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May 30, 2003

Susan L. Lebeaux, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Enforcement Procedures; Notice of Public Hearing and Request for Public Comment (Notice 2003-9)

Dear Ms. Lebeaux:

This letter responds to the FEC's Request for Public Comment regarding Enforcement Procedures. 68 Fed. Reg. 23,311 (May 1, 2003). This has been a subject of great interest to me dating back to my service at the Commission from 1977-1979. Unfortunately, the Commission's Notice coincided with the announcement of the decision in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003). Numerous practitioners, myself included, represent one or more of the dozens of parties in that proceeding. As the Commission knows, motions, responses, and jurisdictional statements have been filed since May 2 and will continue until June 2. Shortly thereafter, the Supreme Court is likely to announce an expedited schedule for briefing and argument. Due to these and other demands, I am unable at this time to provide detailed comments to the Notice.

However, I am pleased to submit for the record two documents. Enclosed (at Tab A) please find a copy of a Resolution and Report of the Section of Administrative Law with correspondence, dated April 1, 1982, regarding Enforcement Procedures of the Federal Election Commission, which are pages 223-252 of the *Annual Reports of Committees*, vol. 19 (Amer. Bar. Ass'n Section of Admin. Law 1982). Also enclosed (at Tab B) is the Statement of William H. Allen, Chairman, Administrative Law, American Bar Association, Accompanied by Jan Baran, Chairman, Committee on Election Law; and Michael Berman, Committee on Election Law, June 21, 1983, which are pages 320-329 of *Campaign Finance Reform Hearings held before the Task Force on Elections of the Committee on*

House Administration, U.S. House of Representatives, 98th Cong. (1984). These documents reflect earlier recommendations and comments regarding FEC enforcement procedures.

I urge the Commission to consider a continuance in this proceeding until after arguments in *McConnell v. FEC*, which may occur as early as September 2003. After that time I, and probably others, will be able to provide more comments and would be in a position to testify at any hearing.

Sincerely,

Jan Witold Baran

TAB A

ANNUAL REPORTS OF COMMITTEES

Section of Administrative Law

American Bar Association

Volume 19, 1982

RECEIVED
APR 2 - 1982
AMERICAN BAR ASSOCIATION

April 21, 1982

Antonin Scalia, Chairman
Section of Administrative Law
University of Chicago Law School
1111 East 60th Street
Chicago, Illinois 60637

Dear Mr. Scalia:

No objection has been raised to the Blanket Authority Request of the Section of Administrative Law dated April 1, 1982, to submit comments to the Federal Election Commission and to committees of Congress regarding enforcement procedures of the Federal Election Commission. The Section, therefore, is authorized to submit the written comments as attached to the Blanket Authority Request.

Please send a copy of the Section's final comments to the Governmental Affairs Group, 1800 M Street, NW, Washington, DC 20036 and to my office at the American Bar Association in Chicago.

Sincerely yours,

F. Wm. McCalpin

F. Wm. McCalpin

FWM/ce
0277R/2

cc: Eugene C. Thomas, Esquire

bcc: Messrs. F. Wm. McCalpin
Robert D. Evans
Ms. Barbara A. Heenan

AMERICAN BAR ASSOCIATION

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LAW

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April 1, 1982

REQUEST FOR BLANKET AUTHORITY

FROM: Section of Administrative Law

SUBJECT: Resolution Regarding Enforcement Procedures of the Federal Election Commission

OBJECTION DEADLINE: April 7, 1982

PROPOSED SUBMISSION DATE: April 8, 1982

At its January 15-17, 1981, meeting our Section Council approved the attached resolution regarding the enforcement procedures of the Federal Election Commission. The resolution recommends changes to the manner in which allegations of campaign financing violations are investigated and resolved in civil administrative proceedings. A copy of the report that supports the resolution is also attached.

If no objection is raised by 5:00 p.m. April 7, 1982, a copy of the resolution and report will be submitted to the Federal Election Commission and to the committees of Congress that have oversight responsibility for this agency, the Senate Rules Committee and the House Committee on Administration.

Blanket authority is requested because the subject matter is highly technical and within the special expertise of the Section. Expedited procedure is being used because the Commission is now analyzing its own procedures, which will be discussed at a meeting scheduled for April 8. Also, a number of bills are pending in Congress with hearings expected within the month. Although technically under expedited procedure the objection deadline could be earlier, we are extending the deadline to allow for mail delivery to you some days before April 7th.

The Section is not aware of any material interest in the subject matter of the request on the part of any member of the Council or the Committee on Election Law by reason of specific employment or representation of clients.

Antonin Scalia, Chairman
Section of Administrative Law

AS:rlb
Enclosure
0326P

cc: Eugene C. Thomas, Esquire
Chairman, ABA House of Delegates
P.O. Box 829
Boise, ID 83701

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Washington, D.C. 20036

Steven J. Uhlfelder, Chairman
Special Committee on Election Law
and Voter Participation
P.O. Box 391
Tallahassee, Florida 32302

All Section/Division Chairmen

Staff Liaisons, w/o enclosures

RESOLUTION OF THE SECTION OF ADMINISTRATIVE LAW
AMERICAN BAR ASSOCIATION

RESOLVED:

That the Section of Administrative Law recommends that the House of Delegates adopt the following Resolution:

> BE IT RESOLVED THAT THE AMERICAN BAR ASSOCIATION SUPPORTS THE FOLLOWING PROPOSALS AND PRINCIPLES WITH RESPECT TO ENFORCEMENT PROCEDURES OF THE FEDERAL ELECTION COMMISSION AND URGES CONGRESS TO ADOPT OR BE GUIDED BY SUCH PROPOSALS OR PRINCIPLES WHEN IT AMENDS THE FEDERAL ELECTION CAMPAIGN ACT.

Reason To Believe Proceedings

1. Complaint Generated Investigations. There should be nothing in the Act to prevent the Commission from gathering voluntarily provided information from the Respondent prior to a Reason To Believe determination.

2. Internally Generated Investigations. With respect to internally generated investigations, the General Counsel should have the discretion to invite the Respondent to respond to the allegations of wrongdoing prior to recommending that the Commission find Reason To Believe.

Probable Cause Proceedings

3. Access to Information. Respondent should be provided access to documents submitted to or obtained by the staff from third parties during its investigation and which the staff relies on in its recommendation. Such access should be afforded to the Respondent at the conclusion of the investigation but before briefing commences.

4. Access to General Counsel's Reports. Any report submitted to the Commission by the General Counsel after the Respondent has filed his or her brief should be provided to the Respondent.

5. Right to Oral Argument. The Respondent should be provided a right to present argument before the Commission prior to a finding of Probable Cause.

Conciliation Negotiations

6. Admission. An admission by the Respondent that a violation has occurred should not be required routinely by the Commission.

7. Civil Penalties. The Commission should be authorized to demand civil penalties only for a knowing and willful violation of the Act.

Miscellaneous

8. Time Limit on Investigations. The Commission should impose time limits on investigations by the General Counsel's office in order to encourage the speedy resolution of such investigations.

9. Statement of Reasons. The Commission should issue a formal statement of its reasons for finding or not finding Reason To Believe or Probable Cause in a proceeding. The Commission may simply endorse the reasoning in the report submitted by the General Counsel.

10. Publication of Index. The Commission should publish an index of all investigations which have been concluded. The Commission should update this index on an annual basis.

REPORT ON REFORM OF THE FEC'S ENFORCEMENT PROCEDURES
COMMITTEE ON ELECTION LAW
SECTION OF ADMINISTRATIVE LAW
AMERICAN BAR ASSOCIATION

This Report is intended to explain the rationale for the proposed changes in the Federal Election Commission's enforcement procedures contained in the attached draft Resolution. The recommendations contained herein represent the work product of a Task Force of members of the Committee on Election Law which was formed to study the enforcement procedures currently in effect at the Commission, to evaluate these procedures, and to suggest changes based on the practical experience of the members.

At the present time, there are several legislative proposals under consideration in the Senate which would substantially revise the FEC's statutory authority. This project was undertaken with the hope that the Bar would be able to provide constructive suggestions at a time when the legislative authority of the Commission is under scrutiny by the Congress.

Accordingly, a volunteer Task Force was designated by the Committee's Chairman, Jan W. Baran, to study this problem and report back to the full Committee with its recommendations. The Task Force was chaired by David G. Frolio of Bracewell & Patterson, a Vice-Chairman of the Committee, and included the following:

Jan W. Baran - Baker & Hostetler

Michael S. Berman - Kirkpatrick, Lockhart, Hill, Christopher & Phillips

Carol C. Darr - Democratic National Committee

Herbert L. Fenster - McKenna, Connor & Cuneo

Edward L. Weidenfeld - McKenna, Connor & Cuneo

In addition, the following individuals participated in the meetings of the Task Force, but did not take a position with respect to the recommendations: John W. McGarry (Chairman, Federal Election Commission); Patricia Ann Fiori (Executive Assistant to Chairman McGarry); and Thomas Josefiak (Deputy to the Secretary of the Senate for the Federal Election Commission). These individuals were instrumental in providing

the Task Force with insight into the daily operation of the Federal Election Commission.

