

January 5, 2009

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Federal Election Commission  
999 E St., NW  
Washington, DC 20463

Dear Sirs:

In response to the Federal Election Commission's most recent Notice of Public Hearing and Request for Comments, 73 Fed. Reg. 74494 (Dec. 8, 2008), we are pleased to provide below our thoughts and feedback on two areas of concern.<sup>1</sup> We also request that Joseph Birkenstock be provided an opportunity to testify at the public hearing on this notice currently scheduled for January 14, 2009.

While, on the whole, our experience has been that the Commission operates as efficiently and effectively as can reasonably be expected given the nature of the laws it implements and the fundamental constitutional rights those laws address, our comments below single out two particular areas that we believe could be substantially improved without the need for new legislation. Specifically, we suggest that the Commission adopt a hearing procedure for advisory opinions, consistent with the hearing approach recently adopted for enforcement actions, and we suggest that the Commission provide greater predictability in concluding enforcement actions.

### **Advisory Opinion Hearings**

First, we propose that the Commission supplement existing advisory opinion procedures by instituting live hearings. With thirty years of existing advisory opinions already in place, we believe the trend in advisory opinion requests has been and will continue to be toward more complicated and technical questions, and away from some of the relatively straightforward questions submitted to the Commission in the past.

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<sup>1</sup> These comments are submitted on behalf of the undersigned attorneys, and do not necessarily represent the opinions or perspectives of other Caplin & Drysdale lawyers, some of whom are associating themselves with comments filed separately.

Accordingly, in our experience, the dialogue between counsel for a requestor and the Office of General Counsel (“OGC”) has been substantive and productive, but by its nature also limited. We have found it enormously helpful to discuss novel or difficult issues with OGC. And while we do not doubt that OGC fairly passes along the thrust of these discussions to Commission members, we believe it could only be helpful for Commissioners to be able to discuss an Advisory Opinion Request (and/or a draft or drafts of the opinion itself) directly and candidly with the requestor.

The advisory opinion hearings we envision (hereinafter “AOHs”) would therefore be modeled closely after the probable cause hearings that the Commission recently incorporated into its administrative enforcement process.<sup>2</sup> Like probable cause hearings, the proposed AOHs would complement and enhance existing procedures, not replace them. As such, the entirety of the advisory opinion process as it currently exists would still be followed, but the Commission would have a discretionary opportunity to discuss issues of its choosing on the record with the requestor and commentors of the Commission’s choosing.

Specifically, we envision that a requestor would ask the Commission for an AOH as part of a written advisory opinion request, or as part of a comment filed in response to a draft opinion from OGC.<sup>3</sup> The Commission would determine whether to grant an AOH request and would determine the content and format of the hearing in its sole discretion. We would expect that these hearings, once granted, would typically be held at the draft stage such that any fact-gathering would already be complete before the hearing is held.

AOH requestors, like enforcement respondents, would be limited to presenting arguments on issues already addressed in a written submission – either the request itself, a factual response to OGC, or a comment on an OGC draft. As we envision it, Commissioners, the Commission’s General Counsel (or her designees), and the Commission’s Staff Director (or designees) would also have the opportunity to pose questions to and engage in discussion with the AOH requestor and/or any commentors which the Commission has allowed to appear at the hearing.<sup>4</sup> The Commission would make transcripts of AOH proceedings and subsequently disclose them to the public for written comment by interested parties, as is done currently with advisory opinion requests and written comments.<sup>5</sup>

These AOHs, as we describe them, would be consistent with existing law. Neither the Federal Election Campaign Act of 1971, as amended (“FECA”), nor its legislative history suggests that the advisory opinion process must be exclusively undertaken in writing. FECA only requires that certain *steps* (requests,<sup>6</sup> comments by interested persons,<sup>7</sup> and opinions issued

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<sup>2</sup> Fed. Election Comm’n, *Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64919 (Nov. 19, 2007).

<sup>3</sup> In other words, only the requestor of a given advisory opinion would be able to request a hearing as part of the AO process, but when and if an AO requestor has requested a hearing, anyone who files a comment on that AO could likewise request to appear at the AOH. The Commission would have the sole discretion to allow or deny any or all commentors to appear at the hearing.

<sup>4</sup> For due process reasons, we believe that a client on whose behalf an attorney requested an advisory opinion could not be compelled to attend or appear at such an AOH, and could authorize counsel to appear instead.

<sup>5</sup> 11 C.F.R. § 112.3(b).

<sup>6</sup> 2 U.S.C. § 437f(a)(1).

