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April 19, 2013

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

VIA E-MAIL: process@fec.gov

Dear Commissioners:

The following comments are submitted in response the Commission's Request For Comment on Enforcement Process (Notice 2013-01), 78 Fed. Reg. 4081 (Jan. 19, 2013) (the "Request"). We write solely in our individual capacities, and not on behalf of any client. The views expressed are our own, and are based largely on our own experiences in recent years representing clients before the Commission.

I. THE ENFORCEMENT PROCESS IN GENERAL

The Request asks broadly "whether this agency is doing an effective job in enforcing the Act and Commission regulations." In our view, the Commission is enforcing the law effectively, as we explain below. We would caution against attempting to answer the Commission's question by reference to the results in a handful of isolated cases, total civil penalties levied and collected, or number of violations found. None of these provide any real measure of "effectiveness" that takes into account the general environment in which the FEC conducts its business, or the extent to which the FEC's work facilitates voluntary, active compliance with the law. And it should go without saying that soliciting individuals with no particular knowledge of the workings of the FEC to sign on to a simplistic slogan is not constructive, persuasive, or in the slightest bit helpful.[1]

[1] *See, e.g.*, the "simple, one-sentence public comment to the Federal Election Commission" of Progressives United: "FEC: You're doing a terrible job," http://www.progressivesunited.org/action/fec-comment?sc=blog_c4_20130405_fec-comment.

In recent years, where the law is settled and clear, the Commission has consistently found reason to believe that a violation occurred, investigated and/or settled the matter with the respondent, as it should. Where the law is not settled, or where a specific application of the law may not be permissible, however, the Commission has appropriately declined to proceed against the respondent. This is how an effective administrative agency with enforcement authority should operate.

Instances in which the Commission declines to proceed with an enforcement action have garnered the most press coverage recently.[2] Press coverage of the FEC is driven almost exclusively by the campaign finance reform industry, their endless stream of press releases, and their ready availability to reporters – and their consistent message for the press is that the FEC is "ineffective" or worse. We note, however, that the advocates who advance these views often demonstrate no interest in hearing from both sides of a dispute before issuing a public reaction condemning the Commission or certain of its Commissioners.[3]

The "reform" lobby has invariably cast the current Commission's votes not to proceed with an enforcement action as lawless refusals to enforce the Act. We strongly urge the Commissioners to pay no attention to the "Failure To Enforce Commission" narrative, which reflects nothing more than the Commission's "failure" to enforce the law in a manner that suits certain interest groups and their allies,[4] who long to replace the current agency with a regulatory mechanism that acts swiftly, presumes guilt, provides inadequate due process protections, and resolves any doubts in favor of an agency that acts as a prosecutor.

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[2] *See, e.g.*, Luke Rosiak, *Politics stifle federal election agency: Split board kills ability for oversight*, Washington Times (Oct. 1, 2012), http://www.washingtontimes.com/news/2012/oct/1/politics-stifles-federal-election-agency/?page=all#pagebreak. The Washington Times' campaign finance report, Mr. Rosiak, was previously employed by the Sunlight Foundation and the Center For Responsive Politics.

[3] *See, e.g.*, Paul S. Ryan, *The Failure To Enforce Commission Reaches A New Low* (April 5, 2013), http://www.clcblog.org/index.php?option=com_content&view=article&id=515:the-failure-to-enforce-commission-reaches-a-new-low (on MUR 6543, but published before the three Commissioners who voted to find no reason to believe released a Statement of Reasons); Richard L. Hasen, *The FEC Is As Good As Dead: The New Republican Commissioners Are Gutting Campaign Finance Law*, Slate (Jan. 25, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_fec_is_as_good_as_dead.html (criticizing certain Commissioners' votes in MURs 6277 and 6279, before those Commissioners issued Statements of Reasons in those matters).

