BEFORE THE FEDERAL ELECTION COMMISSION

NOTICE 2003-9

ENFORCEMENT PROCEDURES

Comments of the National Voting Rights Institute

I. Introduction

The National Voting Rights Institute ("NVRI") submits these comments in response to the Federal Election Commission's Notice of Public Hearing and Request for Public Comment regarding Enforcement Procedures. NVRI is a nonprofit, nonpartisan organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to equal and meaningful participation in every phase of electoral politics. Through litigation and public education, NVRI works to promote reform of our campaign finance system to ensure that those who do not have access to wealth are able to participate fully in the political process.

NVRI is a complainant in pending FEC MUR 5181, alleging serious campaign finance violations by the campaign committee and leadership PAC of current-Attorney General John Ashcroft during his 2000 Senate campaign, and currently serves as lead counsel for the plaintiffs in *Alliance for Democracy v. FEC*, a lawsuit in which the plaintiffs (three of NVRI's co-complainants) have challenged the FEC's failure to act in MUR 5181.

II. Comments

Any enforcement scheme is about ensuring adherence to law, and therefore keeping people whose conduct is regulated accountable to the public. Enforcement under the Federal Election Campaigns Act ("FECA"), 2 U.S.C. § 431 *et seq.*, is no different. Under the current scheme, officeholders and candidates who have violated FECA are held accountable in two ways: they might be required to pay civil fines and/or the violation might become a factor in their subsequent candidacies for election.[1] Because the Federal Election Commission ("FEC") has near-exclusive civil enforcement jurisdiction with respect to FECA, *see* 2 U.S.C. § 437d(e), it is *especially* important that the enforcement procedure maintain its focus on accountability. If the agency loses this focus, and becomes too solicitous to the regulated community, the public has no alternative means to ensure adherence to our nation's campaign finance laws, which help safeguard American democracy.

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[1] In addition, in rare instances, the Department of Justice may bring a criminal prosecution. *See* 2 U.S.C. §§ 437g(a)(5)(C), 437g(c), 437g(d).

There is a perception that the FEC is a "captured agency" and a "toothless tiger" that does little to prevent campaign finance violations.[2] Although there may be many reasons for this perception, we believe it is in part a result of the statutory confidentiality provision, which prevents the FEC from notifying the public of its enforcement activities. We urge the FEC to take proactive steps to counter the perception of an agency allowing campaign finance violations. In this time when campaign finance is a huge public issue, enforcement of existing law is all the more important to convince the public that there is accountability for campaign finance violations.

FECA mandates that the FEC keep confidential all details related to an enforcement matter (a "matter under review" or "MUR") until the matter is resolved. *See* 2 U.S.C. § 437g(a)(12)(A). This statutory confidentiality is not meant to conceal the outcome of an investigation, but rather to protect the subject of an investigation from adverse speculative publicity. *Reagan Bush Committee v. Federal Election Comm'n*, 525 F. Supp. 1330, 1339 (D.D.C. 1981). According to the D.C. Circuit, such secrecy is required "to protect an innocent accused." *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001).

The mechanism by which the enforcement process is initiated, and a matter under review is opened, affects the level of confidentiality. A matter under review may be internally-generated if the potential violation is discovered by the FEC's review of political committee reports, through a Commission audit, or is referred by another agency. In such situations, the public has no knowledge whatsoever of the enforcement activity until the particular MUR is resolved. Alternatively, a matter under review may be externally-generated as a result of the complaint process: Any member of the public may file a sworn complaint alleging violations and explaining the basis for the allegations. A complainant is not required to keep the filing of a complaint confidential and so the public often becomes aware of alleged violations. Even in this circumstance, however, no other aspect of the enforcement process –how the FEC has prioritized the matter, whether there has been a "reason to believe" finding, whether an investigation will even take place, or the like-- is public. Thus, while the public may be aware of alleged violations, the public remains completely unaware whether the government is investigating or simply ignoring the allegations. The lack of knowledge about enforcement activity undermines public confidence that enforcement is taking place at all.