The Task Force was formed at a meeting of the Committee on Election Law on October 13, 1981. Throughout the next six weeks, the Task Force met on numerous occasions to discuss and draft proposed recommendations. At a meeting of the full Committee on November 18, 1981, the Task Force's proposed recommendations were presented and discussed. Representatives of the FEC attended and commented on the recommendations. This Report was subsequently prepared to reflect the majority and usually consensus views of the members of the Committee.

DISCUSSION

The Federal Election Commission is unique in many ways, but particularly in two respects. First, it is unique by virtue of the conduct that it regulates -- political speech. The Supreme Court has noted that regulation of campaign financing affects core first amendment freedoms of political expression and association. Buckley v. Valeo, 424 U.S. 1, 14-15 (1976). For this reason, the Commission has "the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression." Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45, 55 (2d Cir. 1980) (Kaufman, C.J., concurring). The Commission is also singular in its enforcement procedures, which reflect an amalgam of investigative, prosecutorial, and de facto adjudicative phases and functions. In addition to conducting investigations, the Commission "has the sole discretionary power 'to determine' whether or not a civil violation has occurred or is about to occur, and consequently whether or not informal or judicial remedies will be pursued." Buckley, supra at 112, n.153.

With these considerations in mind, the Committee on Election Law proposes certain changes in the enforcement procedures of the FEC. (A summary of the existing enforcement procedures is attached as Appendix A, and a copy of 2 U.S.C. § 437g is attached as Appendix B.) The recommendations are designed to increase the procedural safeguards for those who, while exercising constitutional rights, may be investigated by the agency and potentially subjected to probable cause determinations. The recommendations also attempt to expedite the enforcement proceedings without increasing administrative burdens.

Proposed Modifications To The Enforcement Procedures

Reason To Believe Proceedings

1. Complaint Generated Investigations.

Where an individual has filed a complaint alleging a violation of the Act, § 437g(a)(1) provides that the Commission must serve a copy of the complaint on the Respondent and allow 15 days for a written response. In many cases, the information provided by the Respondent pursuant to this provision demonstrates that no violation occurred. In such a case, the General Counsel would recommend that the Commission find that no Reason To Believe that a violation exists. The Commission then votes on this recommendation.

In some cases, however, the information provided by the Respondent, although convincing, may fail to rebut every single allegation in the complaint. Alternatively, the Respondent's written submission may raise minor questions which the General Counsel and the Commission might wish to pursue prior to dismissing the complaint. The Committee concluded that in both situations, the Commission should have the authority to request additional information from the Respondent. Where the Respondent is willing and can provide information which demonstrates that no violation has occurred, the complaint should be dismissed.

Under the procedures presently in effect, however, the General Counsel is prohibited from requesting information from the Respondent prior to a finding of Reason To Believe. The Commission has concluded that any such communication with the Respondent prior to a finding of Reason To Believe is not authorized by the Act.

In order to provide the Commission with explicit statutory authority in this situation, the Committee recommends that the Act be amended so as to allow the Commission to request that the Respondent provide certain information voluntarily prior to any consideration of Reason To Believe. As in the case of the initial written response, the submission of additional information by the Respondent will be voluntary. The purpose of allowing this voluntary communication between the Commission and the Respondent is to allow the Respondent the opportunity to demonstrate that no violation occurred prior to a formal finding of Reason To Believe. In this manner, the Respondent may avoid the embarrassment and stigma associated with such a finding, and the Commission may eliminate unnecessary formal investigations.

2. Internally Generated Investigations.

The overwhelming majority of internally generated investigations are triggered by information obtained from (1) reports filed with the Commission; (2) audits of the committee's books; and (3) referrals from other agencies. In many cases, the Respondent's first notice that any enforcement action has been opened is the receipt of notification that the Commission has already reached a formal Reason To Believe finding. Unlike complaint generated investigations, the Act does not require the Respondent to be notified of the alleged violation prior to the Reason To Believe determination.

The Committee recommends that the Commission institute a procedure of notifying the Respondent of the alleged violation and providing the Respondent with an opportunity to demonstrate why no action should be taken prior to a Commission decision on the Reason To Believe issue. 1/ This recommendation merely seeks to provide Respondents with the same rights which they would receive if the Commission were investigating the same allegation in response to a complaint. As in the case of the complaint generated investigation, the Respondent will not be required to submit anything to the Commission.

In many cases, the Respondent will be able to provide the Commission with an adequate explanation of the alleged violation. The Committee believes that it would be preferable from the perspective of both the Respondent and the Commission to avoid a formal Reason To Believe finding in such cases. This will allow the Respondent to avoid the stigma of a Reason To Believe finding, and allow the Commission to avoid opening and conducting a full scale investigation.

Probable Cause Proceedings

The recommendations contained within this subsection of the Report (Recommendations 3 - 5) are grounded in the view that

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1/ The Committee believes that this procedure may be implemented by the Commission without additional legislative authority.

the Probable Cause proceeding is quasi-adjudicative in nature. At the point where the General Counsel has recommended in his brief that the Commission find Probable Cause to believe that a violation has occurred, the position of the General Counsel and that of the Respondent are clearly adversarial. In deciding whether the arguments of the General Counsel or those of the Respondent should be given more weight, the Commission is in effect exercising a judicial function.

In light of the First Amendment aspects inherent in these adversarial proceedings, the Respondent should be provided with certain minimal procedural protections. Recommendations 3 through 5 are intended to provide the Respondent with such minimal protection without imposing undue administrative burdens on the Commission and the General Counsel's office.

3. Access To Information.

As discussed above, the General Counsel is required to provide the Respondent with a copy of his brief delineating the legal and factual support for the recommendation. The General Counsel is not required to provide the Respondent with access to the documents, correspondence, interrogatories, and deposition transcripts that support the General Counsel's recommendation to find Probable Cause. In fact, the General Counsel routinely refuses to allow the Respondent access to such material.

The Committee is recommending that the Act be amended so as to allow the Respondent access to such material just prior to the initiation of the briefing stage of the proceeding. Such access will afford the Respondent notice of the evidence upon which the staff is relying, and will allow the Respondent an opportunity to rebut certain factual allegations that are erroneous or incomplete. Moreover, such access will guarantee that the Commission has more information available to it at the time it has to make a decision with respect to Probable Cause.

The FEC staff has resisted disclosure of such information to Respondents on the grounds that staff reports are protected by the work product privilege. This argument, however, has no application to the Committee's recommendation. Our recommendation applies only to documents which were obtained by the Commission from third parties and to the transcripts of depositions taken from third parties. The Committee is not recommending that the internal legal and factual analyses prepared by the Commission or staff be disclosed to the Respondent.

The staff has also argued that the disclosure of such information would violate the confidentiality provisions of the Act. This argument is based on 2 U.S.C. § 437g(a)(12)(A), which provides as follows:

> Any notification or investigation made under this section shall not be made public by the Commission or by 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). The clear intent of this provision is to protect the target of the investigation from adverse publicity which would result from the knowledge that he or she was the target of an investigation. The intent behind this provision was to protect the Respondent, rather than to deprive the Respondent of information. Accordingly, this argument does not support failure to disclose this information to the Respondent.

Finally, the FEC staff has resisted disclosure of information to Respondent on the grounds that the files must remain secret to assure effective investigations. However, the Committee's proposal would not allow a Respondent access to documents until after the staff has concluded its investigation. Presumably, the General Counsel would not recommend Probable Cause and prepare a brief unless the investigative stage has been concluded.

The Committee's proposal in this regard is supported by the the author of an article published in the Yale Law Journal entitled "The Federal Election Commission, The First Amendment, and Due Process." 89 Yale L. J. 1199 (1980). This article concludes as follows:

> The Commission should provide the respondent with sufficient information to defend himself effectively. If the staff recommends conciliation rather than dismissal, the respondent should receive not only a brief setting forth the staff's position, but also access to supporting evidentiary material. . . While adding only marginally to the cost of FEC enforcement, these reforms would markedly increase its fairness. In addition, the formal requirement may en-

> courage the staff to provide more information voluntarily to respondents prior to the final report.

Id. at 1222.

4. Access To General Counsel's Reports.

The 1979 Amendments to the Act require that the General Counsel's brief must be given to the Respondent prior to the Probable Cause determination by the Commission. The Respondent then has an opportunity to submit a responsive brief, after which time both briefs are submitted to the Commission for consideration of the Probable Cause issue. This procedure was intended to provide the Respondent with the legal and factual theories upon which the General Counsel was relying, and to provide the Respondent with an opportunity to rebut these theories.

In practice, however, the General Counsel has added a third step to the process. After the Respondent has submitted a brief pursuant to 2 U.S.C. § 437g(a)(3), the General Counsel submits a post-brief report to the Commission. This report generally summarizes the arguments advanced in Respondent's brief, and often attempts to rebut these arguments. In attempting to rebut the Respondent's arguments, this post-brief report may assert new legal and factual theories. The post-brief report is not provided to the Respondent.