[4] *See, e.g.*, Fred Wertheimer and Don Simon, *The FEC: The Failure to Enforce Commission* (Jan. 2013) at 21 ("The [Republican] commissioners consistently block agency action and prevent the ***proper*** enforcement and interpretation of those laws.") (emphasis added), http://www.democracy21.org/wp-content/uploads/2013/02/Wertheimer-and-Simon-The-Failure-to-Enforce-Commission-.pdf.

The divisions at the Commission that are most often noted in the media are the same sorts of divisions that are seen among our elected officials and courts. There exist very fundamental disagreements over the operation and validity of the campaign finance laws. Congress has not approved any broad overhauls to the campaign finance laws since 2002, and recent efforts to expand the scope of FECA's disclosure requirements failed. The views expressed by Senator Whitehouse and Senator Cruz at the Senate Judiciary Committee's Subcommittee on Crime and Terrorism recent hearing on "Current Issues in Campaign Finance Law Enforcement" (April 9, 2013) are perfect examples of the starkly different, and in some cases incompatible, views within Congress on campaign finance matters. The Supreme Court's most recent campaign finance cases have all been decided by 5-4 votes. It should come as no surprise to anyone that these same disagreements about the law are seen at an executive branch agency. In fact, since BCRA's adoption, the Commission's record has been decidedly mixed when it comes to interpreting and applying the law. We have seen numerous challenges to Commission actions – by both those advocating for more, and those advocating for less, regulation – that yielded judicial constructions at odds with the Commission's positions.

In this environment, if the Commission declines to apply rules as broadly or heavy-handedly as possible, or force through new rules of questionable validity that Congress specifically rejected, that restraint should be viewed as prudent, levelheaded, and appropriately deferential. Such restraint is not evidence of dysfunction or a broken agency, and it certainly should not be regarded as evidence of an intentional effort by certain Commissioners to not enforce the law.

An op-ed in *Roll Call* recently asserted that "the FEC's failure to act on even the most blatant violations is sending an 'anything goes' signal to political players, who are becoming increasingly brazen about testing what's allowed."[5] As counsel who regularly advise on federal campaign finance law and the FEC, we can categorically say that assertions like this are misinformed and simply untrue. As noted above, the FEC has not "fail[ed] to act on even the most blatant violations." This is "reform" industry spin that no serious journalist should take at face value, much less repeat as fact. For every supposed example of the FEC ignoring a "blatant violation," there is a thorough Statement of Reasons issued by one or more Commissioners explaining why they voted the way they did. Second, we have no idea who these alleged people are "who are becoming increasingly brazen about testing what's allowed" – the article does not

[5] *See* Eliza Newlin Carney, *Lame-Duck FEC Invites Scofflaws: Growing backlog of work, protracted stalemates, failure to enforce rules is taking a toll*, Roll Call (April 5, 2013), http://www.rollcall.com/news/rules_of_the_game_lame_duck_fec_invites_scofflaws-223626-1.html?pg=1.

identify them. We see in the "regulated community"[6] people who, very simply, want to know what the law is, what they can do, and what they cannot do. Persons and organizations who are actually subject to FECA and the Commission's regulations invariably take the Commission seriously. We have yet to come across *anyone* who actually thinks that ignoring the law can be reduced to a cost of doing business.

Over the past several years, the campaign finance laws have undergone a very fundamental transformation before the Supreme Court and the lower courts. These decisions significantly narrowed the permissible constitutional scope of regulation, and also raised serious questions about the continued validity and operation of laws that remain on the books. Those of us who actually work within the existing campaign finance laws, and represent clients before the Commission, recognize that the current Commission's record reasonably reflects the current legal landscape. Simply put, the "crisis" that some have proclaimed is little more than a public relations tool.

II. SPECIFIC ASPECTS OF THE ENFORCEMENT PROCESS

The Commission also requested comment on a number of more specific matters pertaining to the enforcement process. We address some of these issues in roughly the order they arise during the enforcement process.

