available at *http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-11.pdf.*
- The Commission adopted procedures to formalize the agency's practice, following probable cause briefs, of providing respondents with a copy of OGC's notice to the Commission advising the Commission whether it intends to proceed with its recommendation to find probable cause. Additionally, these procedures allow a respondent to request an opportunity to reply to the notice, if the notice contains new facts or new legal arguments. *See* Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel, 76 FR 63570 (October 13, 2011), available at *http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-15.pdf.*
- The Commission announced that it is now beginning to provide respondents an explanation in writing of the method used to determine the Commission's opening settlement offers at the conciliation stage of certain enforcement matters. *See http://www.fec.gov/press/press2012/20120112openmeeting.shtml.*
- The Commission recently made public several documents relating to its enforcement and compliance practices following a November 3, 2011 oversight hearing before the Subcommittee on Elections of the House of

Representatives Committee on House Administration. Those documents included various enforcement materials, including the 1997 enforcement manual (which has not been formally updated and contains much information that has been superseded), Reports Analysis Division procedures, and Audit Division documents. *See* Documents on Enforcement & Compliance Practices, available at *http://www.fec.gov/law/procedural_materials.shtml.*

II. Ongoing Reviews of Enforcement Procedures

The 1997 enforcement manual recently placed on the Commission's Web site was compiled as an informal internal guide not intended for public release, was never formally reviewed or adopted by the Commission, was seldom updated, and has been largely superseded. OGC is now in the process of drafting and making public an enforcement procedures manual (''Enforcement Procedures Manual'' or ''Manual'') to guide the Enforcement Division during the course of the agency's enforcement process. The purpose of the Manual is to aid enforcement staff in the consistent, fair, effective and efficient performance of their important public responsibilities in administering the Act, with the goal of serving as a reliable source of information regarding all aspects of the enforcement process. The Commission is seeking public comment on whether certain of its policies, practices and procedures related to the enforcement process should be adjusted, whether rulemaking in this area is advised, and what other considerations should be given to the contents of the Manual. The Commission has made no decisions on these issues and may choose to take no action.

III. General Goals

The FECA grants to the Commission ''exclusive jurisdiction with respect to civil enforcement'' of the provisions of the Act and Chapters 95 and 96 of Title 26. 2 U.S.C. 437c(b)(1). Enforcement matters may be initiated by the Commission as a result of complaints from the public, referrals from the Reports Analysis and Audit Divisions, referrals from other agencies, and *sua sponte* submissions. Enforcement matters are generally administered by the Office of General Counsel pursuant to the procedures set forth in 2 U.S.C. 437g, but are also processed by the Office of Alternative Dispute Resolution and the Office of Administrative Review. *See* 2 U.S.C. 437g(a)(4)(C); 11 CFR 111.30–111.46; *http://www.fec.gov/em/adr.shtml; http://www.fec.gov/af/af.shtml.* During the enforcement process, the Office of General Counsel reviews and makes recommendations to the Commission regarding the disposition of enforcement matters, and investigates and conciliates matters on behalf of the Commission. Stages of the enforcement process may include Reason to Believe (''RTB''), an investigation, pre-probable cause conciliation, probable cause, probable cause conciliation, and litigation. The Current Enforcement Guidebook provides a full description of the Commission's administrative enforcement process. *See http://www.fec.gov/em/respondent_guide.pdf.*

The Commission specifically seeks comment from complainants and respondents who directly interact with the FEC, committee treasurers, and other parties who may become involved in the enforcement process. The Commission seeks general comments on whether the agency is effectively enforcing the Act and Commission regulations and whether certain of the FEC's enforcement procedures and practices unduly limit or expand procedural protections and, if so, how those enforcement procedures might be improved to increase efficiency and adequately address the Commission's interest in enhancing compliance with the Act. The Commission is not interested, with respect to this proceeding, in complaints or compliments about individual matters or FEC employees, and it seeks input only on structural, procedural, and policy issues.

In that regard, the Commission also seeks comment about practices and procedures used by other administrative agencies when acting in an enforcement capacity. For example, do such agencies provide greater or lesser procedural protections? The Commission is also interested in any studies, surveys, research or other empirical data that might support changes in its enforcement procedures, as well as any relevant judicial decisions pertaining to administrative agencies.

The Commission requests those who submit comments to be cognizant that certain proposals may implicate statutory requirements, such as confidentiality mandates. *See* 2 U.S.C. 437g(a)(12). Thus, the Commission would appreciate participants specifying in their written remarks whether their proposals are compatible with current statutes or would require legislative action.

Topics for Specific Comments

As stated, as an initial matter, the Commission requests public comment on whether this agency is doing an effective job of enforcing the Act and Commission regulations.

IV. Enforcement Process at the Pre-RTB Stage

The Act provides that complaints alleging a violation of the Act or Commission regulations shall be in writing, signed and sworn to by the person filing the complaint, notarized, and made under penalty of perjury. 2 U.S.C. 437g(a)(1). Respondents who are alleged in a complaint to have committed such a violation have the opportunity to respond in writing as to the allegations. *Id.* Following the receipt of a response, the General Counsel may recommend to the Commission whether or not to find RTB that there has been a violation of the Act. 11 CFR 111.7(a). Commission regulations also empower ''the General Counsel [to] recommend in writing that the Commission find reason to believe * * *, '' not only based on a complaint, but also ''[on] the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities.'' 11 CFR 111.8(a).

