Glen Shor <gshor@campaignlegalcenter.org> on 05/30/2003 04:48:19 PM

Please respond to gshor@campaignlegalcenter.org

To: enfpro@fec.gov
cc:

Subject: Comments of Campaign Legal Center

Attached are the comments (in Microsoft Word format) of the Campaign Legal Center, on Notice 2003-9 (Enforcement Procedures).

The point of contact for these comments is:

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Thank you for your consideration.

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May 30, 2003

VIA E-MAIL

Susan L. Lebeaux
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Notice 2003-9

Dear Ms. Lebeaux:

I am writing on behalf of the Campaign Legal Center to provide comment on the Federal Election Commission's Notice of Public Hearing and Request for Public Comment Regarding Enforcement Procedures, 68 Fed. Reg. 23,311 (May 1, 2003) (Notice 2003-9). The Campaign Legal Center is a non-profit, non-partisan organization established to represent the public interest in strong enforcement of the nation's campaign finance laws. Through its legal staff, the organization participates in the administrative and legal proceedings in which campaign finance and campaign-related media laws are interpreted and enforced.

Particularly following the enactment of comprehensive Federal campaign finance reform, it is indeed important to consider the FEC's ability and willingness to enforce Federal campaign finance law in a coherent and effective manner. As a practical matter, since the creation of the FEC pursuant to the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), the ability of Federal campaign finance laws to deliver their intended protection of the Federal political process from actual or apparent corruption has turned substantially on the Commission's capacity and desire to implement and enforce these laws to their full extent. In fact, the FEC's role within the scheme for enforcing Federal campaign finance law has arguably increased over the years, as the agency has proved successful in challenging the standing of those who have, under 2 U.S.C. § 437(g)(8), filed suit in U.S. District Court for the District of Columbia to contest its dismissal of complaints.[1]

[1] *See, e.g., Judicial Watch v. FEC*, 180 F.3d 277 (D.C. Cir. 1999). Additionally, the potential for holding the FEC accountable for failing to enforce Federal campaign finance law has recently been diminished by the D.C. District Court's unfortunate decision in *AFL-CIO v. FEC*, 177 F.Supp.2d 48 (D.D.C. 2001), invalidating the Commission's longstanding practice of making enforcement files public at the termination of a case. *See generally* Brief of Amici Curiae The Campaign and Media Legal Center et al., *FEC v. AFL-*

The current Notice generally solicits comment on Commission enforcement procedures and lists specific topics for which public input is requested. These topics can (for the most part) be characterized as proposals for additional procedures for the benefit of respondents – sometimes labeled "due process."[2]

To assess those specific proposals, it is necessary first to take a broader look at the Commission's current capacity to fulfill its critical enforcement mission, given its prevailing structure and outlook. It is likewise important to put those proposals in perspective, in terms of what constitute the chief enforcement "problems" facing the agency.

Unfortunately, the FEC has over the years failed to enforce Federal campaign finance law adequately, due to a combination of structural constraints on the enforcement process (codified in law) and, on many occasions, a lack of will on the part of the Commission. The problems lie in the following areas:

- **Deadlocks:** Under the Federal Election Campaign Act of 1971 (as amended), there are six Commissioners appointed to the FEC. 2 U.S.C. § 437c(a)(1). Commission action to commence a full-fledged investigation in response to an externally or internally generated complaint, to find probable cause to believe a violation was or is about to be committed, to enter into a conciliation agreement, to initiate a civil action in court seeking injunctive relief or the payment of civil penalties by a violator, and to appeal court decisions requires the affirmative vote of four Commissioners. 2 U.S.C. § 437g(a)(2), (4)(A)(i), (6)(A). This structure has resulted in deadlocks (*i.e.*, three-to-three "tie" votes) on important enforcement matters, precluding further investigatory or enforcement action by the agency.[3]

- **Cumbersome Enforcement Process**: The FEC has a cumbersome enforcement process. Pursuit of an internally or externally generated complaint requires progress through multiple internal stages, including the opening of a Matter Under Review, the "reason-to-believe stage," "pre-probable-cause conciliation," the "probable cause to believe" stage, and "post-probable cause conciliation." The completion of this internal Commission process does not even enable the agency to impose a civil monetary penalty

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CIO, No. 02-5069 (D.C. Cir. filed Feb. 15, 2002), *available at* http://www.campaignlegalcenter.org/cases-52.html (last visited May 29, 2002).

