



FEDERAL ELECTION COMMISSION
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AGENDA ITEM

For Meeting of: 06-25-09

SUBMITTED LATE

June 25, 2009

Memorandum

TO: The Commission

FROM: Chairman Steven T. Walther *STW*
Vice-Chairman Matthew S. Petersen *msp*
Commissioner Cynthia L. Bauerly *CLB*
Commissioner Caroline C. Hunter *cc*
Commissioner Donald F. McGahn II *DM*
Commissioner Ellen L. Weintraub *ELW*

Subject: Amendment to Proposed Rule of Agency Procedures: Audit Hearings,
Agenda Document No. 9-37

Attached is an amendment to Agenda Document No. 9-37, proposed rule of agency procedure. Please place this draft on the agenda for June 25, 2009.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[NOTICE 2009-XX]

Procedural Rules For Audit Hearings

AGENCY: Federal Election Commission

ACTION: Rule of Agency Procedure

SUMMARY: The Federal Election Commission (“Commission”) is instituting a program that ~~allows~~provides committees that are audited pursuant to the Federal Election Campaign Act of 1971, as amended (“FECA”) 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 current program for hearings at the probable cause stage of the enforcement process, audit hearings will 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. Further information about the procedures for the audit program is provided in the supplementary information that follows.

DATES: Effective [15 days from the date of publication in the Federal Register].

**FOR FURTHER
INFORMATION**

CONTACT: _____, Assistant General Counsel, or _____,
Attorney, 999 E Street NW, Washington, DC 20463, (202) 694-
1650 or (800) 424-9530.

**SUPPLEMENTARY
INFORMATION:**

The Commission is instituting a program to afford committees that are the subject of a Commission audit the opportunity to participate in hearings

(generally through counsel) and present oral arguments directly to the Commissioners prior to any Commission adoption of an audit report that includes findings that assert a potential violation of law.

I. BACKGROUND:

On June 11, 2003, the Commission held a hearing concerning its enforcement procedures. The Commission received comments from the public, many of which argued for increased transparency in Commission procedures and expanded opportunities to contest allegations. Comments and statements for the record are available at: <http://www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml>. In response to issues raised at the hearing, the Commission issued new rules of agency procedure. See Statement of Policy Regarding Deposition Transcripts in Nonpublic Investigations, 68 Fed. Reg. 50688 (Aug. 22, 2003); Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 1 (Jan. 3, 2005).

On December 8, 2006, the Commission published a proposal for a pilot program for probable cause hearings, and sought comments from the public. See Proposed Policy Statement Establishing Pilot Program for Probable Cause Hearings, 71 Fed. Reg. 71088 (Dec. 8, 2006). The comment period on the proposed policy statement closed on January 5, 2007. The Commission received four comments, all of which endorsed the proposed pilot program for probable cause hearings. These comments are available at <http://www.fec.gov/law/policy.shtml#proposed> under the heading “Pilot Program for Probable Cause Hearing.”

On February 8, 2007, the Commission decided by a vote of 6-0 to institute the pilot program. The program went into effect on February 16, 2007. The pilot program was designed to remain in effect for at least eight months, after which time a vote would be scheduled on whether the program should continue. The Commission found that the pilot program had been successful and the Commission announced that the program would become permanent. See 72 Fed. Reg. 64919 (Nov. 19, 2007).

On December 8, 2008, the Commission issued a notice of public hearing and request for public comment on its compliance and enforcement processes. Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74495 (Dec. 8, 2008). On January 14-15, 2009, the Commission received comment and testimony regarding procedures and processes that it uses to resolve cases. At that time, many commenters praised the probable cause hearing program and some requested that a similar procedure be adopted with respect to other Commission processes, including audits. The comments received by the Commission, as well as the transcript of the hearing are available at: <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>.

