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Subject: Comments from Cleta Mitchell

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**Via Electronic Mail**

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

RE: Notice 2003-9, Comments with Respect to Enforcement Procedures

Dear Ms. Lebeaux:

These comments are submitted in response to the FEC's Notice 2003-09 regarding the enforcement practices and procedures of the Federal Election Commission ("the Commission").

My thanks to the Commission for offering this opportunity to submit comments and suggestions on the procedures of the Commission. As someone who practices in and before the Commission, I definitely appreciate the opportunity to provide some input on and recommendations for changes to the Commission's enforcement procedures.

First are some general thoughts and comments, followed by responses and suggestions related to the Commission's specific questions.

**General Comments.**

**1. Make a principled commitment to due process in the Commission's enforcement procedures.**

There has been, in my experience, a perceptible disdain displayed and publicly argued by the Commission and Office of General Counsel toward the constitutional due process principles of notice and hearing and the applicability of those principles to the Commission's enforcement procedures. The OGC has been known to vociferously argue that the Commission is essentially

*exempt* from all but the most rudimentary requirements of notice and due process.

It is unclear to me why the Commission would *want* to be exempt from providing ample notice and a fair hearing to all respondents in enforcement matters.

If the OGC would dedicate itself as diligently to insuring due process to Respondents as to denying that the Commission is required to do so, it would create a vastly different environment in which the Commission's enforcement functions are executed.

**2. Make the enforcement procedures manual publicly available as a demonstrable step to actively insuring due process.**

A major improvement in the enforcement procedures of the Commission would be adoption of and adherence to the principle of providing as much public notice as possible of the *process* by which enforcement matters are carried out. The Commission could evidence its new-found commitment to that principle by publishing an enforcement procedures manual.

One of the most troublesome aspects of the Commission's enforcement procedures is the absence of publicly available written procedures. The only real information available to Respondents (and Respondents' counsel) in an enforcement proceeding are the regulations promulgated by the Commission which do little more than restate the statute. For respondents new to the Commission's procedures, the information is scarce and is neither helpful nor informative.

After some years of practice before the Commission, I have come to learn that there actually does exist a written procedures manual – which is available *only* to the Commission and its staff. By definition, then, it is also known and available to *former* Commission staff. Thus, there are two classes of Respondents and attorneys appearing before the Commission: those who have never worked for the Commission and those who have. Only those who have previously worked for the Commission have access to the 'secret' procedures manual and the 'inside knowledge' of the actual procedures utilized by the Commission in enforcement proceedings.

Even in responding to the Commission's request for comments in this Notice, it is somewhat difficult to *respond* to this Notice without access to or knowledge of the Commission's existing procedures contained in the 'secret' manual. There may be provisions contained in the manual which already address certain questions posed by the Commission and to which I am submitting responses. Since I have never seen the manual, it is impossible for me to know whether the Commission already has certain policies and procedures in place or whether the Commission is asking for input as to the creation of whole new provisions of its existing procedures manual.

I am certain that my input – and that of others -- would be more effective if it were based on greater knowledge and information as to the Commission's current procedures and policies.

The Commission should adopt and publish an enforcement procedures manual which is available to *all* Respondents, their counsel and the general public. There is no plausible reason for maintaining a 'secret' procedures manual and, in fact, the failure to properly promulgate and publish the procedures raises serious constitutional concerns.

Other federal agencies have developed and publish manuals outlining their procedures which are available to litigants and respondents subject to the agencies' enforcement proceedings.

There can be no downside for the Commission to make certain that due process is afforded to every respondent brought within the ambit of the Commission's enforcement authority.

3. **Confidentiality is to *protect* not to punish respondents.** Part of the problem in making the procedures manual available to respondents and the public is the Commission's perversion over the years of the statutory requirement of 'confidentiality'. Confidentiality is supposed to *protect* the Respondent – not disable his/her/its ability to mount a defense in an enforcement matter. The Commission has seemingly lost sight of the purpose of confidentiality imposed on Commission proceedings by the statute. Confidentiality is for the purpose of protecting a respondent from public revelation of information that would harm the respondent during a pending investigation. The Commission has turned the concept of confidentiality on its head –denying information to respondents necessary for his/her/its defense while failing to take steps to protect confidentiality of facts and circumstances of specific cases and Respondents particularly at the conclusion of an investigation in which the Respondent prevails.

The Commission should restore the statutory principle of confidentiality as being for the purpose of *protecting* rather than punishing respondents. Once that decision is made, other important decisions regarding the enforcement procedures will follow logically.

