CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

April 19, 2013

Via Electronic Transmission

Federal Election Commission
Attn: Commission Secretary
999 E Street NW
Washington, DC 20463

Dear Commissioners:

On behalf of the Center for Competitive Politics (CCP), we respectfully submit the following comments in response to Notice 2013-01, Request for Comment on Enforcement Process.

The Center is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by former FEC commissioner Bradley A. Smith.

First, CCP would like to thank the Commission for this dialogue with the campaign finance community. The Commission has shown a commitment to listening to comments and implementing certain reforms in response.[1] We hope that the feedback of CCP and other organizations and individuals will encourage the Commission to conduct a new round of hearings on the proposals discussed both *infra* and in Notice 2013-01.

We note that it was not so long ago that the Commission was described as a "star chamber" by the chairman of American Bar Association's Administrative Law Section.[2] Since those days, and particularly since the 2003 and 2008 hearings concerning the FEC's enforcement procedures, the Commission has altered old practices and introduced new measures which have expanded the procedural rights of respondents. These changes were accompanied by reductions in the time it took the Commission to resolve matters and an increase in penalties assessed, indicating that concern for the rights of the community is not at all antithetical to the Commission's enforcement mission. It our hope that a new round of hearings will lead to a similar result.

---

[1] *See, e.g.* Statement of Policy Regarding Deposition Transcripts in Nonpublic Investigations, 68 Fed. Reg. 50688 (Aug. 22, 2003).
[2] John Samples, "Reforming Election Oversight," The Washington Times (June 15, 2003).

124 West Street South, Ste 201 Alexandria, VA 22314 www.campaignfreedom.org P: 703.894.6800 F: 703.894.6811

Just seven years ago the FEC, with the support of CCP,[3] created a pilot program for probable cause hearings. This came over two decades after the ABA encouraged the Commission to view "the Probable Cause proceeding [a]s quasi-adjudicative in nature."[4] Now the FEC has expanded this protection "to provide those being audited with an opportunity to address the Commission directly and in person."[5]

CCP believes that additional procedural changes that would encourage engagement between the Commission and the Office of General Counsel— and between the Commission and respondents—are advisable. In all enforcement matters, indeed, in all matters before the Commission, the FEC ought to always bear in mind this observation from the 1982 ABA report on enforcement:

> "The Federal Election Commission is unique in many ways, but particularly in two respects. First, it is unique by virtue of the conduct that it regulates—political speech. The Supreme Court has noted that regulation of campaign financing affects core first amendment freedoms of political expression and association. For this reason, the Commission has the weighty, if not impossible obligation to exercise its powers in a manner harmonious with a system of free expression...
>
> The Commission is also singular in its enforcement procedures, which reflect an amalgam of investigative, prosecutorial, and *de facto* adjudicative phases and functions. In addition to conducting investigations, the Commission has the sole discretionary power to determine whether or not a civil violation has occurred or is about to occur, and consequently whether or not informal or judicial remedies will be pursued."[6]

With that introduction, CCP has the following comments on the specific topics requested by the Commission.

<u>Complaint Generated Matters: Use of Media Reports</u>

The FEC has stated that "[i]n the course of developing its RTB recommendation, OGC may reference publicly available information, including

---

[3] Paul Sherman and Steve Hoersting, Comments on Proposed Policy Statement Establishing a Pilot Program for Probable Cause Hearings, Center for Competitive Politics (January 4, 2007); *available at* http://www.fec.gov/law/policy/probablecause/comm01.pdf.
[4] Committee on Election Law, Section of Administrative Law, "Report on Reform of the FEC's Enforcement Procedures," American Bar Ass'n at 5*(1982)*.
[5] Procedural Rules for Audit Hearings, 74 Fed. Reg. 33140 (July 10, 2009).
[6] Committee on Election Law, Section of Administrative Law, "Report on Reform of the FEC's Enforcement Procedures," American Bar Ass'n at 2 (1982).

public information not contained in either the complaint(s) or response(s)."[7] Some of this information includes information from "Internet Web sites...media reports, [and] subscription databases."[8] CCP does not believe reason-to-believe recommendations ought to be based on information beyond the factual allegations presented by complaints and the records the Commission itself creates in the ordinary course of its statutory duties. The use of online media is especially troubling as such reports—which are necessarily hearsay—are often unreliable or misleading.