Following an affirmative vote of four or more of its members determining that there is RTB that a respondent has committed, or is about to commit, a violation, the Commission ''shall make an investigation of such alleged violation.'' 2 U.S.C. 437g(a)(2). An RTB finding is not a finding that the respondent violated the Act. It simply means that the Commission believes a violation may have occurred. An RTB finding is generally followed by either an investigation of the matter or an offer of pre-probable cause conciliation.[1]

A. Complaint Generated Matters

Most of the Commission's enforcement matters are externally generated based on complaints submitted by individuals pursuant to the requirements of 2 U.S.C. 437g(a)(1). Prior to the Commission's RTB determination in a complaint-generated matter, OGC makes a recommendation to the Commission as to whether, based on the complaint(s) and response(s) in a given matter, there is sufficient information to support an RTB finding. In the course of developing its RTB recommendation, OGC may reference publicly available information, including public information not contained in either the complaint(s) or

[1] *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 FR 12545, 12545–46 (Mar. 16, 2007).

response(s).[2] Public sources for these additional facts have included, among other things, Internet Web sites (most frequently, the Commission's own Web site), media reports, subscription databases, public information filed with other governmental entities, and respondents' own public statements and Web sites.[3] Additionally, OGC, in its RTB recommendations to the Commission, analyzes the facts presented in the case under all relevant legal theories, not solely those theories specifically articulated in the complaint or addressed in the response.

The Commission seeks comment on two of OGC's current practices related to the pre-RTB stage of the enforcement process as it is set forth under 2 U.S.C. 437g(a) and Part 111 of the Commission's regulations.

First, in a complaint-generated matter, do the Act and Commission regulations contemplate a Commission finding of RTB based on, or that takes into account, publicly available information not referenced or included in the complaint and response? Do the statute and regulations contemplate a Commission finding of RTB based solely on the allegations and information set forth in the complaint(s) and response(s)? Do the statute and regulations require the Commission to ignore publicly available information that may be material to the issue of RTB? Would that include public information disclosed as required by the Act and posted on the Commission's own Web site? Should exculpatory facts obtained by the Commission at the pre-RTB stage be considered along with the pending complaint?

The Commission's practice of considering material not specifically referenced or included in a complaint is supported by the case law. In the *In re FECA Litigation* decision,[4] the U.S. District Court for the District of Columbia interpreted 2 U.S.C. 437g(a)(1) and (a)(2) as *requiring* the Commission ''to take into consideration *all available information* concerning the alleged wrongdoing'' when making its RTB determination in a complaint-generated matter. 474 F. Supp. at 1046 (emphasis added). *See also Antosh* v. *FEC,* 599 F. Supp. 850 (D.D.C. 1984) (holding that Commission's dismissal of a complaint was arbitrary and capricious where the Commission failed to consider relevant information available in a committee's disclosure reports revealing that alleged violations were ''more egregious than the Commission realized''). 599 F. Supp. at 855.

Should the Commission, through OGC, maintain a practice consistent with the case law? If the Commission ''may not rely *solely* on the facts presented by the sworn complaint when deciding whether to investigate,'' what is the minimum factual information it must consider when making an RTB determination pursuant to 2 U.S.C. 437g(a)(2)? For example, does the current practice afford respondents sufficient opportunity to address facts and legal theories not contained in the complaint in the course of the Commission's deliberations on finding RTB?

Also, does the current practice conflict with the statutory and regulatory language that the Commission ''shall make an investigation of such alleged violation'' after a finding of RTB by an affirmative four votes of the Commission? Does the use of facts obtained from Internet searches (including the Commission's own Web site), respondents' own public statements and Web sites, media reports, subscription databases, and public information filed with the Commission or other governmental entities in the Commission's deliberations constitute an investigation that must be preceded by a finding of RTB? Concerning the use of facts obtained from the public record, should the Commission draw guidance from the evidentiary practice in litigation of taking judicial notice? Would such facts include those created or controlled by the respondent, such as information on a respondent's own Web site or a respondent's other public statements?

Second, do the Act and Commission regulations contemplate—or implicitly require—a Commission finding of RTB in appropriate circumstances based on legal theories not alleged in the complaint?

In making an RTB recommendation to the Commission, OGC may include legal theories related to the facts of the case that were not specifically alleged in the complaint or addressed in the response, but which are directly related to the facts alleged. Do the statute and regulations require the Commission to ignore additional potential violations that are supported by the facts but not specifically alleged in the complaint? OGC has recently adopted the practice of notifying respondents of such legal theories and affording respondents with an opportunity to respond. Does OGC's current practice afford respondents sufficient opportunity to address additional legal theories not specifically contained in the complaint in the course of the Commission's deliberations on finding RTB? Does the requirement that the Commission ''set forth the factual basis for such alleged violation,'' 2 U.S.C. 437g(a)(2), adequately ensure the fairness of the enforcement process by providing respondents an opportunity to address these additional legal theories after a reason to believe finding?

B. Internally Generated Matters

Alternatively, the Act provides that RTB may be found ''on the basis of information ascertained in the normal course of carrying out [the Commission's] supervisory responsibilities.'' *See* 2 U.S.C. 437g(a)(2). As noted, the Commission's regulations further provide that, ''[o]n the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities, or on the basis of a referral from an agency of the United States or of any state, the General

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[2] *See, e.g., id.* at 12546 (relying on ''publicly available information'' in making determination at pre-RTB stage); *see also* Enforcement Procedure 1992–10 (Subject: News Articles), Enforcement Procedure 1989–6 (Subject: Miscellaneous Information), available at *http://www.fec.gov/pdf/Additional_Enforcement_Materials.pdf* (''Where publically available information from state election reports or from state or federal agencies is needed in the context of a MUR, you do not have to wait until RTB has been found to seek that information. You should try and obtain that information before RTB and include it in your analysis.'').

[3] The 1997 Enforcement Manual provided the following, non-comprehensive list of publicly available sources to be consulted before OGC made its initial recommendation: WESTLAW/LEXIS; Dun & Bradstreet; Newspaper Articles; FEC Press Office; Martindale Hubbell; State Corporate Divisions; State Ethics/Political Reporting Agencies; and Reference Material. *See* 1997 Enforcement Manual, Chapter 2 at 5–6, *available at http://www.fec.gov/pdf/1997_Enforcement_Manual.pdf.*

The Commission may, on occasion, receive non-public information from a governmental agency (typically the U.S. Department of Justice) that may serve as a basis for an internally generated complaint or related to a complaint-generated matter in which the Commission has not yet made any findings. However, under the Commission's Procedure for Notice to Respondents in Non-Complaint Generated Matters (described *supra*), a DOJ or other law enforcement agency referral will be provided to the respondent if OGC intends to initiate an enforcement proceeding based on it. 74 FR 38617–18. In cases where, due to law enforcement purposes, the referral document may not be provided to a respondent, OGC will provide the respondent with a letter containing sufficient information regarding the facts and allegations to afford the respondent an opportunity to show that no action should be taken. *Id.* at 38618.