One of the questions specifically set forth in the Notice of public hearing and request for public comments was whether respondents should be given the opportunity to appear before the Commission at times such as when the Commission is considering audit reports that state violations of law. See 73 Fed. Reg. 74495, 74497. Several commenters supported providing an opportunity for committees being audited to be heard directly by the Commission before the Commission issues a final audit report. Based upon its experience with the probable cause hearing program, and public comments regarding hearings during the audit process, the Commission is instituting a new rule of agency procedure to expand the Commission's hearing procedures to include audits in which one or more findings assert a potential violation of law.

II. Procedures for Audit Hearings

A. Opportunity to request a hearing

The Commission is issuing a new rule of agency procedure allowing a committee that is being audited by the Commission's Audit Division to request a hearing prior to the Commission's adoption of a Final Audit Report when the Audit Division staff's draft Final Audit Report concludes that the committee violated FECA or Commission regulations. Currently, once the Audit Division completes its field work, it conducts an exit conference at which it presents its preliminary findings to the audited committee. Based upon the field work and the committee's response at the exit conference, the Audit Division prepares an interim or preliminary audit report that, in certain situations, the Commission considers in executive session prior to the report being sent to the committee being audited.¹ The committee then has the opportunity to respond in writing. The Audit Division then prepares a draft Final Audit Report for Commission consideration. If one or more Commissioners object to such report, the matter is discussed and decided in an open meeting of the Commission.

While all written submissions provided during the audit process are considered by the Commission under current practice, the Commission wishes to provide those being audited with an opportunity to address the Commission directly and in person, before the Commission considers adopting any Audit Division findings that a violation of the Act or Commission regulations occurred. Upon preparing its draft Final Audit Report, which takes into consideration the committee's exit conference discussion and response to the interim or preliminary audit report, the Audit Division will provide the audited committee with a copy of its draft Final Audit Report. In audits where the Audit Division recommends the Commission adopt findings that a violation of the Act or Commission regulations occurred, it shall attach a cover letter informing the committee of the opportunity to provide a written response and request an oral hearing before the Commission. Moreover, if the Office of General Counsel has provided any legal advice on the

¹ Pursuant to the Commission's regulations, the Audit division prepares "interim" audit reports in Title 2 matters and "preliminary" audit reports in Title 26 matters.

draft Final Audit Report, the Audit Division shall provide a copy of the Office of General Counsel's legal memorandum to the committee. Within 15 days after receiving the draft Final Audit Report and any corresponding legal memoranda, the audited committee may respond in writing, and include a written request for a hearing. Any request for a hearing must be in writing and filed with the committee's response. Requestors who are unable to appear physically at a hearing may participate remotely, subject to the Commission's technical capabilities. Requestors wishing to participate remotely are advised to notify the Commission Secretary when they submit their written request for a hearing. The request must provide notice if the requestor intends to appear via teleconference or videoconference (subject to the Commission's technical capabilities). ~~When non-final audit matters include information entitled to exemption under the Sunshine Act, a hearing regarding a draft Final Audit Report will occur in an executive session of the Commission.~~

Hearings are voluntary, and the Commission will draw no adverse inference based on the committee's request for, or waiver of, such a hearing. Each request for a hearing must state with specificity why the hearing is being requested and what issues the committee expects to address. Absent good cause, to be determined at the sole discretion of the Commission, late requests will not be accepted. Committees are responsible for ensuring that their requests are timely received. The Commissioners shall be notified of any such request within 5 days of receipt of the response. The Commission will grant a request for an oral hearing if any two Commissioners agree that a hearing would help resolve significant or novel legal enforcement issues or significant questions about the application of the law to the facts. The Commission will inform the committee whether the Commission is granting the committee's request within 30 days of receipt of the request.

B. Hearing Procedures

The purpose of an oral hearing is to provide an audited committee with an opportunity to present their arguments in person to the Commissioners when the Audit Division staff's draft alleges that the committee violated FECA or Commission regulations, but before the Commission adopts the Final Audit Report. Consistent with current Commission regulations, a committee may be represented by counsel, at the committee's own expense, or may appear pro se at the oral hearing. See 11 CFR 111.23. Committees (or their counsel) will have the opportunity to present their arguments. Commissioners will have the opportunity to pose questions to the audited committee, or their counsel, if represented.