The Committee recommends that all such written reports and recommendations from the staff which are submitted to the Commission after the submission of the Respondent's brief should be provided to the Respondent. The Committee's proposal does not restrict the General Counsel from submitting such reports. It simply recommends that such reports be provided to the Respondent. The purpose underlying this recommendation is to give the Respondent notice of the legal theories and facts upon which the General Counsel is relying. As noted above, this goal was implicit in the 1979 Amendments to the Act. This recommendation imposes no administrative burden on the Commission or the General Counsel.

5. Right To Oral Argument.

Under the procedures presently in effect, the Respondent's participation in the Probable Cause determination is limited to the filing of his or her brief. In contrast, the General Counsel files his initial brief as well as a post-brief report. In addition, the General Counsel presents his recommendations orally to the Commission at a closed session.

The Committee recommends that the Respondent be allowed an equal opportunity to present his arguments orally to the Commission. Such an opportunity, however brief, will allow the Respondent the opportunity to challenge any misstatements in the General Counsel's post-brief report and oral presentation. It will also allow the Commission to hear both sides of the issue, to ask questions, and to make a more informed decision on the Probable Cause issue.

The Committee's recommendation imposes a minimal administrative burden on the Commission. As noted above, the General Counsel generally presents his argument to the Commission orally. Our recommendation merely requests the Commission to allocate an amount of time to allow the Respondent to rebut the arguments of the General Counsel. Furthermore, it is unlikely that most Respondents will avail themselves of the opportunity to participate in such an oral argument. In many cases, the Respondent may decide that the expense of retaining counsel would be too great and/or that arguments have been presented adequately in the brief. This recommendation imposes a minor burden on the Commission's administrative procedures with a substantial enhancement in the quality and fairness of the decision making process.

This recommendation is supported by both a Common Cause study and the conclusions of the Yale Law Journal article. Noting that one Commissioner indicated that the agency staff did an inadequate job of presenting the Respondent's position, the Common Cause study recommends that "the FEC should make greater use of oral arguments." Stalled From The Start, Recommendation No. 20, at 55. In a similar fashion, the Yale Law Journal article concludes as follows:

> ...the FEC should permit Respondents to make oral arguments to the Commission before it decides whether to enter into conciliation. Oral argument would enhance the fairness and hence the legitimacy of the procedure. Because of its expense to Respondents, oral argument would create only limited additional demands on the Commission's time.

89 Yale L.J. at 1222.

Conciliation Negotiations

6. Admission.

The vast majority of investigations which progress to a finding of Probable Cause are ultimately resolved through a

Conciliation Agreement between the Commission and the Respondent. The legislative history of the Act indicates clear Congressional intent that the Commission utilize the conciliation procedures as the major mechanism for resolving enforcement proceedings.

In negotiating Conciliation Agreements, the Commission has followed a consistent policy of requiring the inclusion of a clause in which the Respondent expressly admits to having violated the Act. In fact, the Commission typically insists that the Conciliation Agreement contain two admissions. For example, if the alleged violation involved a corporate contribution, the Commission typically insists that the Conciliation Agreement contain the following admissions: (1) Respondent admits that he or she accepted a contribution from X Corporation, and (2) Respondent admits that he or she violated 2 U.S.C. § 441b(a).

The Commission's insistence on such an admission results in extended and difficult negotiations between the Respondent and the Commission. Respondents are loathe to sign a document containing an outright admission of a violation of a Federal statute for several obvious reasons. Most persons would prefer to avoid making an outright admission because all Conciliation Agreements are made available to the public once the MUR has been terminated. Secondly, such an admission could expose the Respondent to criminal liability for violating the Act. 2/ There is often a genuine dispute between the FEC and the Respondent as to whether a violation of law has occurred, which dispute cannot be resolved short of de novo trial in federal court. Accordingly, the Commission's insistence on an admission clause has resulted in protracted and lengthy negotiations consuming the resources of both the Commission and the Respondent.

2/ The Act does provide that a Conciliation Agreement may be introduced into evidence in a criminal proceeding as evidence of the Respondent's lack of intent to commit the violation. 2 U.S.C. § 437g(d)(2). In addition, the Act provides that the court will consider the Respondent's compliance with a Conciliation Agreement as a mitigating factor in sentencing for a criminal violation. 2 U.S.C. § 437g(d)(3)(C). Neither of these provisions, however, protect the Respondent from a successful criminal prosecution based on an admission in a Conciliation Agreement.

The Committee recommends that the Commission abandon its insistence on the inclusion of an admission clause in all Conciliation Agreements. Although it might be appropriate to require a Respondent to admit to a violation where the violation was knowing and willful, the Committee believes that the Commission's blanket requirement for an admission is inappropriate.

The adoption of this recommendation would conform the FEC's policies to those of other agencies, such as the FTC and the SEC. Neither of these agencies, nor any agency that members of this Committee are aware of, requires an admission in all cases. Adoption of this recommendation would also shorten the amount of time necessary to terminate an enforcement proceeding. Finally, it would also result in a much more efficient use of resources by both the Commission and the Respondent.

This recommendation is supported by the conclusions of both the Yale Law Journal article and the Common Cause study. The author of the article concludes as follows:

> . . . the Commission should employ a more flexible conciliation policy, acknowledging its de facto adjudicative as well as its prosecutorial role. Instead of demanding admissions of violation as a matter of policy in conciliation proceedings, the FEC should more readily accept neutral language when the issues of fact or law are unclear. This approach would reduce the likelihood that respondents who have not violated the law will be forced to admit a violation and pay a penalty. It will also save respondents and the government considerable expense by allowing conciliation agreements to be concluded more quickly and by reducing the pressure to litigate for vindication.

89 Yale L. J. at 1223. In a similar fashion, the Common Cause study concludes that the "[t]he FEC should re-examine the consequences of its policy of generally requiring an admission of violation in conciliation agreements." Stalled from The Start, Recommendation No. 19, at 54. For these reasons, the Commission should relax its policy on admissions.

7. Civil Penalties.

Under the present law, the Commission has the authority to impose civil penalties in Conciliation Agreements negotiated with the Respondents and in civil proceedings in Federal District Court. The Commission may negotiate Conciliation Agreements containing civil penalties up to a dollar amount equal to $5,000 or an amount equal to the value of the contribution or expenditure involved in the violation, whichever is greater. In a case where the Commission determines that the violation of the Act was "knowing and willful," the Conciliation Agreement may impose a civil penalty of up to a dollar amount equal to the greater of $10,000 or an amount equal to 200 percent of the contribution or expenditure involved in the violation. Where conciliation negotiations fail to result in an agreement, the Commission may initiate a civil action in the Federal District Court and seek civil penalties of a similar amount.

In negotiating Conciliation Agreements, the Commission has generally insisted that the Respondent agree to pay a civil penalty. The Commission requires the payment of a fine in virtually all cases, including those cases in which the violation was inadvertent. 3/

The Committee believes that the Commission's insistence on imposing civil penalties in all cases is undesirable as a matter of policy. It results in lengthier negotiations without substantially increasing the deterrent effect of the Act. Accordingly, the Committee recommends that the Commission's statutory authority to impose civil penalties be restricted to those cases in which a knowing and willful violation of the Act can be established.

The Committee notes that sufficient statutory authority exists to deter serious violations of the Act. The existing authority to require the payment of civil penalties for knowing and willful violations pursuant to a Conciliation Agreement should be retained. 2 U.S.C. § 437g(a)(5)(B). Where the Commission is unable to negotiate a Conciliation Agreement containing such a penalty, the Commission may seek civil fines in Federal District Court. In addition, the Act

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3/ In the past, the Commission has been very inconsistent in determining the amount of the penalty associated with similar offenses. However, the Commission has recently adopted internal guidelines which should eliminate such inconsistencies in the future.

provides that serious violations may be referred to the Justice Department for criminal prosecution. The Committee believes that these provisions will successfully deter knowing and willful violations of the Act.

For violations that are not knowing and willful, the Committee believes that the stigma of signing a public Conciliation Agreement is sufficiently punitive to encourage compliance. The Act depends primarily on voluntary compliance and the level of compliance to date has been very high.

Furthermore, the Committee on House Administration has recently noted that the Commission's policy with respect to admissions of guilt and mandatory civil penalties is contrary to the statute's emphasis on conciliation and voluntary compliance:

> It is the [Committee on House Administration's] opinion that the Commission expends too large a share of its resources pursuing minor, inadvertent violations of campaign law. As a prime example, the Commission appears to misconceive the purpose of the conciliation process. The purpose is not punitive but corrective. The Commission's practice of requiring an admission of guilt is not required by statute, and runs contrary to the principle of voluntary compliance. The payment of a fine, before the Commission [enters into and] concludes a conciliation agreement, proceeds from this misconception.

The Committee's recommendation is supported in part by a conclusion contained in the Common Cause study. The study concludes as follows: "The FEC should establish clear enforcement priorities and should place greater emphasis on the pursuit of important 'knowing and willful' violations of the law." Stalled From The Start, Recommendation No. 14, at 49.

