CREW | citizens for responsibility and ethics in washington

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By e-mail: process@fec.gov

Stephen A. Gura
Deputy Associate General Counsel for Enforcement
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Request for Comment on Enforcement Process

Dear Mr. Gura:

Citizens for Responsibility and Ethics in Washington ("CREW") files these comments in response to the Federal Election Commission's ("FEC" or "Commission") Request for Comment on Enforcement Process, Notice 2013-01, 78 Fed. Reg. 4081 (Jan. 18, 2013).

CREW is a non-profit corporation committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials. In furtherance of its mission, CREW seeks to expose unethical and illegal conduct of those involved in government. One way CREW does this is by educating citizens regarding the integrity of the electoral process and our system of government. Toward this end, CREW monitors the campaign finance activities of those who run for federal office and those who make expenditures to influence federal elections. Further, CREW publicizes information about those who violate federal campaign finance laws through its website, press releases, and other methods of distribution. CREW also files complaints with the FEC when it discovers violations of the Federal Election Campaign Act ("FECA" or "Act"). Publicizing campaign finance violations and filing complaints with the FEC serves CREW's mission of keeping the public informed about individuals and entities that violate campaign finance laws and deterring future violations of campaign finance law. As a result, CREW is deeply interested in the Commission's enforcement policies and procedures.

A. The Commission Is Not Doing An Effective Job Enforcing the FECA and FEC Regulations

The Request for Comment first asked for public comment on the general question of whether the Commission is doing an effective job of enforcing the FECA and FEC regulations. It is not. Candidates, political committees, and outside groups routinely flout the Act, secure in the knowledge that the Commission will not take action against them except in the most egregious and clear-cut cases. For many participants in federal elections, hiring counsel to deal with the FEC has become nothing more than a cost of doing business.

There are countless examples of the Commission's feeble enforcement and penalties. In one critical case, the Commission undermined disclosure for groups that broadcast electioneering communications. *See* MUR 6002 (Freedom's Watch). The FECA and FEC regulations require disclosure of anyone who makes donations to groups for the purpose of furthering electioneering communications. In this case, a *New York Times* article reported one donor gave a group $30 million and dictated how it was spent. Nevertheless, three members of the Commission read the regulations to mean donors only need to be disclosed if the contribution was made for the purpose of paying for a specific communication, and concluded the complaint did not provide sufficient evidence to even launch a full investigation.

Another recent case involved allegations of illegal coordination between a candidate and his brother, who spent more than $1 million on independent expenditures supporting the candidate. *See* MUR 6277 (Robert E. Kirkland). Even though the brothers extensively used the same slogan in their campaign materials, and the political consultant for the independent expenditure committee was a volunteer for the candidate, the Commission deadlocked on whether to follow the Office of General Counsel ("OGC") recommendation to conduct a full investigation and dismissed the case. The decision paved the way for the establishment of super PACs funded and run by relatives of candidates, all of which claim no coordination with the candidates' campaign.

In another recent failure, the Commission deadlocked on whether a conduit contribution was knowing and willful. *See* MUR 6623 (William A. Bennett). The respondent admitted he instructed three individuals to make maximum contributions to a candidate and told them he would reimburse them. Further, one of the reimbursed individuals said the respondent stated he already had contributed the maximum individual contribution limit. Still, three commissioners concluded there was no reason to believe the violation was knowing and willful, forcing the Commission to pursue a far lower penalty.

The primary reason the FEC is failing to effectively enforce the FECA is the unprecedented increase in deadlocked votes in enforcement matters. According to statistics compiled by Public Citizen, split votes on proposed enforcement actions have skyrocketed since 2007. From 2003 to 2007, the Commission deadlocked in only one percent of its votes on enforcement matters. Over the next five years, the Commission deadlocked on more than 14 percent of those votes, reaching a high last year of split votes 18.5 percent of the time. This steep increase in deadlocked votes has been accompanied by steep decline in votes on proposed enforcement actions. While the Commission held an average of 726 votes on enforcement matters each year between 2003 and 2007, it only voted an average of 173 times over each of the next five years, hitting a ten-year low of 135 votes in 2012. Not surprisingly, the combination of fewer enforcement actions coming to a vote and many more deadlocked votes on these actions has led to a steep drop in civil penalties obtained by the Commission. As the Request for

Comment notes, the Commission assessed $5,563,069 in civil penalties in 2006, but just $627,200 in 2010 and $527,125 in 2011.

