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To: "cnfpro@fec.gov" <cnfpro@fec.gov>
cc:

Subject: Comments in Notice 2003-9

Attached are comments of Common Cause and Democracy 21 in regard to Notice 2003-9, Enforcement Procedures.

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

Re: Notice 2003-9: Enforcement Procedures

Dear Ms. Lebeaux:

I am writing on behalf of Common Cause and Democracy 21 to provide comments on Notice 2003-9, relating to a review of the Commission's Enforcement Procedures, published at 68 Fed. Reg. 23311 (May 1, 2003).

Both Common Cause and Democracy 21 have a longstanding interest in reform of the Nation's campaign finance laws and in the administration and enforcement of those laws.

In the fall of 2000, the Democracy 21 Education Fund initiated "Project FEC," a study undertaken to develop a comprehensive new approach for effectively enforcing the campaign finance laws. Common Cause participated actively in this study.

The study was the product of a 14-member bipartisan task force consisting of some of the nation's most experienced and respected campaign finance and law enforcement experts, including a former Democratic Deputy Attorney General of the United States as well as a former Republican chairman of the FEC; a former Democratic state Attorney General as well as a former Republican state Attorney General; the Executive Director of the New York City Campaign Finance Board and a former Executive Director of the Los Angeles City Ethics Commission (two of the country's most highly regarded campaign finance enforcement bodies), and two former chairs of the ABA Committee on Election Law of the Administrative Law Section.

In May, 2002, the task force released a 142-page report, *No Bark, No Bite, No Point*,¹ that detailed its conclusions and its five major recommendations:

- A new agency headed by a single administrator should be established with responsibility for civil enforcement of the campaign finance laws.
- The new agency should be independent of the executive branch.
- The new agency should have the authority to act in a timely and effective manner, and to impose appropriate penalties on violators, including civil money penalties and cease-and-desist orders, subject to judicial review. A system of adjudication before administrative law judges should be incorporated into the new enforcement agency in order to achieve these goals.
- A means should be established to help ensure that the new agency receives adequate resources to carry out its enforcement responsibilities.
- The criminal enforcement process should be strengthened and a new limited private right of action should be established where the agency chooses not to act.

These changes are clearly statutory in nature, and thus beyond the scope of what can be accomplished by the Commission in this, or any other, rulemaking proceeding. But, in one particular, these recommendations highlight a core problem with the Commission's existing enforcement procedures that would be exacerbated, not ameliorated, by several of the proposals discussed in the pending NPRM.

The Commission was structured by Congress to be a weak enforcement agency. As the Task Force report notes:

The Commission is constrained by its lack of powers and authority. The Commission was established as the only agency with civil jurisdiction over matters arising under the federal campaign finance laws, but the agency can do little on its own to actually enforce the law. At no point in the lengthy enforcement process... does the agency have power to find that a violation has occurred – it is only given options of finding “reason to believe” and “probable cause to believe.”

Additionally, through the process of conciliation, the Commission can attempt to negotiate civil penalties and settle matters under review, but it cannot adjudicate complaints or require sanctions for violations....

The single power that the Commission wields is the power to file a civil suit against a respondent in court. Other than the ability to impose fines for minor reporting violations, this is the Commission's only authority for formal action on an alleged violation. Yet this authority can only be exercised after the exhaustive internal enforcement process has run its course and conciliation has failed, and is only an *initiation* of another process of research, briefs, presenting arguments and seeking action. Litigation adds years to the already-lengthy enforcement process. . . .²

Thus, as the Report notes, “The only power to act that the agency has at the end of its elaborate enforcement proceedings – which often take years to complete – is to file a civil lawsuit against a respondent and thereby *initiate* an enforcement action in court, which itself will likely take additional years

1 The report is available online at: <http://www.democracy21.org/vertical/Sites/{3D66FAFE-2697-446F-BB39-85FBBBA57812}/uploads/{B4EE5C24-65EA-4910-974C-759644EC0901}.pdf>

2 Task Force Report at 52.

3 *Id.* at 14.

to complete.”³

By contrast, the Task Force recommended that Congress revamp the FEC by basing a new enforcement agency on a wholly different model of administrative law enforcement, one that is used for many other enforcement agencies such as the SEC, NLRB, OSHA and EPA.