[2] Many of the specific topic areas mentioned in the Notice are also raised in a law journal article written by FEC Commissioner Bradley Smith and Stephen Hoersting, in a discussion of what they term "due process protections." *See* Bradley A. Smith and Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 ELECT. L. J. 145, 155-58 (2002).

[3] These deadlocks have often occurred along partisan lines. *See* PROJECT FEC, NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION'S CAMPAIGN FINANCE LAWS 9-11 (2002).

on violators unwilling to conciliate on acceptable terms.[4] Instead, the Commission must then vote again on whether to pursue a civil suit in court for an injunction or civil monetary penalties. In the event such a suit is authorized, the Commission's Office of General Counsel represents it in district and appellate court proceedings, which can be lengthy and costly in their own right.

In practice, despite the FEC's efforts to prioritize its enforcement caseload, these procedures are prone to producing considerable delay in enforcement responses to cases presenting significant campaign finance issues.[5] As observed by commentators with diverse perspectives on the ideal state of Federal campaign finance law and the structure and functioning of the Commission itself, this delay severely compromises the effectiveness of the agency's enforcement mission.[6]

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[4] *See* Lawrence M. Noble, *in* 1202 PLI/CORP 975, 987-93 (2000). In 1999, Congress authorized a small exception to the FEC's inability to impose civil monetary penalties, permitting the imposition of administrative fines for certain reporting violations. *See* 2 U.S.C. § 437g(a)(4)(C).

[5] *See* Commissioner Scott E. Thomas and Jeffrey Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 584-590 (2000).

[6] *See* Kenneth A. Gross and Ki P. Hong, *The Criminal and Civil Enforcement of Campaign Finance Laws*, 10 STAN. L. & POL'Y REV. 51, 52 (1998) ("Second, the statutory enforcement scheme under FECA makes it difficult for the Commission to deter violations. Third, the FEC uses an open-ended process which results in an investigation phase without any limits; cases eventually become stale and the FEC's limited resources give out.") (citations omitted); Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 286-87 (1991) ("The lack of deterrent force under FECA can be traced in great part to its cumbersome multi-stage enforcement process, under which many matters are not resolved in a timely manner. As a result, continuing violations may give the respondent an unfair advantage in the election. Delayed civil penalties create little deterrent effect, as many view a civil penalty imposed after a successful campaign as a small price to pay for winning the election."); Todd Lochner, *Overdeterrence, Underdeterrence, and a (Half-Hearted) Call for a Scarlet Letter Approach to Deterring Campaign Finance Violations*, 2 ELECTION L. J. 23, 29-30 (2003) ("There are compelling reasons to believe, however, that the FEC has a serious problem with underdeterrence . . . the time lag between detection of a possible infraction and the punishment imposed . . . is quite large. Indeed, it is extremely unlikely that a fine will be imposed until after the election in which the infraction occurred. To its credit, the FEC has implemented programs that may greatly reduce its "time to sanction" on the more straightforward and usually less serious types of infractions. But it is precisely the more serious types of offenses that are least likely to be treated expeditiously. This creates incentives for candidates and campaigns to violate the law now in the hopes of winning the election and paying the fine later.") (citations omitted); PROJECT FEC, *supra* note 3, at 13-14 ("The structural problems of the FEC are compounded by the extraordinarily cumbersome enforcement procedures built into the statute . . . Respondents who are the subject of investigations by the agency are granted elaborate opportunities to contest agency action at multiple stages of the enforcement process. This invariably slows agency enforcement actions to such an extent that cases often languish for years before final agency decisions are made."); Michael W. Carroll, Note, *When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act*, 84 GEO. L. J. 551, 578 (1996) ("Even after a violation is detected, the enforcement process can be very slow. A respondent has little incentive to cooperate with the FEC. Respondents can and do use their ability to prolong settlement either to force the FEC to drop the case or to reduce the magnitude of the penalty.") (citations omitted); Colloquium, *Federal Election Commission Panel Discussion: Problems and Possibilities*, 8 ADMIN. L. J. AM. U. 223, 232 (1994) (remarks of Lawrence Noble, then-General Counsel of the Federal Election Commission) ("Mainly what I was referring to, using that example, was those who believe that, unless the FEC can act before the election, it is useless. The