Miscellaneous

B. Time Limits On Investigations.

There was a consensus among the Committee members that the investigations unnecessarily stretched over far too long a period of time. In some cases, the delays were caused by dilatory tactics of Respondents, such as refusal to comply

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with subpoenas. In such a case, the Commission is forced to request a Federal District Court to enforce the subpoena. In the majority of cases, however, the responsibility for delay lay with the Commission. Several members of the Committee had been involved in investigations in which the staff or the Commission, for no apparent reason, failed to take any action whatsoever for periods of up to one year.

Unwarranted delays in the investigation of alleged violations of the Act create substantial problems for both the Commission and Respondents. With the passage of time, it becomes increasingly difficult to ascertain the relevant facts. For example, the memories of witnesses become clouded. Moreover, it is not unusual for a campaign committee to dissolve shortly after the campaign and for the principals of the committee to disperse throughout the country. In such cases, it is difficult for the Commission to ascertain whether the facts support a finding of Probable Cause, and it is equally difficult for the Respondent to gather the appropriate information to prepare a defense.

In order to alleviate this problem, the Committee considered recommending statutory deadlines on the investigation of alleged violations. The Committee concluded, however, that it would be inappropriate to impose statutory deadlines on the investigative stage. This option was rejected on the grounds that it would hamper the Commission's flexibility to investigate alleged violations involving particularly complex factual or legal theories.

The Committee ultimately concluded that the problem lay within the internal management of the Commission staff which has the responsibility for conducting the investigations. This conclusion is reinforced by the Common Cause study, which states as follows:

> Serious questions have been raised about the operation of the General Counsel's office in terms of its workload, its policy direction in conjuction with the responsibilities of the staff director, and its ability to serve the Commissioners and ultimately the public. An outside review, perhaps by the Administrative Conference of the United States or the American Bar Association could lead to changes that would strengthen the

ability of the General Counsel and the FEC to enforce the law.

Stalled From The Start, at 53.

In recognition of a lack of management within the Commission, the Committee recommends that the Commission take a more active role in directing the management of its staff. The Committee proposes that the Commission impose deadlines on the conclusion of investigations. Such deadlines could vary according to the factual complexities in each case. Upon the expiration of the time period granted by the Commission for the investigatory period, the staff could either present the Commission with its brief and recommendations, or, in the event that the investigation had not been concluded, the staff would be expected to provide an explanation. The purpose of this procedure would be to encourage the staff members to keep their cases moving along expeditiously toward resolution or to be prepared to explain why no action had been taken. 4/

9. Statement Of Reasons.

Under existing practices, the Commission does not provide a formal statement of its reasoning to support its decisions. In a typical proceeding, the General Counsel prepares a report recommending that the Commission find Reason To Believe (or Probable Cause) that a violation has occurred. The Commission then votes on whether to accept the recommendation. If four of the Commissioners vote in favor of the recommendation, the Secretary of the Commission prepares a certification which merely recites that the Commission has voted to adopt the recommendations of the General Counsel's report. On several occasions, the Commission has taken the position that these certifications do not endorse the reasoning of the General Counsel's reports. Accordingly, these reports may not be relied upon by campaign committees and candidates in attempting to ascertain the Commission's policy in a given area.

Failure to provide a statement of reasons for Commission decisions deprives candidates and political committees of needed guidance on the Commission's policies in some of the most difficult interpretive questions. For example, in the

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4/ Several of the other recommendations made by the Committee are also intended to address the general problem of delays. For example, Recommendations 6 (relating to admissions) and 7 (relating to civil penalties) are intended to expedite the negotiation of Conciliation Agreements.

1980 primary elections, the Commission decided in MURs 1167, 1168, and 1170 5/ that the debate between Ronald Reagan and George Bush could not be sponsored by the Nashua Telegraph Company without constituting an illegal corporate contribution. The Commission's failure to publish a statement of reasons in these MURs forces practitioners to speculate as to their meaning and precedential value.

In defense of this policy, spokesmen for the Commission have stated that the advisory opinion process exists to answer any interpretive questions. However, this response ignores the perceived inadequacies of the advisory opinion procedure. One major problem with this process is that it requires a campaign committee or a candidate to commit publicly to a given course of action. One cannot ask hypothetical questions. Additionally, the Commission is often unable to obtain the necessary votes to issue an Advisory Opinion on a controversial subject.

The Commission has also resisted the requirement to issue a formal statement of reasons on the grounds that such a requirement would require four Commissioners to agree on a given decision, which would reduce the flexibility in the decisionmaking process. Commissioners voting in favor of a Probable Cause finding might do so for different reasons. If this is in fact the case, the committees and practitioners deserve to be aware of it. Requiring a Commissioner to articulate the rationale for his or her position will promote a more reasoned decisionmaking process.

FEC attorneys also point to the burden of preparing a formal statement of reasons. The Committee submits that in the vast majority of cases, the Commission need only endorse the General Counsel's (or the Respondent's) reasoning for recommending a finding of Probable Cause (or a dismissal). 6/

5/ The FEC designates each investigation as a "Matter Under Review" or "MUR." Each MUR is assigned a number.

6/ The Supreme Court recently stated that even without express Commission adoption of reasons, the staff report will be viewed as the basis for the Commission's action. Federal Election Commission v. Democratic Senatorial Campaign Committee, 50 U.S.L.W. 4000, 4008 n. 19 (1981). However, there is a continuing need for a formal statement of reasons because the Commission may, and regularly does, take action contrary to staff recommendations. In these cases, the staff report would clearly not support the Commission's action.

Accordingly, the Committee recommends that the Commission publish a statement of reasons for all decisions in which Reason To Believe or Probable Cause is at issue. Such statements would provide necessary guidance to political committees and candidates. It would also promote consistency in the decisionmaking process while imposing only a minimal burden on the Commission.

This recommendation of the Committee is supported by the conclusions of the Yale Law Journal article cited above. The article concludes as follows:

> Failure to provide reasons for enforcement actions impairs the quality of the Commission's decision making. The Commissioners may decide on a course of action without majority agreement on an interpretation of the law or its application to the facts. This reduces the coherence and predictability of enforcement decisions and deprives political participants of a guide to the Commission's interpretation of the law.

89 Yale L. J. at 1211-12.

10. Publication Of Index.

After a MUR is closed, either through dismissal, conciliation, or Federal Court action, the file is made available in the Public Records Office of the Commission. More than 1200 MURs have been closed to date and are available for inspection. At the present time, there is no adequate index to the MURs. MURs are presently indexed only by number, by Respondent, and by complainant (where applicable). There is no subject matter index of the MURs.

Notwithstanding the absence of a formal statement of reasons, MURs often provide the only guidance on a number of difficult questions. "An Analysis of the Impact of the Federal Election Campaign Act, 1972-1978," Institute of Politics, Harvard University, October 1979, at 140. The absence of a subject matter MUR index makes it extremely difficult for private practitioners and FEC attorneys to determine how particular violations were treated in the past. Accordingly, the Committee recommends that the Commission prepare and publish a subject matter index of all MURs which have been

closed. As in the case of the statement of reasons, such an index would promote compliance with the Act by providing guidance to candidates and committees.

This recommendation of the Committee is supported by the conclusion of the Common Cause study discussed above. Recommendation No. 17 of this study provides as follows: "Matters under review should be published and categorized once the Commission has completed the conciliation process." Stalled From The Start, Recommendation No. 17, at 53. The study elaborates on the need for such an index in the following passage:

> Without this kind of index, it is extremely difficult for interested parties or even Commission staff to determine whether similar questions have been resolved previously. It is well past the time when individual memories can be relied upon for consistency, if there ever was such a time.

Id.

CONCLUSION

For the reasons stated herein, the Committee on Election Law urges the Section of Administrative Law to adopt the attached resolution.

Committee on Election Law
Section of Administrative Law
American Bar Association

APPENDIX A

Summary of Existing Enforcement Procedures.

The administrative procedures governing enforcement actions by the Federal Election Commission were recently revised with the enactment of the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187. These procedures are codified in 2 U.S.C. § 437g and 11 C.F.R. Part 110. In order to put the Recommendations of the Committee in the proper perspective, the existing enforcement procedures are summarized below.

An enforcement action 1/ by the Commission may be triggered as the result of two occurrences. It may be triggered by a notarized, signed complaint from an individual alleging a violation of the Act, or by the Commission's receipt of information in the normal course of its duties which suggests that a violation of the Act has taken place. With respect to the former category (i.e., complaint generated investigations), the Act provides that the Commission must notify the Respondent and provide the Respondent with a copy of the complaint within five days of its receipt. The Commission must also allow the Respondent a minimum of 15 days to submit written materials demonstrating that no violation occurred. The Commission subsequently votes as to whether "reason to believe" exists that a violation has occurred. A total of 4 votes is necessary to support a finding of Reason to Believe. 2 U.S.C. § 437g(a)(1).

