May 29, 2003

VIA E-MAIL

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

Re: Notice 2003-9; Enforcement Procedures

Dear Ms. Lebeaux:

FEC Watch, a project of the Center for Responsive Politics (CRP), is pleased to submit the attached comments on the Notice of Proposed Rulemaking on Enforcement Procedures, published at 68 *Fed. Reg.* 23311 (May 1, 2003).

Lawrence M. Noble, Executive Director of CRP, requests an opportunity to testify at the hearing.

Respectfully submitted,

Lawrence Noble
Executive Director
Center for Responsive Politics

Paul Sanford
Director
FEC Watch

Attachment

BEFORE THE FEDERAL ELECTION COMMISSION

NOTICE 2003-9

ENFORCEMENT PROCEDURES

Comments of FEC Watch and the Center for Responsive Politics

I. Introduction

FEC Watch and the Center for Responsive Politics submit these comments in response to the Federal Election Commission's Notice entitled Enforcement Procedures. 68 *Fed. Reg.* 23311 (May 1, 2003). FEC Watch is a project of the Center For Responsive Politics, a non-partisan, non-profit research group based in Washington, D.C. that tracks money in politics and its effect on elections and public policy. FEC Watch's objective is to increase enforcement of the nation's campaign finance, lobbying, and ethics laws. FEC Watch monitors the enforcement activities of the Federal Election Commission (FEC) and other government entities, including the Department of Justice and congressional ethics committees, and encourages these entities to aggressively enforce the law.

II. Comments

A review of the Federal Election Commission's enforcement procedures involves balancing the public's right to timely and effective enforcement of the nation's campaign finance laws, the rights of respondents in cases to fair treatment, and the obligation of the FEC to meet its statutory mandate. Any such discussion must begin with the obvious fact that for all relevant purposes, the FEC does not have the power or authority to declare that anyone has violated the law, impose any penalties or order any remedial action.[1] This is critical because "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). No matter what procedural "rights" the FEC decides to give to respondents, at the end of the day all the FEC will be able to do is either settle a case or bring the matter to court for a trial *de novo,* where the agency will have to prove its case from scratch. Nothing the FEC might do to its enforcement procedures will change this. With this in mind, we offer the following specific comments.

A. Designating Respondents in a Complaint

The Commission should designate a party as a respondent when the agency has information (whether from the complaint or from information ascertained in the normal course of carrying out its supervisory responsibilities) that fairly implicates the party in a possible violation of the law. Obviously, this is not an exact science and will require judgment and prosecutorial discretion on the part of the agency. However, the agency should err on the side of giving notice, which will allow the party to respond and leave the agency with the option of pursuing the party or not, as the facts develop.

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[1] The Notice does not appear to address the audit process for public financed presidential campaigns or the administrative fine programs, both of which do involve elements of adjudication.

B. Confidentiality Advisement

It is appropriate for the FEC to advise witnesses of the statutory confidentiality provision (2 U.S.C. 437g(a)(12)). However, as a general matter, the FEC should not attempt to further "clarify" the provision. First, in multi-respondent cases the application of the provision may be less than clear. For example, if a witness tells respondent A about what he/she learned of the case against respondent B, does respondent B have a cause of action against the witness? What if respondent A then tells the press? Given these difficult situations, it is best for the FEC to give its standard notice and not try to tailor it to each case.

While the statutory confidentially provision is read to mainly serve the interest of respondents, the FEC has a separate interest in confidentiality that stems from its role as a law enforcement agency. During an investigation, the FEC has an interest in trying to lessen the opportunity for witnesses and respondents to coordinate or tailor their testimony. While there are limits to how far the agency can go in ensuring the integrity of its investigation, it should not volunteer information that will undermine its law enforcement role. To this end, we strongly recommend that the FEC seek advice and input from other law enforcement agencies that have faced similar issues.[2]

C. Motions Before the Commission

The question of how to deal with motions is one that must be answered in the context of the agency's lack of adjudicatory authority. Since the agency's findings of "Reason to Believe" or "Probable Cause to Believe" are not adjudications, there is little reason to allow motions that seek to reverse those decisions. The statute already provides respondents with several opportunities to respond to allegations and further opportunities will only delay the process. Each finding merely triggers a move to the next step and is based on the facts and circumstances known to the Commission at the time the finding was made. Since the findings do not carry with them any sanctions or requirements, the agency should continue to move forward and not revisit each finding through the filing of motions.

The only possible exception might be where there is a procedural defect in a finding that is brought to the Commission's attention by a respondent. For example, should the Commission fail to properly notify a respondent of a complaint before moving to Reason to Believe, the agency could consider a motion reconsider the finding. However, this should be limited to procedural defects and the regulations should provide a set time limit on the filing of such motions. At the same time, the regulation should also make clear that motions based on a disagreement with the law or facts upon which the finding was made will not be entertained.

D. Depositions and Document Production Practices

Again, the FEC's practices regarding the making of depositions available to witnesses and respondents must be viewed in light of the non-adjudicatory nature of the

[2] The Notice asks for information on what other law enforcement agencies do. We urge the FEC to directly contact other law enforcement agencies on a staff to staff basis. It is in that context that the FEC will best get the unvarnished view of what works and does not work from the perspective of those assigned to enforce the law.

process. All the finding of RTB does is to trigger an investigation. While the respondent does have certain statutory rights, the FEC also has certain rights and powers as a law enforcement agency conducting an investigation. One of these rights is to keep what it learns in its investigation confidential so as to not allow respondents and witnesses to coordinate testimony, destroy evidence or otherwise undermine the investigation. There is no reason for the agency to prematurely disclose any of its investigatory material to respondents while the case is being investigated. Where disclosure is made during an investigation, it should be based on an analysis of what will most help the agency do its job.