- **No Random Audit Authority:** In the late 1970's, Congress removed the Commission's authority to conduct random audits of campaigns.[7] Audits of non-presidential campaigns are now permitted only "for cause." 2 U.S.C. § 438(b). This is not an adequate mechanism for detecting or deterring political committee compliance problems, because committees engaged in significant violations can avoid audit by filing forms that are timely and appear to be in order.[8]

- **Inadequate and Unstable Funding:** The FEC's funding is subject to the congressional appropriations process. The agency has faced budget shortfalls which have compromised its ability to activate and process enforcement matters in a timely and effective manner.[9]

- **Failure of Will:** Apart from constraints on effective enforcement by the FEC stemming from the structure of or authorities or resources available to the agency, the Commission has opted not to enforce the law in a number of circumstances presenting significant campaign finance violations, including (among other examples):

    - *national party presidential "issue ads":* Through a series of 3-3 votes effectively rejecting the findings of its General Counsel, the Commission failed to treat national party spending on electioneering advertisements coordinated with the 1996 presidential campaigns (financed in part with soft money) as subject to the party coordinated expenditure limits. In so doing, the Commission departed from Federal campaign finance law, rejected its own precedents (subjecting political party spending on ads with an "electioneering message" to those spending limits, even if the ads did not expressly advocate an election result) and denied obvious reality about the conduct in question.[10] This failure to enforce the law resulted in

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argument is that violating the law has become the cost of doing business. I can tell you in many cases this is true.").

[7] *See* Gross, *The Enforcement of Campaign Finance Rules*, *supra* note 6, at 290.

[8] *See* Gross, *The Enforcement of Campaign Finance Rules*, *supra* note 6, at 290-91.

[9] *See* PROJECT FEC, *supra* note 3, at 20-22; Commissioner Scott E. Thomas, *Statement of Reasons*, Pre-MUR 395 (College Republican National Committee), at fn. 12 (FEC Nov. 9, 2001). The former General Counsel of the FEC has fairly recently observed that the agency is "very far away from having sufficient resources to enforce the old law, let alone the new law." Peter H. Stone, *Under Fire*, NAT. JOURNAL, May 18, 2002. Given the cumbersome enforcement process, large workload, and budget constraints facing the FEC, violators have a greater ability (compared to those in proceedings with some other campaign finance enforcement agencies) to leverage prospects for delay and protracted litigation into smaller or no penalties during the conciliation stages. *See* Todd Lochner and Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations*, 52 ADMIN. L. REV. 629, 648-49 (2000).

[10] *See* Hon. Scott E. Thomas, *Beyond Silly – What the Courts and the FEC Have Done to Congressional Reform Attempts*, 1331 PLI/CORP 663, 679-83 (2002); Letter from Ann McBride, President, Common Cause, to the Honorable Janet Reno, Attorney General of the United States (Oct. 28, 1997), *available at* http://www.commoncause.org/publications/102897_letter.htm (relating President Clinton's own characterization of the arrangement in question).

similar conduct in the 2000 presidential elections and contributed to the rise of soft money "joint fundraising committees" (in which Federal candidates used the political parties to launder soft money they raised into their own races).[11]

