Before the Federal Election Commission
Hearing on Enforcement Procedures

Prepared Statement of

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Introduction

Madam Chair & Commissioners:

Thank you for this opportunity to testify. Enforcement procedures were an issue when I had the privilege of working at the FEC in 1977-79. In my subsequent 24 years of private practice, I have represented hundreds of clients before this agency. Therefore, I believe that I have both an insider's and outsider's perspective on this important topic.

General Observations

Enforcement procedures should be approached in two ways. First, there are procedures that the Commission must adopt because of statutory or constitutional requirements. Second, the Commission must consider the optimal use of its resources to accomplish its enforcement objectives and balance such use against the need to promote compliance and to ensure that accused persons have been fairly dealt with. Efficiency and fairness within the confines of statutory directives were the subject of William H. Allen's testimony in front of the House Administration Committee 19 years ago when he put forward the recommendations of the ABA Section of Administrative

Law. (I attached his testimony as well as the Section's recommendations to my May 30, 2003 comments submitted in this proceeding.)

The first consideration is absolute. The Commission may not adopt policies, procedures, or regulations that ignore or contravene the requirements of the Federal Election Campaign Act, the Administrative Procedures Act, other laws or the constitutional principles of due process. For example, the Commission must comply with the statute of limitations. 28 U.S.C. § 2462; FEC v. Nat'l Republican Senatorial Comm., 877 F. Supp. 15 (D.D.C. 1995). It also must supply statements of reason under certain circumstances. See, e.g., Common Cause v. FEC, 842 F.2d 436 (D.C. Cir. 1988); Democratic Cong. Campaign Comm. v. FEC, 831 F.2d 1131 (D.C. Cir. 1987); Common Cause v. FEC, 676 F. Supp. 286 (D.D.C. 1986). Back in 1982, the ABA report recommended time limits and statements of reason. The Commission did not adopt either recommendation until required by court decisions.

In addition to upholding Congressional and constitutional directives, the Commission should ensure that efficiency and fairness are balanced in its enforcement policies and procedures. The Commission needs, for example, to avoid unnecessary litigation. Respondents, on the other hand, deserve to know and understand that enforcement procedures are not politicized and that all parties are treated in a fair manner. Access to information and an opportunity for oral argument can extend a sense of fairness and perhaps enhance prosecutorial efficiency.

With these principles in mind, let me now touch on some of the specific issues raised by the notice.

Designating Respondents in a Complaint

The Commission is required to notify within five days those identified as respondents in a complaint. The Commission must inform them that they have been so identified and provide them with a copy of the Commission's compliance procedures and of the complaint itself. 2 U.S.C. § 437g(a)(1). The usual practice of the Commission, however, is that it notifies everyone mentioned in a complaint. This occurs despite the fact that the Commission's own regulations state that the complaint "should clearly identify as a respondent each person or entity who is alleged to have committed a violation," 11 C.F.R. § 111.4(d)(1), and that the General Counsel should review the complaint for "substantial compliance" with such technical requirements, id. § 111.5(a). The statute requires notification only of "any person alleged in the Complaint to have committed such a violation." 2 U.S.C. § 437g(a)(1). Not only are the Commission's usual practices contrary to the plain meaning of FECA and existing regulations, but they add an enormous amount of pressure and anxiety to persons and entities merely included in the complaint for factual context.

Under a more consistent and fairer procedure, the FEC could notify only those persons specifically identified as respondents by the complainant. This would place the pleading burden on the complainant who knows the persons he or she believes violated the election law.

Such a procedure would be fair in that those who were not intended to be involved in a MUR would not be dragged into the case. In addition, the pleading standard is not so burdensome as to detract from the complaint process, for even in

federal court, where there are no technical pleading requirements, plaintiffs must still name the defendants.

If the Commission were to proceed against other persons as respondents in a MUR, either persons not included in the complaint at all or persons not identified as respondents in the complaint, the Commission should amend its regulations to provide notice to such persons and time to respond (i.e., 15 days). The Commission may then decide "Reason to Believe." Although such notification and procedure is not required by the FECA, the FECA does not prohibit the Commission from doing so.

Through such a process, the Commission would have to consider under what legal theory the added respondent possibly violated the law instead of including the respondent because the person was merely mentioned in the complaint. Fairness dictates such a consideration and that persons be given a chance to respond to accusations before a "reason to believe" finding—a finding, although preliminary and prosecutorial, that has major ramifications in the public arena where legal nuances are not fully appreciated and opponents are ready to publicize any bit of bad news. The need for pre-"reason to believe" responses is even more important given that such findings may be based upon the staff's unilateral observations and are not always reversible through motions to reconsider, etc. Opportunities for responses and the responses themselves also may obviate the need to proceed against a potential respondent thereby saving Commission resources in the long run.