At the hearing, committees are expected to raise only issues that were identified in their hearing request. Similarly, absent extenuating circumstances, committees may not introduce any new documents at the hearing that were not previously provided to the Audit Division. Committees may discuss any issues presented in the Audit Division staff's draft Final Audit Report, and the request

for hearing should include specific citations to any authorities (including prior Commission actions) on which the committee is relying or intends to cite at the hearing. If audited committees discover new information after submission of their response to the draft Final Audit Report or need to raise new arguments for similarly extenuating circumstances, they should notify the Commission as soon as possible prior to the hearing. Commissioners may ask questions on any matter related to the audit and committees are free to raise any germane new issues in response.

Committees should notify the Secretary of the Commission at least one week prior to the scheduled date of the hearing if they intend to use charts, handouts, or audio-visual aids during their presentation to the Commission, to allow the Commission time to coordinate the handling of these arrangements with the court reporter and the Commission Secretary.

When non-final audit matters include information entitled to exemption under the Sunshine Act, a hearing will occur in an executive session of the Commission, and only the committee and their counsel may attend. Attendance by any other parties must be approved by the Commission in advance. ~~When the hearing is held in an executive session, the Committee will be afforded the opportunity to submit a response to the Final Audit Report, which will be placed on the public record at the same time as the Final Audit Report.~~

The Commission will determine the format and time allotted for each hearing at its discretion. Among the factors that the Commission may consider are agency time constraints, the complexity of the issues raised, and the extent of the Commission's interest, ~~and the availability of teleconference or videoconference capabilities.~~ The Commission will determine the amount of time allocated for each portion of the hearing; the time limit may vary from hearing to hearing. The Commission anticipates that most hearings will begin with a brief opening statement by the committee or their counsel. Thereafter, Commissioners will have the opportunity to pose questions to the audited committee, and Commissioners may ask questions designed to elicit clarification from the Office of General Counsel or Office of the Staff Director. The General Counsel and the Staff Director will have the opportunity to pose questions to the audited committee, or their counsel, if represented. Hearings will normally conclude with closing remarks from the committee or their counsel.

Third-party witnesses may not be called to testify at an oral hearing. However, the Commission may request that the committee submit supplementary information or briefing after the hearing. The Commission discourages voluminous submissions. Supplementary information may be submitted only upon Commission request and no more than ten days after such a request from the Commission, unless the Commission's request for information imposes a different, Commission-approved deadline. Materials requested by the Commission and materials considered by the Commission in making its

determination may be made part of the public record pursuant to the Commission's Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426 (Dec. 18, 2003).

When the hearing is held in an executive session, the Commission will have transcripts made of the hearings. The transcript will become part of the record of the audit and may be relied upon for Commission determinations. Committees may be bound by any representations made by the committee or their counsel at the hearing. The Commission will make the transcripts available to the committee for inspection as soon as practicable after the hearing, and committees may purchase copies of the transcript. Transcripts may be made public after the matter is closed in accordance with Commission policies on disclosure. Additionally, the Committee's response to the draft Final Audit Report will be placed on the public record as part of the file of the Final Audit Report.

C. Scheduling of Hearings

The Commission will seek to hold the hearing in a timely manner after receiving a committee's request for a hearing. The Commission will attempt to schedule the hearing at a mutually accepted date and time. If a committee is unable to accommodate the Commission's schedule, however, the Commission may decline to hold a hearing. The Commission reserves the right to reschedule any hearing. Where necessary, the Commission reserves the right to request from a committee an agreement tolling any upcoming deadline, including any statutory deadline or other deadline found in 11 CFR 111.

D. Pilot Program

The Commission shall evaluate this new program, and consider whether it should, by an affirmative four votes of the Commission, be discontinued or modified. After one calendar year, the program shall continue as a pilot program until such time that the Commission either terminates it by an affirmative four votes or makes it permanent by an affirmative four votes.

E. Conclusion

This notice establishes rules of agency practice or procedure. This notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public comment, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedures Act ("APA"). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.