[4] 474 F. Supp. 1044, 1046 (D.D.C. 1979) (''[I]t seems clear that the Commission must take into consideration all available information concerning the alleged wrongdoing. In other words, the Commission may not rely solely on the facts presented by the sworn complaint when deciding whether to investigate. Although the facts provided in a sworn complaint may be insufficient, when coupled with other information available to the Commission gathered either through similar sworn complaints or *through its own work* the facts may merit a complete investigation * * * *[I]t is clear that a consideration of all available information material is vital to a rational review of Commission decisions.''*) (emphasis added).

Counsel may recommend in writing that the Commission find [RTB] that a person or entity has committed or is about to commit a violation'' of the Act or regulations. 11 CFR 111.8(a).

The primary types of internally generated matters are (a) those based on referrals from within the Commission (internally generated from RAD or the Audit Division), (b) those based on referrals from other government agencies, and (c) those that are part of ongoing matters. The Commission also processes *sua sponte* submissions, i.e., voluntary submissions made by persons who believe they may have violated campaign finance laws, but which may contain allegations against other parties that result in a separate enforcement matter with additional respondents.

Before the Commission votes on OGC's recommendations as to any referral, respondents will have an opportunity to review and respond to the referral. *See* Commission's Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 FR 38617 (Aug. 4, 2009). The statute and Commission regulations do not restrict what information the Commission may consider in its supervisory responsibilities.[5]

Additionally, in Directive 6, entitled ''Handling of Internally Generated Matters,'' the Commission in 1978 specified the following non-exhaustive sources as falling within the scope of 2 U.S.C. 437g(a)(2): (1) Referrals from the Commission's operating divisions (i.e., Audit, Reports Analysis, and Public Disclosure); (2) referrals from other government agencies and government documents made available to the public or to the Commission; (3) Commission-authorized non-routine reviews of reports and other documents, provided that it is based on a uniform policy of review of a particular category of candidates or other reporting entities or a category of reports, for the purpose of ascertaining specific types of information; and (4) news articles and similar published sources, considering such factors as the particularity with which the alleged violations are set out in such sources and whether such allegations are supported by in-house documents. *See* Directive 6, *available at http://www.fec.gov/directives/directive_06.pdf.*

Does the current practice of bringing to the Commission's attention media reports and publicly available information filed with the Commission or other governmental entities comport with Directive 6 with respect to the permissible sources of information the Commission may consider in its RTB determination? Does Directive 6 itself properly set forth the scope of information the Commission may consider in its RTB determination pursuant to the statute and regulations? Are there other sources of information that the Commission needs or should consider in its normal course during the pre-RTB stage, beyond those in Directive 6?

At the RTB stage, OGC's recommendations may take into account the types of information referred to in Directive 6. Should the reliance on this type of information in the Directive 6 context—that is, internally generated matters—inform OGC's recommendations in complaint-generated matters? Should OGC use relevant publicly available information to support its recommendations, or do the statute, regulations, Directive 6, or other Commission procedures or policies require such information to form the basis of a separate (or complementary) internally generated matter? What benefits and drawbacks would result from generating an additional enforcement matter beyond the complaint-generated matter compared with relying on such information in assessing the complaint? Under the Commission's recently formalized procedures discussed above, should respondents continue to be informed of, and given the opportunity to respond to, relevant publicly available information that OGC may use to support its RTB recommendations? *See* Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 FR 38617 (Aug. 4, 2009). Should OGC's recently implemented informal policy of doing so be formalized by the Commission?

C. Specific Proposals

In light of the issues discussed above, the Commission seeks comment on several approaches the agency could take with respect to OGC's pre-RTB process, as well as any approach not set forth below.

1. Approaches To Use of Factual Information Beyond Complaint

The Commission could maintain its current approach as reflected in Directive 6 and the *Policy Statement on the Initial Stages of Enforcement.* What are the advantages and disadvantages to this current practice?

Another approach the Commission could consider is to discontinue its current practice of taking into consideration in its RTB determination any relevant publicly available information that is not specifically included in complaints and responses. Assuming that Directive 6 is consistent with the Act and Commission regulations, and notwithstanding that it currently applies only to internally generated matters, should the Directive limit OGC's use of publicly available information not included in complaints and responses? For example, Directive 6 states that non-routine reviews of reports or other documents (''reports and other documents'' is not defined) available to the Commission require ''specific prior approval of the Commission.'' Moreover, even with Commission authorization, such reviews are appropriate only for a ''particular category of candidates or other reporting entities or a review of a category of reports for specific types of information.'' In other words, should Commission-authorized reviews of reports or other documents outside the scope of complaints be generalized and not be used to supplement particular complaints?

Additionally, Directive 6 states that news articles and other similar published accounts may constitute the source of internally generated MURs, depending on such factors as the ''particularity with which the alleged violations are set out in the article'' and ''supported by in-house documents.'' Unlike reviews of internal Commission reports and documents, Directive 6 does not address whether news articles and similar materials may be used to supplement existing complaints because the Directive primarily addresses internally generated matters. The Commission requests comment on whether these aspects of Directive 6 suggest that the Commission should refrain from considering relevant public information that is not specifically set forth in complaints and responses. How should Directive 6 be amended to achieve greater efficiency and fairness? What if the Commission uncovers facts that are exculpatory and undercut the allegations? Should the Commission ignore all relevant public information regardless of whether it is inculpatory or exculpatory? If the Commission may institute enforcement actions based on reviews of news media, are there other constraints on which articles or allegations can give rise to enforcement actions? For example, would unsourced or anonymous allegations constitute a ''complaint of a person whose identity is not disclosed,'' which would preclude the Commission from taking

[5] The regulations do specify that, prior to taking action against any person who has failed to file certain disclosure reports, the Commission shall notify that person. *See* 11 CFR 111.8(c).

action on those allegations? *See* 2 U.S.C. 437g(a)(1).

