

Comments on Federal Election Commission Policies and Procedures
Response to Notice 2008-13

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I commend the Commission for offering this opportunity to comment on its procedures and policies. Procedural changes made during my own tenure, and described in the “Background” section of the notice, were, in my view, overwhelmingly productive. My only regret is that we did not accomplish more and do so more quickly. At a minimum, a re-examination of institutional procedures every five or six years is entirely appropriate and productive for any organization.

I offer one bit of personal advice to my successors considering further revisions to procedures: **just do it**. It is the nature of bureaucracies, and in particular of a six member collegial body, to move slowly. The coming year will pass quickly. At some point new Commissioners will join you, necessitating reviewing any then-pending procedural changes. No set of procedures is or will be perfect. Due to the requirements of the law and the nature of the Commission you face a far greater likelihood of failure by inaction or over-caution than any risk from changing procedures decisively.

To the extent you can reach consensus about desirable changes, I urge you to move quickly and boldly. Mistakes resulting from action, should you make one, can be corrected. Mistakes resulting from inaction are difficult even to identify, much less to rectify.

Set yourselves (and your staff) a short deadline after this hearing, reach consensus on what matters you can, and adopt and implement those policies within the next few months. Note also that the 2003 hearing was still bearing fruit several years later: do not hold hostage procedures you agree on now in order to resolve every issue of interest. You can certainly make one set of changes right away and others later.

I will offer substantive comments on motions, timeliness, prioritization, penalties and appearances. To summarize, I recommend that the Commission further clarify the standards, timing and procedures for a motion to dismiss and that it provide for a motion for reconsideration at RTB. In general, I recommend the Commission focus formal motions at the RTB stage, but continue to allow extraordinary motions on an ad hoc basis as it has in the past. I urge the Commission to reinvigorate the effort to improve the timeliness of enforcement matters. Finally, I recommend that you expand opportunities for appearances before the Commission based on the success of the probable cause hearing experience.

¹ I am currently a public policy consultant, and advise some clients on matters related to the Federal Election Commission. However, the views presented here are my own, and are not offered on behalf of any client or other person.

1. Motions Before the Commission

The notice (at I.A.) states that the FECA does not provide for consideration of motions to dismiss (among others). While it is true that the statute does not provide detailed procedures for consideration of motions to dismiss, the statute mentions dismissal no fewer than five times in §437g.² Further, the Commission's Policy Statement on Commission Actions at the Initial Stage of the Enforcement Process, http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-6.pdf, provides a description of the use and import of a motion to dismiss.

This statutory treatment of the dismissal motion shows that the Commission not only “should”, but in many cases must entertain motions to dismiss or their equivalent. More broadly, it shows that Congress did not intend to limit the Commission to the reason to believe, probable cause, and suit motions described in detail in §437g. Note also that the Commission's regulations provide a procedure for reconsideration of advisory opinions despite the absence of any suggestion of such a procedure in the statute. *Compare* 2 U.S.C. 437f with 11 C.F.R. 112.6. Further, Commission internal procedures provide procedures for and limitations on a vote to reconsider on any matter.

It is true that the Commission has exercised flexibility in considering motions submitted by respondents, however styled. But the question the notice appears to be raising is not whether the Commission should entertain motions it already uses routinely, but whether the Commission should establish more formal procedures or guidance for submission and consideration of such motions by outside parties (respondents), including, for instance, whether there are circumstances in which the Commission should agree to formal consideration of such a motion.

a. Motion to Dismiss

Pursuant to the 2007 Policy on Actions at the Initial Stage of the Enforcement Process, and effectively under Commission practice prior to that time, respondents have the ability to ask the Commission to dismiss a matter (on prosecutorial discretion grounds) or to find No Reason to Believe (on substantive grounds) in their statutorily-protected response (“opportunity to demonstrate ... that no action should be taken.”) §437g(a)(1). It would be useful to tie the 2007 Policy Statement and the 437g(a)(1) response right more explicitly together by amending the 2007 Policy Statement to specify that respondents may request dismissal, No RTB, or pre-probable cause conciliation in their response.