Another factor in the Commission's ineffective enforcement is its continued reliance on conclusory denials by respondents. Relying on these self-serving statements, the Commission has found no reason to believe violations occurred, ending enforcement matters before any substantive investigation has been undertaken. For example, in *La Botz v. FEC*, 2012 U.S. Dist. LEXIS 125431 (D.D.C. Sept. 5, 2012), the Commission did not find reason to believe a consortium of newspapers made an illegal corporate contribution in organizing a Senate debate. *Id.* at *4. The court, however, rejected the Commission's determination because it had relied on a single unsupported affidavit that denied the central issue in the case – that the newspapers used pre-established, objective criteria in deciding which candidates to invite. *Id.* at *22-28. Nevertheless, several commissioners have continued to rely on conclusory affidavits to determine there was no reason to believe a violation occurred. In one recent case, three commissioners found no reason to believe a 501(c)(4) group and a Senate campaign committee illegally coordinated on the basis of affidavits that did not provide information about the key issues or simply denied the allegations. *See* MUR 6368 (Friends of Roy Blunt). Similarly, on the basis of equally conclusory denials, the Commission did not find reason to believe a super PAC and a House campaign committee illegally coordinated. *See* MUR 6570 (Berman for Congress). Where participants in federal elections need not fear an investigation if they simply deny they violated the Act, the FEC does noting to deter illegal conduct and is not effectively enforcing the law.

The overall impact of the Commission deadlocking on important votes has been to neuter its enforcement function. Those involved in activities allegedly regulated by the FEC know that if they violate the FECA they are unlikely to be caught in the first place, unlikely to be subject to any enforcement action, unlikely to face a full investigation even if the matter is brought to the Commission's attention, unlikely to be found in violation of the Act, and unlikely to face severe penalties even in the rare event the Commission finds a violation.

B. In Complaint-Generated Matters, the Commission May and Should Rely On Publicly Available Information Not Referenced or Included in the Complaint in Making the Reason To Believe Determination

Most of the Commission's enforcement matters are generated by complaints such as those CREW files in furthering its mission. After providing the respondents the opportunity to respond to the complaint, OGC recommends to the Commission whether it should find reason to believe ("RTB") a violation has occurred. Under OGC's long-standing practice, in developing that recommendation, it may reference publicly available information not included in the complaint or response, such as material on the FEC's website, news reports, other websites, public databases, and public information filed with other government agencies. The Commission

has requested comments on whether it may use public information not referenced or included in the complaint or response in making RTB determinations. For numerous reasons, the Commission may and should continue to rely on this information in making RTB determinations.

1. The Statute Allows the Commission to Consider Public Information Not Included in the Complaint

The only apparent reason for questioning whether public information not contained in the complaint or response may be relied on in making RTB determinations is the language of 2 U.S.C. § 437g(a), which provides:

> If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

The Request for Comment asks whether referencing and relying on public information not included in a complaint conflicts with this provision. It does not. The language of the provision does not limit what the Commission may do in making its determination, leaving the Commission the discretion to consider public information not included in the complaint. In general, agencies have wide discretion in deciding whether to conduct an investigation, and in deciding what information to consider in the investigation. *See, e.g.*, *United States v. Morton Salt Co.*, 338 U.S. 632, 643 (1950) ("When investigative and accusatory duties are delegated by statute to an administrative body, it . . . may take steps to inform itself as to whether there is probable violation of the law."); *Resolution Trust Corp. v. Greif*, 906 F. Supp. 1457, 1464 (D. Kan. 1995).