- *outside group coordination with parties and candidates:* Starting in 1999, the Commission began eviscerating its own capacity to enforce the longstanding statutory requirement that spending by outside groups in coordination with Federal candidates and political parties for the purpose of influencing Federal elections be treated as in-kind contributions subject to Federal source prohibitions, amount limitations, and reporting requirements 2 U.S.C. § 441a(a)(7)(B). By a 2-4 vote, it rejected the recommendation of its General Counsel and failed to appeal a 1999 district court decision adopting a novel, narrow interpretation of the concept of coordination in a case involving massive and systematic coordination by an outside group with a presidential campaign and Federal candidates, despite the court's invitation for an appeal[12] and indications that the Supreme Court had a more expansive perspective on what constitutes coordination.[13]

  Following its refusal to appeal, the Commission (by a 4-2 vote) adopted narrow coordination regulations based on that single decision.[14] This move heralded the demise of two enforcement actions initiated previously by the Commission (under its former coordination rules which better reflected the statute) and pending at the time, concerning massive campaign spending by business and labor groups in coordination with the political parties and Federal candidates in the 1996 elections. Indeed, though acknowledging that labor groups had both access to and the authority to approve or disapprove the plans, projects and needs of the DNC with respect to "Coordinated Campaign" activity and that there was likewise a strong case for a finding of coordination between business groups and Republican leaders under the Commission's old regulations,

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[11] *See generally* Commissioner Scott E. Thomas, *Statement of Reasons*, MUR 4994 (FEC Dec. 19, 2001).

[12] *See FEC v. Christian Coalition*, 52 F.Supp.2d 45, 98 (D.D.C. 1999) ("[T]his Court is of the opinion that this Order in relation to Counts I, II, and III involves controlling questions of law as to which there is substantial group for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.").

[13] *See Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (contrasting "controlled or coordinated expenditures" with expenditures made "totally independently" of a candidate and his or her campaign); *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 614 (1996) (disputing argument that party had "coordinated" advertisement with its candidates, noting that the advertising campaign "was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate").

[14] General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76,138 (Dec. 6, 2000).

the Commission dismissed both cases precisely because of the narrowness of its new coordination rules.[15]

- *ban on corporate contributions*: By a 2-3 vote (with one Commissioner abstaining), the FEC rejected the advice of its General Counsel and refused to recommend an appeal of the U.S. Court of Appeals for the Fourth Circuit's decision in *Beaumont v. FEC*, 278 F.3d 261 (4th Cir. 2002), which struck down Federal campaign finance law's prohibition on corporate contributions to political candidates for a subset of incorporated non-profits.[16] This was the first time in the history of the agency that Commissioners were not willing to defend the constitutionality of a statutory contribution restriction.[17] The Commission's failure to appeal flies in the face of the fact that Supreme Court precedent rules out any such an allowance for corporate political contributions.[18] Again for the first time, the U.S. Solicitor General, Theodore B. Olson, overruled the FEC and decided to appeal the *Beaumont* decision, noting in the petition for a writ of certiorari that "the question presented is undeniably important."[19]

- *political committee status:* The FEC failed to appeal the U.S. District Court for the District of Columbia's decision in *FEC v. GOPAC*, 871 F. Supp. 1466 (D.D.C. 1994), which misinterpreted the statute to require that an organization have a major purpose of electing particular Federal candidates in order to constitute a Federal political committee.[20]

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[15] *See* PROJECT FEC, *supra* note 3, at 104-05. The Bipartisan Campaign Reform Act rescinded the FEC's narrow coordination rules adopted in the wake of the *Christian Coalition* district court decision and required the agency to promulgate new rules that fully encompassed the statutory standard of 2 U.S.C. § 441a(a)(7)(B) and did not require the presence of "agreement" or "formal collaboration" in all instances for there to be a finding of coordination. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(b)&(c), 116 Stat. 81 (2002). Nonetheless, the Commission proceeded to issue new coordination rules permitting Federal candidates to coordinate extensively with outside groups on the latter's expenditure of soft money even for certain election-year campaign advertisements benefiting those candidates. *See* 11 C.F.R. § 109.21 (2003); First Amended Complaint for Declaratory and Injunctive Relief at 39-42, *Shays v. FEC*, No. 02-1984 (D.D.C. filed Oct. 8, 2002), *available at* http://www.campaignlegalcenter.org/cases-27.html (last visited May 29, 2003).