For example, an article by *The New York Times* published in September 2012 actually accused the Romney campaign of "accept[ing] $3 million in contributions from Oxbow, a coal company controlled by William Koch, a brother of David Koch."[9] Obviously, this was incorrect, or else the Romney campaign was in violation of longstanding campaign finance law.[10] Such an article should obviously not be utilized by OGC in the event someone filed a complaint alleging illegal contributions by Oxbow or illegal solicitation by Governor Romney's campaign. As is it happened, the article was simply wrong—likely attributing contributions by Oxbow employees to the Republican nominee as contributions from the corporation itself.

This represents an easy case, where the FEC's staff can be expected to note the article's inaccuracy. But not all errors, such as those dealing with accusations of coordination or pass-through contributions, will be so obvious. That the *Times*, with its substantial resources and expertise, can be so obviously wrong, strongly suggests that less obvious mistakes will also be made by the press, especially by smaller reporting entities.

Consider another salacious article that initially discussed a "mystery donor" to political campaigns.[11] The article noted that the donor was a "reclusive figure" living in "a small apartment in a scrubby section of Jamaica, Queens, where the average household income is $33,800 and many residents receive government assistance;" and that he was making hundreds of thousands of dollars in political contributions. There is no direct connection between such assertions and any violation of the campaign finance laws (some wealthy individuals are frugal), and the article ought not to provide support for

---

[7] Request for Comment on Enforcement Process, 78 Fed. Reg. 4083-4084 (January 18, 2013).
[8] 78 Fed. Reg. 4084.
[9] Joe Trotter, "Media Watch: *New York Times* levels serious – and incorrect – charges," Center for Competitive Politics, September 14, 2012, http://www.campaignfreedom.org/2012/09/14/new-york-times-levels-serious-and-incorrect-charges/
[10] *United States v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012).
[11] Brad Smith, "Another Post in the Never Ending Saga of Why Media Reporting on Campaign Finance Reform so often Misinforms the Public," Center for Competitive Politics, July 28, 2012, http://www.campaignfreedom.org/2012/07/28/another-post-in-the-never-ending-saga-of-why-media-reporting-on-campaign-finance-reform-so-often-misinforms-the-public/.

an RTB recommendation by the OGC concerning, for instance, a conduit donor allegation.

To give one additional, particularly egregious, example, an article, published in the Examiner.com,[12] listed the Center for Competitive Politics as a "non-profit super PAC."[13] CCP trusts the Commission does not require comment on that error.

While the Commission's request for comment does cite *In re FECA Litigation* for the principle that "it seems clear that the Commission must take into consideration all available information concerning the alleged wrongdoing," that case does not suggest the Commission ought to rely on outside reporting. The *In re FECA Litigation* court in fact *upheld* the Commission's decision not to investigate a claim that, within the four corners of the complaint, was a "shambles."[14]

Indeed, that court only noted that "the Commission may not rely solely on the facts presented by the sworn complaint when deciding whether to investigate. Although the facts provided in a sworn complaint may be insufficient, when coupled with other information available to Commission gathered either through similar sworn complaints *or through its own work* the facts may merit a complete investigation."[15]

Antosh, similarly, does not grant a right to review media reports. In that case, the FEC's dismissal of a complaint based on the Commission's ignorance of previously filed reports by the same candidate committee which *touched on the exact transactions named in the complaint* was found to be "contrary to law."[16]

At the time *In re FECA Litigation* and *Antosh* were decided, the ability to rapidly pull news articles off the Internet did not exist. Reading those cases in the context of the time, "information available to the Commission...through its own work" referred to reviewing reports filed with the Commission and equivalent documents – that is, a review of the FEC's own prior and routine regulatory and enforcement work. It is unlikely to have referred to news reports, and could not have referred to "Internet Web sites [or] subscription databases."