4. **The Commission should more specifically define the roles, responsibilities – and legal liability – of candidates, treasurers, volunteer fundraisers, paid staff members, vendors and 'agents' of political committees.** Citizens who become involved with political committees are largely unaware of the potential legal liability associated with their involvement in federal campaigns and federally registered committees. Particularly with regard to campaigns for federal office, the people who participate are largely *not* seasoned political veterans or political professionals.

With the changes in the statute under BCRA and, in particular, with the increase in potential civil and criminal liability, the Commission should specifically delineate the responsibilities and exposure of the differing roles within a political committee.

The role of the treasurer is especially important for the Commission to more fully and completely explain. Besides signing the FEC reports, what potential personal exposure does the treasurer for violations of the law? Often, the treasurer is a local volunteer with no actual knowledge

of the law and often no actual knowledge of the contents of the FEC reports or their contents. If a vendor is responsible for mistakes or malfeasance, who is ultimately responsible for the violation of law and what legal liability is visited upon the candidate or the treasurer?

The enforcement procedures must begin with a clear statement of who is responsible for which compliance role and the penalties for violation by each player of each separate role to insure overall compliance.

**Specific Responses to Questions Posed by Notice:**

1. **Designation of respondents and witnesses in an investigation.** There are a number of problems in the Commission's practices involving the designation of witnesses and respondents in an enforcement proceeding. As indicated in the Notice, many complainants do not designate every potential respondent, or even the most appropriate respondent. Other complaints may designate organizations such as committees, corporations or labor unions as respondents in a complaint, but the Commission then argues that the person from the entity is a 'witness' rather than the personification of the named respondent.

The Commission should establish in its procedures manual the steps it follows with regard to identifying additional respondents not named in a complaint by the complaining party. The criteria for naming additional respondents should be *different* from the criteria for naming witnesses. Additional respondents in an enforcement proceeding should only be those whose identities are discovered during the investigation and for whom there is 'reason to believe' have committed violations of the law. When the criteria is met for naming additional respondents, they should be provided ample notice of the overall complaint, the identity of the other respondents named in the complaint and any additional facts which may not have been specified in the complaint but which have given rise to the Commission's decision to subsequently name them as additional respondents. Again, the operative principle is *notice*. It is not helpful to simply provide a copy of a complaint in which the initial complaining party failed to name or identify the additional respondent and then to be advised that "you have fifteen days to respond."

Another issue that should be addressed in the enforcement procedures manual is the ability of a corporation, committee or labor organization named as a respondent in an enforcement proceeding to designate its corporate representative for purposes of the proceeding. The criteria should be set forth in the enforcement manual in a manner similar to the federal rules of civil procedure in which a corporation designates such a representative. That designation should be specifically defined and outlined by the Commission to protect the rights and responsibilities of the entity *through its designated corporate representative.*

The Commission has argued that a corporate respondent's representative is really a 'witness' who can be subpoenaed and deposed separately from the corporation. A corporation, labor union or committee should be able to name a designated representative who, for all practical purposes, is the responsible party insofar as providing information and responses to the Commission during an investigation and is the personification *for all purposes* of the artificial entity.

2. **Confidentiality.** As indicated above, the Commission has perverted the notion of confidentiality.

Communications with witnesses. Respondents should be advised that the provisions of confidentiality are for their protection and should they choose to discuss the facts and issues related to an FEC enforcement matter, that is their choice. It is not the Commission's job to keep respondents from discussing their own matters - it is the Commission's responsibility NOT to discuss the proceedings with third parties other than the respondent. For purposes of conducting an investigation, the Commission should have a standard declaration provided to third party witnesses, which advises the witness that the Commission is not at liberty to discuss anything related to the matter under review, that the Commission is conducting the interview for purposes of ascertaining facts and that the witness should be mindful of the Commission's responsibility to protect respondents in an enforcement proceeding from improper or premature revelation of facts related to the matter.

It is not the Commission's responsibility to advise witnesses that he/she is precluded from discussing the matter with respondents in the event the respondent contacts the witness directly. In fact, the Commission should NOT so advise witnesses.

Notice of adverse witness / opportunity to cross-examine. The procedures manual should also provide a specific process whereby respondents are given notice of adverse witnesses, advised of their opportunity to cross-examine such witnesses and/or to present rebuttal witnesses or information during the course of an investigation. The Commission's practice of not only failing to give respondents the opportunity to cross-examine adverse witnesses but failing even to provide copies of testimony on which it relies to find probable cause of a violation of law is abominable and is suggestive of star chamber tactics.