Compounding the problem, the current enforcement process takes so long that the public (or perhaps, the media) often no longer cares about the initial violation by the time a MUR is resolved. Thus, by the time the confidential portion of the enforcement process is completed – by conciliation or lawsuit – too much time has passed for there to be any public accountability.[3] Moreover, because the FEC seems to receive more complaints

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[2] *See, e.g.,* Project FEC, *No Bark, No Bite, No Point* 5, 15 (2002).

[3] It is not clear whether the length of time to process and resolve complaints has always been a problem, although it seems likely that the problem has not always existed. In the annual reports filed by the FEC in 1975, 1976, and 1977, the agency provided statistics

than it can handle, there is a decent possibility that any one particular complaint may be dismissed under the Enforcement Priority System rather than processed through to a "reason to believe" finding and beyond. As a result, candidates and officeholders may be more willing to take calculated risks by committing violations.[4] This situation deters compliance and encourages the public perception that campaign finance violations are not taken seriously. Thus, the confidentiality provision serves its purpose of protecting "innocent accuseds" – but at the cost of a certain level of public accountability for actual violators.

Whatever the reason for the length of time of the enforcement process today, that length combined with the confidentiality provision undermines adherence to the law and public confidence in the FEC's enforcement of the law. The D.C. district court's recent decision in *AFL-CIO v. FEC*, 117 F. Supp.2d 48 (D.D.C. 2001), exacerbates this problem. In *AFL-CIO,* the court interpreted FECA's confidentiality provisions to extend indefinitely, applying after resolution of MURs to all but a very few documents. Confidentiality, without temporal limitation, in no way protects the "innocent accuseds" because, by definition, in a resolved matter, the accused has been exonerated or has been determined to have committed a violation. Without full access to the documents relating to resolved MURs, the public has no way to assess whether violators indeed have been held accountable. A legislative change is required to ensure that public oversight remains possible.

The FEC's seeming suggestion that it might change the enforcement procedures to intentionally withhold the outcome of a resolved MUR until *after* an election –because the outcome might have an effect on the election– is wrong-headed and will exacerbate the already-existing problem of limited public accountability. By delaying release of the information, the FEC will, in conflict with a general policy toward sunshine in government, extend the period of confidentiality beyond that required in FECA. This does nothing to further the policy of shielding someone wrongly accused. When a matter

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on the number of enforcement cases processed, pending, and resolved each year. *See* FEC, Annual Report 1977, at 16; FEC, Annual Report 1976, at 51-52; FEC, Annual Report 1975, at 63. There were also details regarding the stage in the process at which MURs were resolved or remained pending. Annual Report 1977, at 16; Annual Report 1976, at 52; Annual Report 1975, at 63. Additionally, the early annual reports indicate that the Office of General Counsel generally made its recommendations about matters under review within a week of receipt of the complaint. *See, e.g.,* FEC, Annual Report 1977, at 15 (seven days); FEC, Annual Report 1976, at 49 (48 hours).

The more recent annual reports do not include such detailed information. *See, e.g.,* FEC, Annual Report 2001, at 10-13; FEC, Annual Report 2000, at 10-12. Moreover, NVRI is aware from its experience with MUR 5181, in which a Commission lawyer was not assigned until four months after the filing of the complaint, that the Office of General Counsel does not make recommendations within one week. To publicize its handling of enforcement matters, the FEC should consider reinstating the more comprehensive statistics and information it provided in the mid-1970s.

[4] *See generally No Bark, No Bite, No Point* at 6-7.

is resolved, the FEC makes public that the subject of the MUR has either been exonerated or actually committed a violation. Thus, a delay of the release of the outcome can only benefit those who actually violated the law. If a violation has been committed, the public *should* have access to that information to assess its importance. To withhold the information is to game the electoral process and deny the public the right to make informed decisions about their representatives in government. We urge the FEC to maintain its current policy of releasing the outcome of a resolved MUR in the course of normal business – without regard to the timing of an election.