In addition, the statute provides the Commission may make the RTB determination "upon receiving a complaint" or "on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities." The Commission treats these as two separate paths for OGC to make a recommendation and for the Commission to make an RTB determination. The statute should be interpreted to mean, however, that the Commission may, after receiving a complaint, examine additional information in carrying out its supervisory responsibilities. That

is, if the Commission receives a complaint, the plain language of the statute allows it to obtain additional information about the allegations. At most, the statute limits this to information obtained by the Commission in the normal course of carrying out its supervisory responsibilities which, as the Commission notes in the Request for Comment, provides the Commission broad discretion in deciding which sources of information to review.

Further, the statute's provision that the Commission "shall make an investigation" after making the RTB determination does not preclude the Commission from referencing public information in the process of making that determination. Simply because the statute mandates a deeper investigation to determine whether there is probable cause a violation occurred does not bar some inquiry at the RTB stage beyond information included in the complaint or response.

To the contrary, the only courts to have ruled on what sources the Commission may consider in making the RTB determination have concluded the statute not only allows the Commission to take into account information not included in the complaint, but requires it "to take into consideration all available information concerning the alleged wrongdoing." *In re FECA Litigation*, 474 F. Supp. 1044, 1046 (D.D.C. 1979) (emphasis added); *see also Antosh v. FEC*, 599 F. Supp. 850, 855 (D.D.C. 1984). The Commission "may not rely solely on the facts presented on the sworn complaint when deciding whether to investigate." *In re FECA Litigation*, 474 F. Supp. at 1046. Reviewing the language of this provision of the Act, courts concluded the statute's "reference to the Commission's 'belief' calls for the Commission to exercise its informed discretion . . . [which] must be based on all the information the FEC possesses." *Id.* That requires the Commission to examine "facts which the FEC has ascertained in the normal course of carrying out its supervisory responsibilities." *Id.*

2. Barring the Use of Public Information Would Deprive the Commission of Relevant Evidence

The impact of barring the Commission from referencing and relying on public information not referenced or included in the complaint or response would be to deprive the Commission of relevant information, leading to nonsensical results and inefficient practices that would undermine the Commission's ability to enforce the law.

Taking into account facts not included in the complaint or response but available to the Commission "through its own work" allows the Commission to make the most informed decision as to whether there is reason to believe a violation did or did not occur. *In re FECA Litigation*, 474 F. Supp. at 1046. The additional information, for instance, may result in a decision not to investigate a complaint that appeared on its face to be "persuasive and strong," or conversely lead the Commission to authorize a complete investigation of a complaint that, without information obtained by the Commission, would have been insufficient. *Id.*

Changing the current practice would deprive the Commission of relevant information regarding possible violations and lead to the dismissal of legitimate complaints, especially those filed by members of the public less familiar with campaign finance law and the Commission's practices. Congress deliberately set the bar low for the content of complaints, requiring only that complaints be notarized and made under penalty of perjury. 2 U.S.C. § 437g(a)(1). Reflecting the Act, the Commission currently does not require a high degree of formality in complaints. Many complaints are simply letters filed by members of the public. These complaints may make allegations without referencing specific public information sources or without appending supporting materials.

It would be self-defeating for the Commission to ignore specifically referenced public information simply because it was not attached to a complaint. Complaints commonly refer to particular news reports or campaign finance reports filed with the Commission, but do not attach those specific documents. CREW's complaints, for example, normally refer to campaign finance reports filed by candidates, political committees, and others, but do not attach them. These reports frequently run hundreds or thousands of pages, and the Commission has easy access to them. Similarly, ignoring public information not specifically identified in the complaint but easily located in news reports, public databases, and other sources would deprive the Commission of information relevant to potential violations. For example, a member of the public might file a complaint that generally references news stories describing potential violations, but does not specifically identify those reports. These reports can usually be easily found by the Commission on websites and in databases such as Westlaw and Lexis. Failing to consider these reports, or specifically identified news reports, would pointlessly and absurdly elevate form over function. The Commission would be ignoring key, relevant information in its own files or otherwise easily available, and would be forced to dismiss legitimate complaints.