3. **Motions Before the Commission.** The Commission should establish a procedure whereby motions submitted to the Commission are heard and decided entirely on the papers submitted by both OGC and Respondents – or else an opportunity afforded movants' counsel to be heard. The practice of allowing the OGC to appear and argue its position on motions filed by respondents without the opportunity for opposing counsel to do likewise is wholly inappropriate.

The procedures manual could specify a motion docket and practice, what motions would be entertained and at what point in the proceedings but in no event should the practice continue whereby *only* the OGC is allowed to argue motions before the Commission.

With respect to 'tolling the statute of limitations' for any period in which motions are filed and pending, the answer is no. Absent the statute of limitations, the Commission has no pressure or incentive to timely process an investigation. A continuing problem with enforcement proceedings is the length of time between filing of a complaint and its ultimate disposition. A respondent should not have to choose between filing procedural motions deemed necessary and appropriate to advance the rights of a respondent and tolling the statute of limitations which are time sensitive precisely because of the length of time of the investigation. Penalizing respondents for the Commission's delay in conducting investigations is not appropriate.

4. **Deposition and Document Production Practices.** The Commission has very odd rules governing depositions which should be revised and brought into line with normal deposition practice. The current 'rules' are beyond comprehension.

Respondents should have the opportunity to attend and cross-examine both fact and expert witnesses in an investigation, particularly if the deponent is a witness whose testimony is adverse to a respondent. Witness lists notifying the respondent of the sworn testimony the Commission intends to take should be provided to respondents with the opportunity to be present to cross-examine such witnesses.

If the deponent is the commission's 'expert witness', the respondent should also receive in advance the curriculum vitae of the expert, and respondent should not only be given the opportunity to attend and cross-examine the commission's 'expert' , but should also have the opportunity to present his/her/its own expert to insure balance in the record presented to the Commission on probable cause.

The deponent should be given the opportunity to read his/her deposition transcript prior to signing the deposition.

One specific problem is that of the fifteen (15) days for response. The Commission may have taken *years* to develop its factual record – but Respondents are given only fifteen (15) days in which to respond to a proposed finding of probably cause. Recognizing that the fifteen day period is statutory, the Commission should be mindful of the difficulty of assembling a factual response in fifteen days to a matter that may well have been pending for several months or years with no word from the Commission as to the matter's status.

The Commission should establish a preliminary step prior to the 'Notice of Probable Cause' at which time the OGC would make available <u>all</u> evidence assembled to date, including exculpatory evidence and information. This intermediate step before the Notice of Probable Cause should be followed by sufficient time in which the respondent can assemble a record to counter the Commission's investigative record. This procedure could result in more expeditious resolution

through conciliation if the respondent has access to the totality of the evidence supporting the probable cause finding which the Commission has collected during its investigation.

In the event that presentation of the factual record does not result in pre-probable cause conciliation, the Notice of Probable Cause should then be accompanied by the factual record on which the OGC relies for its proposed finding – with the sworn testimony and other facts and evidence supporting the proposed finding. As with a motion for summary judgment, the facts relied upon by the OGC should be *uncontroverted* and the respondent should have the opportunity to *controvert* the facts submitted by OGC through its own evidence.

The ultimate presentation to the Commission of proposed probable cause findings should be either the briefs with no separate presentation by OGC to the Commission or, in the alternative, a hearing with the opportunity for respondents' counsel to also be heard in defense against the probable cause finding. The practice of *only* allowing the OGC to appear to argue its recommendation is not appropriate.

5. **Extensions of Time.** As indicated above, most enforcement matters involve not hearing from the Commission for months or years and then receiving a notice requiring a fifteen day response from date of receipt. There is little justification for denying an extension of time to respond when the Commission affords itself the luxury of unlimited time to address submissions by respondents and witnesses. Denying respondents a fraction of the time the Commission staff utilizes is hardly fair to respondents and their counsel. There should be no hard rules governing the granting of extensions of time – if anything, the Commission should apportion time to respondents in proportion to the time spent by Commission staff since the last contact respondents received from the Commission. Example: If the Commission hasn't contacted the respondent in two years, the Commission should grant to respondents a percentage of that time for response. The "hurry up and wait" approach should be changed.

6. **Appearance before Commission.** Essentially, the Commission should allow Respondents to choose to appear either individually or through counsel. The Commission need not authorize both, but it should establish through its procedures manual the opportunity for respondents to be heard one way or the other. The present practice of not allowing either is unacceptable particularly in light of the presence of OGC to argue against whatever respondents or their counsel may have submitted to the Commission.