Assuming, under either approach, that the Commission maintains its practice of using news articles as a basis for internally generated enforcement matters, the Commission seeks comment on whether separate internally generated matters should be initiated on the basis of information outside a complaint that OGC gathers during the pre-RTB process, whereupon a separate notification letter would be sent to respondents setting forth the additional information as well as legal theories that OGC is considering. Should OGC be required to receive specific prior approval of the Commission in order to take into consideration relevant public information outside a complaint during the pre-RTB process? Should Directive 6 be modified to provide OGC with authority to consider relevant publicly available information? The Commission requests comment on whether such an approach, if adopted, should be limited in the scope of the additional facts and legal theories that OGC may consider and ask respondents to address. In other words, should there be a requirement that such additional information and/or theories be closely related or pertinent to the original complaint?

2. Scope of Legal Theories Presented in Complaint

The Commission recognizes that complainants may not possess broad or detailed knowledge of the Act or regulations and that the regulations merely require a complaint to recite facts, whether on the basis personal knowledge or information and belief, that describe a violation of law under the Commission's jurisdiction (citations to the law and regulations are not necessary but helpful), similar to notice proceedings in civil litigation. Accordingly, the Commission seeks comment as to when legal theories supporting OGC's RTB recommendations should be considered violations alleged in the complaint or whether they are otherwise appropriate to use to support the recommendations. For example, if there is a secondary violation that flows from a set of facts alleged, but the complaint does not specifically allege that violation, should the Commission consider an RTB recommendation on the secondary violation (e.g., when the complaint alleges that a corporate contribution was made in the form of a coordinated advertisement, but the same facts also show that the cost of the ad was not disclosed as required by 2 U.S.C. 434 and did not contain a disclaimer as required by 2 U.S.C. 441d)? If not, should the Commission seek further input from a complainant to determine whether he or she intended to allege a potential secondary violation based on the facts presented in the complaint? Under what circumstances should the Commission consider seeking further input from complainants?

Alternatively, the Commission could retain its existing approach of integrating relevant publicly available information and/or additional legal theories not specifically included in complaints and responses into existing complaint-generated matters. However, the Commission is considering whether and under what circumstances to apprise respondents of such information or theories. One such approach was discussed, but not voted on (and remains pending before the Commission), at the open meeting of December 1, 2011. *See* ''Agency Procedure for Notice to Named Respondents in Enforcement Matters of Additional Material Facts and/or Additional Potential Violations,'' dated November 10, 2011, *available at http://www.fec.gov/agenda/2011/mtgdoc_1165.pdf.* Under that proposal, a respondent would be given written notice by OGC in the event that OGC intends to include in its RTB recommendation to the Commission (1) any additional facts or information known to OGC and not created by or controlled by the respondent, which are deemed to be material to the RTB recommendation, and (2) any potential violation of the Act and/or the regulations that may not have been specifically alleged in the complaint or included in the referral notification, and the facts and arguments supporting the RTB recommendation on the additional potential violation. The proposal specified that, within 10 days from receipt of the OGC notice, the respondent may submit a written statement demonstrating why the Commission should take no action based on the additional material facts or with regard to any potential violation. *See id.*

The Commission requests comment on the merits of the above-mentioned approaches, as well as any others, including whether they are consistent with the enforcement process set forth in the Act and regulations, and which if any should be adopted.

V. Civil Penalties and Other Remedies

A. Background

After the Commission finds RTB, conducts an investigation, and finds probable cause to believe that a respondent has violated the Act and Commission regulations, the Act requires the Commission to attempt to enter into a conciliation agreement with respondents. 2 U.S.C. 437g(a)(4). This conciliation agreement may include a requirement that the respondent pay a civil penalty. 2 U.S.C. 437g(a)(5). Conciliation agreements may require respondents to pay civil penalties in the following amounts:

- For violations that are not knowing and willful, a penalty not to exceed the greater of $7,500 or an amount equal to any contribution or expenditure involved in the violation;
- For violations that are knowing and willful, a penalty not to exceed the greater of $16,000 or an amount equal to 200 percent of any contribution or expenditure involved in the violation;
- For knowing and willful violations of 2 U.S.C. 441f (contributions made in the name of another), a penalty not less than 300 percent of the amount involved in the violation and not more than the greater of $60,000 or 1,000 percent of the amount involved in the violation.

2 U.S.C. 437g(a)(5)(A) and (B). The dollar amounts set forth above are indexed for inflation. *See* 28 U.S.C. 2461; *see also* 11 CFR 111.24.

Although the Commission is not required to enter into settlement negotiations unless and until it makes a finding of probable cause, as a matter of practice, when appropriate, the Commission attempts to settle matters with respondents prior to such a finding (''pre-probable cause conciliation''). 11 CFR 111.18(d). In most cases the Commission will have already made an RTB finding; however, it may also enter into mutually acceptable ''fast-track'' settlements prior to any finding for persons who file complete *sua sponte* submissions and fully cooperate with the Commission, as described in the Commission's Policy Regarding Self-Reporting of Campaign Finance Violations (*Sua Sponte* Submissions), 72 FR 16695 (Apr. 5, 2007), also available at *http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-8.pdf.* The Commission generally will propose civil penalties at the pre-probable cause stage based on the same schedule set forth in the Act, as well the Commission's own precedents (explained more fully below), with the exception that the Commission generally will offer a 25 percent pre-probable cause ''discount'' to incentivize early settlement.