Further, ignoring this information will lead to inefficient practices. If the Commission will only consider information attached to a complaint, CREW and other complainants will have no choice but to attach voluminous exhibits to any complaints filed to ensure all relevant facts are considered in making the RTB determination. In addition, CREW and others will feel compelled to reference every possible information source in complaints to ensure no relevant information is accidentally omitted. This may force the Commission to review these information sources needlessly.

In the end, barring the use of public information not included in the complaint or response undermines the FEC's mission to fairly enforce campaign finance laws and regulations. As the courts in *In re FECA Litigation* and *Antosh* concluded, using all available information allows the Commission to reach the best informed conclusion in making an RTB determination.

3. Ignoring Public Information Will Lead to Unnecessary Litigation

By failing to consider relevant and available information, the Commission will invite complainants and respondents to challenge those decisions in court, resulting in overturned decisions and unnecessary litigation costs. The Act provides that any party aggrieved by an order of the Commission dismissing a complaint may file a petition challenging the order in federal court. 2 U.S.C. § 437g(a)(8)(A). If the court finds the dismissal contrary to law, it may direct the Commission to conform to its declaration. 2 U.S.C. § 437g(a)(8)(C). Similarly, any person against whom the Commission makes an adverse determination may obtain a review of the determination in federal court. 2 U.S.C. § 437g(a)(4)(C)(iii).

Ignoring relevant evidence not included in the complaint but available to the Commission would not satisfy the Commission's obligation to make reasoned decisions. Courts may set aside the FEC's decision to dismiss a complaint if that decision is "'arbitrary and capricious, or an abuse of discretion.'" *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (citation omitted). This standard presumes the validity of the Commission's action, unless it is "'not supported by substantial evidence, or the agency has made a clear error in judgment.'" *Id.* (citation omitted). As the courts in *In re FECA Litigation* and *Antosh* reasoned, "consideration of all available material is vital to a rational review of Commission decisions." *Id.*; *Antosh*, 599 F. Supp. at 855. "Although the Court applies the deferential arbitrary and capricious standard, the Court is not required 'to accept meekly administrative pronouncements clearly at variance with established facts.'" *Id.* (citation omitted).

Antosh exemplifies the consequences that will arise if the Commission fails to consider information not included in the complaint or response. In that case, the complainant alleged two associated political action committees made contributions to a House candidate's 1982 primary campaign in excess of the limit of $5,000 per election. *Id.* at 852. Based on the complaint and the response, OGC recommended and the Commission determined that most of the alleged $3,600 in excess contributions were to retire the debt from the candidate's 1980 campaign, and thus were not attributable to his 1982 primary. *Id.* at 853-54. The Commission found reason to believe that the small remaining amount violated the Act, but determined to take no further action. *Id.* at 854-55.

The court, however, noted a "major problem" in the Commission's determination. *Id.* at 855. Two of the candidate's FEC reports demonstrated that the candidate had retired his 1980 campaign debt before the political action committee made its contributions, "persuasive evidence" that the Commission "ignored." *Id.* As a result, the court concluded there was "no basis in the record" not to find a violation, and the Commission's actions were arbitrary and capricious, and thus contrary to law. *Id.* at 855-56.

Ignoring evidence not included in any complaint or response would similarly invite litigation and subject the Commission to reversals. The lawsuits certain to follow when the Commission fails to consider public information are wholly unnecessary, and a waste of the Commission's time and resources. Indeed, courts might view the Commission's policy of turning a blind eye to public information itself as arbitrary and capricious, and strike it down.

