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# Guidebook for Complainants and Respondents on the FEC Enforcement Process

**AGENDA ITEM**

For Meeting of: 12-17-09

**SUBMITTED LATE**

Federal Election Commission

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## **ABBREVIATIONS**

ADR	Alternative Dispute Resolution
ADRO	Alternative Dispute Resolution Office
CELA	(Office of) Complaints Examination and Legal Administration
DOJ	Department of Justice
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
OAR	Office of Administrative Review
OGC	Office of General Counsel
PCTB	Probable Cause to Believe
RAD	Reports Analysis Division
RTB	Reason to Believe

## **I. INTRODUCTION**

The purpose of this guidebook is to assist complainants and respondents and educate the public concerning Federal Election Commission (“FEC” or “Commission”) enforcement matters. The guidebook summarizes the Commission’s general enforcement policies and procedures and provides a step-by-step guide through the Commission’s enforcement process.

This publication also provides guidance on certain aspects of federal campaign finance law. It does not replace the law or change its meaning, nor does this publication create or confer any rights for or on any person or bind the Commission or the public. The reader is encouraged also to consult the Federal Election Campaign Act of 1971, as amended (“the Act” or “FECA”), Commission regulations (Title 11 of the Code of Federal Regulations), Commission advisory opinions, and applicable court decisions. All of these materials can be accessed via the Commission’s website, [www.fec.gov](http://www.fec.gov). This Guidebook is a general reference guide, is not intended to be an exhaustive list of procedures, and does not attempt to address all circumstances that may arise in any given enforcement matter.

The FEC is the independent federal regulatory agency that holds the exclusive authority and responsibility for the civil enforcement of the federal campaign finance laws that are found in the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.*; the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 *et seq.*; the Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9031 *et seq.*; and Title 11 of the Code of Federal Regulations. The FEC has jurisdiction over the financing of campaigns for the U.S. House of Representatives, the U.S. Senate, the Presidency and the Vice Presidency.

The Commission has six members, no more than three of whom may be of the same political party. Commissioners are nominated by the President and confirmed by the Senate. The Chairman and Vice Chairman of the Commission, who are not from the same political party, serve terms of one calendar year. The Commissioners serve in these capacities on a rotating basis, with the Chairmanship alternating between the two parties.

The Commission’s core functions include administering the public disclosure system for campaign finance activity, providing information and policy guidance on campaign finance laws, encouraging voluntary compliance with campaign finance laws, and enforcing the campaign finance laws through audits, investigations, and civil litigation. This guidebook concerns three aspects of the Commission’s enforcement function: the general enforcement process set forth in 2 U.S.C. § 437g, the Commission’s Alternative Dispute Resolution program and Administrative Fine program.

As an initial matter, it is important for respondents to be aware that:

- The fact that an entity or person has been designated a “respondent” at the outset of an enforcement matter does not mean that the Commission has made a finding or otherwise believes that a violation has occurred or is about to occur; respondents may admit or deny, in whole or in part, any allegation made against them.
- The FEC’s general enforcement process, as carried out through the Commission’s Office of General Counsel (“OGC”) and as described below, moves in stages during which there are opportunities for respondents to respond to the allegations and present their views to General Counsel staff and to the Commission.
- A vote by at least four of the six Commissioners is needed at every stage, including whether to find reason to believe and initiate an investigation, find probable cause that a violation has occurred or is about to occur, settle a matter, or authorize filing a lawsuit. If there are not four votes at any stage, the Commission will not proceed to the next step of the enforcement process.
- With the limited exception of the Administrative Fine program discussed in Section III.B. below, the Commission does not impose fines for violations of the campaign finance laws. The Commission seeks the payment of civil penalties through voluntary settlements with the respondent. If there is no such settlement, the Commission may file suit in federal district court.

## **II. GENERAL ENFORCEMENT PROCESS**

The enforcement process most often begins in one of the four following ways:

- The filing of a complaint by a person or entity (the “complainant”),
- A referral from another government agency,
- A referral from the Commission’s Audit Division or Reports Analysis Division (“RAD”), or
- A voluntary submission made by persons or entities who believe they may have violated campaign finance laws (often referred to as a *sua sponte* submission).

The process ends when the Commission determines to take no action or reaches a settlement with the respondent. If the Commission fails to successfully conciliate differences with a respondent, it may file a civil lawsuit in U.S. District Court. In certain circumstances, the Commission may also refer a matter to the U.S. Department of Justice for criminal prosecution under the Act.

For additional information regarding the rules pertaining to the Commission’s enforcement process, *see* 11 CFR Part III, Subpart A, which sets forth the rules governing enforcement procedures. These regulations are on the Commission’s website at [http://www.fec.gov/law/cfr/ej\\_citation\\_part111.shtml](http://www.fec.gov/law/cfr/ej_citation_part111.shtml). The Commission’s website also contains documents from closed enforcement matters, all the policy statements cited herein, and other information about Commission practices and procedures. The links for this material are included throughout this guidebook.