An investigation may also be triggered by information obtained by the Commission in the normal course of carrying out its supervisory responsibilities. Such information may come from the following four primary sources: (1) the analysis of reports filed by registered committees pursuant to 2 U.S.C. § 434; (2) audits and field investigations of political committees pursuant to 2 U.S.C. § 438(b) and 26 U.S.C. §§ 9007(a), 9038(a); (3) referrals from other agencies such as the General Accounting Office or the Department of Justice; and (4) admissions of wrongdoing by individuals or committees. Upon the receipt of information which suggests that a violation of the Act has occurred, the Commis-

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1/ The FEC designates each investigation as a "Matter Under Review" or "MUR." Each MUR is assigned a number.

sion votes on the issue of whether the evidence supports a finding of Reason To Believe. 2 U.S.C. § 437g(a)(2).

If the Commission determines that there is Reason To Believe that a violation has occurred, the Commission must notify the Respondent of this finding. In cases where the finding of Reason To Believe arose from internal sources, the Respondent must also be sent a copy of the staff report setting forth the legal basis and the alleged facts which support the Commission's action. 2 U.S.C. § 437g(a) (2); 11 C.F.R. § 111.8(b).

Once the Commission has determined that Reason To Believe exists, the General Counsel initiates an investigation of the alleged violation. Such an investigation may include the reliance on subpoenas, depositions, and field investigations. 2 U.S.C. §§ 437d(a)(3),(4), and (9).

Upon the conclusion of the investigation, the General Counsel is required to prepare a brief containing an evaluation of the legal and factual issues of the case. This brief, which also includes a recommendation as to whether there is Probable Cause To Believe that a violation has occurred, must be served on the Respondent. Within fifteen days of receipt of this brief, the Respondent may submit a reply brief stating his or her position on the legal and factual issues in the case. The Commission subsequently votes on the issue of whether Probable Cause exists. As in the case of a Reason To Believe determination, four Commissioners must vote in favor of a finding of Probable Cause. 2 U.S.C. § 437g(a)(3).

Subsequent to a finding of Probable Cause, the Act directs the Commission to attempt for a period of at least 30 days but no more than 90 days to correct or prevent such violation by "informal methods of conference, conciliation, and persuasion" leading to entry into a Conciliation Agreement with the Respondent. 2 U.S.C. § 437g(a)(4)(A)(i). Such an agreement is negotiated by the General Counsel's staff and must be approved by the Commission. The Commission is empowered to include within the Conciliation Agreement civil penalties of a dollar amount equal to the greater of $5,000 or an amount equal to the contribution or expenditure involved in the violation. 2 U.S.C. § 437g(a)(5)(A). In a case where the Commission believes that a violation of the Act was "knowing and willful," the Conciliation Agreement may impose civil penalties of up to a dollar amount equal to

the greater of $10,000 or an amount equal to 200 percent of the contribution or expenditure involved in the violation. 2 U.S.C. § 437g(a)(5)(B). Any Conciliation Agreement which is approved by the Commission shall be made public and put on file in the Public Records Office of the Commission. 2 U.S.C § 437g(a)(4)(A) (ii).

If the Commission and Respondent fail to enter into a Conciliation Agreement, the Commission may bring a civil action in Federal District Court. 2 U.S.C. § 437g(a)(6)(A). In such an action, the Commission must establish its allegations of a violation of the Act by a preponderance of the evidence in a de novo proceeding. As in the case of the Conciliation Agreements, the Commission may request the court to impose civil penalties of up to $5,000 (or the amount of the violation involved). 2 U.S.C. § 437g(a)(6)(B). Where the court finds the violation to be "knowing and willful," it may impose penalities of up to $10,000 (or 200 percent of the violation involved). 2 U.S.C. § 437g (a)(6)(C). 2/

2/ FEC procedure is described further in "The Federal Election Commission: A Guide for Corporate Counsel," 22 Ariz. L. Rev. 519 (1980).

APPENDIX B

TITLE 2—THE CONGRESS

§ 437g. Enforcement

(a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by 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 or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general coun-

sel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)(A)(i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5)(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A)

may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpenas for witnesses who are required to attend a United States district court may run into any other district.

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by

such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(10) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports

Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish

before the election the name of the person and the report or reports such person has failed to file.

(c) Reports by Attorney General of apparent violations

Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) Penalties; defenses; mitigation of offenses

(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, and 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) of this section which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

TAB B

CAMPAIGN FINANCE REFORM

HEARINGS

HELD BEFORE THE

TASK FORCE ON ELECTIONS

OF THE

COMMITTEE ON HOUSE ADMINISTRATION
U.S. HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

JUNE 9, 16, 21, 23, 1983, WASHINGTON, D.C.
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Printed for the use of the Committee on House Administration

STATEMENT OF WILLIAM H. ALLEN, CHAIRMAN, ADMINISTRATIVE LAW, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY JAN BARAN, CHAIRMAN, COMMITTEE ON ELECTION LAW; AND MICHAEL S. BERMAN, COMMITTEE ON ELECTION LAW

Mr. ALLEN. I think I will make the principal presentation. I will ask Mr. Berman to say a word or two near the outset because, unhappily, Mr. Berman has to make an airplane and will have to leave, I think, before we are done. So I will begin, and then will turn to Mr. Berman for just one remark, if I may, Mr. Chairman.

Mr. SWIFT. That is fine.

Mr. ALLEN. On behalf of the Section of Administrative Law of the American Bar Association, I want to thank you for your invitation to testify on possible changes in the enforcement procedures of the Federal Election Commission. The Section of Administrative Law adopted a resolution recommending changes in those procedures in January of 1982. I am accompanied to testify on those recommendations by two members of the Section's Committee on Election Law who were instrumental in the drafting of the recommendations, Mr. Baran, chairman of the committee, and Mr. Berman. As I say, I will now ask Mr. Berman to make a few remarks because of the necessity that he leave.

Mr. BERMAN. Thank you.

Mr. Chairman, I am sorry, but I do have to catch a plane to New York.

I would like to make one point about this effort. As you know, I am somewhat partisan in most of my activities. And as we began this effort, there were some of us who thought it would not be possible for a group of Republican FEC lawyers and a group of Democratic FEC lawyers to actually sit down on a sustained basis and come up with anything that we could agree on.

We solved the problem by putting everything in column A and column B. Column A was procedure, column B was substantive. We quickly found we could do nothing in the substantive area. But in the procedural area, we found almost total unanimity in terms of the kinds of issues and problems we are all facing representing our clients before the FEC.

With that comment, if I might be excused, I do need to be in New York by 5 o'clock.

Mr. SWIFT. We are happy to excuse you. We are sorry the committee has run so long that you weren't able to stay and participate further. Thank you very much for being here.

Mr. Allen.

Mr. ALLEN. Thank you again, Mr. Chairman.

It grieves me to say, but when it comes time for questions, I am afraid I will have to call upon Mr. Baran a good deal because he knows a great deal about it.

Mr. Berman's remarks lead to the next thing I want to say, which is the views that I am expressing today are solely those of the Section of Administrative Law. The House of Delegates and the Board of Governors of the ABA have not approved or disapproved our resolution. The ABA is on record in support of having an independent agency such as the Federal Election Commission enforce Federal election laws.

I should say as particularly apropos Mr. Berman's remarks that my section, the Section of Administrative Law, is concerned with the fairness and efficiency of procedures of agencies, especially in this case, a Federal agency, but of agencies throughout the country. And we do deal with procedural matters and try to set policy to one side, and that is a major explanation of why we are able to achieve a very high degree of unanimity on issues that pertain to such delicate matters as the Federal election laws.

The goal of securing and preserving the integrity of our election process is a worthy goal. When the path to that goal lies through the enforcement of laws by an administrative agency, there are inevitably hazards in the path, because the Federal Election Commission inevitably regulates the means by which citizens express themselves in a political way. One of our eminent circuit judges has said that the FEC has "the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression."

Congress has authorized the FEC to enforce our election laws by means of persuasion and conciliation. There are avenues for going to court ultimately, but the statute places a premium on conflict resolution through conciliation. The fact is that the overwhelming majority of election law cases are resolved administratively for a variety of reasons. The cost of going to court is prohibitive in a lot of cases. A lot of the entities that are subject to regulation are mere temporary enterprises, their useful lives limited to a single election, and litigation simply is not worthwhile in those circumstances.

Accordingly, the procedures of this agency are of very great importance, practical importance, in the disposition of a lot of matters having to do with enforcement of the election laws. In the administrative process that the Election Commission engages in, it acts as complainant sometimes, as investigator, as prosecutor and, in a sense, ultimately, as judge and jury. It is not surprising that there are criticisms of this process.

The Committee on Election Law of our section attempted to identify the root causes of this criticism and to make recommendations that would deal with those causes. It found that the criticism, generally speaking, falls into two categories. First, there are complaints that the administrative process is unduly prolonged. It is a drawn out inefficient process in that sense. Efficiency, then, is one aim of our recommendations. Then there is criticism of the FEC for operating in a star chamber style, whereby those who are investigated are not clearly apprised of what it is they are alleged to have done, and they are never given the opportunity to plead their cases in the way that most of us as lawyers are accustomed to by addressing the decisionmakers--in this case, the commissioners.