4. Other Agencies Use Outside Information in Deciding Whether To Launch a Full Investigation

Other agencies conduct preliminary investigations in which public information is reviewed before deciding whether to open a formal investigation. The Securities and Exchange Commission ("SEC"), for instance, conducts preliminary investigations, called Matters Under Investigation ("MUIs"), based on complaints received from the public and other sources. 17 C.F.R. § 202.5(a). The purpose of those preliminary investigations is "to gather additional facts to help evaluate whether an investigation would be an appropriate use of resources." SEC Division of Enforcement, Enforcement Manual, § 2.3.1 (Nov. 1, 2012). In conducting a MUI, SEC staff generally conducts "additional information-gathering and analysis" before deciding whether to open a formal investigation. *Id.* § 2.3.2. No process is issued or testimony compelled in a preliminary investigation, 17 C.F.R. § 202.5(a), but the SEC is free to consult public information such as news reports, reports filed with the SEC, and other sources.

Similarly, the Federal Trade Commission ("FTC") conducts "initial phase" investigations that consist "of the development of sufficient facts and data regarding possible violations." FTC Operations Manual, Ch. 3, § .2.1. As part of the investigation, "every effort should be made to utilize existing sources of facts and data," such as non-government databases, published government reports, trade journals, and other sources. *Id.*, § .2.3.1. Although compulsory procedures are not used during initial phase investigations, "[f]acts and data may be developed through interviews, written requests for the submission of facts and data, limited questionnaires, informal surveys and other voluntary methods." *Id.*, § .2.3.2. If justified by the initial phase investigation, the Directors of the Bureaus of Consumer Protection and Competition may authorize a full investigation, *id.*, .3.5.1.1, and only after conducting a full investigation does the FTC make a determination that there is "reason to believe" a violation has occurred and issue a complaint, 15 U.S.C. § 45(b).

As the practices of the SEC and FTC demonstrate, reviewing public information during a preliminary investigation is both efficient and leads to well-reasoned decisions as to whether to launch a full investigation.

C. The Commission May and Should Consider Legal Theories Not Alleged in the Complaint

The Request for Comment also asks whether the FECA and FEC regulations require the Commission to ignore potential violations supported by the facts but not specifically alleged in the complaint. Again, it would be self-defeating to ignore any potential violations, and would allow violations to go unpunished simply because the complainant did not have sufficient knowledge of the Act and the regulations.

Ignoring potential violations not specifically alleged in a complaint would erect a new and unnecessary barrier to enforcement. Congress deliberately set the bar low for the content of complaints, requiring only that the complaint be notarized and made under penalty of perjury. 2 U.S.C. § 437g(a)(1). There is no requirement that the complainant list all possible legal theories, or even provide one at all. As with information not included or referenced in the complaint, ignoring potential violations not alleged in the complaint but supported by the facts would pointlessly elevate form over function. The Act and the regulations are complex, and complainants frequently are not aware that facts they are providing to the Commission support multiple violations. Ignoring such potential violations would allow them to go unpunished. In addition to allowing violators to evade consequences for misconduct, failing to pursue these additional violations would reduce the deterrent effect of the Commission's enforcement of the Act.

Furthermore, as a practical matter, a policy of ignoring potential violations would be inefficient, as the original complainant or other parties likely would file follow-on complaints to address the additional potential violations. The Request for Comment uses the example of a complaint that alleged a corporate contribution was made in the form of a coordinated advertisement, but the same facts also show the cost of the ad was not disclosed and the ad did not contain a disclaimer. If the Commission found reason to believe there was a violation based on the coordinated advertisement, but ignored the other violations, the complainant or another party would likely file a second complaint alleging the other legal violations. The Commission would then have to open a new matter under review, fully analyze the new alleged violations, and vote on OGC's recommendation. This inefficiency could be avoided by taking the common sense step of considering the unalleged legal theories in the first place, as the Commission does now.

The Request for Comment further seeks comment on several methods by which the Commission might ascertain whether the complainant wished to allege additional violations. The Commission does not need to, and should not, seek further input to determine the complainant's intentions. Once the complainant has made the allegations, the Commission is responsible for pursuing any possible legal theories. Returning to the complainant for further input will only delay enforcement. In addition, it is unclear how the Commission would interpret

a failure of the complainant to respond. If OGC intends, however, to include in its recommendation a violation that was not alleged in the complaint, the respondent should be provided a time-limited opportunity to respond. This provides the respondent due process, and will help the Commission determine whether the secondary violation is supported by the facts. The time to respond, however, should be kept short and extensions should not be routinely granted, to avoid further delay.

