



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

TO: The Commission

FROM: Steven T. Walther *STW*
Chairman *BWB*

DATE: July 24, 2009

RE: Agency Procedure for Notice to Potential New Respondents in Enforcement
Matters

AGENDA ITEM
For Meeting of 07-28-09

SUBMITTED LATE

Attached is a revised draft of a proposed agency procedure for notice to potential new respondents in enforcement matters.

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 Potential New Respondents
in Enforcement Matters**

AGENCY: Federal Election Commission.

ACTION: Agency Procedure.

SUMMARY: The Federal Election Commission (“Commission”) is establishing an agency procedure that will provide potential new respondents 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 allegations 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 (“Regulations”) has been or is about to be committed by such respondents. Specifically, for complaint-generated matters this policy will provide a person who has not been specifically named in a complaint, but about whom the Commission’s Office of General Counsel (“OGC”) has ascertained information either from the complaint, from readily available public facts, or from an investigation, that are within the general scope of the allegations contained in the complaint that the person may have violated the Act or the Regulations, with notice and an opportunity to respond prior to the OGC making a recommendation that the Commission find RTB that a violation has taken place.

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 developing its recommendation to the Commission as to whether or not to find RTB, the OGC will on occasion determine, based on the facts alleged in the complaint or from facts the OGC otherwise ascertains from readily available public information within the general scope of the allegations contained in the complaint, that a person who has not been specifically

identified in a complaint may nevertheless have committed a violation of the Act or the Regulations. The Commission has not adopted a formal procedure by which the OGC would notify a potential new respondent of the potential violations and to provide the respondent with an opportunity to respond to the notice prior to the OGC making its RTB recommendation to the Commission.

Similarly, in the course of an investigation after the Commission has already made an RTB finding based on a complaint, the OGC will on occasion determine that a person who has not been specifically identified in the complaint may nevertheless have committed a violation of the Act or the Regulations. The Commission has not adopted a formal procedure by which the OGC must notify a potential new respondent of the potential violations and to provide the respondent with an opportunity to respond to the notice prior to the OGC making its RTB recommendation to the Commission.

II. Agency Procedure for Potential New Respondents Who Have Not Been Named in a Complaint

The Commission is establishing an agency procedure intended to provide any person who is not identified in a complaint, but who may be added as a potential new respondent in a complaint-generated matter, with written notification and an opportunity to respond to the alleged violations. Accordingly, this agency procedure will provide a potential new respondent in complaint-generated matter who was not identified in a complaint with notice of the basis of allegations and an opportunity to respond, essentially the same as the notice provided to a respondent who has been named in the originating complaint.

The Commission is hereby setting forth a policy that the Commission generally has been following for approximately two years.

This new agency procedure provides as follows:

- A. Any potential new respondent who has not been named in a complaint, and who therefore has not been provided with a copy of the complaint¹ or with an opportunity to respond, will be given written notice by the OGC that the OGC is considering recommending that the Commission find RTB based on the facts alleged in the complaint, or from facts the OGC otherwise ascertains from readily available public information within the general scope of the allegations contained in the complaint, that the potential new respondent may have committed a violation of the Act or the Regulations.

¹ Absent written consent from the respondents named in a complaint, the Commission is prohibited from sending the potential new respondent a copy of the complaint itself. See 2 U.S.C. 437g(a)(12)(A); 11 CFR 111.21.

- B. The written notice from the OGC will contain the following:
1. An explanation of the Commission's enforcement process;
 2. A description of the potential violation or violations of the Act or Regulations based upon based on the facts alleged in the complaint or from facts the OGC otherwise ascertains from readily available public information within the general scope of the allegations contained in the complaint; and
 3. 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 potential new respondent may submit a written explanation of why the Commission should take no action.
- D. The Commission will not make any RTB finding against such a potential new respondent unless it has considered the response or unless no such response has been received by the Commission within 15 days of the potential new 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