Our Election Committee came up with 10 recommendations for improving the process of the FEC. Some of these would require legislation to implement; some can be undertaken by the Commission on its own. I will just go through them very briefly.

The first two recommendations would entail the granting by Congress of greater discretion to the FEC. Recommendation No. 1 calls for legislation that would allow the FEC to undertake more

informal voluntary factfinding before making a formal finding that the election law may have been violated.

Recommendation No. 2 is similar. It calls upon Congress to grant similar discretion to the General Counsel of the FEC to elicit more facts before recommending a formal finding to the FEC on the basis of a complaint that is generated within the agency of some kind of wrongdoing. It is the FEC's position that, under present law, it does not have that kind of discretion. That may be a debatable issue of law, but it is the FEC's position, and it is a matter that could be clarified by legislation.

Recommendations 3 through 5 would provide respondents—that is those who are suspected or accused or something—in FEC proceedings, it would provide them with certain affirmative rights, the right to know what evidence the FEC staff is relying upon in proceeding against them, the right to know what arguments the staff has made to the Commission at the stage where the Commission is considering whether to go forward and—this is very important—the right of the respondent to argue his case directly to the Commissioners. None of those opportunities, as I understand it, are available under the Commission's practice today.

Recommendation No. 6 calls for eliminating the current FEC policy of demanding admissions of guilt as a prerequisite to making a conciliation agreement. Recommendation seven would limit the FEC's ability to negotiate civil penalties to those cases in which it has been found that there has been a knowing and willful violation of the statute.

Our final 3 recommendations, Nos. 8 through 10, call for the initiation of a system of internal time limits so as to improve the efficiency of the process, and not have the proceedings drag on for a year or more, as I understand from practitioners such as Mr. Baran now occurs, we recommend that the Commission issue statements of reasons as to why it is making decisions. Virtually all, if not all, of our other administrative agencies do this. It is something that is practically a part of our tradition, that has become a part of our tradition, in dealing with administrative agencies. And finally, we recommend that the FEC publish an index of closed investigations. I understand from Mr. Baran that the Commission has taken that step, or at least a step, that may be regarded as responsive to that recommendation.

All of these recommendations are set out in a document that we have submitted for the record, and they are discussed in great detail in the supporting report that was prepared by our Committee on Election Law and which we also submit with the resolution. I hope that these materials and the testimony will be of some assistance to this Task Force and to the committee in the event legislation along this line is considered.

Thank you very much, Mr. Chairman.

Mr. SWIFT. Thank you.

STATEMENT OF WILLIAM H. ALLEN, CHAIRMAN, SECTION OF ADMINISTRATIVE LAW, AMERICAN BAR ASSOCIATION

Mr. Chairman, on behalf of the Section of Administrative Law of the American Bar Association I want to thank you for your invitation to testify on possible changes to the enforcement procedures of the Federal Election Commission. As you know, the Section adopted a Resolution recommending changes to those procedures in January of 1982. I am accompanied today by two members of our Committee on Election Law who were instrumental in drafting that Resolution: Jan W. Baran and Michael S. Berman.

The views that we express today are those of the Section of Administrative Law. The ABA has neither approved nor disapproved the Resolution. The ABA, however, is on record in support of having an independent agency such as the Federal Election Commission ("FEC") enforcing federal elections laws.

The goal of securing and preserving the integrity of our election process is a worthy goal. The way by which this goal can be achieved by an enforcement agency is not without hazard. The FEC inevitably regulates the means by which citizens find effective political expression. As Circuit Judge Kaufman noted, the FEC has "the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression."

Congress has conferred upon the FEC a mandate to enforce our election laws by means of persuasion and conciliation. While there are procedural avenues available to resolve disputes between the FEC and an individual or organization in Federal District Court, the Act clearly places a premium on conflict resolution through conciliation. The overwhelming majority of election law cases are resolved administratively. The reasons are several. First, the cost of litigating a matter in court is virtually prohibitive for most respondents who are candidates or campaign committees. Furthermore, those who are subject to these laws, other than large political action committees and party committees, tend to be temporary enterprises whose useful lives are limited to a single election.

Accordingly, if one were accused of violating a campaign financing statute, it is highly likely that the administrative process would be the only practical way in which the issue would be resolved. In this process, the FEC acts as complainant, investigator, prosecutor and, ultimately, judge and jury. Not surprisingly, this process has been criticized as one-sided. In reviewing the Act's enforcement scheme, the Section and its Committee on Election Law sought to identify the exact nature of this criticism, which seems to fall into two general categories. First, there have been chronic complaints that the process is unduly long and drawn out. Second, the FEC has been criticized for operating in the style of a "Star Chamber" proceeding whereby those who are investigated are not clearly apprised of their alleged wrongdoing and are never afforded an opportunity to plead their case directly to the decision-makers, that is the commissioners.

The ten recommendations adopted by our Section in its Resolution seek to address these two general criticisms. The first two recommendations entail the granting by Congress of more discretion to the FEC. Recommendation No. 1 would allow the FEC to undertake more informal voluntary factfinding prior to a formal finding that a law may have been violated. Recommendation No. 2 would grant similar discretion to the FEC General Counsel prior to recommending a formal finding to the FEC on the basis of a staff generated complaint. The FEC's position is that it is denied such discretion under current law.

Recommendation Nos. 3–5 would provide respondents with certain affirmative rights. Those rights are the right to know what evidence the FEC staff is using against a respondent; the right to know what arguments the staff has made against a respondent to the FEC; and the right to argue one's case directly to the six commissioners. None of these opportunities are available today.

Recommendation No. 6 would elimate the current FEC policy of demanding admissions of guilt and Recommendation No. 7 would limit the FEC's ability to negotiate civil penalties only to those cases in which it has found that there has been a knowing and willing violation of the Act. Finally, we suggest in the last three proposed changes (Recommendations 8–10) that the Commission initiate a system of internal time limits to monitor the progress of its investigations, issue statements of reasons for its actions and regularly publish an index of its closed investigations.

All of these recommendations are discussed in great detail in the supporting Report which was prepared by the Committee on Election Law and which we submit for the record with the Resolution. We hope that these materials and our testimony today will be of some assistance to this Task Force and the Committee on House Administration in the event legislation is considered.

Mr. SWIFT. Without objection, the two documents to which you referred will be made a part of the record.

RESOLUTION OF THE SECTION OF ADMINISTRATIVE LAW AMERICAN BAR ASSOCIATION

Be it resolved, That the Section of Administrative Law of the American Bar Association supports the following proposals and principles with respect to enforcement procedures of the Federal Election Commission and urges Congress to adopt or be guided by such proposals or principles when it when it amends the Federal Election Campaign Act.

REASON TO BELIEVE PROCEEDINGS

1. *Complaint Generated Investigations.* There should be nothing in the Act to prevent the Commission from gathering voluntarily provided information from the Respondent prior to a Reason to Believe determination.

2. *Internally Generated Investigations.* With respect to internally generated investigations, the General Counsel should have the discretion to invite the Respondent to respond to the allegations of wrongdoing prior to recommending that the Commission find Reason To Believe.

PROBABLE CAUSE PROCEEDINGS

3. *Access to Information.* Respondent should be provided access to documents submitted to or obtained by the staff from third parties during its investigation and which the staff relies on in its recommendation. Such access should be afforded to the Respondent at the conclusion of the investigation but before briefing commences.

4. *Access to General Counsel's Reports.* Any report submitted to the Commission by the General Counsel after the Respondent has filed his or her brief should be provided to the Respondent.

5. *Right to Oral Argument.* The Respondent should be provided a right to present argument before the Commission prior to a finding of Probable Cause.

CONCILIATION NEGOTIATIONS

6. *Admission.* An admission by the Respondent that a violation has occurred should not be required routinely by the Commission.

7. *Civil Penalties.* The Commission should be authorized to demand civil penalties only for a knowing and willful violation of the Act.

MISCELLANEOUS

8. *Time Limit on Investigations.* The Commission should impose time limits on investigations by the General Counsel's office in order to encourage the speedy resolution of such investigations.

9. *Statement of Reasons.* The Commission should issue a formal statement of its reasons for finding or not finding Reason to Believe or Probable Cause in a proceeding. The Commission may simply endorse the reasoning in the report submitted by the General Counsel.

10. *Publication of Index.* The Commission should publish an index of all investigations which have been concluded. The Commission should update this index on an annual basis.

REPORT ON REFORM OF THE FEC'S ENFORCEMENT PROCEDURES—COMMITTEE ON ELECTION LAW SECTION OF ADMINISTRATIVE LAW—AMERICAN BAR ASSOCIATION

This Report is intended to explain the rationale for the proposed changes in the Federal Election Commission's enforcement procedures contained in the attached draft Resolution. The recommendations contained herein represent the work product of a Task Force of members of the Committee on Election Law which was formed to study the enforcement procedures currently in effect at the Commission, to evaluate these procedures, and to suggest changes based on the practical experience of the members.