---

[12] And not, to be clear, the *Washington Examiner*.
[13] Joe Trotter, "Media Watch: Independent Expenditure Committees vs. Social Welfare Organizations," Center for Competitive Politics, July 26, 2012, http://www.campaignfreedom.org/2012/07/26/media-watch-independent-expenditure-committees-vs-social-welfare-organizations/.
[14] *In re FECA Litigation*, 474 F. Supp. 1044, 1047 (D.D.C. 1979) (Richey, J.).
[15] *In re FECA Litigation*, 474 F. Supp. at 1046 (emphasis supplised).
[16] *Antosh v. FEC*, 599 F. Supp. 850, 852 (D.D.C. 1984) (Richey, J.)

As the United States Court for the District of Columbia noted just last year, "while an agency may consider evidence that is not formally admissible in a judicial proceeding, to constitute 'substantial evidence' the affidavit must at least contain indicia that it is 'reliable and trustworthy.'"[17] The current state of campaign finance reporting, especially online, does not bear such indicia.

When the FEC conducts what is essentially a mini-investigation by consulting public sources and attempting to draw conclusions from them, it violates the core stricture of enforcement process of 2 U.S.C. 437g(a)(2), which provides that the Commission must first vote "reason to believe" and then "make an investigation... ."

The FEC should evaluate the complaint on its own terms, together with information gained from its routine regulatory and enforcement duties. It should not proceed to mini-investigations relying on often inaccurate news reporting and databases before moving to an RTB or dismissal vote.

Complaint Generated Matters: Alternative Legal Theories

For similar reasons, OGC should be cautious in "includ[ing] legal theories related to the facts of the case that were not specifically alleged...but which are directly related to the facts alleged."[18] To paraphrase John Quincy Adams, it is not the Commission's job to go forth in search of monsters to destroy. The role of the Commission is—and ought to be—to take the facts and theories alleged before it, and if there is no actionable claim, to dismiss the case. Just as a Federal judge would not unilaterally reform a complaint to plead a more substantive charge, the FEC should not begin to stand in the shoes of the complainant. This is especially true as doing so may create perceptions of bias.

This is not an unreasonable concern. The Nixon administration attempted to use campaign finance law as a vehicle to silence anti-war critics.[19] While the current Commission and current OGC may act in the best interests of the Republic and the First Amendment, there is no guarantee future Commissions and future OGCs will do the same.

Perhaps because of these concerns, some states have constrained their election law enforcement agencies in the manner we have proposed. One large and politically-important state, Florida, has prohibited the Florida Elections Commission from engaging beyond the four corners of a complaint.[20]

---

[17] *La Botz v. FEC*, 889 F.Supp.2d 51, 61 (D.D.C. 2012) (internal citations omitted).
[18] 78 Fed. Reg. 4084.
[19] *See, e.g. United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972).
[20] Fla. Stat. § 106.25 (2012). ("The commission shall investigate only those alleged violations specifically contained within the sworn complaint. If any complainant fails to allege all violations that arise from the facts or allegations alleged in a complaint, the commission shall

We recognize there will be some complaints where the original allegations *necessarily* suggest a separate charge. But OGC ought to search for and seek out an alternative charge such as coordination based on broad statements. For example, the Commission might receive a complaint suggesting a $10,000 contribution from an individual to a candidate committee, but only name the contributor as a respondent. Obviously, it follows that the named candidate also violated the law in accepting the contributions – if there is "reason to believe" as pertains to the donor, there is necessarily "reason to believe" as it pertains to the recipient.

Put another way: if the facts in the complaint are proven, would they *necessarily* prove an un-alleged offense? If so, it may be appropriate to consider legal theories stemming from those facts. If not, if some degree of extrapolation or conjecture is required, the better practice is to confine the OGC's inquiry to the face of the complaint itself.

Lastly, to the extent that OGC continues to build cases based on alternative legal theories, respondents ought to be given an opportunity to respond *before*, not *after*, a reason to believe finding.