[16] *See* Kenneth P. Doyle, *Corporate Contributions: Solicitor General Weighs Appeal in Case Involving Campaign Money for Non-Profits*, BNA MONEY & POLITICS REPORT, Aug. 27, 2002.

[17] Hon. Scott E. Thomas, *Beyond Silly*, *supra* note 10, at 672.

[18] *See* Brief of Amici Curiae Public Citizen et al., *FEC v. Beaumont*, No. 02-403 (S.Ct. filed Sept. 12, 2002), *available at* http://www.campaignlegalcenter.org/cases-58.html (last visited May 29, 2003).

[19] *See* Solicitor General (on behalf of Petitioner FEC), Petition for a Writ of Certiorari at 14, *Beaumont v. FEC*, No. 02-403 (S.Ct. filed Sept. 12, 2002), *available at* http://www.usdoj.gov/osg/briefs/2002/2pet/7pet/2002-0403.pet.aa.html; Kenneth P. Doyle, *Corporate Contributions: Overruling FEC, Justice Department Asks Supreme Court to Review Case on Nonprofits*, BNA MONEY & POLITICS REPORT, Sept. 17, 2002. The U.S. Supreme Court ultimately decided to hear the case (oral argument occurred on March 25, 2003).

[20] *See* Vice Chairman John Warren McGarry, Commissioner Danny Lee McDonald, and Commissioner Scott E. Thomas, *Statement for the Record in FEC v. GOPAC* (FEC Mar. 21, 1996). There were in fact three votes to appeal in this case (with two votes opposed and one vacancy), one vote short of the four-vote majority required to authorize an appeal. *See id.*

This combination of congressionally inflicted and self-inflicted shackles is the chief "enforcement" problem involving the FEC. Clearly, broad reform of the functioning of the agency -- with a principal objective of improving enforcement of Federal campaign finance law – is in order.[21]

As previously noted, the current Notice specifically solicits comments on proposals for additional procedures for the benefit of respondents – sometimes labeled "due process."

The term "due process" begs the question, however. As a FEC General Counsel once indicated during a symposium on the Commission's performance in enforcing Federal campaign finance law, "asking the due process question is really just opening the discussion and doesn't give you any answers because in talking about due process you then have to decide what process is due them, *and that answer . . . depends very much on what is going on.*"[22]

The prior discussion has emphasized that, in its current configuration, the FEC does not have the power to find violations or unilaterally impose sanctions on respondents.[23] At the end of its lengthy, multi-stage internal enforcement process, the Commission must then initiate litigation in Federal court in order to secure the imposition of civil penalties upon violators unwilling to conciliate on acceptable terms. During those *de novo* judicial proceedings, the defendant would in fact receive a full array of procedural rights, including some of the rights described in the Notice.[24] Given this prevailing enforcement structure, enhanced procedural protections for respondents such as mandated broader and earlier access to the Commission's investigatory material (*e.g.*, depositions and documents of other respondents and third parties) during its internal proceedings, rights for respondents or their counsel to appear and present their positions in person before the

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[21] *See, e.g.*, PROJECT FEC, *supra* note 3, at 33-46.

[22] Symposium, *Campaign Finance Enforcement: A Comparative View*, 11 J.L. & POL. 1, 28 (1995) (remarks of Lawrence Noble) (emphasis added). This assessment is well-founded in judicial precedent. *See Mathews v. Eldredge*, 424 U.S. 319, 334 (1976) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . (D)ue process is flexible and calls for such procedural protections as the particular situation demands.") (internal quotations and citations omitted).

[23] The sole exceptions to this rule are the administrative fines program, which deals only with the minor, "cut-and-dry" issues of whether reports are late or not filed, and the audit process for publicly financed presidential candidates (which appear to be outside the scope of this rulemaking).