A. The Adequacy Of Complaints and OGC's Pre-RTB Review

In our view, the question of the appropriate scope of OGC's pre-RTB review and research into allegations made in a complaint is closely tied to questions regarding the adequacy of complaints. Stated differently, it is the almost non-existent pleading requirements imposed on complainants that results in the "need" (perceived or actual) for OGC to conduct fairly extensive case reviews before making a recommendation to the Commissioners on finding RTB. If more were required of complainants, there would be less need for OGC to "flesh out" complaints, which respondents rightfully perceive as inconsistent with OGC's proper role.

Ideally, complainants would always file organized, detailed, logical, and comprehensive complaints. In practice, however, FECA does not impose any real pleading requirements on complainants, and the standards the Commission has historically required for complaints are fairly minimal. Against this backdrop, OGC has come to very routinely use other publicly

[6] The "regulated community," of course, consists of individuals and organizations that actually operate under the FEC's regulations. Most of the FEC's biggest critics, or at least its most vocal ones, are not subject to these laws, but are, nevertheless, full of suggestions on how to better regulate the speech of others.

available information – not included in the complaint – in preparing reports and recommendations to the Commission. The 1997 Enforcement Manual refers to this as "pre-RTB information gathering and research."

The Act does not affirmatively authorize any "investigation" by the Commission until after "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." 2 U.S.C. § 437g(a)(2). Following this vote, and notification of the respondent, "[t]he Commission shall make an investigation of such alleged violation…." *Id*. The Commission's regulations similarly do not affirmatively authorize any pre-RTB investigation by OGC. At the same time, the Act does not specify exactly what is involved in an "investigation" or whether there is some amount of research or fact-finding that the Commission may undertake that does not constitute an "investigation."[7]

However, Commission regulations set forth four requirements of all complaints, *see* 11 C.F.R. § 111.4(d)(1) – (4). The original *Explanation & Justification* is instructive:

> Subsection (b) [11 C.F.R. §111.4(b)] sets forth the statutory requirements [2 U.S.C. § 437g(a)(1)] with which a complaint must comply in order for the Commission to act upon it. A complaint is improper if it does not comply with this subsection, and shall not be acted upon by the Commission. **Subsection (d)** [11 C.F.R. § 111.4(d)] **sets forth additional requirements which should be complied with in order to provide the Commission with sufficient information to address a complaint fully.** The Commission may find that a complaint which does not comply with subsection (d) provides insufficient information, and for that reason, may vote to take no action on a complaint.

Transmittal of Regulations to Congress On Amendments to Federal Election Campaign Act of 1971, 45 Fed. Reg. 15,080, 15,088 (March 7, 1980) (emphasis added).

It *seems* that the Commission in 1980 did not intend or authorize OGC to conduct additional research for the purpose of supplementing complaints. Rather, the Commission adopted basic regulatory standards that complaints were supposed to meet. The Commission obviously believed that if those standards were met, the Commission would have "sufficient information to address a complaint fully." At some point after 1980, however, what the

[7] The legislative history indicates that Congress anticipated that the Commission would sometimes dismiss complaints *before* the 15-day respondent notification period had run. *See* Committee on House Administration, Report No. 96-422 To Accompany H.R. 5010 (Sept. 7, 1979) at 20 ("the Commission shall not take any action against a respondent, except a vote to dismiss the complaint, until 15 days after the notification"). This anticipated enforcement speed is inconsistent with an expectation that OGC would conduct any significant research and review of a case prior to a RTB vote.

Commission seems to have intended gave way to the current practice of OGC routinely engaging in "information gathering and research" during the pre-RTB stage, a practice that was eventually "codified" in the 1997 Enforcement Manual.

The 1997 Enforcement Manual distinguishes between "information gathering and research" that is limited to "sources available to the general public," and information that is "developed through formal or informal investigation techniques." The former is said to be permissible under the statute during the pre-RTB stage, while the latter is not. *See* 1997 Enforcement Manual, Chapter 2, pp. 4-6.