Whether a respondent's dismissal request is styled as a “motion” (implying a right to formal approval or rejection) at the RTB stage is irrelevant substantively because the

² Allowing no vote “other than a vote to *dismiss*” prior to 15 day reply period. §437g(a)(1). Providing for review of “an order of the Commission *dismissing* a complaint.” §437g(a)(8)(A). Petition challenging “*dismissal* of a complaint [must be filed] within 60 days after the date of the *dismissal*. §437g(a)(8)(B). “[T]he court may declare that the *dismissal*...is contrary to law. §437g(a)(8)(C). (Emphasis added in each citation.)

Commission is required by statute to take some action at that stage. Thus, for instance, a Commission finding of RTB inescapably implies a rejection of dismissal. Explaining in the “Initial Stage” Statement that the Commission is required to consider any response, including any specific requested action, would provide some assurance to respondents that their requests will be considered.

If, however, the Commission wishes to make its assurance of hearing the respondent more explicit, agreeing to vote on a respondent’s request to dismiss or find No RTB could be accomplished with no delay and extremely minimal complication. The Commission could simply announce, by way of policy statement or regulation, that it will consider any request to dismiss or find No RTB submitted with a timely response. Obviously, the Commission might agree with such a motion. If not, a motion to reject the respondent’s motion (to dismiss or find No RTB) could be coupled with a motion to find RTB. Because similar compound motions are routine at the Commission, such a process would likely be seamless after a brief adjustment period.

The “Initial Stage” Policy Statement could be further improved by clarifying the standard for a “No RTB” finding. While the current statement includes examples of when such a finding would be appropriate, in my experience, Commissioners and the General Counsel frequently compared the No RTB finding to a motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The “fails to describe a violation of the Act” language of the Initial Stage Statement is already quite similar to the “failure to state a claim” language of Rule 12(b)(6). Making this parallel explicit in the Initial Stage Statement or elsewhere would be especially helpful to counsel who do not practice before the Commission frequently by providing a familiar and precedent-rich analogy to the standard the Commission already applies.

It would also be helpful to point out the difference in terminology between Commission practice and the Federal Rules of Civil Procedure. The 12(b)(6) motion is normally styled as a motion to “dismiss,” the term the Commission normally uses for prosecutorial discretion decisions. As noted, the “No RTB” standard, a term not used in civil procedure motions, is equivalent to the 12(b)(6) standard.

b. Motion to Reconsider

In my experience, a reconsideration request arose most often in the immediate wake of an RTB finding. Because the Factual and Legal Analysis that accompanies the notice of a finding (required by §437g(a)(2)) is the first Commission statement on a complaint, a respondent is sometimes surprised by a legal theory or factual assumption embodied in the finding. If a respondent believes the Commission has simply overlooked or misunderstood a critical point, allowing reconsideration in lieu of resolving the matter through investigation may be useful.

As noted above, the Commission has long had a procedure to reconsider Advisory Opinions despite lack of specific statutory guidance. That regulation, at 11 C.F.R. 112.6, may provide a useful model for reconsideration of RTB findings. Both the time for a

motion and the procedure for Commission consideration are limited to avoid the necessity for Commission action in cases where the outcome would not be changed.

During ten years on the Commission I recall only a handful of reconsideration motions on Advisory Opinions. Reconsideration was genuinely rare, I suspect, because requestors recognized that they needed extraordinary reasons to convince Commissioners who had already considered and voted on the matter to change their minds. Against fears that allowing reconsideration of an RTB finding would introduce unacceptable delay, I suggest that the experience with Advisory Opinions suggests that such hypothetical fears are unlikely to be realized.