## **A. Sources of Allegations**

### **1. Complaint Generated Matters**

Any person may file a complaint if he or she believes a violation of the federal election campaign laws or Commission regulations has occurred or is about to occur. The complaint must be made in writing and submitted to the Office of General Counsel, Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463. The original must be submitted, along with three copies, if possible. Upon receipt of the complaint, OGC circulates a copy to each Commissioner. Facsimile or e-mail transmissions are not acceptable. A complaint must comply with certain requirements. 2 U.S.C. § 437g(a)(1); 11 CFR 111.4(a)-(d).

A complaint must:

- Provide the full name and address of the complainant; and
- Be signed, sworn to and notarized. This means that the notary public's certificate must say "...signed and sworn to before me", or words that connote the complaint was affirmed by the complainant (such as "under penalty of perjury").

Furthermore, in order for a complaint to be considered complete and proper, it should:

- Clearly recite the facts that describe a violation of a statute or regulation under the Commission's jurisdiction (citations to the law and regulations are not necessary but helpful);
- Clearly identify each person, committee or group that is alleged to have committed a violation;
- Include any documentation supporting the alleged violations, if available; and
- Differentiate between statements based on the complainant's personal knowledge and those based on information and belief. Statements not based on personal knowledge should identify the source of the information.

Complaints should be as factually specific as possible (e.g., by providing the date or approximate dates that the activities at issue occurred), and sworn affidavits from persons with first-hand knowledge of the facts alleged is encouraged. If the allegations in the complaint are based in whole or in part upon information contained in an advertisement, news article, or website, the complaint should provide a copy of the relevant advertisement, news article, or link to the website, if possible. Complaints should be filed as soon as possible after the alleged violation becomes known to the complainant in order to preserve evidence and the Commission's ability to seek civil penalties in federal district court within the five-year statutes of limitations period (measured from the time of the violation) provided by 28 U.S.C. § 2462 (civil) and 2 U.S.C. § 455 (criminal).

The Office of Complaints Examination and Legal Administration (“CELA”) within OGC is the entry point for processing the complaint. CELA reviews the complaint for compliance with the required criteria, as described above. If the complaint does not meet the criteria, CELA notifies the complainant of the deficiencies and that no action can be taken on the basis of the complaint. 11 CFR 111.5(b). If the complaint is deemed sufficient, CELA assigns the complaint a Matter Under Review (“MUR”) number, informs the complainant that the complaint has been received and that the Commission will notify him or her once the entire matter has been resolved. *See* 11 CFR 111.5(a)-(b).

Until the matter is closed, the Commission is required by law to keep its actions regarding the MUR confidential. 2 U.S.C. § 437g(a)(12). Confidentiality requirements, however, do not prevent a complainant or respondent from disclosing the basis of the complaint. Information about a Commission notification of findings or about a Commission investigation may not be disclosed before the matter is made public, unless the respondent waives the right to confidentiality in writing.

## 2. Non-Complaint Generated Matters

The primary types of non-complaint generated matters are: (1) those based on referrals from within the Commission (internally generated from RAD or the Audit Division), (2) those based on referrals from other government agencies, and (3) those based on *sua sponte* submissions (i.e., voluntary submissions made by persons or entities who believe they may have violated the law). 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 Section II.B.2 below.

### a. Internal Referrals

- Referrals from the Commission’s Reports Analysis Division

OGC receives referrals regarding apparent violations of the Act and FEC regulations from RAD and the Audit Division. RAD monitors the filing of disclosure reports filed with the Commission by federal political committees and other reporting entities, reviews their contents for compliance with the federal campaign finance laws, and, when necessary, sends written requests for further information, clarification, and sometimes correction of potential inaccuracies that appear on disclosure reports. Prior to any potential referral, RAD will contact the committee or reporting entity and give it an opportunity to take corrective action, if possible, or provide clarification. Pursuant to internal Commission thresholds, depending upon the nature and extent of the apparent violations, and any corrective actions taken, RAD may refer apparent violations to OGC for possible enforcement action.

- Referrals from the Commission's Audit Division

The Audit Division conducts audits pursuant to (1) 26 U.S.C. §§ 9007, 9008, and 9038 of all presidential candidates and nominating conventions that qualify for public financing, and (2) 2 U.S.C. § 438(b) of committees required to file reports under 2 U.S.C. § 434. During an audit, the committee will have the opportunity to review and respond to any proposed or suggested findings made by the Audit Division. Depending upon the nature and severity of apparent violations identified during an audit, and any corrective actions taken, such findings may be referred to OGC for possible additional action.

The Final Audit Report, upon which the potential referral is based, will be reviewed by the full Commission and must be approved by at least four Commissioners. The committee will receive a copy of the Audit Division's proposed Final Audit Report, after which it may request an oral hearing before the full Commission. Two Commissioners must agree to hold the hearing before the request is granted. The Commission will inform the committee whether the Commission is granting the committee's request within 30 days of receipt of the request. For more information on the audit hearing process, please refer to the Commission's Policy Statement on Procedural Rules for Audit Hearings at [http://www.fec.gov/law/cfr/ej\\_compilation/2009/notice\\_2009-12.pdf](http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-12.pdf).