The Request also references two cases from the D.C. Federal District Court which either permit or require the Commission "to take into consideration all available information concerning the alleged wrongdoing" at the time it considers reason to believe. Request at 4084 *citing In re FECA Litigation*, 474 F. Supp. 1044, 1046 (D.D.C. 1979). *In re FECA Litigation* was decided on June 15, 1979, *before* Congress began its consideration of the 1979 Amendments to FECA in July 1979. These amendments substantially overhauled, and more carefully defined, the Commission's enforcement process, meaning that *In re FECA Litigation* addresses an enforcement process that has not existed for over 30 years. It is unclear exactly what "other information available to the Commission gathered … *through its own work*" might have entailed in the first half of 1979, because the scope of the Commission's "own work" at that time is not readily apparent. *In re FECA Litigation*, 474 F. Supp. at 1046 (emphasis added). However, the court's conception of "all available information" appears to be limited to "all the information which the FEC possesses, including the individual sworn complaint, other sworn complaints, and facts which the FEC has *ascertained in the normal course of carrying out its supervisory responsibilities*." *In re FECA Litigation*, 474 F. Supp. at 1046 (emphasis added). Even today, reviewing a wide array of publicly available information, such as news articles, Westlaw/Lexis, Dun & Bradstreet, Martindale Hubbell, and other "reference materials" is not part of the Commission's normal "supervisory responsibilities." *See* 1997 Enforcement Manual, ch. 2, pp. 5-6. Accordingly, there does not appear to be much support in *In re FECA Litigation* for the proposition that OGC may broadly research any and all "sources available to the general public" during the pre-RTB stage.

In *Antosh* v. *FEC*, the court determined the Commission acted arbitrarily and capriciously by failing to consider "persuasive evidence in the administrative record," which consisted of "1980 Year-end and 1981 Mid-year reports" filed with the Commission. *Antosh* v. *FEC*, 599 F. Supp. 850, 855 (D.D.C. 1984) Again, this case had nothing to do with "sources available to the general public," such as newspaper articles or other "reference material." Rather, it concerned information contained in FECA-mandated disclosure reports that the Commission maintained in its public records office.

To the extent the Commission's practice regarding "pre-RTB information gathering and research," as described in the 1997 Enforcement Manual, rests on *In re FECA Litigation* and *Antosh*, the Commission has read those two cases liberally.

Rather than quarrel about whether the Commission's long-standing practice is or is not proper, we believe a more productive exercise would be to more effectively enforce of the requirements set forth at 11 C.F.R. § 111.4(d). Commission regulations require that a "complaint should conform to the following provisions:

> (1) It should clearly identify as a respondent each person or entity who is alleged to have committed a violation;
> (2) Statements which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainants [sic] belief in the truth of such statements;
> (3) It should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction; and
> (4) It should be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available to, the complainant."

11 C.F.R. § 111.4(d). Generally speaking, if a complaint satisfies these four requirements, OGC should not have to do any but the most basic and cursory of background reviews. If OGC finds itself involved in any significant research or review, whether limited to publicly available sources or not, the chances are quite good that the complaint does not meet one or more of the requirements of 11 C.F.R. § 111.4(d). In these circumstances, OGC *should not* simply continue conducting its research and review. Rather, OGC should advise the Commissioners that significant additional research or fact compiling is necessary before OGC could recommend finding RTB. The Commission may then consider dismissing the complaint for failure to meet the basic requirements of Section 111.4(d).[8] And this is exactly what the Commission intended when it adopted 11 C.F.R. § 111.4(d), as the Explanation & Justification makes clear: "The Commission may find that a complaint which does not comply with subsection (d) provides insufficient information, and for that reason, may vote to take no action on a complaint." Transmittal of Regulations to Congress On Amendments to Federal Election Campaign Act of