Appearance Before the Commission

As the ABA report stated 20 years ago, it is necessary that a respondent in a Commission MUR be allowed an opportunity to present an oral argument in front of the Commission. Such argument is necessary for two major reasons.

First, such an appearance may illuminate certain facts and arguments that would otherwise go unnoticed based upon the written briefs. Taking into account these previously un-highlighted facts or arguments, the Commission may well decide that the case should be handled in a different manner. Such an informed decision would promote conciliation and avoid the need for costly and time-consuming litigation.

Second, allowing respondents to make oral arguments before the Commission would promote a sense of fairness in the Commission's procedures. Currently, many respondents become frustrated both by the fact that they are prohibited from appealing directly to the real decisionmakers—the six Commissioners—as well as by the fact that the General Counsel always enjoys an opportunity for oral argument. This frustration is exacerbated by the fact that the General Counsel is allowed to present the Commission with the last analysis of the MUR in his or her report. These reports are not (but should be) seen by the respondents and often criticize the respondents' briefs. The General Counsel is also present at the decisive Commission meeting and able to put forward his or her view of not only the facts of the case but also of the underlying law. Any misstatements about either go unrebutted. Respondents should be afforded some modest opportunity to directly address the Commissioners in response to the General Counsel.

Of course, there are critics of this proposal who argue that such oral arguments would merely prolong investigations and increase expense. Neither of these assertions is true. The granting of oral arguments is not a grant of a trial. Argument is a presentation of facts and law already in the record and presumably shared between General Counsel and respondents. Such hearings should be limited to probable cause proceedings which are a fraction of the FEC's docket.

The Commission might at least experiment with such oral arguments. If the Commission finds oral arguments to be unbeneficial or abused, then it can simply end the experiment. At the probable cause stage, respondents are often so convinced of their position that they are set on litigating if the Commission finds probable cause. However, a Commission hearing might cause them to rethink this litigation strategy once they have been able to make their own argument to the Commission—even in light of an adverse decision. By the same token, the Commission may detect reasons for dismissal or an alternative settlement. Any avoidance of litigation would save the Commission and respondents time and resources.

Motions

At times, the Commission finds "reason to believe" against a person based solely upon staff evidence or allegations against a person who was not included in a complaint. After such a "reason to believe" finding, the Commission often rejects motions for reconsideration and informs the respondent that it cannot reconsider its findings, but can, instead, "take no further action." Nevertheless, the Commission's finding of "reason to believe" has already besmirched the respondent.

If the Commission can find "reason to believe" but "take no further action," which is not an explicit provision in the statute, it also can take up motions that would remedy Commission actions taken upon incomplete or erroneous information. The Commission has an obligation to take up motions because it treats the enforcement proceedings as adversarial and because of the reputational impact of its findings. Furthermore, formally allowing motions would address the unprofessional ad hoc system that is now seemingly in effect.

Depositions and Document Production Practices

Some 20 years ago, the ABA report recommended that, just prior to the briefing stage, the FEC provide respondents with access to the documents, correspondence, interrogatories, and deposition transcripts that support the General Counsel's recommendation to find probable cause. The FEC should formalize its subsequently adopted practice and continue to provide this and more information, including the necessary deposition transcripts of other respondents as well as any exculpatory information. As stated in 1983, the confidentiality requirement exists for the protection of respondents from public disclosure, not to restrain the respondents from mounting defenses by depriving them of necessary information. The confidentiality provision would still apply to the respondents receiving such information, as the statute refers to "any person" in addition to the Commission and provides penalties for its violation. 2 U.S.C. § 437g(a)(12).

In this quasi-adjudicative proceeding, the Commission can only hope to arrive at the truth by hearing from both sides. One side cannot be handicapped in its advocacy,

or the quest for the truth will be futile. For the same reasons a copy of the General Counsel's "Reply" brief in the probable cause stage should be provided to respondents. This also was recommended in the ABA report.

Conclusion

In my brief time here today I have been able to comment on but a few of the aspects of the Commission's enforcement proceedings. Nevertheless, I appreciate the opportunity to present my ideas to the Commission, and I hope that the Commission moves further in the direction of efficiency and fairness while remaining within the confines that statutes and the Constitution have drawn for it. Thank you.