b. External Referrals

Enforcement proceedings may also originate from other entities referring potential violations to the Commission. These entities include local and state law enforcement authorities, federal enforcement authorities, and other federal agencies. The majority of external referrals received by the Commission originate with the U.S. Department of Justice (DOJ). The fact that a person is or was the subject of a DOJ investigation or prosecution does not necessarily preclude the Commission from civilly pursuing that person for violations the Act, even when the conduct at issue is the same and similar facts are involved. Also, the FEC may elect to proceed on the civil track at the same time the DOJ is pursuing the criminal case, but will, under appropriate circumstances, hold cases in abeyance during the criminal proceedings.

c. *Sua Sponte* Submissions

Self-reported voluntary submissions (called "*sua sponte*" submissions) should include the following:

- An admission of each violation, with names and contact information as appropriate;
- A complete recitation of the facts along with all relevant documentation that explains how each violation was discovered;
- The actions that were taken in response to the violation, if any (e.g., a report of an internal investigation); and
- What other agencies, if any, are investigating the violation (or facts surrounding the violation).

To encourage self-reporting, the Commission will often negotiate penalties that are between 25 and 75 percent lower than those for comparable matters arising by other means.

In certain circumstances, the Commission may allow persons or entities who voluntarily report their violations and make a complete report of their internal investigation to proceed directly into conciliation before the Commission makes a finding as to whether there is reason to believe the committee violated campaign finance laws or Commission regulations. Generally speaking, the more complete the submission and the greater the cooperation from a person or entity that is self-reporting, the more likely a mutually acceptable “fast track” settlement can be presented to the Commission for its approval.

For more guidance on how to prepare and file a *sua sponte* submission, please refer to the Commission’s Statement Regarding Self-Reporting of Campaign Finance Violations (*Sua Sponte* Submissions), which can be found on the Commission’s website at [http://www.fec.gov/law/cfr/ej\\_compilation/2007/notice\\_2007-8.pdf](http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-8.pdf).

## **B. Notice to Respondents**

A “respondent” is a person or entity who is the subject of a complaint or a referral (or who files a *sua sponte* submission) that alleges that the person or entity may have violated one or more of the federal campaign finance laws within the FEC’s jurisdiction.

### 1. Complaint Generated Matters

Within 5 days after receiving a properly filed complaint, OGC sends each respondent a copy of the complaint, a letter describing the Commission's compliance procedures and a designation of counsel form. 11 CFR 111.5(a). The Commission must provide the respondent at least 15 days from the date of receipt to respond in writing, explaining why no action should be taken. 11 CFR 111.6(a). The letter from OGC notes that respondents have a legal obligation to preserve all documents, records and materials relating to the matter until such time as they are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519 (establishing penalties for knowing destruction, alteration, or falsification of records in federal investigations).

## 2. Non-Complaint Generated Matters

In RAD referrals and Audit referrals, within five days of OGC's receipt of such referrals, OGC sends notification letters to respondents, attaching the documents from RAD that set forth the basis for the referral or, in the case of Audit referrals, the relevant audit findings. The respondents have at least 15 days to respond to OGC's notification. For more information, please refer to the Commission's Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 Fed. Reg. 38617-618 (Aug. 4, 2009), also available at [http://www.fec.gov/law/cfr/ej\\_compilation/2009/notice\\_2009-18.pdf](http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-18.pdf).

When OGC receives referrals from other government agencies or *sua sponte* submissions, it notifies the respondents (other than the *sua sponte* submitters) of the allegations by letter containing the same types of information as discussed above. The respondents have at least 15 days to respond in writing.

The notification letters reflect no judgment about the accuracy of the allegations, but are merely a vehicle for (1) informing the respondent that the Commission has received allegations as to possible violations of the federal campaign laws by the respondent, (2) providing a copy of the complaint or referral document, or in limited circumstances, a summary thereof, and (3) giving the respondent an opportunity to respond in writing in a timely manner.

### **C. The Response**

The response is the respondent's opportunity to demonstrate to the Commission why it should not pursue an enforcement action, or to clarify, correct, or supplement the information in the complaint or referral, including possible mitigating circumstances, and if desired, to ask for early settlement consideration. The Commission may not take any action on a complaint or referral other than a vote to dismiss, until 15 days after the date of notification. See, e.g., 2 U.S.C. § 437g(a). Respondents are not required to respond to the allegations.

There is no prescribed format for responses. While not required, documentation, including sworn affidavits from persons with first-hand knowledge of the facts, tends to be helpful. It is also helpful for a respondent to specifically address each allegation in the complaint. Upon receipt of the response, OGC circulates a copy to each Commissioner. All responses are reviewed and considered by OGC and the Commissioners.

The Act requires that, before taking any action on a complaint (except to dismiss it), the Commission must provide a respondent at least 15 days to file a response demonstrating that no action should be taken. But extensions to this 15-day period may be available. To request an extension of time to respond to a complaint before the Commission considers the complaint, the respondent should submit a letter to the Commission as soon as possible after receiving notice of the complaint explaining why the respondent needs more time. If an extension is granted, the Commission will take no action on the complaint until after the new deadline.

Respondents may contact OGC at any time to ask questions they may have about a matter, such as the current status of the case. A contact person within OGC (typically a paralegal or attorney) and phone number is identified in the first notification to the respondent.