<sup>7</sup> 2 U.S.C. § 437f(d).

by the Commission<sup>8</sup>) in the advisory opinion process be in writing, much the same way that FECA only requires certain steps (e.g., complaints, notifications of complaint sent by the Commission, and responses<sup>9</sup>) in the enforcement process to be in writing. FECA therefore permits the Commission to add AOHs to the advisory opinion process, just as it permitted the Commission to institute probable cause hearings as a new step in enforcement proceedings.

Furthermore, AOHs would allow the Commission to give clearer guidance to the regulated community, and would allow that community to better understand the reasoning and concerns underlying particular opinions or votes on opinions. As described in FECA's legislative history, the advisory opinion process was provided to help "elaborate the meaning of basic provisions of the law" and "answer the residual questions created by unique circumstances that can never be fully anticipated in drafting generally applicable rules."<sup>10</sup> Regulated persons regularly look to the advisory opinion process as a means to better understand the law, simply in an effort to comply with it. An optional, real-time dialogue between the Commission and requestors (and selected commentors who have filed written comments) would help everyone concerned better understand the nature and context of any given advisory opinion request and ensure that the Commission has fully considered all related issues before exercising judgment.

In sum, we have found great value in our dialogue with Office of General Counsel staff about advisory opinion requests, and we understand the value for the Commission itself in having these discussions with OGC both before and during the public hearing in which AO drafts are approved or sent back for revisions. The proposed AOH proceeding would build on these practices by combining them, but not replacing them, in a formalized process that maintains the open, on-the-record nature of the advisory opinion process already set out in FECA.

### **Post-Determination Notification Procedure**

Second, we propose that the Commission provide greater predictability with regard to concluding enforcement actions, specifically with respect to publicizing conciliation agreements and notifying enforcement-matter respondents.

Under current rules, the Commission may publicize a conciliation agreement immediately after it is "finalized."<sup>11</sup> An agreement is finalized when "signed by the respondent and by the General Counsel upon approval by the affirmative vote of four (4) members of the Commission."<sup>12</sup> Because the Commission usually performs its agreement-finalization role after the respondent signs, the respondent, in our experience, is typically uncertain as to whether the Commission has approved an agreement and as to when the Commission will publicize the agreement.

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<sup>8</sup> 2 U.S.C. § 437f(a)(1).

<sup>9</sup> 2 U.S.C. § 437g(a)(1).

<sup>10</sup> Statement of Wayne L. Hays, Chairman of the Cmtee. on House Admin., Cong. Rec. H 3777 at 60 (May 3, 1976).

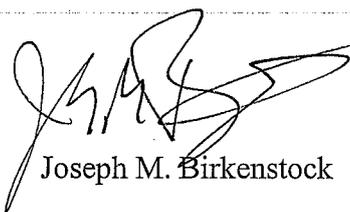
<sup>11</sup> 11 C.F.R. § 111.20(b).

<sup>12</sup> 11 C.F.R. § 111.18(b).

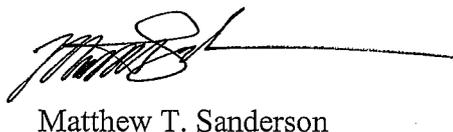
The leadership and staff of OGC are typically very collegial about providing a courtesy notice to counsel for respondents about when a conciliation agreement is scheduled to be taken up by the Commission and whether the Commission approved or disapproved a given proposal. Occasionally, however, OGC counsel may not send out these courtesy notifications, and respondents are consequently left wondering whether or when their enforcement matter will be concluded and when the outcome will be made public.

We suggest that the Commission adopt a formal policy to always notify enforcement-matter respondents before conciliation agreements are made public.<sup>13</sup> MUR respondents typically have close political supporters, customers, investors or other stakeholders that have invested time, effort, and funds in the respondent. Since the MUR process is confidential, particularly for RAD referrals or other internally generated matters, formalized advance notice from the Commission would allow respondents to avoid having these supporters and stakeholders learn about the existence of an enforcement matter through the media.

Sincerely,



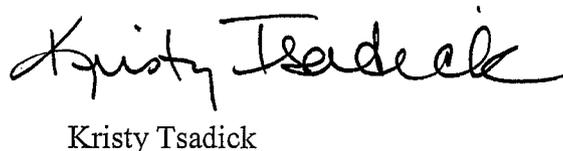
Joseph M. Birkenstock



Matthew T. Sanderson



Stacy Cline



Kristy Tsadick

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<sup>13</sup> 11 C.F.R. § 111.18(e) currently requires notification to be sent, but does not specify that the notification must be sent before the Commission publicizes the agreement.