Internally Generated Matters

The Commission has also asked for comment on Directive 6, which permits OGC to use "news articles and similar published sources" in generating an internal matter.[21]

Once again, CCP applauds the decision by the Commission to provide more procedural rights for respondents to internally-generated matters.[22] Before the Commission issued this regulation, respondents in complaint-generated matters were granted an opportunity for response, but this was unavailable for respondents in other circumstances. The Commission's decision to correct this imbalance is praiseworthy.

However, CCP opposes the use of outside media and other hearsay for the purpose of internally generating a matter. The concerns raised *supra* cut even more deeply when the Commission is acting unilaterally.[23] To the extent that the Commission perceives Directive 6 as

---

be barred from investigating a subsequent complaint from such complainant that is based upon such facts or allegations that were raised or could have been raised in the first complaint.")

[21] 78 Fed. Reg. 4085.

[22] Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 Fed. Reg. 38617 (Aug. 4, 2009).

[23] Again, CCP notes the difference when the Commission responds to DOJ indictments or information from the office of a state attorney general.

blessing such a practice, the Commission should seek notice and comment, and amend the Directive.

In the alternative, OGC should be required to receive "specific prior approval from the Commission in order to take into consideration relevant public information outside a complaint during the pre-RTB process."[24] The same should go for adopting new legal theories outside the complaint.

To the extent that the Commission continues to rely on this practice, respondents should be promptly informed of such actions and permitted to respond to this type of information.[25]

Publication of Settlement Offers or Penalty Formulas/Schedules

The Commission asks if it should "continue to make public ongoing developments regarding civil penalties"...and to "adopt a chart—or guidelines—binding on itself and its staff."[26] The Commission also sought comment "on whether reliance on a penalty schedule would be appropriate."[27]

As a general matter, CCP opposes the publication of settlement offers or penalty formulas and schedules. As this information is released to the public, it will inevitably bind the Commission's hands, a result contrary to the FECA's emphasis on flexibility, "conciliation, and persuasion."[28] Settlement offers perceived to depart from "the norm" will be scrutinized, and the Commission's credibility may be thrown into doubt. This will strip the Commission of the needed flexibility both to limit punishment in *de minimis* cases or those with strong mitigating facts, and also to increase penalties in cases involving particularly grave violations of the campaign finance laws.

There is no requirement in FECA that the Commission levy penalties at a certain rate. CCP is concerned that the publication of any formula or scale will often serve, in practice, to create "mandatory minimums" for certain violations. Many of the arguments commonly marshaled against mandatory minimums apply in the FEC context with great force given the sensitive constitutional environment in which the Commission operates.

---

[24] 78 Fed. Reg. 4086.
[25] Thus, the Commission ought to adopt "Agency Procedure for Notice to Named Respondents in Enforcement Matters of Additional Material Facts and/or Additional Potential Violations," dated November 10, 2011, *available at http://www.fec.gov/agenda/2011/mtgdoc_1165.pdf.*
[26] 78 Fed. Reg. 4088.
[27] 78 Fed. Reg. 4089.
[28] 2 U.S.C. § 437(g)(a)(4)(A)(i) (imposing a 30-day conciliation period after a probable-cause finding).

Disgorgement

To the extent that the Commission pursues disgorgement of funds as a penalty, CCP recommends that this practice not be used when the value of the contribution involved is inherently subjective. One example of such a subjective valuation problem was spelled out by our founder and chairman, former Commissioner Brad Smith, in testimony before the Senate Subcommittee on Crime and Terrorism[29]:

> A recent example of how citizens can trip over election laws was highlighted in a U.S. News & World Report article on a Mr. T. Augurson. Last year, he customized his Cadillac in stunning chrome and printed on the car's exterior a sign urging citizens to vote for President Barack Obama's reelection. Even though Mr. Augurson spent well over $250 on his rolling billboard, he never reported the independent expenditure to the FEC. His car also failed to carry the required disclaimer indicating who had paid for the message, how that person could be reached, and that the message was not authorized by any candidate or candidate's committee.
>
> How was Mr. Augurson supposed to know about these reporting and disclaimer laws? Even if he had known about the law, deciding to what to report was far from straightforward. What counts toward the independent expenditure? The whole cost of the car? Or just the cost of the customization? Part of the customization, including the chrome body, or just the printing on the car? Then there is the matter of what states with primaries he drove through and when, which is important in deciding when to file the various reports and for what activity? To further complicate this real-life puzzle, consider that some FEC commissioners have publicly stated the cost of gas should count as campaign speech too.