Because a probable cause finding is preceded by cross-briefing and the opportunity to request a hearing, surprise or misunderstanding should be minimal. Thus, reconsideration of a Probable Cause finding would be less useful and probably more prone to use for delay.

c. Motions During the Course of an Investigation

Motions made well after RTB in the course of an investigation, while sometimes styled as motions to dismiss or reconsider, often involved disputes or concerns about the scope or conduct of an investigation. When such controversies amount to discovery disputes, mechanisms such as a motion to quash a subpoena, or forcing the Commission to seek subpoena enforcement, are more apt than a dismissal motion.

In other cases such motions were offered in response to legal developments, including judicial decisions or the Commission's own disposition of a legally or factually similar matter. As with the recent *Davis* case, the Commission is normally fully aware of such developments and their bearing on pending cases, and motions by respondents are not necessary to trigger appropriate consideration by the Commission.

In still other instances, motions in the course of an investigation amounted to complaints that the matter had simply dragged on too long, or had failed to produce evidence of wrongdoing. While it is useful for the Commission to understand the degree of frustration sometimes occasioned by its investigations, such motions were often more reflective of the contentiousness of the matter than its merits.

In summary, I found motions made, however styled, in the course of investigations occasionally informative, but rarely useful. In addition, the circumstances under which such a motion might be meritorious are difficult to predict. Specific rules governing extraordinary motions might do as much to frustrate as to facilitate justice in the unusual circumstances in which such motions may be necessary. For this reason, I recommend that the Commission continue its current, informal practice of receiving and circulating extraordinary motions, without assuming any obligation to act or respond. As with all matters before the Commission, if any Commissioner feels the matter deserves attention, the Commission will consider it.

A policy statement explaining that the General Counsel will receive and circulate extraordinary motions (and so describing them) without obligation to act may also be useful. Practitioners would understand that the route was open but extraordinary, setting realistic expectations.

d. Probable Cause and Conciliation

Respondents again have an opportunity to make the equivalent of a motion to dismiss at the probable cause stage (if a matter progresses that far) by asking that the Commission reject the General Counsel's probable cause recommendation. Further, respondents engaging in conciliation (including pre-probable cause) have the ability to suggest dismissal of particular elements of a complaint or particular respondents. Under Commission practice, Commission staff historically has circulated to Commissioners any proposal that a respondent wishes to have considered during the conciliation process. Any single Commissioner who so wishes may then obtain Commission consideration of the proposal. As with many informal Commission procedures, it may be helpful to describe this practice in a policy statement or elsewhere for the benefit of less experienced counsel or respondents who want assurance that Commissioners themselves will review their submissions.

e. Timing of Motions in General

In addition to considering specific motions, the Commission may wish to focus more generally on the stage(s) at which motion practice is appropriate. Again by analogy to Federal Rule of Civil Procedure 12(b), respondents should be encouraged to make any and all claims defenses or motions with their initial response. By focusing potentially dispositive motions around the statutorily-mandated RTB and PC stages at which the Commission must act in any case, the Commission can provide greater transparency and procedural protections without unnecessarily delaying its investigative and enforcement processes.

2. Timeliness of Commission Action

I share the sense of accomplishment of Commission staff in the significant improvements in the time for processing enforcement matters made over the least several years. In my view, however, further significant improvements are still possible. After an initial dramatic improvement following the adoption of a 90 day target for First General Counsels Reports (FGCR) the Commission hit a plateau. Early in the Commission's history FGCRs were known as "48 hour reports" because they were expected to be completed in that time frame. Obviously, those reports were not as detailed as the ones the Commission receives today, but at a minimum they show that a different model, involving far quicker action, is possible.

Reviewing the time deadlines in §437g is informative: periods of 5 days, 15 days (three instances), and 30 days are specified. The only instance of a 90 day period is as an outside limit (rather than a target or average) for conciliation. I see no reason why the

Office of General Counsel cannot routinely produce an FGCR in the same 15 days respondents are expected to reply to a complaint or a probable cause brief. Even allowing extensions similar to those routinely given respondents, 90 days should be an outside limit rather than a mere target or average. By comparison, the Policy staff and Commission routinely meet the statutory 60 day deadline for issuance of Advisory Opinions.