#### **D. Representation by Counsel**

Respondents, if they so choose, have a right to be represented by counsel during all or any portion of the enforcement process, and may designate or change counsel at any point. A respondent who decides to be represented by counsel must inform the Commission by sending a “statement of designation of counsel,” a copy of which is included with the notification letter. Where the respondent is a political committee, the designation of counsel also covers the treasurer in his or her official capacity unless the respondent specifies otherwise. Once the Commission receives the “statement of designation of counsel,” the Agency will communicate only with the counsel unless otherwise authorized by the respondent.

#### **E. Processing Enforcement Matters**

After the 15-day response period (and any extension of time, if granted) has elapsed, OGC evaluates the complaint and response, if any, using objective criteria approved by the Commission under its Enforcement Priority System. Matters are prioritized and in some instances are referred to either the Alternative Dispute Resolution Office or the Administrative Fine Program (discussed below). In general, matters that are deemed high priority (generally those reflecting such factors as a substantial amount of activity involved, high legal complexity, the presence of possible knowing and willful intent, and potential violations in areas that the Commission has set as priorities) are preliminarily assigned to the Enforcement Division. Matters not warranting the further use of Commission resources are recommended for dismissal.

#### **F. Initial Vote to Proceed (Reason to Believe)**

With regard to each matter assigned to an attorney in the Enforcement Division, the General Counsel recommends to the Commission whether or not there is “reason to believe” the respondent has committed or is about to commit a violation of the law. This report, called the First General Counsel’s Report, is circulated to the Commissioners for a vote on whether to approve the General Counsel’s recommendation or to seek an alternate disposition of the matter. In casting their votes, the Commissioners consider the complaint, the respondent’s reply, relevant committee reports on the public record, and the General Counsel’s analyses and recommendations. If the Report receives less than four approvals, it is scheduled for a closed Executive Session, during which the full Commission considers the recommendations and votes on the disposition of the matter.

In the initial stages of the process, the Commission will take one of the three following courses of action:

- Find Reason to Believe

The Act requires that the Commission find “reason to believe that a person has committed, or is about to commit, a violation” of the Act as a precondition to opening an investigation into the alleged violation. 2 U.S.C. § 437g(a)(2). A “reason to believe” finding is not a finding that the respondent violated the Act, but instead simply means that the Commission believes a violation may have occurred.

A reason to believe finding is generally followed by either an investigation or pre-probable cause conciliation. For example, a reason to believe finding followed by an investigation would be appropriate when there is reason to believe a violation may have occurred, but an investigation is required to determine whether a violation in fact occurred and, if so, the exact scope of the violation. However, if it appears the Commission has all of the necessary information regarding the alleged violations, the Commission may immediately authorize OGC to enter into conciliation with the respondent(s) prior to a finding of probable cause (called “pre-probable cause conciliation”) and approve a proposed conciliation agreement attached to the First General Counsel’s Report. *See* 11 CFR 111.18.

- Dismiss the Matter

Pursuant to the exercise of its prosecutorial discretion, the Commission may dismiss a matter when, in the opinion of at least four Commissioners, the matter does not merit further use of Commission resources. The Commission may take into account factors such as the small dollar amount at issue, the insignificance of the alleged violation, the vagueness or weakness of the evidence, or the merits of the response. For example, a dismissal would be appropriate when the seriousness of the alleged conduct is not sufficient to justify the likely cost and difficulty of an investigation to determine whether there is probable cause to believe a violation in fact occurred, or the evidence is sufficient to support a reason to believe finding but the violation is minor and not likely to be repeated. In this latter circumstance, the Commission may send a letter cautioning or reminding the respondent regarding their legal obligations under the relevant statutory and regulatory provisions.

- Find No Reason to Believe

The Commission will make a determination of “no reason to believe” a violation has occurred when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law. For example, a no reason to believe finding would be appropriate when a violation has been alleged, but the respondent’s response or other evidence demonstrates that no violation has occurred, a complaint alleges a violation but is either

not credible or is so vague that an investigation would be unwarranted, or a complaint fails to describe a violation of the Act.

### **G. Notification of Reason to Believe Findings**

When the Commission approves a recommendation by OGC that it find reason to believe, the respondent will receive written notification (generally through a letter signed by the Chairman) of the Commission's determination shortly thereafter. In matters involving registered committees, the current treasurer is usually included as a respondent in his or her official capacity. In rare instances, however, the Commission has made findings against a treasurer in his or her personal capacity. For example, the Commission may make a determination that the treasurer acted in a personal capacity when information indicates that the treasurer knowingly and willfully violated the Act, recklessly failed to fulfill duties specifically imposed by the Act or intentionally deprived himself or herself of facts giving rise to the violation. For further information regarding the Commission's practice with respect to committee treasurers, please refer to the Commission's Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (January 3, 2005), at <http://www.fec.gov/law/policy/2004/notice2004-20.pdf>.

If the respondent has not already filed a designation of counsel with the Commission, the notification letter will again advise the respondent of the right to be represented by counsel. Enclosed with the notification letter is a copy of the Factual & Legal Analysis approved by the Commission that provides the basis for the Commission's decision.

