FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement of Commissioner Ellen L. Weintraub
Seeking Public Comment on the Commission's Proposed Procedures for Disclosure of Documents in the Enforcement Process

I welcome efforts to formalize the Commission's practice regarding the production of exculpatory evidence in the enforcement process and share my colleagues' goal of providing fairness to respondents.

The Commission has put forward two proposals for public comment. Agenda Document 11-23A is similar to policies in place at other civil enforcement agencies and would apply the teachings of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny on disclosure of exculpatory evidence. Agenda Document 11-23 would provide broader and earlier disclosure not just of exculpatory evidence, but of all relevant, non-privileged documents in the Commission's possession. I am particularly interested in receiving comments on the following issues.

Concerns Involving Multiple Respondents

In matters involving multiple respondents, how should the Commission balance the interest in providing respondents with exculpatory evidence against the confidentiality requirements imposed by the FECA? *See* 2 U.S.C. § 437g(a)(3) and 2 U.S.C. § 437g(a)(4)(B)(i).

The Act provides: "Any notification or investigation made under this section shall not be made public by the Commission or any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." 2 U.S.C. § 437g(a)(12)(A). *See also* 2 U.S.C. § 437g(a)(4)(B)(i) (requiring confidentiality of Commission actions and information derived during conciliation). Is it appropriate for the Commission routinely to ask respondents to waive the statutory confidentiality provisions? (*See* Agenda Document 11-23 at 12-13.)

Does 2 U.S.C. § 437g(a)(12)(A) permit the Commission to disclose documents relating to the investigation of one respondent to another respondent if the former declines to consent? Does the answer to this question change depending upon whether the respondent who receives the documents signs a non-disclosure agreement? Would such a non-disclosure agreement satisfy section 437g(a)(12) in all instances?

How do past court decisions addressing the confidentiality provisions, such as *In re: Sealed Case*, 237 F.3d 657 (D.C. Cir. 2001) and *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), affect the Commission's proposals?

Should non-disclosure agreements be required in all cases, rather than left to case-by-case decisions by the Commission? (*See* Agenda Document 11-23 at 12-13.)

Should the policy require the Commission to redact documents to protect privacy concerns (e.g., if bank account or social security numbers appear on any documents to be produced)?

Should the Commission consider whether the various respondents are allied or adverse to each other in interest? For example, should the Commission disclose documents to one respondent that were obtained from another if the two are known to be involved in civil litigation against one another? Should the Commission take into account whether the documents were submitted voluntarily or compelled by a Commission subpoena?

Enforcement Concerns

Do the proposals provide necessary exculpatory and mitigating information to respondents without unduly complicating or undermining the enforcement of the Federal Election Campaign Act?

In applying the *Brady* doctrine, the Supreme Court has repeatedly found that even criminal defendants are not entitled to view the entire investigative file. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[w]e have never held that the Constitution demands an open file policy (however such a policy might work out in practice)"); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) ("A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files."); *Illinois v. Moore*, 408 U.S. 786, 795 (1972) (holding that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case"). How should the Commission tailor its own exculpatory evidence practice in light of these cases?

In considering whether to adopt an exculpatory evidence policy, other investigative agencies have considered such concerns as the agencies' ability to conduct investigations effectively and efficiently, prevent the disclosure of confidential information, avoid the opportunity for collusion or intimidation among witnesses or parties, prevent the source of complaints and informants from dwindling, and prevent harming a parallel investigation or proceeding by another agency. How should such concerns inform the Commission's disclosure policy?

Should the Commission require tolling agreements as a matter of course if respondents challenge a decision to withhold or disclose a particular document or category of documents?

What will be the impact on conciliation of restricting the Commission's ability to continue formal investigation while engaging in conciliation and at the same time producing existing investigative records to respondents?

The Commission intends to discuss the proposals again at the next scheduled Open Meeting on May 26, 2011. Comments are due by 5:00pm on May 23, 2011 and may be sent to: documentdisclosure@fec.gov. The proposals and audio of the discussion the Open Meeting of May 5, 2011 are available at: http://www.fec.gov/agenda/2011/agenda20110505.shtml .