Those agencies, unlike the FEC, have the authority to make findings about whether the law has been violated – not merely conclude there is “probable cause” that a violation may have occurred; and then, subject to judicial review, to impose sanctions for any such violation – not merely seek sanctions to be imposed by a court.

This “administrative imposition” model typically involves adjudications conducted by administrative law judges. In such ALJ proceedings, respondents have significant procedural rights to develop evidence, examine witnesses, and present oral and written arguments.

It is appropriate, where an agency can make an actual finding of a violation and consequently impose sanctions, to provide respondents with such due process rights.

Such procedural protections, however, do not necessarily apply where, as in the case of the FEC, the administrative process is simply a prelude to a subsequent court action which will be the forum for adjudicating whether a violation has occurred, and where the respondent will be provided full due process rights as the defendant in that civil action.

And indeed, there may be harm in importing these additional procedures into the current FEC scheme. As Commissioner Thomas has noted of the current FEC enforcement process:

[A] fairly routine matter can easily take one year if the matter proceeds to probable cause under the procedural requirements of the Act. Of course, if a matter is factually complex and requires an extensive formal investigation, the resolution of the case can take much longer... Under the enforcement procedures mandated by the Act, it is virtually impossible for the Commission to resolve a complaint during the same election cycle in which it is filed.⁴

Such delay impairs effective enforcement. Because enforcement proceedings before the agency can often take years, and then lead only to an enforcement action in court which itself can take additional years, the public interest in effective, certain and swift law enforcement is routinely sacrificed.

Given the longstanding problem of delay that has existed at the FEC, and operating as it must within the context of its current statutory enforcement system, the Commission should be searching for ways to *streamline* and *expedite* its enforcement procedures. Instead, the NPRM proposes multiple ways to *lengthen* and *delay* the process, by:

- allowing respondents greater rights to file motions before the Commission to dismiss or reconsider.
- providing respondents access to all OGC documents and deposition transcripts prior to a probable cause finding.
- providing respondents the opportunity to appear before the Commission to present oral argument.

The NPRM recognizes the trade-off between “add[ing] an additional procedural right” for

⁴ S. Thomas and J. Bowman, “Obstacles to Effective Enforcement of the Federal Election Campaign Act,” 52 Admin.L.Rev. No. 2 (Spring 2000) at 589.

respondents but one that "would also lengthen the enforcement process." 68 Fed. Reg. at 23313.

This balance between procedural protection for the respondent and administrative efficiency for the agency must be struck in the context of the Commission's overall enforcement authority. Where the Commission, as now, does not have the power to adjudicate violations or impose sanctions, the proposals set forth in the NPRM which would lengthen an already unacceptably long process do not make sense. The respondents will receive such rights under the Federal Rules of Civil Procedure *if and when* the respondents are brought to court in a civil action filed by the Commission after a finding of "probable cause to believe" a violation has occurred.

Thus, the appropriate rights to be conferred by the Commission in its enforcement process should relate to the powers that can be exercised by the Commission in that proceeding. Where, as here, the Commission does not have the power to adjudicate a violation or impose a sanction, the respondent is at less risk and accordingly in need of fewer procedural protections.

On the other hand, if Congress were to grant a successor agency to the Commission the power to make adjudicatory findings and impose sanctions, then procedural rights such as those suggested in the NPRM would be appropriate. Since that is not the present case, however, we urge the Commission to re-focus its attention in this rulemaking on the problem of delay in its existing enforcement proceedings, and to institute procedural changes that would expedite, not lengthen, its current MUR process.

We appreciate the opportunity to provide these comments.

Sincerely,

/s/ Donald J. Simon

Donald J. Simon