A letter notifying a respondent of a reason to believe finding will apprise the respondent of the ability to submit any factual or legal materials that the respondent believes are relevant for the Commission's consideration or resolution of the matter. Respondents should not hesitate to provide the Commission with relevant new information or present the Commission with any errors in the Commission's recitation of the facts or law. The Commission receives all responses and considers them when determining whether and how to proceed with an investigation or conciliation. Any documents or letters that are sent directly to the Commissioners should also be sent to the Office of General Counsel to ensure that the materials are properly documented and included in the files related to the matter.

Respondents or their counsel may also contact the Enforcement Division attorney handling the matter by telephone, or request a meeting to discuss any issues relating to the reason to believe findings or other developments in the matter.

Depending on whether further information is required, the Commission may follow a reason to believe finding with an investigation or proceed to attempt to settle the matter prior to a finding of probable cause to believe.

## H. Investigation

Upon finding reason to believe that a violation has occurred or is about to occur, the Commission may authorize an investigation.

Enforcement Division staff may conduct an investigation through informal and formal methods. Informal methods may include such activities as in-person or telephone interviews with persons, including respondents or third-party witnesses, and informal requests for information and documents. Staff may also examine relevant information from publicly available sources.

Formal methods (also called “compulsory process”) may include subpoenas and orders for information, documents, or depositions. See 2 U.S.C. § 437d. All subpoenas are reviewed and approved by the Commission before they are served.

Responses to subpoenas are generally due within 30 days of receipt of such subpoenas, but extensions may be granted as appropriate. Persons subpoenaed may file motions to quash with the Commission within five days of receipt of the subpoenas. If a person fails to respond to a subpoena or order for documents and information, or provides insufficient grounds for declining to respond or provides an incomplete submission, the Commission may file a subpoena enforcement action in federal district court. See 11 CFR 111.13(b), 111.15.

A deposition in the enforcement process is subject to special rules. See 11 CFR 111.12, 111.14. A respondent or other witness deponent may have counsel present during the deposition and shall be paid the same fees and mileage as witnesses in federal courts. If the deponent lives and works a long distance from Washington, D.C., and the deposition is scheduled at the FEC’s headquarters, the Commission may also pay for the deponent’s air, bus, or train fare and if, necessary, overnight lodging, within certain government-approved parameters. A deponent is responsible for paying all costs for his or her attorney.

At the deposition itself, the deponent will be placed under oath by the court reporter (who is a notary public), and is required to respond to questions by the Commission’s staff unless the information requested is protected from disclosure by law. Respondent’s counsel may be present, take notes, consult with the deponent, object to or seek to clarify certain questions, and, generally at the end, ask questions of the deponent. The court reporter, paid for by the Commission, will make a verbatim transcript of the deposition.

A deponent has the right to review the deposition transcript, consistent with Federal Rule of Civil Procedure 30(e). 11 CFR 111.12(c). If there are any changes in form or substance to the testimony, the deponent may sign a statement listing the changes and the reasons for making them. Furthermore, the deponent may purchase a copy of the transcript of his or her own deposition from the court reporter. For further information, please refer to the Commission’s Statement of Policy Regarding Deposition

Transcriptions in Nonpublic Investigations, 68 Fed. Reg. 50688-589 (Aug. 22, 2003) at <http://www.fec.gov/agenda/agendas2003/notice2003-15/fr68n163p50688.pdf>.

### **I. Early Resolution of MUR (Pre-Probable Cause Conciliation)**

Although the Act only requires the Commission to attempt to conciliate matters after a finding of probable cause, 2 U.S.C. § 437g(a)(4), the Commission has promulgated regulations for pre-probable cause conciliation to allow for early disposition of appropriate matters. *See* 11 CFR 111.18(d). Pre-probable cause conciliation is strictly voluntary; both the Commission and the respondent must be willing to participate.

If OGC believes that an investigation is not necessary before attempting conciliation, it may recommend pre-probable cause conciliation before the Commission approves an investigation. Additionally, respondents can request pre-probable cause conciliation at any time, even in matters in which the Commission has authorized an investigation. If the respondent is interested in pursuing a settlement, the respondent should so request in writing to OGC. Upon receipt of a request for settlement, OGC will make recommendations to the Commission whether pre-probable cause conciliation is appropriate at that juncture.

At the time the Commission decides to enter into pre-probable cause conciliation, it approves a proposed conciliation agreement that serves as the opening settlement offer. Among other things, the proposed agreement will generally:

- Recite the Commission’s reason to believe finding(s),
- Set forth relevant facts and law,
- Contain the respondent’s admission of violating specific provisions of the Act and the Commission’s regulations,
- Include an agreement that the respondent will cease and desist from violating those provisions in the future, and
- Include an agreement to pay a civil penalty and/or possibly take corrective actions, such as refunding impermissible contributions, amending reports, hiring compliance specialists, or attending FEC educational seminars.