D. In Internally-Generated Matters, the Commission May and Should Rely On Publicly Available Information in Making the Reason To Believe Determination

For the same reasons the Commission may and should rely on public information in complaint-generated matters, it also may and should continue to rely on public information in making RTB determinations in internally-generated matters.

The statute provides the Commission may make the RTB determination "on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities." As the Commission notes in the Request for Comment, this does not restrict what information the Commission may consider in carrying out its supervisory responsibilities. As a result, the Commission has broad discretion to decide which sources of information to review.

As with complaint-generated matters, ignoring public information would deprive the Commission of relevant information, leading to nonsensical results that undermine the Commission's ability to enforce the law.

E. Several of the Civil Penalty Formulas Are Inappropriate for the Violations

The Request for Comment seeks comments on the Commission's practices with regard to opening settlement offers and its formulas for civil violations. As the Request for Comment notes, the Commission recently released to the public a chart compiling the base formulas used to calculate opening settlement offers in prior enforcement actions. The Commission also announced it is providing respondents the method used to determines the Commission's opening settlement offers at the conciliation stage of certain enforcement matters. In addition, the Commission makes final settlement amounts public by publishing conciliation agreements.

The Commission should not release the opening settlement formulas chart to the public. Publishing the chart allows parties regulated by the Act to easily compute the exact amount of the highest possible penalties for violating the Act, and treat that as the cost of doing business. While the Commission asserts the chart reflects past practice and does not necessarily reflect the most current practice, the formulas represent the Commission's opening offers for settlement. As the Request for Comment acknowledges, these amounts can only decrease in final

agreements. Publishing the formulas encourages violations by allowing easy calculation of costs, and reduces the deterrent effect of the Act's penalties.

Conversely, the Commission should publish final settlement amounts and penalties more prominently and systematically. In addition to publishing final settlement amounts in conciliation agreements released as part of MUR files, the Commission should publish in the FEC's annual report a chart showing the total amount of final settlements and administrative fines broken down by section of the Act violated. Publishing the cumulative totals would increase transparency and accountability for both the Commission and the regulated community.

The Request for Comment also requests comments on whether the formulas for civil violations are appropriate. Several of the formulas provide for fines far too low. In particular, the penalty formula for violations of 2 U.S.C. § 441b (making and accepting prohibited corporate contributions), 2 U.S.C. § 441e (contributions in the name of another), and 2 U.S.C. § 441e (foreign national contributions) are insufficient to punish or effectively deter illegal conduct. These prohibitions on corporate contributions, conduit contributions, and foreign contributions are some of the core provisions of the Act. They protect the public against some of the most egregious forms of corruption, circumvention of the statute, and foreign influence on political activities. As a result, the Department of Justice prosecutes knowing and willful violations of these provisions. The penalties provided by the formulas, however, are not commensurate with the severity of these violations. In practice, the fines amount to nothing more than the cost of doing business for getting caught violating the Act, already an unlikely occurrence. To reflect the severity of these violations, the penalties should be at least double the Commission's current formulas.

Conclusion

Enforcement of campaign finance law is critical to public confidence in the integrity of public officials and federal elections. The Commission, unfortunately, is not doing an effective job of enforcing the FECA and FEC regulations, leaving candidates, parties, and outside groups free to flaunt the law without fear of serious consequences, if any punishment at all. The possibility of creating new barriers to enforcement suggested by the Request for Comment would only make the Commission's problems worse. Instead, the Commission should use all available information to aggressively investigate allegations of violations, pursue enforcement actions using any viable legal theory, and impose appropriate punishments.

We appreciate the opportunity to discuss these matters, and hope you find the foregoing comments helpful.

Sincerely,

Melanie Sloan
Executive Director
Citizens for Responsibility and Ethics in Washington