[8] We recognize the distinction between rejecting a complaint outright for failure to satisfy the basic statutory requirements at 2 U.S.C. § 437g(a)(1) (requiring a complaint to be in writing, signed, sworn to, and notarized), and summarily dismissing a complaint for failure to satisfy the regulatory requirements at 11 C.F.R. § 111.4(d)(1) – (4), as interpreted by several Statements of Reasons. We are aware of instances in which OGC staff undertakes the former task, and advises the complainant that he or she must resubmit the complaint with, for example, an additional signature or notary seal. What we are suggesting here is a more vigorous enforcement by the Commissioners of the summary dismissal standards set forth in the regulations.

1971, 45 Fed. Reg. 15,080, 15,088 (March 7, 1980). Voting "to take no action on a complaint" is not the same thing as finding no reason to believe a violation occurred, and a "no action" disposition would not preclude a complainant from filing an amended complaint. More frequent use of this procedure would have the effect of placing the burden on the complainant to file a proper complaint, rather than requiring or allowing OGC to carry part of this burden by engaging in "information gathering and research."

If the Commission systematically enforced the minimal pleading requirements that already exist, as originally intended, the question of what materials OGC may review prior to a Commission RTB would largely resolve itself. A complaint that satisfies Section 111.4(d) will, in most instances, allow OGC to make a recommendation to the Commission on the question of RTB with a minimal amount of "information gathering and research." And a more rigorous enforcement of Section 111.4(d) would, in turn, lead to a higher overall quality of complaints received at the Commission.

The Commission has, in the past, attempted to enforce a minimal standard regarding the quality of complaints. The Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas in MUR 4960 (Hillary Clinton) (Dec. 21, 2000) set forth a basic standard for determining whether a complaint includes sufficient specific facts that would allow the Commission to find reason to believe a violation occurred. Specifically,

> The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented. . . . Unwarranted legal conclusions from asserted facts … or mere speculation … will not be accepted as true. In addition, while credibility will not be weighed in favor of the complainant or the respondent, a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint … or available from public sources such as the Commission's reports database.

Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas in MUR 4960 (Hillary Clinton).

Ideally, the Commission would assess a complaint in light of Section 111.4(d) and the MUR 4960 standard first, and *then* notify the respondent whether a written response is even necessary, or if the matter has been summarily dismissed. We acknowledge, however, that an initial assessment of a complaint's adequacy is not part of the statutory scheme. Instead,

respondents must be notified of the filing of a complaint, and then given 15 days to submit a written response. *See* 2 U.S.C. § 437g. A written response, however, tends to dignify even the most frivolous of complaints, and also provides OGC with material to address in a First General Counsel's Report. A discussion of the merits of a complaint in the response naturally leads to recommendations based on the merits, while the summary dismissal standards tend to be downplayed. While respondents may forever be burdened with responding to frivolous complaints under the current statute, the Commission could still undertake a more systematic approach to weeding out frivolous complaints at an early stage in the proceedings.

Much as federal district court opinions always discuss and establish standing and jurisdiction *before* dealing with the merits of a case, the Commission should consider requiring OGC to specifically address the sufficiency of a complaint, under 11 C.F.R. § 111.4(d) and/or some internal standard based on MUR 4960, at the outset of every First General Counsel's Report. Where OGC determines the standard is satisfied, it would explain this determination, proceed to the substance of the complaint, and make a recommendation to the Commissioners on RTB. Where a complaint does not satisfy these standards, however, a recommendation to dismiss would be forwarded to the Commissioners. If the Commissioners reject that recommendation, the case would be returned to OGC which would then proceed with a substantive review of the matter.

A more vigorous and focused application of 11 C.F.R. § 111.4(d) and the summary dismissal standard of MUR 4960 would likely improve the overall quality of complaints, and deter some from filing frivolous complaints. In addition, it could save OGC time and resources.