The Commission recently has announced that it is providing to respondents, in writing, the method used to determine the Commission's

opening settlement offers at the conciliation stage of certain enforcement matters. *See* News Release, Jan. 12, 2012, available at *http://www.fec.gov/press/press2012/20120112openmeeting.shtml.* Should discussions of how opening settlement offers are calculated be included in enforcement documents made public at the close of a matter, or should such calculations be redacted pursuant to the provisions of 2 U.S.C. 437g(a)(4)(B)(i)? Would it be fair for all who are subject to enforcement proceedings before the Commission to know how the Commission has dealt with penalties as to those similarly situated?

As discussed above, the Commission recently made available to the public several internal documents relating to the enforcement process, including a chart entitled, ''Calculating Opening Settlement Offers for Non-Knowing and Willful Violations'' available at *http://www.fec.gov/pdf/Additional_Enforcement_Materials.pdf.* This chart is a compilation of the base formulas that have been used by the Commission to calculate opening settlement offers in prior enforcement MURs. OGC created the chart to ensure that its recommendations regarding civil penalty amounts were consistent with the Commission's previous decisions regarding opening settlement offers. Depending on the circumstances of the matter (including aggravating and mitigating factors), OGC has recommended, and the Commission has authorized, penalties either higher or lower than those set forth in the chart. The information in the chart reflects opening settlement offers and not amounts that result after negotiations with a respondent. Moreover, this chart reflects past practice and does not necessarily reflect the most current practice at the Commission, given that the Commission may use its discretion to apply a new base formula for a particular violation. Final Conciliation Agreements approved by the Commission, which are the product of negotiations between OGC staff and respondents that result in mutually acceptable settlements, may contain civil penalties that are lower than the Commission's opening offers. The Commission makes final settlement amounts public by placing approved Conciliation Agreements on its Web site.

As set forth in the released chart, OGC generally recommends that the Commission approve agreements with opening offers based on formulas previously approved by the Commission. The civil penalty information below has been compiled from the above-described chart (superseded violations are omitted; knowing and willful violations generally result in a multiplier being added to the following penalties):

- Violations of 2 U.S.C. 432(b)(2) (collecting agent's failure to timely forward contributions)—20 percent of the amount of the contributions at issue.
- Violations of U.S.C. 432(b)(3) (commingling of campaign funds)—no standard practice.
- Violations of 2 U.S.C. 432(c)(5) (recordkeeping)—base statutory penalty when part of more significant reporting violations.
- Violations of 2 U.S.C. 432(d) (preservation of records)—no separate penalty for violations arising out of same transactions.
- Violations of 2 U.S.C. 432(e)(1) (late filing of statement of candidacy)—$500.
- Violations of 2 U.S.C. 432(h)(1) (campaign depositories)—no standard practice.
- Violations of 2 U.S.C. 432(h)(2) (excess cash disbursements)—no standard practice.
- Violations of 2 U.S.C. 433 (late or non-filing of statements of organization)—$500 for authorized committees when violation arises in context of late statement of candidacy; $0 for unauthorized committees that are found to be political committees, plus applicable penalty for failure to file reports.
- Violations of 2 U.S.C. 434(a) (failure to file/timely file reports)—administrative fines plus 25 percent; pre-probable cause discount does not apply.
- Violations of 2 U.S.C. 434(b) (failure to report or properly report transactions)—the greater of 15 or 20 percent of the amount at issue, or the base statutory penalty, with a maximum cap of $250,000; with respect to taking the gross or net amount for misstatements of financial activity, the Commission has used both approaches. (For knowing and willful reporting violations, the penalty is the greater of $11,000 or 200 percent of the amount in violation.) For reporting errors resulting from misappropriation of committee funds, the Commission generally has used administrative fines plus 25 percent, but has not penalized committees that can show they had all of the internal controls set forth in the Commission's 2007 safe harbor (72 FR 16695 (Apr. 5, 2007)). For self-reported increased activity cases, the Commission also generally has applied administrative fines plus 25 percent, with no pre-probable cause discount, in accordance with a policy adopted by the Commission in executive session on March 16, 2007. (The policy may be found at page 224 of the PDF file available at *http://www.fec.gov/pdf/Additional_Enforcement_Materials.pdf.*)
- Violations of 2 U.S.C. 434(c) (failure to file 24-hour independent expenditure reports)/434(g) (failure to file 48-hour independent expenditure reports)—administrative fines plus 25 percent, with no pre-probable cause discount.
- Violations of 2 U.S.C. 438(A)(4) (prohibition on sale and use of contributor information)—no standard practice.
- Violations of 2 U.S.C. 439a(b) (personal use of campaign funds)—100% of amount in violation.
- Violations of 2 U.S.C. 441a(a)(1) and (2) (making excessive contributions)—50 percent of excessive amount when not refunded; 25 percent of excessive amount when refunded.
- Violations of 2 U.S.C. 441a(a)(3) (making contributions in excess of annual/biennial limits)—100% of excessive amount.
- Violations of 2 U.S.C. 441a(f) (receipt of excessive contributions)—50 percent of excessive amount when not refunded or not cured by redesignation/reattribution; 25 percent of excessive amount when refunded or cured by redesignation/reattribution. (In several recent matters, the Commission's practice may have been to apply a 20 percent penalty for excessive contributions cured by redesignation/reattribution.)
- Violations of 2 U.S.C. 441b (making and accepting prohibited corporate contributions)—50 percent of contribution when not refunded; 25 percent when refunded. An additional base statutory penalty is added if the contributor is a government contractor (2 U.S.C. 441c).
- Violations of 2 U.S.C. 441b/114.2(f) (corporate facilitation)—100 percent of amount of facilitated contributions for facilitator; 50 percent of unrefunded facilitated contributions for recipient.
- Violations of 2 U.S.C. 441d(a) (missing disclaimer)—20 percent of cost of communication or $5,500 if cost is unavailable.
- Violations of 2 U.S.C. 441d(c) (incomplete disclaimer)—10 percent of cost of communication or $2,750 if cost is unavailable.
- Violations of 2 U.S.C. 441d(d) (''stand by your ad'' disclaimer)—25 percent of cost of communication.
- Violations of 2 U.S.C. 441e (foreign national contributions)—100 percent of contribution amount.
- Violations of 2 U.S.C. 441e (contributions in the name of another)—the greater of 100 percent of

contribution amount or base statutory penalty.