[24] For instance, the Commission mentions in the Notice that the Federal Rules of Civil Procedure give litigants the right to attend the depositions of all persons deposed in their case and obtain copies of all deposition transcripts (in contrast with the practice during internal Commission proceedings, which does not give respondents the right to attend other depositions and provides some, but not necessarily complete, access to the documents and deposition transcripts of other respondents and third-party witnesses). Enforcement Procedures, 68 Fed. Reg. 23,311, 23,313 (May 1, 2003). The rights provided under the Federal Rules of Civil Procedure would certainly attach in the event the Commission pursued its enforcement action to the only stage at which it may force the imposition of sanctions – *i.e.*, a *de novo* judicial proceeding under 2 U.S.C. § 437g(a)(6).

Commission,[25] and formalized opportunities for the filing of motions on the merits with the Commission are unnecessary.

In fact, however well-intentioned they may be, a number of the proposals highlighted in the Notice would exacerbate current problems with the enforcement process, present opportunities for sophisticated parties to undermine enforcement, or be counterproductive in other respects.

As previously indicated, delay in "time-to-sanction" has been a longstanding problem for the FEC, eroding both deterrence and the Commission's capacity to ensure that violators are adequately punished. Grafted onto the existing enforcement process, formalized authority for complainants' and respondents' attorneys to file motions on the merits, mandated broader and earlier provision of the Commission's investigatory materials to respondents during its internal proceedings, and rights for respondents and/or counsel to appear in person before the Commission (in addition to the existing opportunities for them to present their case through written submissions) would exacerbate this problem by prolonging the process and adding to the resource needs of an agency that does not *currently* receive adequate funding. Again, it bears emphasis that sophisticated and well-financed violators – aware of the Commission's resource constraints and large workload – would enjoy increased leverage to diminish or eliminate penalties with the provision of new opportunities for them to prolong and complicate the enforcement process. Indeed, as the Notice appears to recognize, some of the enhanced "due process" protections under consideration are much more relevant to respondents with considerable resources than to smaller political actors.[26]

Furthermore, the proposal that the Commission withhold releasing to the public closed enforcement matters, or initiating lawsuits to enforce Federal campaign finance law, for some period immediately preceding an election is objectionable on multiple grounds. Refraining from filing suit during this time period would only add to existing incentives for political actors to commit violations perceived to be to their electoral benefit, for the "bad news" of a Commission lawsuit would then never emerge during the most important time period for a candidate or political party. The Commission has no statutory authority to withhold such information from voters, who might very well (and properly) consider a candidate's compliance with the law to be relevant to their electoral choices. In terms of releasing documents or filing suits, the agency should instead proceed in the normal course of business during this time period – the best route to insulating it from charges of political favoritism.

The objections we have raised to proposals contained in the Notice are not necessarily a flat rejection of these ideas for all times, however. Some of these proposals for enhanced

[25] As indicated in the Notice, respondents are already permitted to present their position to the Commission in numerous ways – such as "through written submissions in response to the complaint and the General Counsel's probable cause brief, and . . . at the reason-to-believe stage pursuant to Commission practice." Enforcement Procedures, 68 Fed. Reg. at 23,313 (May 1, 2003).

[26] The Notice correctly notes the prospect that respondents with limited resources may not benefit from the ability to make a personal appearance before the Commission to the same extent as those with more substantial resources. Enforcement Procedures, 68 Fed. Reg. at 23,313.

procedural rights for respondents would be appropriate were the Commission replaced by an adjudicatory agency with the capacity to impose certain and timely sanctions for violations (a result clearly requiring the enactment of legislation by Congress).[27] Pending that outcome, we counsel against their adoption, as they are not required and would entail costs that outweigh any benefits. In general, mindful of the everyday problems it faces in securing compliance and accountability, the Commission should not act to further compromise its current (already compromised) ability to enforce the law.

We appreciate this opportunity to provide comments on this rulemaking.

Sincerely,

/s/ Glen Shor

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[27] *See, e.g.*, PROJECT FEC, *supra* note 3, at 33-46. We do note, however, that even under a restructured and strengthened Federal campaign finance law enforcement agency, the proposal for withholding information from voters would not be justified.