At the present time, there are several legislative proposals under consideration in the Senate which would substantially revise the FEC's statutory authority. This project was undertaken with the hope that the Bar would be able to provide con-

structive suggestions at a time when the legislative authority of the Commission is under scrutiny by the Congress.

Accordingly, a volunteer Task Force was designated by the Committee's Chairman, Jan W. Baran, to study this problem and report back to the full Committee with its recommendations. The Task Force was chaired by David G. Frolio of Bracewell & Patterson, a Vice-Chairman of the Committee, and included the following:

Jan W. Baran—Baker & Hostetler; Michael S. Berman—Kirkpatrick, Lockhart, Hill, Christopher & Phillips; Carol C. Darr—Democratic National Committee; Herbert L. Fenster—McKenna, Connor & Cuneo; and Edward L. Weidenfeld—McKenna, Connor & Cuneo.

In addition, the following individuals participated in the meetings of the Task Force, but did not take a position with respect to the recommendations: John W. McGarry (Chairman, Federal Election Commission); Patricia Ann Fiori (Executive Assistant to Chairman McGarry); and Thomas Josefiak (Deputy to the Secretary of the Senate for the Federal Election Commission). These individuals were instrumental in providing the Task Force with insight into the daily operation of the Federal Election Commission.

The Task Force was formed at a meeting of the Committee on Election Law on October 13, 1981. Throughout the next six weeks, the Task Force met on numerous occasions to discuss and draft proposed recommendations. At a meeting of the full Committee on November 18, 1981, the Task Force's proposed recommendations were presented and discussed. Representatives of the FEC attended and commented on the recommendations. This Report was subsequently prepared to reflect the majority and usually consensus views of the members of the Committee.

DISCUSSION

The Federal Election Commission is unique in many ways, but particularly in two respects. First, it is unique by virtue of the conduct that it regulates—political speech. The Supreme Court has noted that regulation of campaign financing affects core first amendment freedoms of political expression and association. *Buckley* v. *Valeo,* 424 U.S. 1, 14-15 ;(1976). For this reason, the Commission has "the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression." *Federal Election Commission* v. *Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45, 55 (2d Cir. 1980) (Kaufman, C.J., concurring). The Commission is also singular in its enforcement procedures, which reflect an amalgam of investigative, prosecutorial, and de facto adjudicative phases and functions. In addition to conducting investigations, the Commission "has the sole discretionary power 'to determine' whether or not a civil violation has occurred or is about to occur, and consequently whether or not informal or judicial remedies will be pursued." *Buckley, supra* at 112, n.153.

With these considerations in mind, the Committee on Election Law proposes certain changes in the enforcement procedures of the FEC. (A summary of the existing enforcement procedures is attached as Appendix A, and a copy of 2 U.S.C. § 437g is attached as Appendix B.) The recommendations are designed to increase the procedural safeguards for those who, while exercising constitutional rights, may be investigated by the agency and potentially subjected to probable cause determinations. The recommendations also attempt to expedite the enforcement proceedings without increasing administrative burdens.

PROPOSED MODIFICATIONS TO THE ENFORCEMENT PROCEDURES REASON TO BELIEVE PROCEEDINGS

1. Complaint Generated Investigations

Where an individual has filed a complaint alleging a violation of the Act, § 437g(a)(1) provides that the Commission must serve a copy of the complaint on the Respondent and allow 15 days for a written response. In many cases, the information provided by the Respondent pursuant to this provision demonstrates that no violation occurred. In such a case, the General Counsel would recommend that the Commission find that no Reason To Believe that a violation exists. The Commission then votes on this recommendation.

In some cases, however, the information provided by the Respondent, although convincing, may fail to rebut every single allegation in the complaint. Alternatively, the Respondent's written submission may raise minor questions which the General Counsel and the Commission might wish to pursue prior to dismissing the complaint. The Committee concluded that in both situations, the Commission should have the authority to request additional information from the Respondent. Where

the Respondent is willing and can provide information which demonstrates that no violation has occurred, the complaint should be dismissed.

Under the procedures presently in effect, however, the General Counsel is prohibited from requesting information from the Respondent prior to a finding of Reason To Believe. The Commission has concluded that any such communication with the Respondent prior to a finding of Reason To Believe is not authorized by the Act.

In order to provide the Commission with explicit statutory authority in this situation, the Committee recommends that the Act be amended so as to allow the Commission to request that the Respondent provide certain information voluntarily prior to any consideration of Reason To Believe. As in the case of the initial written response, the submission of additional information by the Respondent will be voluntary. The purpose of allowing this voluntary communication between the Commission and the Respondent is to allow the Respondent the opportunity to demonstrate that no violation occurred prior to a formal finding of Reason To Believe. In this manner, the Respondent may avoid the embarrassment and stigma associated with such a finding, and the Commission may eliminate unnecessary formal investigations.

2. Internally Generated Invetigations

The overwhelming majority of internally generated investigations are triggered by information obtained from (1) reports filed with the Commission; (2) audits of the committee's books; and (3) referrals from other agencies. In many cases, the Respondent's first notice that any enforcement action has been opened is the receipt of notification that the Commission has already reached a formal Reason To Believe finding. Unlike complaint generated investgations, the Act does not require the Respondent to be notified of the alleged violation prior to the Reason To Believe determination.

The Committee recommends that the Commission institute a procedure of notifying the Respondent of the alleged violation and providing the Respondent with an opportunity to demonstrate why no action should be taken prior to a Commission decision on the Reason To Believe issue.[1] This recommendation merely seeks to provide Respondents with the same rights which they would receive if the Commission were investigating the same allegation in response to a complaint. As in the case of the complaint generated investigation, the Respondent will not be required to submit anything to the Commission.

In many cases, the Respondent will be able to provide the Commission with an adequate explanation of the alleged violation. The Committee believes that it would be preferable from the perspective of both the Respondent and the Commission to avoid a formal Reason To Believe finding in such cases. This will allow the Respondent to avoid the stigma of a Reason To Believe finding, and allow the Commission to avoid opening and conducting a full scale investigation.

PROBABLE CAUSE PROCEEDINGS

The recommendations contained within this subsection of the Report (Recommendations 3–5) are grounded in the view that the Probable Cause proceeding is quasi-adjudicative in nature. At the point where the General Counsel has recommended in his brief that the Commission find Probable Cause to believe that a violation has occurred, the position of the General Counsel and that of the Respondent are clearly adversarial. In deciding whether the arguments of the General Counsel or those of the Respondent should be given more weight, the Commission is in effect exercising a judicial function.

In light of the First Amendment aspects inherent in these adversarial proceedings, the Respondent should be provided with certain minimal procedural protections. Recommendations 3 though 5 are intended to provide the Respondent with such minimal protection without imposing undue administrative burdens on the Commission and the General Counsel's office.

3. Access To Information

As discussed above, the General Counsel is required to provide the Respondent with a copy of his brief delineating the legal and factual support for the recommendation. The General Counsel is not required to provide the Respondent with access to the documents, correspondence, interrogatories, and deposition transcripts that support the General Counsel's recommendation to find Probable Cause. In fact, the General Counsel routinely refuses to allow the Respondent access to such material.

[1] The Committee believes that this procedure may be implemented by the Commission without additional legislative authority.

The Committee is recommending that the Act be amended so as to allow the Respondent access to such material just prior to the initiation of the briefing stage of the proceeding. Such access will afford the Respondent notice of the evidence upon which the staff is relying, and will allow the Respondent an opportunity to rebut certain factual allegations that are erroneous or incomplete. Moreover, such access will guarantee that the Commission has more information available to it at the time it has to make a decision with respect to Probable Cause.

The FEC staff has resisted disclosure of such information to Respondents on the grounds that staff reports are protected by the work product privilege. This argument, however, has no application to the Committee's recommendation. Our recommendation applies only to documents which were obtained by the Commission from third parties and to the transcripts of depositions taken from third parties. The Committee is not recommending that the internal legal and factual analyses prepared by the Commission or staff be disclosed to the Respondent.

The staff has also argued that the disclosure of such information would violate the confidentiality provisions of the Act. This argument is based on 2 U.S.C. § 437g(a)(12)(A), which provides as follows:

"Any notification or investigation made under this section shall not be made public by the Commission or by 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). The clear intent of this provision is to protect the target of the investigation from adverse publicity which would result from the knowledge that he or she was the target of an investigation. The intent behind this provision was to protect the Respondent, rather than to deprive the Respondent of information. Accordingly, this argument does not support failure to disclose this information to the Respondent.

Finally, the FEC staff has resisted disclosure of information to Respondent on the grounds that the files must remain secret to assure effective investigations. However, the Committee's proposal would not allow a Respondent access to documents until after the staff has concluded its investigation. Presumably, the General Counsel would not recommend Probable Cause and prepare a brief unless the investigative stage has been concluded.