One cause of delay in counsels reports is a continual effort by line attorneys and supervisors to predict and react to Commissioners' concerns. While responding to Commission direction is commendable, predicting it is sometimes impossible. When complex or closely balanced questions are present, it may be preferable to get the issues before decision-makers (Commissioners) expeditiously, rather than to attempt too fine a balancing. Even if a 30 day report timeframe comes at the cost of occasionally sending one back for further analysis, the net gain will be huge.

The Commission may want to consider specific steps to enforce time deadlines. For instance, the Commission might require OGC to notify the Secretary of case activations and then place matters on the agenda for the first meeting following the expiration of a 60 or 90 day period (if not already forwarded). Matters taking that long at the FGCR stage would likely benefit from a Commission discussion. More importantly, knowing that such a discussion would occur would provide the staff a significant incentive to complete the report in a timely fashion.

3. Prioritization

The Enforcement Priority System was adopted largely to address a problem which no longer exists: deciding which cases to dump because the Commission could not address every complaint within the five year statute of limitations. The EPS is still useful as an objective system for identifying low rated complaints that may be eligible for dismissal, and for selecting matters appropriate for ADR. The ratings also assist OGC managers in assigning cases and setting time schedules. So long as the Commission continues addressing all but the lowest-rated complaints, whether the Commission gives greater or lesser priority to certain types of cases is not highly significant.

4. Settlements and Penalties

Commissioner Weintraub has long advocated disclosing the Commission's internal penalty schedules. I was a skeptic largely because I feared that doing so might result in extensive arguments with respondents' counsels about how the Commission should interpret the Commission's penalty schedules. Ideally, conciliation should focus on remediation on the part of the respondent rather than Commission procedures. Late in my tenure, however, I became persuaded that some disclosure of Commission penalty expectations could be accomplished without risking most conciliations devolving into a race to the bottom of a penalty schedule.

The Commission has several starting penalty levels stated as percentages of the amount in violation for differing categories of violations such as reporting, excessive contributions, corporate contributions, etc. It also has, in some instances, detailed processes for incorporating mitigating (mostly) and aggravating (occasionally) factors. If the Commission were to release a simple list limited to the beginning calculation by category (10, 20, 30, 50, 75, 100%, etc.), it would serve the useful purposes of identifying what the Commission considers the relative seriousness of violations and inform inadvertent violators (who compose the vast majority of respondents) what they can expect to pay by way of penalty. If the Commission omitted the more detailed (and more fact specific and judgment laden) exceptions and refinements, it would likely avoid shifting the focus of conciliation from the respondent's actions to the Commission's schedules.

The Commission should retain flexibility to depart from penalty schedules: while schedules are useful as a starting point, every case is unique. Because departures were, in my experience, almost always downward from the base levels, no harm in a due process sense would result.

5. Appearances—Audits and Advisory Opinions

Given the Commission's successful experience with oral hearings in the enforcement process, the commission should consider expanding opportunities for appearances in other limited circumstances. Specifically, audited committees should be allowed to request a hearing at the final audit report stage, under procedures similar to existing probable cause hearings. Such hearings are required in public funding audits, and are often informative for the Commission. As with enforcement matters, it is likely that many committees will not request hearings, and the Commission should retain discretion in whether to grant them for Title 2 audits.

The Commission should also consider allowing appearances by counsel requesting advisory opinions. The Commission may wish to limit appearances to instances in which one or more draft opinions would not grant or substantially limit a proposed activity or where Commissioners themselves have questions. Requesting counsels' presentations need be no more lengthy than presentations by the General Counsel's policy staff currently are. In instances where Commissioners have questions, often readily answered, there is no discernible purpose in requiring Commission counsel to consult privately with requesting counsel and then to report to Commissioners, who are present in the same room, what requesting counsel said. Requesting counsel is presumably competent to speak in public on behalf of a client, and no concerns about improper *ex parte* communications could possibly arise in the context of an on the record discussion in an open hearing room.