With respect to the civil penalty, the Act provides that a conciliation agreement entered into by the Commission may require that the respondent pay a civil penalty “which does not exceed the greater of \$5,000 or an amount equal to any contribution or expenditure involved.” 2 U.S.C. § 437g(a)(5)(A). In 2009, the statutory penalty was adjusted for inflation to \$6,500. *See* 11 CFR 111.24(a)(1) (2009). If a respondent knowingly and willfully violates the Act, the Act provides for a civil penalty “which does not exceed the greater of \$10,000 or an amount equal to 200 percent of any contribution or expenditure involved.” 2 U.S.C. § 437g(a)(5)(B). The statutory penalty of \$10,000 was adjusted for inflation in 2009 to \$11,000. *See* 11 CFR 111.24(a)(2)(i) (2009). Finally, for knowing and willful violations of 2 U.S.C. § 441f— contributions made in the name of another—the Act provides for a civil penalty “which is not less than 300 percent of the amount involved in the violation and is not more than the greater of \$50,000 or 1000 percent of

the amount involved in the violation.” 2 U.S.C. § 437g(a)(5)(B). The statutory penalty of \$50,000 was adjusted for inflation to \$55,000 in 2009. 11 CFR 111.24(a)(2)(ii). When determining the amount of a civil penalty to be included in a conciliation agreement, the Commission uses the statutory guidelines described above and considers the particular facts involved in a specific matter, including all potential mitigating and aggravating circumstances.

OGC transmits the proposed conciliation agreement to a respondent and invites the respondent to engage in negotiation concerning the proposed agreement. The respondent should reply to OGC’s invitation to enter into such negotiations within seven days of the receipt of the offer.

Upon agreeing to enter into conciliation, the respondent may sign the conciliation agreement and return it to OGC, or the respondent may make a counter-offer. Negotiations may take place in writing, by telephone, in person, or any combination of these approaches. A respondent may ask OGC to present a specific counter-offer to the Commission. Respondents who claim an inability to pay an appropriate civil penalty may be asked to provide documentation as to their financial condition.

Neither the Act nor the Commission’s regulations specify a time frame for pre-probable cause conciliation, but OGC attempts to limit it to no more than 60 days. Because the Commission’s ability to seek civil penalties in federal district court is subject to a five-year statute of limitation, *see* 28 U.S.C. § 2462, OGC may request at any stage in the enforcement process that the respondent agree to toll the statute of limitations, including during the pendency of the pre-probable cause conciliation process.

Conciliation agreements in closed matters are available on the Commission’s website for review and comparison. *See* <http://www.fcc.gov/em/em.shtml>.

#### **J. General Counsel’s Brief**

After the investigation is completed and/or no pre-probable cause conciliation agreement is reached, if the General Counsel intends to recommend that the Commission find probable cause to believe a violation has occurred or is about to occur, OGC notifies the respondent of the intent to make such a recommendation and includes with the notification a brief stating the General Counsel’s position on the factual and legal issues of the matter. The respondent is sent a copy of the brief and has at least 15 days to file a reply brief explaining the respondent’s position.

#### **K. Probable Cause Hearing**

Respondents are also entitled to request a hearing to present oral arguments directly to the Commission prior to any decision on whether there is probable cause to believe that a violation of the Act or the Commission’s regulations has or is about to occur. Such a hearing may be requested by the respondent in his or her reply brief. The request for a

hearing is optional, and the respondent's decision on whether to request one will not influence the Commission's decision regarding a probable cause finding.

The respondent must include a written request for a hearing as a part of the respondent's brief filed with the Commission Secretary under 11 CFR 111.16(c). Each request for a hearing must state with specificity why the hearing is being requested and what issues the respondent expects to address.

The Commission will grant a request for an oral hearing if any two Commissioners approve the request. If the request is granted, a respondent who appears before the Commission may discuss any issues presented in its brief, including potential liability and the amount of any civil penalty.

Hearings are not open to the public. Respondents and their counsel are the only people from outside the Commission who may attend. Commissioners, the General Counsel and the Staff Director may ask questions relevant to the matter of the respondent or respondent's counsel, if respondent is represented, and may request that the respondent supplement the record within a set time. The Commissioners may also ask questions designed to elicit clarification from the General Counsel and the Staff Director.

A court reporter will transcribe the proceedings, and the respondent may purchase a copy of the transcript from the court reporter. The transcript of the hearings, with possible appropriate redactions, will be made public as part of the public record when a case is closed. The Commission determines the format and time allotted for each hearing at its discretion.

For more detailed information regarding the Commission's probable cause hearings, please refer to:

- Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007), at [http://www.fec.gov/law/cfr/ej\\_compilation/2007/notice\\_2007-21.pdf](http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-21.pdf); and
- Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55443 (October 28, 2009), at [http://www.fec.gov/law/cfr/ej\\_compilation/2009/notice\\_2009-24.pdf](http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-24.pdf).

#### **L. Vote on Alleged Violations (Probable Cause to Believe)**

After reviewing the briefs of both the General Counsel and the respondent, the Commission votes on whether there is "probable cause to believe" that a violation has occurred or is about to occur. Four affirmative votes are required to make a finding of probable cause to believe. If the Commission does not find "probable cause to believe," the case is closed and the parties are notified. In complaint-generated matters where the Commission does not approve OGC's recommendation to find probable cause, the objecting Commissioners are required to issue a Statement of Reasons setting forth the basis for their rejection, which will appear on the public record and be provided to the complainant and the respondent(s).

If the Commission determines that there is “probable cause to believe” the law has been violated, it must attempt to conciliate with the respondent for at least 30 days, but not more than 90 days. If the Commission makes a probable cause finding in the 45-day period immediately preceding any election, then the Commission must attempt to conciliate a matter for a period of at least 15 days. See 2 U.S.C. § 437g(a)(4)(A).