B. The Ability To Address Factual and Legal Issues Before The Commission Votes on RTB

We encourage the Commission to continue its efforts to afford respondents more opportunity to respond to the materials used by OGC in formulating its reports and recommendations and to the legal theories presented by OGC in its reports and recommendations.

The Commission is to be commended for recent steps it has taken to ensure that respondents have the opportunity to respond to materials not referenced in the complaint, but used by OGC nevertheless. The updated process described in Notice 2011-06, however, is not adequate. Under the procedure adopted in 2011, the Commission "provide[s] respondents in enforcement proceedings with relevant information ascertained by the Commission as the result of an investigation." Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34,986, 34,989 (June 15, 2011). That is, only *after* a finding

of reason to believe has already been made is this information made available, meaning it is produced during the conciliation stage. In order for the respondent to make any actual use of these materials, the respondent must decline to enter into a conciliation agreement and proceed to the probable cause stage. Doing so means forfeiting the pre-probable cause conciliation discount. In many cases, the respondent will decide that it is less expensive to simply settle.

On December 1, 2011, the Commission considered and discussed a proposal presented by Commissioner Walther that would afford respondents with an opportunity to respond to materials and legal theories used by OGC, but not found in the complaint. *See* Agenda Doc. No. 11-65. Other Commissioners noted that the proposal largely codified the Commission's existing practice. If that is the case, then those practices should be codified and made available to the public. Otherwise, many respondents will be unaware of the existence of these protections and have no way of enforcing their procedural rights. We strongly urge the Commission to reconsider Commission Walther's proposal, albeit with certain modifications described below.

Commissioner Walther's proposal is a frank acknowledgment that the critical part of the enforcement process is the portion of that process leading up to the Commissioners' reason to believe vote. Regardless of how the statute reads, and regardless of the fact that many Commissioners have repeatedly emphasized that a RTB finding is not a final determination that the Act actually was violated, the RTB vote does, in fact, function in most cases as the Commission's substantive judgment of a case. In a high proportion of cases, the facts are developed and the law is argued exclusively during the pre-RTB stages. When OGC recommends finding reason to believe, the recommendations very often include a recommendation to authorize conciliation prior to a finding of probable cause. Thus, in a great many cases in which the Commission finds RTB, the respondent usually enters into a conciliation agreement. Where this happens, the facts and the law are memorialized more or less as they existed at the time the Commission voted to find RTB.

In at least some of these cases, a settlement occurs *not* because the respondent genuinely acknowledges that it violated the law, but because there are substantial financial incentives to give up and settle. In some cases, this financial incentive (*i.e.*, the pre-probable cause discount[9]) works as an easy and cheap way out for the violators, and as something of a trap for those who believe they are innocent but do not want to risk doubling their civil penalty. As a result of these various considerations, very few cases continue to the probable cause stage, which means that for most respondents, the only meaningful opportunity to address and persuade the Commissioners is through the response to the complaint.

[9] While "pre-probable cause discount" sounds like an incentive, it can just as easily be understood as a threat: "If you do not settle, the civil penalty we pursue at the next stage will be substantially increased."

Both the Commission and respondents would greatly benefit if more argument were heard prior to the Commission's vote on OGC's RTB recommendation. In practice, we suggest that all of the documents described in Notice 2011-06 be provided voluntarily to respondents before OGC forwards its First General Counsel's Report. Commissioner Walther's proposed motion for reconsideration of a RTB finding would be unnecessary if the Commission's adopted policy on evidence disclosure was sufficiently comprehensive. For example, a respondent should be aware of, and have the opportunity to respond to, every source considered or referenced in OGC's report recommending a RTB finding. If a source is not referenced in the complaint, OGC should notify the respondent that it has obtained the source and that the respondent may submit an additional written response with respect to that source. It goes without saying that these sources should be specifically identified, and not simply referenced generally as news reports, public filings, or available information. These steps should be formalized so that the Commission has the opportunity to hear from both OGC and the respondent on every single piece of evidence considered by OGC *before* the Commission votes on a recommendation to find reason to believe a violation of the law occurred.

