



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2009 JUL 24 P 5:18

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther
Chairman

*STW/hs
BEG*

DATE: July 24, 2009

RE: Agency Procedure for Notice to Named Respondents in Enforcement Matters of
Additional Material Facts or Additional Potential Violations

AGENDA ITEM
For Meeting of: 07-28-09

SUBMITTED LATE

Attached is a revised draft of a proposed agency procedure for notice to named respondents in enforcement matters of additional material facts or additional potential violations.

I have asked to place this draft on the agenda for July 28, 2009, and that it replace the version that was on the July 16, 2009 agenda.

Attachment

FEDERAL ELECTION COMMISSION

[NOTICE 2009-XX]

**Agency Procedure for Notice to Named Respondents
in Enforcement Matters
of Additional Material Facts or Additional Potential Violations**

AGENCY: Federal Election Commission.

ACTION: Agency Procedure.

SUMMARY: The Federal Election Commission (“Commission”) is establishing an agency procedure that will provide a respondent in certain complaint-generated enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”) with (1) notice of additional material facts and/or additional potential violations not contained in the complaint and (2) an opportunity to respond thereto, prior to the Commission’s consideration of whether it has reason to believe (“RTB”) that a violation of the Act or the Commission’s regulations (the “Regulations”) has been or is about to be committed by such respondents. This policy will provide a respondent who has been named in a complaint with notice and an additional opportunity to respond when the Commission’s Office of General Counsel (“OGC”) otherwise intends to recommend an RTB finding based on (1) additional readily available public facts that are within the general scope of the allegations contained in a complaint but that were not included with specificity in the complaint and (2) additional potential violations not specifically stated in the complaint but within the general scope of the allegations contained in the complaint.

DATES: Effective upon 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:

I. Background

On December 8, 2008, the Commission issued a notice of public hearing and request for public comment on all aspects of its agency procedures. Agency Procedures, 73 FR 74495 (Dec. 8, 2008). The purpose for the notice and ensuing proceeding was to obtain from all sources information on how the Commission might improve its efficiency, fairness and transparency in all aspects of its procedures. These procedures include the formal enforcement process, the referral of matters internally within the Commission, and the issuance of advisory opinions. Between the publication date and January 14, 2009, the Commission received written comments and on January 14-15, 2009, the Commission conducted open hearings and received oral testimony. 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>.

This agency procedure is among the most recent in a series of agency procedures that have been recently adopted by the Commission in response to the received comments and testimony. See Advisory Opinion Procedures, 74 FR 32160 (July 7, 2009); Procedural Rules for Audit Hearings, 74 FR 33140 (July 10, 2009); Procedural Rule for Notice to Respondents in Non-Complaint Generated Matters, 74 FR ____ (July XX, 2009).

Under section 437g of FECA, 2 U.S.C. 437g, and part 111 of the Regulations, 11 CFR part 111, any person who believes that a violation of any statute or regulation over which the Commission has jurisdiction has occurred, or is about to occur, may file a complaint with the Commission. 2 U.S.C. 437g(a)(1); 11 CFR 111.4. Upon receipt of the complaint, the OGC reviews the complaint and notifies each respondent named in the complaint that the complaint has been filed. 2 U.S.C. 437g(a)(1); 11 CFR 111.5. The OGC notification also provides the respondent with a copy of the complaint. 11 CFR 111.5(b). The respondent is then provided with 15 days from receipt of the complaint to demonstrate why the Commission should not take action based on the complaint. 2 U.S.C. 437g(a)(1); 11 CFR 111.6. Only after the expiration of this 15 day period, or receipt of a response from the respondent, whichever occurs first, may the OGC make a recommendation to the Commission that it should find RTB that the respondent has committed or is about to commit a violation. 2 U.S.C. 437g(a)(1); 11 CFR 111.6(b).

In the usual course of to the Commission as to whether or not to find RTB, the OGC may ascertain additional readily available public facts within the general scope of the allegations contained in the complaint. After ascertaining these additional facts, the OGC will on occasion determine (1) that these additional material facts not presented in the complaint, and not addressed in the response to

the complaint, either support or dispute the allegations contained in the complaint or (2) that additional potential violations of the Act or the Regulations may have occurred which were not specified with particularity in the complaint. The Commission has not adopted a formal procedure by which the OGC would notify a respondent of such additional material facts, or of additional potential violations, and to provide the respondent with an opportunity to respond to the notice prior to the OGC making an RTB recommendation to the Commission.

II. Agency Procedure for Notice to Respondents of Additional Material Facts or Potential Violations

The Commission is establishing an agency procedure intended to provide a respondent with written notification and an opportunity to respond to additional readily available material facts and additional potential violations of the Act or the Regulations within the general scope of the allegations contained in the complaint. Accordingly, this agency procedure will provide a respondent in a complaint-generated matter with essentially the same notice and opportunity to respond to all additional material facts, and all additional potential violations, as that provided to a respondent with regard to material facts and allegations had the same been included in the originating complaint.

This new agency procedure provides as follows:

- A. A respondent will be given written notice by the OGC in the event that the OGC intends to include in its RTB recommendation to the Commission (1) any facts or information that were obtained by the OGC from readily ascertainable public sources, which facts are deemed material and are within the general scope of the allegations in the complaint and (2) any potential violation or violations of the Act or the Regulations within the general scope of the allegations contained in the complaint that have not been specifically alleged in a complaint.
- B. The written notice from the OGC will contain the following:
 1. If the OGC intends to include in its RTB recommendation to the Commission additional readily available material facts that are within the general scope of the allegations in the complaint but were not contained in a complaint, the notice will include a recitation of the additional material facts available to the OGC and the source or sources of those facts, unless the Commission determines that good cause exists for withholding such source or sources; and
 2. If the OGC intends to include in its RTB recommendation to the Commission one or more additional potential violations of the Act or the Regulations within the general scope of the

allegations contained in the complaint that were not specifically alleged in a complaint, the notice will identify each such potential additional violation that the respondent may have committed, along with a recitation of the material facts available to the OGC upon which the OGC intends to rely in making its RTB recommendation to the Commission, and the source or sources of those facts, unless the Commission determines that good cause exists for withholding such source or sources.

- C. Within 15 days from receipt of the OGC notice, the respondent may submit a written explanation of why the Commission should take no action based on the additional material facts or with regard to the additional potential violation or violations.
- D. The Commission will not make any RTB finding against a respondent based on the additional material facts or with regard to the additional potential violation or violations unless it has considered the response or unless no such response has been received by the Commission within 15 days of the respondent having received the OGC notice.

III. Conclusion

This notice establishes an agency practice or procedure. This notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedure 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.

The above provides general guidance concerning notice to respondents in complaint-generated matters and announces the general course of action that the Commission intends to follow. This notice sets forth the Commission’s intentions concerning the exercise of its discretion in its enforcement program. However, the Commission retains that discretion and will exercise it as appropriate with

respect to the facts and circumstances of each matter it considers. Consequently, this notice does not bind the Commission or any member of the general public.

On behalf of the Commission,

Steven T. Walther
Chairman
Federal Election Commission

DATED _____
BILLING CODE: 6715-01-P