Furthermore, CCP does not believe that disgorgement ought to be considered an "equitable remedy" and therefore place such violations outside of the space of 28 U.S.C. § 2462. Doing so would obviously create the appearance that the FEC is seeking to subvert the five-year statute of limitations.

Given the fact that many small committees shut down shortly after an election, easily misplace their paperwork, cannot afford counsel, and share in the fogginess of human memory, CCP believes that considering disgorgement

---

[29] A full copy of Commissioner Smith's testimony is available at: http://www.judiciary.senate.gov/pdf/4-09-13SmithTestimony.pdf.

as an equitable remedy would only be harmful to unsophisticated grassroots speakers.

Downward Trend in Collection of Civil Penalties

The Commission asks: should it "be concerned about the downward trend in the collection of civil penalties?"[30]

If the Commission were to be guided by the amount of money flowing in from fines, it would quickly find itself enforcing a silent quota system. Such a policy would clearly serve to chill speech, and would encourage over-zealousness and potential abuse—especially in a world where the Commission relies upon news accounts to support internally-generated matters.

To the extent that there has been a noticeable drop in fines since 2008, CCP would suggest that the liberalization of more avenues of speech post-*Citizens United*, the Commission's decision to engage more proactively with the regulated community and other process expansions are responsible for the decline in fines. There is no indication that more committees are skirting the law.

Alternative Dispute Resolution

The Commission seeks comments on "its 'accept or dismiss' policy" in regards to ADR, as well as "how to maintain adequate oversight of ADRO's civil penalty regime."[31]

This request suggests that the Commission is considering reforms to the ADR process which will allow the Commission to involve itself more directly in that process. But it was Commission's slowness that spurred the need for the ADR process in the first place. "In 1998 the Commission dismissed 86 cases as stale and in 1997 the Commission dismissed 208 pending cases as 'stale.'"[32] The availability of ADR serves to focus the Commission's energy and rapidly resolve cases. Accordingly, the Commission ought to stay away from having ADRO inform the Commission of opening offers or negotiation strategy.

CCP believes the ADR process currently works well. Indeed, CCP would not be opposed to the Commission considering methods of expanding the ADR program. But the hallmark of effective ADR must remain the ability of

---

[30] 78 Fed. Reg. 4089.
[31] 78 Fed. Reg. 4090.
[32] Opening Statement of Bradley A. Smith, Chairman of the FEC, Senate Committee on Rules and Administration (July 14, 2004), http://www.fec.gov/members/former_members/smith/smithstatement05.pdf.

mediators and arbitrators to reach agreements that are not subject to revision by the Commission.

Other Issues

CCP appreciates the Commission's "welcom[ing of] comments on other issues relevant to these enforcement policies and procedures."[33] CCP has a few comments of this nature that touch upon issues not listed in the Commission's request for comments.

Culture

Given the delicate nature of the activities regulated by the Commission, CCP believes some attitudinal changes could go a long way toward demonstrating more concern for the notion of innocence until proven guilty. To this end, the Commission ought to replace some terminology.

For instance, it has been widely noted that—contrary to how the phrase is viewed in the popular imagination—"reason to believe" does not, as a legal matter, carry any implication of guilt. The Guidebook succinctly notes: "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."[34]

The FEC itself has asked Congress to amend the statute to replace the phrase "reason to believe" with a less-troubling term.[35] CCP believes the term the FEC suggested in 2002, "reason to open an investigation", would be preferable. If such a change requires the consent of Congress, then the Commission ought to ask for it.