7. **Release of Documents.** There are two points at issue here: one is the release of documents at the conclusion of an enforcement proceeding, which is presently pending before the DC Circuit Court of Appeals. I do not believe that the Commission should release to the public the documents and records obtained through an investigation. Period. This is a further evidence of the Commission's perversion of the statutory requirement of confidentiality I discussed above. The only persons harmed by the Commission's interpretation and practice regarding confidentiality are respondents

the very persons intended by Congress to be protected by the requirement of confidentiality.

The Commission should adopt a regulation, policy and practice of *not* releasing information and materials obtained during the course of an investigation and should take the position that the normal FOIA rules may not be applicable due to the specific confidentiality provisions imposed on the Commission by Congress. Were that rule to be adopted, the remainder of this question is rendered essentially moot.

8. **Public Release of Directives and Guidelines.** It is difficult to answer such a question since I am not aware of or familiar with the Commission's penalty guidelines and directives. Perhaps one solution to easing the backlog would be to bifurcate the 'fault' and 'penalty' phases of an investigation – such that respondents would be more willing to expedite the investigation stage if they had more knowledge and information about potential penalties. In light of BCRA's more stringent civil and criminal penalties, it would seem that now is an appropriate time to make these policies public as part of streamlining, expediting and making more transparent the entire enforcement process.

9. **Timeliness.** I would recommend the appointment of a task force to study this issue, which should include both Commission staff and practitioners representing respondents. While the Commission has made an effort to expedite the investigation and resolution of enforcement matters, that has not yielded the result of timely resolution of matters under review.

The Commission should also examine a process whereby respondents would be advised upon request of the status of pending matters. Now, if a respondent files a response with the Commission, it may be years before any additional word is forthcoming from the Commission. But the reasons for the delay are not known or knowable to a practitioner – which makes it difficult to make a recommendation on this subject when it is impossible from my perspective to figure out what is causing these lengthy delays.

It is not sufficient to say that the reason for lengthy delays is 'not enough staff'. Everyone is busy. The first response from government agencies is always, 'we need to hire more people'. That may be true but I am unwilling to echo that as the primary solution when the problem has yet to be identified.

10. **Prioritization.** Perhaps the Commission should establish a two-tier system of review with special training and expertise invested in certain staff teams who can be focused on enforcement of the *most* fundamental principles of the law – expedited to be decided prior to an election. It would also be helpful if staff members charged with enforcement had practical experience in campaigns. Too often, there is such a total absence of knowledge and information on the part of the investigating staff about how campaigns and elections really work that it hinders the Commission staff's ability to sort through facts to determine real vs. imagined and serious vs. minor violations of law.

All violations are not equal. All complaints are not equal. Some violations are more egregious and systemic than others. The Commission should weigh the investment of Commission resources and time devoted to incredibly minor issues as opposed to seeking to enforce the major components and principles of the law.

As with many agencies, the Commission is much better at identifying the tiniest addition or subtraction error in a report submitted to the FEC --- rather than identifying systemic or wholesale flaunting or violation of the major principles of the law.

People with no practical knowledge or experience in the regulated 'industry' often cannot distinguish the real vs the imaginary. The Commission should make an ongoing effort to change both the experience and perceptions on the part of the enforcement staff.

11. **Memorandum of Understanding with Department of Justice.** Because of the increased criminal penalties in BCRA, it would seem appropriate for the Commission and the Department of Justice to review and update the 1977 MOU to insure that it is properly reflective of the requirements of law in 2003. It would be useful to publish the MOU on the FEC website as part of the ongoing effort to give notice to the public of *all* the procedures of the Commission.

12. **Tie Votes on Reason to Believe.** As I read and understand the law, I believe that Congress has provided by statute that absent a fourth vote for any action, the Commission is not statutorily entitled to proceed. There is nothing in the statute that confers on the Office of General Counsel the ability to cast the tie-breaking vote when the Commission cannot achieve majority support for an action and to suggest otherwise is outside the scope of the Commission's statutory authority.

Finally, I request permission to testify before the Commission at its June 11, 2003 public hearing regarding this notice. I can be reached as follows:

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Again, my thanks to the Commission for conducted this review and for the opportunity to submit comments. I look forward to appearing before the Commission at the public hearing in June.

Sincerely,

**/s/ Cleta Mitchell, Esq.**

Cleta Mitchell, Esq.
Attorney at Law