Once the FEC gets to the probable cause to believe stage, the question gets just slightly more complicated. Again, regardless of what access the FEC gives respondents to the FEC investigatory file, the agency will still have to prove its case *de novo* in court. Therefore, there is no reason for the agency to artificially and prematurely apply the Federal Rules of Civil Procedure.

However, the agency (and public) often benefits from the respondent being able to respond to specific evidence ascertained during the investigation. Therefore, release of the relevant depositions and evidence may have some benefit. The FEC should establish a minimum base line of what will be released (e.g. respondents own testimony and testimony directly related to the allegations in question) and deal with other situations on a case-by-case basis. We also urge the FEC to inquire about the practices of other law enforcement agencies in this regard.

E. Extensions of Time

The first request for an extension of time to respond to a probable cause brief should be granted for good cause shown on the agreement that the statute of limitations will be tolled. Further extensions should only be granted for extraordinary reasons.

F. Appearances before the Commission

The Commission should not provide hearings at which respondents or their counsel may appear prior to a finding of probable cause to believe a violation has occurred. Not only does the statute not provide for such hearings, but also there is no obligation to provide such hearings under the APA, nor is one required by Due Process. Since the agency cannot adjudicate, hearings would only serve to delay cases, without providing the public with any benefit in terms of effective enforcement of the law.

Moreover, as a practical matter, hearings would be difficult, if not impossible to manage. Arguably, hearings are most effective when they aid a fact finder. Putting aside the fact that the Commission is not a “fact-finder,” it is not equipped to take testimony, cross-examine witnesses, nor even subpoena witnesses for a trial-like hearing.

Even if the Commission were to limit the hearing to mainly legal issues, the hearing would only serve to slow down the process. Looking at the time and effort put into hearings provided to publicly financed candidates facing a repayment, it is difficult to see how the Commission would manage hearings in enforcement cases. To be sure, once the Commission announced it would hold hearings, most lawyers representing

clients in enforcement cases would be extremely reluctant to let pass the opportunity to appear before the Commission, especially where there is little downside, since nothing the Commission decides leads to any sanction and they will always have the opportunity to reargue the matter in court. This would lead to an immediate backlog of cases awaiting a hearing. Moreover, it would raise the costs of enforcement cases to respondents and the agency and would leave those who do not have access to, or cannot afford, experienced campaign finance lawyers at a distinct disadvantage. (Imagine the situation where only respondent A can afford to be represented at a hearing, where his or her counsel uses the opportunity to put the blame for the violation squarely on non-represented respondent B.)

If the Commission believes that the process should become adjudicatory, it should ask Congress to amend the statute to recreate the FEC as an adjudicatory agency, with the full powers that accompany such a structure. Otherwise, the Commission should not further burden the process by giving respondents opportunities that neither the law nor sound public policy require.

G. Releasing Documents or Filing Suit Before an Election

Under no circumstances should the Commission adopt a policy that would require the agency to intentionally withhold information from the public, or refrain from filing suit, because of an upcoming election. The reality is that just as the release of information may impact the voters, the withholding of information impacts the voters in that they are deprived of information to which they have a right. Likewise, for each candidate grateful for the agency hiding the results of an enforcement action from the public until after an election, an opposing candidate will be angry and frustrated that the voters were not given the facts before they went to the polls.

The Commission should never take into account the political ramifications of the release of information or the filing of a suit. To begin to do so will sink the FEC into an impossible political swamp and further undermine the agency's role as a non-partisan enforcement agency.

H. Public Release of Directives and Guidelines

The FEC should consult with other agencies about the release of civil penalty guidelines. However, the release of such guidelines would appear counter-productive as long as the agency is negotiating civil penalties, rather than imposing them.

Other directives and internal procedures should be released if they come under any of the exemptions provided by the Freedom of Information Act.

I. Timeliness

Timeliness in the enforcement process has been a problem since the early days of the Commission. While speeding up the enforcement process should be a goal of any changes in the procedures, it should be remembered that effective law enforcement may take time. Artificial time barriers only mean that the agency will have to forgo investigating complex factual cases. Moreover, such barriers encourage delay on the part of respondents.

One of the major barriers to speedier enforcement is a lack of resources. Congressional hostility to effective enforcement of the law is evidenced by the historic reluctance to provide sufficient funding to the agency (and, too often, the agency's reluctance to request sufficient funding). In this regard, it would be interesting and informative for the FEC to review and compare the length of time taken and the resources used by other law enforcement entities investigating and prosecuting complex cases. For example, a look at Department of Justice's and special prosecutors' use of resources and time in various investigations of campaign finance matters in recent years may put the FEC experience and needs in context.

J. Prioritization

The Enforcement Prioritization System has been an effective tool in allowing the FEC to manage its caseload. However, the prioritization system should not be used as a method by which the agency avoids difficult or controversial issues. The mix of cases should always include ones with complex and difficult issues, even where there is little consensus about the application of the law. The public resolution, or lack of resolution, of these cases will allow the public and Congress to judge the ability of the agency to do its job.

K. Memorandum of Understanding with the Department of Justice

Given the recent changes in the law brought about by the Bipartisan Campaign Reform Act of 2002, the FEC and Department of Justice should revisit the Memorandum of Understanding signed in 1977.

L. Dealing with 3-3 Votes at "Reason to Believe" Stage

The Commission should ask Congress to amend the statute to allow an investigation to proceed on the vote of three Commissioners where the general counsel has recommended such an investigation.

III. Conclusion

FEC Watch and the Center for Responsive Politics hope that these comments are useful to the Commission as it considers changes to its Enforcement Procedures. As indicated in our cover memo, Lawrence Noble would like to testify at the hearing.