But CCP believes that the Commission could merely issue a regulation interpreting the phrase "reason to believe" as "reason to open an investigation", and then use the latter term in all public and private documents. As others have noted, "[l]ittle reason exists not to implement this sensible semantic change."[36] For instance, such a new turn of phrase will take the sting out of press reports which inevitably use the phrase "reason to believe" to suggest the guilt of parties still innocent under our system of law.

Similarly, the Commission should move away from describing itself as "deadlocked" on probable cause or reason-to-believe findings. If the

---

[33] 78 Fed. Reg. 4090.
[34] Federal Election Commission, Guidebook for Complainants and Respondents on the FEC Enforcement Process at 12 (May 2012).
[35] FEC Annual Report 2003 at 42-43, http://www.fec.gov/pdf/ar03.pdf
[36] Lauren Eber, "Waiting for Watergate: The Long Road to FEC Reform," 79 S. Cal. L. Rev. 1155, 1176 (2006).

commission cannot find probable cause or reason to believe by a majority vote, as required by statute, it has simply failed to make such a finding. The Commission's press releases and other public documents should reflect this.

Provide Up-to-Date, Succinct Online Guidance

During the 2003 enforcement hearings, one commentator requested that the Commission post its enforcement manual.[37] CCP does not take a position on the posting of the manual, except to note that the presently-published 1997 enforcement manual has been, by the Commission's own account, "superseded."[38] If such materials are to be posted, they should be current. Otherwise, they risk misleading those who come to the Commission's website for guidance.

CCP does, however, approve of the simple, constantly updated Enforcement Guidebook that the Commission has posted on the Web. While a shorter summary of the process (perhaps a flowchart of some kind) would also be useful, we approve of the Commission's efforts to explain its processes to the regulated community as succinctly as possible.[39]

Random Audit Authority

The present audit system, while containing more due process than ever before, remains limited by the fact that audit authority is not random. Congress stripped the FEC of the power to conduct random audits after a random review of reports filed in the 1976 campaign showed "close to a third of incumbents' reports showed small [illegal] contributions from corporations or unions."[40] While random audit authority certainly ought to be cabined (perhaps no more than a few percent of all entities filing could permissibly be audited), the FEC should again request this authority from the Congress.

Restoring random audit authority "might have a mildly ameliorative effect on small players...because in the absence of random audit authority the FEC is required to select audit targets by the error rate on reports filed with the

---

[37] Transcript of June 11, 2003 FEC Enforcement Hearing at 25 (Cleta Mitchell: "[M]ake the Enforcement Procedures Manual public.")
[38] 78 Fed. Reg. 4083.
[39] To that end, the several hundred page enforcement manual, containing material that is a decade and a half old, ought to be removed the Web site. Its presence there only invites confusion.
[40] Eber at 1168.

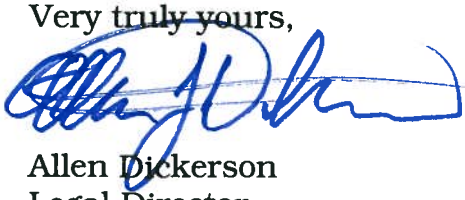
Commission."[41] Others have "call[ed] the case for random audits 'unassailable.'"[42]

Additionally, random audits could determine the extent to which entities are attempting to skirt the law, or demonstrate if entities are merely expressing a good faith misunderstanding of filing requirements. Either way, gaining such knowledge will be a boon for the Commission as well as the campaign finance community.

Conclusion

CCP appreciated the opportunity to respond to the Commission's request for comments. We request to testify should the Commission choose to open a rulemaking, or otherwise take live testimony, on any of these matters.

Very truly yours,



Allen Dickerson
Legal Director

Zac Morgan
Staff Attorney

---

[41] Brad Smith and Stephen Hoersting, "A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission," 1 Election L.J. 145, 170 (2002).
[42] Eber at 1189, quoting Todd Lochner and Bruce Cain, "Equity and Efficacy in the Enforcement of Campaign Finance Laws," 77 Tex. L. Rev. 1891, 1930 at n.24 (1999).