- Violations of 2 U.S.C. 441h (fraudulent misrepresentation of campaign authority)—no standard practice.
- Violations of 2 U.S.C. 441i(e)(1)(A) (Federal candidates soliciting, accepting, directing, transferring, or spending non-Federal funds)—no standard practice.

In addition, particularly in the context of reporting violations, OGC has recommended the following mitigating factors in some cases:

- Respondent cooperates in rectifying the violations.
- Inaccurate or incomplete reports were amended after the complaint or referral but before RTB.
- The matter was a *sua sponte* submission.
- Missing information from a report was disclosed nevertheless in another report before the election.
- Respondent lacks knowledge of Commission rules and procedures.

OGC also has recommended the following aggravating factors:

- Respondent previously entered into a conciliation agreement or was reminded or cautioned of the same or similar violations.
- A reporting error or omission was made on an election-sensitive report.

B. Comments Sought

1. Penalty Formulas

The Act speaks of a penalty ''amount equal to any contribution or expenditure involved in the violation.'' 2 U.S.C. 437g(a)(5)(A). In the context of knowing and willful violations of 2 U.S.C. 441f, the Act more generally refers to ''the amount involved in the violation.'' 2 U.S.C. 437g(a)(5)(B). Based on the Act, the Commission frequently uses the concept of ''amount in violation'' (''AIV'') in determining penalties. For example, for a misreporting violation, the Commission may consider the AIV to be the amount of financial activity not reported or misreported, and derive a penalty based on the AIV. The Commission seeks comment on whether the use of AIV is proper and/or consistent with the Act. Are there any violations for which AIV is not appropriate? What is the appropriate determination of AIV (*e.g.,* is the cost of a communication or the breadth of distribution an appropriate measure of AIV in the context of a disclaimer or reporting violation)?

Although the Commission has made variations of civil penalty calculations public, both through release of OGC's compiled civil penalty chart and through letters accompanying conciliation agreements, should the Commission continue to make public ongoing developments regarding civil penalties? If so, in what form should the Commission release this information: in a chart, through individual letters, or in some other manner? Would it be preferable for the Commission to adopt a chart—or guidelines—binding on itself and its staff? Finally, the Commission requests comments on any and all of the specific penalty formulas referenced above. Are the penalties appropriate for the violations?

2. Disgorgement

The Commission also requests comment on its practice of seeking disgorgement in addition to penalties for certain violations.

Disgorgement is a form of equitable relief that seeks to deprive a wrongdoer of unjust enrichment. *SEC* v. *First Financial Corp.,* 890 F.2d 1215, 1231 (D.C. Cir. 1989). The Act authorizes the Commission to seek equitable relief in court if it is unable to correct or prevent a violation of the Act. 2 U.S.C. 437g(a)(6); *FEC* v. *Christian Coalition,* 965 F. Supp. 66, 70–72 (D.D.C. 1997). Beyond its power to seek equitable relief in court, the Commission is required to ''attempt * * * to correct or prevent such violation by informal methods of conference, conciliation, and persuasion * * *'' 2 U.S.C. 437g(a)(4)(A). Thus, disgorgements required through the enforcement process may be viewed both as a derivative of the Commission's authority to seek equitable relief in court and as a means of ''correcting or preventing'' violations under the Act.

In the context of Commission enforcement actions, when the Commission determines that a committee has accepted or received a prohibited contribution in violation of the Act, the Commission has asked the committee to disgorge the contribution to the U.S. Treasury once the committee learns the contribution was improper, in addition to paying a civil penalty based on a percentage of the amount of the prohibited contribution. In the context of excessive contributions, the Commission occasionally also has offered the committee that received the excessive contribution the option to refund the excessive amount or to disgorge it to the U.S. Treasury, in addition to paying a civil penalty based on a percentage of the excessive amount. However, in matters involving the receipt of prohibited or excessive contributions made in the name of another, *see* 2 U.S.C. 441f, the Commission generally does not make findings against recipient committees when they have not had knowledge of the true source of funds.

Typically, the Commission's proposed conciliation agreements for respondents who made an impermissible contribution require the respondent to waive its right to a refund and request the recipient committee to disgorge the amount of the contribution to the U.S. Treasury.[6] If the recipient committee were allowed to keep a prohibited or excessive contribution, then the Commission would, in essence, be permitting the committee to use impermissible funds to influence elections. Also, since the civil penalty will generally be a lower figure than the amount of impermissible funds, a committee that has violated the Act could effectively use those funds to pay the penalty.

In *Fireman* v. *U.S.,* 44 Fed. Cl. 528 (1999), the plaintiff was prosecuted and pled guilty to making contributions in the names of others and making excessive contributions to two federal candidate committees, served a criminal sentence, and paid a $5 million fine. In addition, the Commission directed the candidate committees that accepted the excessive contributions to disgorge the $69,000 excessive amount of the plaintiff's contributions. *Id.* at 530. The plaintiff sought to recover the $69,000 amount under the theory of illegal exaction. *Id.* at 534. In ruling on the government's motion to dismiss for failure to state a claim under Federal Rules of Civil Procedure Rule 12(b)(6), the Court of Federal Claims held that the plaintiff had stated a proper cause of action. *Id.* at 538. Solely for the purpose of settling the action, the government and the plaintiff subsequently entered into a settlement whereby the government agreed to return the $69,000 to the plaintiff. *See Fireman* v. *U.S., available at http://www.fec.gov/law/litigation_CCA_F.shtml#fireman.*

In light of the *Fireman* litigation, is the Commission's practice of seeking disgorgement of prohibited or excessive contributions proper? Should it make a difference if the Commission asks the source of the excessive or prohibited

