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January 5, 2009

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

Re: FEC Notice Seeking Comment on Policies and Procedures

This is in response to the December 8, 2008 Federal Register Notice seeking comment on various policies and procedures of the Federal Election Commission. I make this submission in my individual capacity and not on behalf of any client or other person.

The Commission is to be commended for seeking ways to improve its policies and procedures. On balance, I believe the Commission's procedures reflect a proper balance between the needs of the agency for dispatch and the needs of the regulated community for fairness.

While there are many issues raised by the Notice, this comment is focused on just a few topics.

## *I. Motions in the enforcement process to reconsider*

I believe it would be appropriate to allow motions to reconsider a "reason to believe" or a "probable cause to believe" determination, but only if this is coupled with appropriate standards and time frames to discourage mere dilatory tactics. It would seem reasonable to insist that any motion for reconsideration be based on new facts or new legal guidance not otherwise available to the Commission, and to require that the motion be filed within, say, 14 days of notice of the FEC's determination being sent.

## *II. Deposition practice*

I believe the respondents' rights to deposition transcripts are being adequately handled under the current procedures. It is critical that witnesses be given an opportunity to review and correct the transcripts because, experience shows, the transcriptions are sometimes not reflective of what actually was said. No system has yet been devised that allows even the most skilled transcriber to get everything right, so having a review process available to facilitate corrections is essential.

## *III. Extensions of time*

If the Commission is concerned about extensions of time affecting statute of limitation concerns, it would be prudent to require that the respondent involved agree to waiver of the statute for the

January 5, 2009

Page 2

amount of time sought for an extension. To avoid disputes over this policy, perhaps the Commission could limit its application to the last year before the expiration of the statute of limitations.

*IV. The personal appearance option*

The current policy of allowing a respondent or counsel to appear at a probable cause hearing offers advantages that warrant continuing this practice, I believe. In some complicated legal areas, the legal and factual analysis can be aided by a question and answer format that allows commissioners to get at the point of most interest. The one complication that can arise is how to deal with what are truly factual questions not answered by the record thus far. This is a problem that exists also with an attempted resolution solely on the written materials available. Perhaps the procedures could be amplified slightly so that precise written follow-up questions (approved by a Commission vote) could be directed to the respondent or counsel to get prompt written answers within a prescribed, short time frame. Apart from that slight modification, the Commission should continue to use the personal appearance option sparingly. It might have some use in stages of the presidential public funding audit process that do not yet involve a repayment determination, such as the initial eligibility determination phase. See 11 C.F.R. § 9033.10.

*V. Timeliness issues*

The Commission has great responsibility to provide prompt action on all pending matters. This is a basic function of serving the public that relies on the FEC to enforce and administer the law. In years past, the FEC occasionally faced criticism for asking for additional staff resources it believed necessary to move enforcement cases quickly. I would urge commissioners to never be timid about asking for the resources truly needed to do the job. At the same time, commissioners need to always be looking for ways to streamline operations and become more efficient. Meanwhile, staff need to be given deadlines for pending work assignments so that everyone understands that performance is being measured. These are not new concepts, and I have little doubt that commissioners all have ideas of how to best make this work. The key is getting everyone to 'buy in' with the understanding that everyone then gets credit for the good results.

*VI. Prioritization of enforcement cases*

The prioritization process, as originally envisioned, primarily was to identify cases that would be low-rated and that would not be allowed to impair the ability of OGC staff to work on more important, timely matters. I believe that approach is still sound. The FEC will only be successful in the minds of the public and the regulated community if it focuses on the cases that really matter. While respondents may hope that the FEC will go easy on them in a particular matter, the reality is that most players in the political process want the rules effectively enforced against the opposition. The most significant cases will often involve the most complex issues

January 5, 2009  
Page 3

(coordination, express advocacy, *Wisconsin Right to Life* analysis, etc.), but the FEC should not retreat from dealing with these matters simply because they are difficult.

*VII. Civil penalty policy*

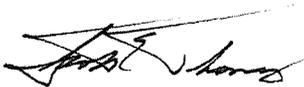
Traditionally, I have opposed making public the Commission's calculation formulas for civil penalties. In my view, giving potential respondents a precise cost for violating the law makes it too easy to determine if the penalty is worth paying. There is an element of deterrence that comes with leaving the potential penalty somewhat mysterious.

*VIII. RAD referral process*

Currently, a potential respondent in a RAD referral doesn't have a good idea of whether the matter in fact will move to the enforcement track. It might be appropriate to generate a trial program whereby such potential respondents are provided at least a written summary of the matter, and an opportunity to respond in writing, before the Commission makes its "reason to believe" determination. If nothing else, in appropriate cases this would put potential respondents on notice that they should get counsel to assist with a response. More importantly, this notice probably would generate a more thorough, helpful analysis to the Commission before it makes its initial determination. While most such matters involve clear-cut legal and factual issues, a respondent's extenuating circumstances may assist the Commission in formulating a better conciliation posture or other means of resolving the case. If the Commission adopts such a trial program, it should confine it to a written process and should only allow the potential respondent a fairly short time frame for providing a response.

I hope the foregoing comments are helpful. I would like to testify on January 14, but would not be offended if the witness list is too crowded to allow for this.

Sincerely,



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