The Committee's proposal in this regard is supported by the author of an article published in the Yale Law Journal entitled "The Federal Election Commission, The First Amendment, and Due Process." 89 Yale L. J. 1199 (1980). This article concludes as follows:

"The Commission should provide the respondent with sufficient information to defend himself effectively. If the staff recommends conciliation rather than dismissal, the respondent should receive not only a brief setting forth the staff's position, but also access to supporting evidentiary material . . . While adding only marginally to the cost of FEC enforcement these reforms would markedly increase its fairness. In addition, the formal requirement may encourage the staff to provide more information voluntarily to respondents prior to the final report."

Id. at 1222.

4. Access to General Counsel's Reports

The 1979 Amendments to the Act require that the General Counsel's brief must be given to the Respondent prior to Probable Cause determination by the Commission. The Respondent then has an opportunity to submit a responsive brief, after which time both briefs are submitted to the Commission for consideration of the Probable Cause issue. This procedure was intended to provide the Respondent with the legal and factual theories upon which the General Counsel was relying, and to provide the Respondent with an opportunity to rebut these theories.

In practice, however, the General Counsel has added a third step to the process. After the Respondent has submitted a brief pursuant to 2 U.S.C. § 437g(a)(3), the General Counsel submits a post-brief report to the Commission. This report generally summarizes the arguments advanced in Respondent's brief, and often attempts to rebut these arguments. In attempting to rebut the Respondent's arguments, this post-brief report may assert new legal and factual theories. The post-brief report is not provided to the Respondent.

The Committee recommends that all such written reports and recommendations from the staff which are submitted to the Commission after the submission of the Respondent's brief should be provided to the Respondent. The Committee's proposal does not restrict the General Counsel from submitting such reports. It simply recommends that such reports be provided to the Respondent. The purpose underlying this recommendation is to give the Respondent notice of the legal theories and facts

upon which the General Counsel is relying. As noted above, this goal was implicit in the 1979 Amendments to the Act. This recommendation imposes no administrative burden on the Commission or the General Counsel.

5. Right to Oral Argument

Under the procedures presently in effect, the Respondent's participation in the Probable Cause determination is limited to the filing of his or her brief. In contrast, the General Counsel files his initial brief as well as a post-brief report. In addition, the General Counsel presents his recommendations orally to the Commission at a closed session.

The Committee recommends that the Respondent be allowed an equal opportunity to present his arguments orally to the Commission. Such an opportunity, however brief, will allow the Respondent the opportunity to challenge any misstatements in the General Counsel's post-brief report and oral presentation. It will also allow the Commission to hear both sides of the issue, to ask questions, and to make a more informed decision on the Probable Cause issue.

The Committee's recommendation imposes a minimal administrative burden on the Commission. As noted above, the General Counsel generally presents his argument to the Commission orally. Our recommendation merely requests the Commission to allocate an amount of time to allow the Respondent to rebut the arguments of the General Counsel. Furthermore, it is unlikely that most Respondents will avail themselves of the opportunity to participate in such an oral argument. In many cases, the Respondent may decide that the expense of retaining counsel would be too great and/or that arguments have been presented adequately in the brief. This recommendation imposes a minor burden on the Commission's administrative procedures with a substantial enhancement in the quality and fairness of the decision making process.

This recommendation is supported by both a Common Cause study and the conclusions of the Yale Law Journal article. Noting that one Commissioner indicated that the agency staff did an inadequate job of presenting the Respondent's position, the Common Cause study recommends that "the FEC should make greater use of oral arguments." *Stalled From The Start,* Recommendation No. 20, at 55. In a similar fashion, the Yale Law Journal article concludes as follows:

". . . the FEC should permit Respondents to make oral arguments to the Commission before it decides whether to enter into conciliation. Oral argument would enhance the fairness and hence the legitimacy of the procedure. Because of its expense to Respondents, oral argument would create only limited additional demands on the Commission's time."

89 Yale L.J. at 1222.

CONCILIATION NEGOTIATIONS

6. Admission

The vast majority of investigations which progress to a finding of Probable Cause are ultimately resolved through a Conciliation Agreement between the Commission and the Respondent. The legislative history of the Act indicates clear Congressional intent that the Commission utilize the conciliation procedures as the major mechanism for resolving enforcement proceedings.

In negotiating Conciliation Agreements, the Commission has followed a consistent policy of requiring the inclusion of a clause in which the Respondent expressly admits to having violated the Act. In fact, the Commission typically insists that the Conciliation Agreement contain two admissions. For example, if the alleged violation involved a corporate contribution, the Commission typically insists that the Conciliation Agreement contain the following admissions: (1) Respondent admits that he or she accepted a contribution from X Corporation, and (2) Respondent admits that he or she violated 2 U.S.C. § 441b(a).

The Commission's insistence on such an admission results in extended and difficult negotiations between the Respondent and the Commission. Respondents are loathe to sign a document containing an outright admission of a violation of a Federal statute for several obvious reasons. Most persons would prefer to avoid making an outright admission because all Conciliation Agreements are made available to the public once the MUR has been terminated. Secondly, such an admission could expose the Respondent to criminal liability for violating the Act.[2] There is often a

[2] The Act does provide that a Conciliation Agreement may be introduced into evidence in a criminal proceeding as evidence of the Respondent's lack of intent to commit the violation. 2

Continued

genuine dispute between the FEC and the Respondent as to whether a violation of law has occurred, which dispute cannot be resolved short of de novo trial in federal court. Accordingly, the Commission's insistence on an admission clause has resulted in protracted and lenghty negotiations consuming the resources of both the Commission and the Respondent.

The Committee recommends that the Commission abandon its insistence on the inclusion of an admission clause in all Conciliation Agreements. Although it might be appropriate to require a Respondent to admit to a violation where the violation was knowing and willful, the Committee believes that the Commission's blanket requirement for an admission is inappropriate.

The adoption of this recommendation would conform the FEC's policies to those of other agencies, such as the FTC and the SEC. Neither of these agencies, nor any agency that members of this Committee are aware of, requires an admission in all cases. Adoption of this recommendation would also shorten the amount of time necessary to terminate an enforcement proceeding. Finally, it would also result in a much more efficient use of resources by both the Commission and the Respondent.

This recommendation is supported by the conclusions of both the Yale Law Journal article and the Common Cause study. The author of the article concludes as follows:

". . . the Commission should employ a more flexible conciliation policy, acknowledging its de facto adjudicative as well as its prosecutorial role. Instead of demanding admissions of violation as a matter of policy in conciliation proceedings, the FEC should more readily accept neutral language when the issues of fact or law are unclear. This approach would reduce the likelihood that respondents who have not violated the law will be forced to admit a violation and pay a penalty. It will also save respondents and the government considerable expense by allowing conciliation agreements to be concluded more quickly and by reducing the pressure to litigate for vindication."

89 Yale L. J. 1223. In a similar fashion, the Common Cause study concludes that the "[t]he FEC should re-examine the consequences of its policy of generally requiring an admission of violation in conciliation agreements." *Stalled From The Start,* Recommendation No. 19, at 54. For these reasons, the Commission should relax its policy on admissions.

7. Civil Penalties

Under the present law, the Commission has the authority to impose civil penalties in Conciliation Agreements negotiated with the Respondents and in civil proceedings in Federal District Court. The Commission may negotiate Conciliation Agreements containing civil penalties up to a dollar amount equal to $5,000 or an amount equal to the value of the contribution or expenditure involved in the violation, whichever is greater. In a case where the Commission determines that the violation of the Act was "knowing and willful," the Conciliation Agreement may impose a civil penalty of up to a dollar amount equal to the greater of $10,000 or an amount equal to 200 percent of the contribution or expenditure involved in the violation. Where conciliation negotiations fail to result in an agreement, the Commission may initiate a civil action in the Federal District Court and seek civil penalties of a similar amount.

In negotiating Conciliation Agreements, the Commission has generally insisted that the Respondent agree to pay a civil penalty. The Commission requires the payment of a fine in virtually all cases, including those cases in which the violation was inadvertent.[3]

The Committee believes that the Commission's insistence on imposing civil penalties in all cases is undesirable as a matter or policy. It results in lengthier negotiations without substantially increasing the deterrent effect of the Act. Accordingly, the Committee recommends that the Commission's statutory authority to impose civil penalties be restricted to those cases in which a knowing and willful violation of the Act can be established.

The Committee notes that sufficient statutory authority exists to deter serious violations of the Act. The existing authority to require the payment of civil penalties for knowing and willful violations pursuant to a Conciliation Agreement should

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U.S.C. § 437g(d)(2). In addition, the Act provides that the court will consider the Respondent's compliance with a Conciliation Agreement as a mitigating factor in sentencing for a criminal violation. 2 U.S.C. § 437g(d)(3)(C). Neither of these provisions, however, protect the Respondent from a successful criminal prosecution based on an admission in a Conciliation Agreement.

[3] In the past, the Commission has been very inconsistent in determining the amount of the penalty associated with similar offenses. However, the Commission has recently adopted internal guidelines which should eliminate such inconsistencies in the future.