In order to facilitate these discussions, a Commission-approved proposed conciliation agreement is sent to the respondent, forming the basis for settlement negotiations. The provisions included in a pre-probable cause conciliation agreement, described above, are generally also included in post-probable cause conciliation agreements.

If the Commission determines that there is probable cause to believe that knowing and willful violations occurred, it may refer such violations to the DOJ for possible criminal prosecution. 2 U.S.C. § 437g(a)(5)(C).

#### **M. Resolution of MUR (Conciliation Agreement)**

If the General Counsel and the respondent enter into a conciliation agreement, the written agreement becomes effective once it is approved by the affirmative vote of four Commissioners and signed by the respondent and the General Counsel. When the Commission approves a signed conciliation agreement, the Commission closes the matter, sends a copy of the signed agreement to the complainant and respondent, and puts documents on the public record. Civil penalty payment checks, which are made payable to the United States Treasury, are transferred from the Commission to the Treasury for deposit once the Commission approves a conciliation agreement.

Unless a respondent violates the conciliation agreement, the agreement is a complete bar to any further action by the Commission based on the same facts. If the respondent violates the conciliation agreement, however, the Commission can sue to enforce the terms of the conciliation agreement in federal district court.

#### **N. Litigation**

If post-probable cause conciliation does not result in an agreement, OGC may recommend to the Commission that it authorize a civil action in federal court. The Commission may only authorize the filing of a civil action by an affirmative vote of at least four members.

If the Commission provides such authorization, the matter is transferred from OGC’s Enforcement Division to its Litigation Division, which represents the Commission in all litigation. Contact information for relevant staff in the Litigation Division is provided in the letter informing respondents that suit has been authorized.

If the Commission gives such authorization, the Commission will file suit in the District Court of the United States for the district in which the person against whom such action is

being brought is found, resides, or transacts business. 2 U.S.C. § 437g(a)(6)(A). The proceedings are then governed by the Federal Rules of Civil Procedure and the local rules of the district court.

The Commission may seek a variety of remedies, including a civil penalty that meets the appropriate statutory guidelines as set forth in 2 U.S.C. § 437g(a)(6). The federal district court will review the facts of the matter *de novo*, which means that the court will not rely exclusively on the administrative record but also on fresh fact discovery by the parties, and will review the facts anew. *See, e.g., American Fed'n of Labor & Congress of Indus. Orgs. v. F.E.C.*, 177 F. Supp.2d 48, 63 (D.D.C. 2001).

#### **O. Complainant's Recourse**

If a complainant disagrees with the Commission's dismissal of a complaint, or any allegations contain therein, he or she may file a petition in the U.S. District Court for the District of Columbia. This petition must be filed within 60 days after the date of the dismissal. 2 U.S.C. § 437g(a)(8).

In addition, if 120 days have passed since the filing of a complaint, and the Commission has not yet acted on the complaint, the complainant may file suit in district court. 2 U.S.C. § 437g(a)(8)(A). As discussed above, however, the Commission may be taking action on the allegations (e.g., finding reason to believe and conducting an investigation) that it may not disclose to the public (including the complainant) until the conclusion of the matter under 2 U.S.C. § 437g(a)(12).

In any case brought against the Commission for dismissing or failing to act on a complaint, a court may declare that the Commission acted contrary to law and direct the Commission to conform to that declaration. If the Commission fails to act on the court's order within 30 days, complainants may bring a civil action under their own name to remedy the alleged violation. 2 U.S.C. § 437g(a)(8)(C).

#### **P. Confidentiality**

To protect the interests of those involved in a complaint, the law requires that any Commission action on a MUR be kept strictly confidential until the case is resolved. These provisions do not, however, prevent a complainant or respondent from disclosing the substance of the complaint itself or the response to that complaint or from engaging in conduct that leads to the publication of information contained in the complaint.

#### **Q. Public Disclosure Upon Termination of an Enforcement Matter**

Because the public has the right to know the outcome of any enforcement proceeding, a redacted file is made available to the public in the Press Office and the Office of Public Records within 30 days after the parties involved have been notified that the entire matter has been closed. Complaints and responses are placed on the public record, though in some cases, sensitive or privileged information such as personal phone numbers or

financial information is redacted. Closed enforcement files are also available for review at the Enforcement Query System found on the Commission’s web site at <http://eqs.nictusa.com/eqs/searcheqs>.

**R. Overview of Stages and Applicable Timeframes**

Stage	Number of Days
Complaint Received	n/a
Complaint Notification	5 Days
Response to Complaint	15 Days
Reason to Believe Finding	n/a
Investigation	n/a
Pre-Probable Cause Conciliation	60 Days*
General Counsel’s Brief	n/a
Response to General Counsel’s Brief	15 Days
Probable Cause to Believe	n/a
Probable Cause to Believe Conciliation	30-90 Days
Disposition	n/a
Public Release of closed case file	30 Days
* Not set by statute or regulation.	