As referenced in the Request For Comment, Commissioner Walther's proposal provided: "a respondent would be given written notice by OGC in the event that OGC intends to include in its RTB recommendation to the Commission (1) any additional facts or information known to OGC and not created by or controlled by the respondent, which are deemed to be material to the RTB recommendation, and (2) any potential violation of the Act and/or the regulations that may not have been specifically alleged in the complaint or included in the referral notification, and the facts and arguments supporting the RTB recommendation on the additional potential violation." We support this policy fully, albeit with two caveats.

First, with respect to Part 2 of the procedure outlined above, the Commission should include not only potential violations that may not have been specifically alleged in the complaint, but also any legal theory in a pre-RTB General Counsel's Report that the respondent has not had an opportunity to address. This includes the "secondary violations" referenced in Commissioner Walther's proposal, and also in the Request For Comment, but also instances where OGC proposes to apply existing law in a new way that might not have been reasonably anticipated by the respondent. For example, it may be perfectly clear on the face of a complaint that the complainant is alleging a coordination violation. OGC's recommendation to the Commission, however, might be based, in part or in whole, on a new legal theory, or on an application of the law that the Commission has not previously considered or adopted. In these circumstances, the respondent would not necessarily be notified under Part 2 of the procedure outlined above because there is no secondary violation at issue, only a new theory of the alleged primary violation. In this regard, we believe that Part 2 may be inadequate as the respondent should have

the opportunity to address OGC's recommended new legal theory or proposed application of the law during the pre-RTB stage.

While the Commission is not supposed to change the law through the enforcement process, "development" of the law through the enforcement process is, to some degree, inevitable. In these cases, however, it is crucial that respondents have a chance to address new legal theories or applications of the law *before* the Commission votes to find RTB on the basis of those theories.

Second, we urge the Commission to ensure that OGC is not solely responsible for determining when a respondent must be notified of the use of additional facts, information, legal violations, legal theories or applications. The Commission should remain cognizant that while OGC acts as a fact-finder and arbiter to some extent, it also acts as the prosecuting attorney in an enforcement matter. This latter role is not always consistent with determining when a respondent should be afforded an opportunity to offer counterarguments.

The need for this additional opportunity for response and comment on legal issues is well-illustrated by the so-called "527 cases" that arose from the 2004 election cycle. In these cases, several respondents entered into conciliation agreements and paid very large penalties. We strongly suspect that these conciliation agreements were the product of financial considerations rather than genuine acknowledgements of legal violations. In fact, we suspect that most of these respondents believe the Commission changed the law through these cases without affording respondents an adequate opportunity for comment. In some of these cases, it appears that the Commission voted to find RTB without having heard from the respondents on a variety of legal theories that were either new or not well-established.

The "527" cases are most notable for: (1) the reemergence of 11 C.F.R. § 100.22(b) under the theory that the standard was revitalized or saved by BCRA and the Supreme Court's decision in *McConnell*; (2) the formal adoption of the *Survival Education Fund* solicitation standard; and (3) the use of the "PASO" standard as part of the political committee status analysis. It is not clear from the record in these cases that respondents were actually heard on these legal questions before the Commissioners voted on OGC's RTB recommendations. A review of the public records in these cases suggests that the respondents – almost uniformly – did not anticipate that the Commission would eventually adopt any of these theories, and thus, the issues were never fully briefed. While the respondents *could have* argued their cases during the probable cause stage, given the penalty figures involved, it is not surprising that respondents chose to settle rather than forfeit their pre-probable cause settlement discounts.

To be clear, we are not commenting on the FEC's substantive decisions in any of these cases, and we raise the subject solely for the purpose of noting that there are actual, recent examples of cases that might have benefited from allowing for expanded comment opportunity from the respondent during the pre-RTB stage.