[6] In these contexts, the Commission has sought disgorgement when it has received a waiver from the contributor. Statement of Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions), 72 FR 16695, 16697 (Apr. 5, 2007) (assessing sufficiency of *sua sponte* submission based on, *inter alia,* ''whether an organization or individual respondent waived its claim to refunds of excessive or prohibited contributions and instructed recipients to disgorge such funds to the [United States] Treasury'') (basing reduction of civil penalty on ''[a]ny appropriate refunds, transfers, and disgorgements'' as a basis for assessing compliance with *sua sponte* policy).

contribution to voluntarily waive its right to any refund? Is it appropriate for the Commission, when negotiating with the source of the impermissible contribution, to enter into an agreement that requires the source to voluntarily waive its right to a refund and to notify all recipient committees of its waiver? Should the recipient committees instead be directed to return the impermissible contribution to the original source? Should disgorgement be considered an ''equitable remedy'' as opposed to a fine or penalty, and therefore not limited by the general five-year statute of limitations at 28 U.S.C. 2462, which by its terms applies only to civil fines, penalties and forfeitures? Does the pronouncement in *FEC* v. *Christian Coalition,* 965 F. Supp. at 71, that 28 U.S.C. 2462 ''provides no such shield from declaratory or injunctive relief'' apply to disgorgement?

3. Penalty Schedule

The Commission also seeks comment on whether reliance on a penalty schedule would be appropriate, particularly in light of the courts' admonitions that ''[t]he statutory language 'makes clear [that] [t]he assessment of civil penalties is discretionary.''' *FEC* v. *Kalogianis,* 2007 WL 4247795 at *6 (M.D. Fla. 2007) (quoting *FEC* v. *Friends of Jane Harman,* 59 F. Supp. 2d 1046, 1058 (C.D. Cal. 1999)); *see also FEC* v. *Ted Haley Cong. Comm.,* 852 F.2d 1111, 1116 (9th Cir. 1988) (''A court's discretion on civil penalties is reviewed under an abuse of discretion standard.''). In order to ensure consistency, should a penalty chart be viewed as a standard from which deviations must be justified? Would the penalty chart outlined above provide the Commission sufficient discretion to consider the particulars of a violation? Would the use of the chart result in unfair treatment of respondents, particularly novice and unsophisticated actors? Are the mitigating and aggravating factors set forth in OGC's internal guidance appropriate? Should other factors, such as whether the candidate won or lost the election (or dropped out of the race), the margin of victory or defeat, intent to run again in the future, or campaign resources, be considered? Could consistency be maintained through an alternative approach to penalty calculation, or are the current opening offer formulas needed to maintain consistency? Are other options available under the Act?

Should the Commission not accept civil penalties less than a certain percentage of the amount in violation, to ensure that penalties exceed the ''cost of doing business'' for the particular respondent involved? *See, e.g.,* MUR 5440 (The Media Fund) (civil penalty approximately 1% of amount in violation of over $55 million). Do low civil penalties in Commission settlements, which are generally made public at the close of a matter long after the election at issue is over, erode compliance incentives and encourage potential violators to ignore the Act and Commission regulations?

The total civil penalties in OGC enforcement matters has decreased substantially over the past several fiscal years, as follows: $5,563,069 in 2006; $4,038,478 in 2007; $2,385,043 in 2008 (the Commission lacked a quorum for approximately 6 months in 2008 and was thus unable to take actions such as accepting settlements and closing enforcement cases); $807,100 in 2009; $672,200 in 2010; and $527,125 in 2011. *See http://www.fec.gov/press/press2011/FEC_Joint_Statement-Nov3.pdf* at 11; *http://www.fec.gov/em/enfpro/enforcestatsfy03-08.pdf; http://www.fec.gov/em/enfpro/enforcestatsfy09-10.pdf.* Should the Commission be concerned about the downward trend in the collection of civil penalties, or can the decrease be explained by factors other than the Commission's enforcement decisions (*e.g.,* court cases striking down portions of the Act and regulations; increased use of Alternative Dispute Resolution)?

In the context of penalties sought by the Commission in litigation pursuant to 2 U.S.C. 437g(a)(6) due to unsuccessful attempts at conciliation, the courts have set forth the following factors for determining the appropriate penalty: (1) The good or bad faith of the respondents; (2) the injury to the public; (3) the respondent's ability to pay; and (4) the necessity of vindicating the authority of the responsible federal agency. *FEC* v. *Furgatch,* 869 F.2d 1256 (9th Cir. 1989) (affirming a $25,000 penalty sought by the Commission); *FEC* v. *Kalogianis,* 2007 WL 4247795 (M.D. Fla. 2007) (reducing a nearly $300,000 penalty sought by the Commission to $7,000); and *FEC* v. *Harman,* 59 F. Supp. 2d 1046 (C.D. Cal. 1999) (holding that payment of a penalty and disgorgement were not required due to technical nature of violations).

Additionally, the courts have cited defendant's state of mind when committing the violation. *Kalogianis,* 2007 WL 4247795 at *6; *Harmon,* 59 F. Supp. 2d at 1058. Does the penalty chart in its current form provide for sufficient consideration of these factors? Should these factors, set forth by the courts in the context of enforcement matters that have proceeded to litigation, also be applied to the Commission's probable cause conciliation process under 2 U.S.C. 437g(a)(5), as well as the Commission's practice of seeking pre-probable cause conciliation? Would the Commission be better served by replacing the current penalty chart with an approach that begins at a baseline of zero and builds up to an appropriate penalty based on the factors identified by the courts? Alternatively, instead of using penalty formulas that, as reflected in the current schedule, may be substantially lower than the statutory penalties, should the Commission start with the penalties set forth at 2 U.S.C. 437g(a)(5) and work downward based on mitigating factors? Also, should the Commission continue its current policy of offering a 25% pre-probable cause discount to the calculated penalty? Does a 25% discount appropriately incentivize early settlement or would respondents be sufficiently motivated to settle at the RTB stage with a lesser or no discount?