**III. ALTERNATIVE DISPUTE RESOLUTION (“ADR”)**

The Commission established the Alternative Dispute Resolution Office (“ADRO”) to promote compliance with the federal election laws by encouraging settlements outside of the general enforcement process. In most enforcement matters where a settlement is involved, the Commission has already voted to find reason to believe a violation has occurred or is about to occur. In ADR, however, a settlement is generally reached prior to any finding by the Commission. ADR tends to place greater emphasis on remedial measures, such as hiring compliance specialists or having persons responsible for FEC disclosure attending Commission educational conferences.

ADR is an option extended only in appropriate matters based on criteria approved by the Commission. Once a matter is deemed suitable for ADR, the respondent will receive a letter from the ADRO asking for a commitment, in writing, to the terms for participation in ADR, which include (1) engaging in the ADR process; (2) setting aside the statute of limitations while the complaint or referral is pending in ADRO; and (3) participating in bilateral negotiations. The respondent should respond to the letter within 15 business days of receipt; otherwise, the matter may be dropped from further consideration for ADR and sent to OGC for further processing. After the respondent provides this information (which involves completing a form enclosed with ADRO’s notification letter) and any additional information relevant to the matter, ADRO will contact the respondent or respondent’s counsel to discuss mutually acceptable dates and times for engaging in bilateral negotiations.

If the respondent and ADRO are able to reach a mutually acceptable settlement agreement, ADRO presents a signed agreement to Commission for approval. All ADR settlements are placed on the public record. They do not serve as precedents for subsequent enforcement actions. If the respondent and ADRO are unable to reach a settlement during bilateral negotiations, the case may be sent to OGC for enforcement processing.

For more information regarding ADR, please see <http://www.fec.gov/pages/brochures/adr.shtml>.

#### **IV. ADMINISTRATIVE FINE PROCESS**

Civil fines for violations by registered political committees involving (1) failure to file reports on time, (2) failure to file reports at all, and (3) failure to file 48-hour notices of contributions are assessed through the Administrative Fine process. 2 U.S.C. § 437g(a)(4)(C); 11 CFR 111.30 – 111.46.

Under the administrative fine regulations, if the Commission finds reason to believe that a committee violated the law, the Commission sends a letter to the committee containing the factual and legal basis of its finding and the amount of the proposed fine. Fine schedules are published in the administrative fine regulations and all fines are calculated using the formulas in these schedules. 11 CFR 111.43, 111.44. The committee has 40 days from the date of the reason to believe finding to (1) pay the proposed fine or (2) challenge the RTB finding and/or fine.

Unlike enforcement matters that are handled through OGC or ADRO, the penalties assessed through the Administrative Fine Program are not subject to settlement negotiations. So there are no settlement agreements approved by the Commission as typically occurs when a respondent is on the OGC or ADR enforcement track.

If the committee pays the proposed fine, it sends the payment and remittance form (provided in the Commission's RTB letter) to the FEC following the instructions in the letter. Upon receipt of payment, the Commission makes a final determination, assesses the appropriate fine, and sends the committee a final determination letter.

If the committee does not pay the proposed fine or submit a challenge, the Commission makes a final determination, assesses the appropriate fine, and sends the committee a final determination letter.

If the committee challenges the RTB finding and/or the fine, it must submit a written response to the Office of Administrative Review ("OAR"). The challenge must include the reason why the committee is challenging the RTB finding and/or fine, along with supporting documentation. The FEC only considers challenges that are based on the following:

- A factual or legal error in the RTB finding;

- A miscalculation of the RTB fine by the FEC; or
- A demonstrated use of best efforts to file in a timely manner but being prevented from filing by reasonably unforeseen circumstances that were beyond the committee's control.

The RTB letter includes examples of circumstances that are considered reasonably unforeseen and beyond the committee's control, as well as examples that are not considered reasonably unforeseen and beyond the committee's control.

The committee's challenge is reviewed by a reviewing officer who was not involved in the original RTB finding. After review of the challenge and any information provided by staff, the reviewing officer makes a recommendation to the Commission and sends a copy of the recommendation to the committee. The committee has 10 days to respond in writing to the recommendation. The Commission then either (1) makes a final determination that a violation occurred and upholds the RTB fine; (2) determines that no violation occurred because the RTB finding was based on a factual error or the committee used best efforts to file on time; (3) terminates its proceedings; or (4) makes a final determination that a violation occurred and modifies the fine.

OAR will notify the committee in writing of the Commission's decision. If the letter notifies the committee that the Commission has made a final determination that a violation occurred, the committee has 30 days from its receipt of such "final determination letter" to (1) pay the assessed fine or (2) file suit in the U.S. District Court where the committee or treasurer resides or transacts business.

If the committee pays the fine, it sends the payment and remittance form (provided in the notification letter) to the FEC following the instructions in the letter. If the committee chooses to appeal the final determination, it should file suit within the 30-day timeframe in the U.S. District Court in which it or the treasurer reside or transact business. The failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of the committee's right to present that argument in the court petition.

If the committee fails to pay the fine or seek judicial review, the unpaid fine is treated as a debt under the Debt Collection Improvement Act. The Commission will transfer the unpaid fine to the Department of the Treasury for collection.

For more information about the Administrative Fine Program, including a fine calculator and examples of how to calculate a fine, please see <http://www.fec.gov/af/af.shtml>.