In addition, expanding a respondent's ability to be heard on the legal theories advanced by OGC is far preferable to the suggestion that "the Commission seek further input from a complainant to determine whether he or she intended to allege a potential secondary violation based on the facts presented in the complaint." Request for Comment on Enforcement Process, 78 Fed. Reg. at 4086. This suggestion is a recipe for OGC coaching complainants on the art of preparing a more comprehensive complaint. OGC's function too closely resembles that of a prosecutor already; it should not be in the business of editing complaints.

C. More Frequent Status Reports on Pending Enforcement Matters

Clients constantly ask us about the status of either a complaint they filed or a complaint that was filed against them. For respondents, between the time we (1) submit a response to a complaint and (2) receive notification of the Commission's vote on reason to believe, we generally have no way of knowing the status of a pending matter. (Complainants, of course, are not notified until a matter is concluded and closed.) Occasionally, OGC will seek an additional response on materials that it is considering but that were not included in the complaint. From this, we know that OGC is still reviewing a matter and (presumably) has not completed the First General Counsel's Report. In some instances, we have received notices that the Commission intends to vote on a matter during some period of time (*e.g.*, by the end of the year). From this, we can presume that OGC has forwarded its recommendation to the Commission, and that the matter awaits Commission action.

We believe it would be beneficial if the Commission undertook to provide respondents with regular updates regarding the status of a pending matter.

III. PUBLICIZING CIVIL PENALTIES AND FORMULAS

The Request For Comment refers to the Commission's recently adopted practice of providing respondents with the method used to determine the opening settlement offer at the pre-probable cause conciliation stage. In our view, this is a very positive development. Like most of the attorneys who are regularly engaged with the Commission (many of whom have served as Commissioners or worked as Commission staff), we were generally aware of how the Commission calculates penalty figures, even before the Commission publicly released much of

this information. This information has never really a secret, but it was also not possible to tell a client *exactly* how a given penalty would be reached.

Most respondents, on the other hand, deal with the Commission only once and do not have the "benefit" of seeing first-hand how the Commission has, for the most part, penalized instances of the same type of violation consistently over time. A one-time respondent who is penalized according to some semi-secret method tends to view the entire process with skepticism and as something less than fully legitimate. The simple step of revealing the penalty calculation formula to a respondent goes a long way toward assuring respondents that they are, in fact, being treated fairly. This, in turn, tends to facilitate the conciliation process.

We view this additional transparency as beneficial to all parties, and we see no legitimate reason for not making public any penalty calculations at the close of a matter. As the Request notes, a chart of "base formulas" for calculating opening offers has already been released (and those formulas are repeated in the Request itself). To the extent that actual settlements deviate from the base formula figures, as they often do, those deviations reflect valuable information about the Commission's views on mitigating and aggravating circumstances (which we presume serve as the justification for the deviation). If the Commission is committed to treating respondents fairly, as we believe it is, there is no reason for the penalty process to be anything other than fully transparent.

Some suggest that readily available penalty formulas will enable people to easily determine the penalty for a violation and then treat that penalty as a "cost of doing business." In our experience, the "regulated community" is <u>not</u> full of people who set out to commit knowing and willful violations of the law. Rather, those who are subject to the Act tend to be, rightfully, preoccupied with *not* violating the law. Clients want to know what the law is and whether a particular course of action is legal. Those who claim that the Act is routinely violated by those who view FEC penalties as nothing more than a cost of doing business are just fundamentally wrong on that count, and if they actually counseled people who are subject to the Act, they would quickly realize this. Instead, proponents of this view tend to be people who make a living criticizing the existing campaign finance system, rather than actually navigating within it. In any event, we do not recall any instances in which a proponent of this view has cited an actual example.

As always, we appreciate the opportunity to provide comment to the Commission.

Sincerely,

Thomas J. Josefiak | Jason Torchinsky | Michael Bayes