VI. Alternative Dispute Resolution

A. Background

The Commission established the Alternative Dispute Resolution Office (''ADRO'') in October 2000 as authorized by the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571–584, which required Federal agencies take steps to promote the use of ADR. The Commission's ADR program was designed to enhance compliance by encouraging settlements outside the agency's regular enforcement context. By expanding the tools for resolving complaints and internal referrals, the program was aimed at improving the Commission's ability to process complaints and resolving matters more rapidly using fewer resources. Other benefits include saving costs and time for respondents whose cases are processed by ADRO. Respondents are afforded the opportunity to settle cases before the Commission makes any finding of a violation, providing an attractive incentive to engage in good faith negotiations with ADRO. The Commission has included a comprehensive description of its ADR program on the Web site. See *http://www.fec.gov/em/adr.shtml.*

Although the Commission received several comments on the ADR program during its 2009 enforcement hearing, no substantive changes have been made to the program since that time. *See* Agency Procedures Recommendations, available at *http://www.fec.gov/law/policy/enforcement/2009/recommendationsummary.pdf.* For

example, a recommendation to set guidelines for negotiating penalties and other remedial measures has yet to be considered by the Commission. *See id.* at 2. Accordingly, the Commission believes it may be beneficial to revisit certain of those issues and to address other relevant ADR topics.

B. Proposals and Issues To Consider

1. Commission Approval or Rejection of ADR Settlements

From the time the ADR program was implemented in 2000, the Commission's only options when reviewing ADR settlements have been either to (1) accept the agreement without revisions or (2) reject the agreement in its entirety and dismiss the matter. This policy has the advantage of giving ADRO wide latitude to fashion agreements without Commission involvement—thereby speeding up the process—while providing respondents with a unique incentive by assuring that any agreement they sign will represent the end of the case (respondents may be more likely to use the ADR program if they can be confident their settlements are not subject to renegotiation). The obvious disadvantage is that Commission is boxed in; since it cannot direct ADR to renegotiate an agreement it finds unpalatable, its role as final agency arbiter is arguably undermined. Also, a respondent may be unduly benefited if, for example, an agreement with a stiff penalty is dismissed because the Commission does not like certain language contained therein.

The Commission seeks comment on its ''accept or dismiss'' policy to determine whether the advantages outweigh the disadvantages and how the policy might be revised to strike a more appropriate balance. For example, the Commission could simply vote on whether to instruct ADRO to renegotiate problematic aspects of a settlement upon the motion of one Commissioner. If a more narrowly tailored approach is deemed preferable, ADRO could inform respondents at the start of higher priority ADR matters (*e.g.,* where the amount in violation appears to be above a particular amount) that the Commission reserves the right to direct ADRO to renegotiate any ADR settlement brought before it.

2. Civil Penalties

Similar to the civil penalty issues raised above concerning the traditional enforcement process, the Commission seeks comment on the penalty scheme used by ADRO so the Commission can better evaluate the program's effectiveness. The main objective should be to achieve a balance so that penalties are sufficiently low for respondents to prefer participating in the ADR program rather than being subject to OGC processing, yet high enough to deter future violations and promote compliance. The Commission recognizes that ADR tends to focus more on non-monetary ''behavioral'' remedies in its settlements and may offer a wider array of settlement options to respondents than does OGC (*e.g.,* attendance at a Commission-sponsored workshop), but the importance of securing civil penalties to modify behavior should not be understated, even in cases where the amounts in violation are comparatively low. Although respondents may be quick to make counteroffers with very small and often no penalties, the Commission is not necessarily served well by accepting such offers. In order for terms of settlement to serve as meaningful deterrents, the penalty should at least exceed the ''cost of doing business'' for the particular respondent involved. There still may be sound reasons why ADR settlements often contain no or minimal penalty amounts, but perhaps there should be a fuller airing of the reasons for accepting such terms so that the Commission can determine whether the proper balance of program objectives is being achieved and maintained.

As it has recently done with OGC's civil penalty calculations as discussed above, the Commission is considering whether to apprise respondents of its ''opening offer settlement'' formulas for the typical violations it encounters. ADRO currently employs a penalty formula scheme resembling a scaled-back version of the formulas used by OGC. After a respondent agrees in writing to ''buy in'' to the ADR process, ADRO generally communicates an opening offer by telephone (in contrast with OGC-drafted written agreements containing opening offers approved by the Commission) and negotiates terms to include in a written settlement. Although the ADR program was set up to operate without extensive Commission involvement—thus promoting faster resolution of cases—it may nevertheless be in the Commission's interest for ADRO to inform it of the parameters for negotiation before it begins settlement negotiations. Currently, both the opening and negotiated figures are simultaneously presented to the Commission along with an agreement already signed by the respondent; the Commission does not have any prior opportunity to review the opening offer as it does with OGC reports recommending conciliation. The Commission could consider having ADRO provide a proposed penalty amount in its assignment memorandum to the Commission, since the amount in violation is generally clear at that time. The memoranda could be circulated on a no-objection basis to maintain efficiency (it is currently circulated on an informational basis). The Commission recognizes that including such information may increase the likelihood of Commission objections and thus slow down the ADR process; accordingly, the Commission seeks comment on how to maintain adequate oversight of ADRO's civil penalty regime.

VII. Other Issues

The Commission welcomes comments on other issues relevant to these enforcement policies and procedures, including any comments concerning how the FEC might increase the fairness, transparency, efficiency and effectiveness of the Commission.

Dated: January 11, 2013.

On behalf of the Commission.

Donald F. McGahn II,

Vice Chairman, Federal Election Commission.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0018; Directorate Identifier 2010–SW–060–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter Deutschland GmbH Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Eurocopter Deutschland GmbH (Eurocopter) Model MBB–BK 117 C–2 helicopters. This proposed AD would require determining if a certain serial-numbered bevel gear is installed in the tailrotor intermediate gear box (IGB). If such a bevel gear is installed in the IGB, this AD would require recording the bevel gear's reduced life limit in the Airworthiness Limitations section of the maintenance manual and on the component history card or equivalent IGB record. If the bevel gear's life limit has been reached or exceeded, this AD