The length of time for enforcement combined with confidentiality of the progress of a MUR also undermines the confidence of *complainants* who file complaints. In general, to the extent the public participates in the enforcement process, it is as complainants – either individually or by the various watchdog groups who file complaints with the FEC. *See* MUR 5338 (filed by Common Cause, Democracy 21, Campaign and Media Legal Center, and Center for Responsive Politics); MUR 5181 (filed by NVRI, Alliance for Democracy, Common Cause, Hedy Epstein, and Ben Kjelshus). Currently, the confidentiality provision requires that the FEC not disclose information about a MUR to anyone, including the complainants who lodged the initial complaint. The complainants are not informed about the progress that the complaint makes through the enforcement procedure –what priority has been accorded to the complaint, whether a reason to believe vote has been taken, whether an investigation is under way, whether a probable cause vote has been taken, whether conciliation efforts are under way, or anything else. Indeed, the complainants are apprised of nothing until the MUR is resolved – by dismissal, conciliation, or lawsuit.

Naturally, the entire enforcement process takes time but, short of filing a lawsuit pursuant to 2 U.S.C. § 437g(a)(8), there is no way for complainants to know whether the FEC is acting on the complaint or whether the FEC is abusing its discretion by failing to act on the complaint. The FEC's inability to inform complainants of the progress of their complaints means that complainants have no hard information –other than a failure to resolve the complaint—to assess whether the FEC has done anything about the allegations within their complaints. To reiterate: the *only way* the complainant can find out whether the FEC is doing anything at all about the complaint is by bringing a lawsuit, in which a protective/confidentiality order is issued and the FEC provides a chronology of actions and events it has undertaken in connection with the MUR at issue. The statutory right to sue, which gives the public a mechanism to ensure enforcement and accountability, is one of the very few checks on the FEC's discretion with respect to its exclusive civil enforcement jurisdiction.

The need to file a "failure to act" lawsuit to determine the status of a MUR leads to a waste of resources by the complainant and the FEC, both of whom must engage in potentially unnecessary litigation. Without knowledge whether the FEC is actively pursuing a particular complaint, the complainant is more likely to bring a lawsuit. For example, six months after the filing of the complaint, the FEC might already be at the point of a probable cause determination or the Office of the General Counsel might not even have prepared a recommendation regarding "reason to believe" for the full

Commission. There is no way for a complainant to know – so a complainant is more likely to bring a lawsuit to ensure timely action by the FEC.

To alleviate all of the above problems, we recommend one of the following two options, both of which require the FEC to seek legislative change to 2 U.S.C. § 437g(a)(4)(B) and 2 U.S.C. § 437g(a)(12)(A):

1. Urge Congress to modify the confidentiality provisions such that the progress of a MUR is public information but the specifics of the investigation, conciliation, and/or Commission deliberations are not. Inasmuch as FECA does not prevent complainants from disclosing allegations within their complaints, it is unclear how much protection the confidentiality mandate provides against "adverse speculative publicity" by preventing disclosure of the status of the enforcement process for a particular matter. With this modification, the public can have confidence that enforcement activity is occurring without being privy to the specific facts of each particular MUR.

2. At a minimum, urge Congress to modify the confidentiality provisions to allow the FEC to provide complainants with regular updates regarding the status of the complaints they have filed. As an adjunct, there could be a provision requiring that complainants keep such information confidential.[5] If complainants have information about the progress of their MURs, they (and the public, in a derivative way) will feel more confident in the enforcement process, there will be fewer § 437g(a)(8) lawsuits for the FEC to defend, and the remaining § 437g(a)(8) lawsuits are more likely to be those in which judicial intervention is warranted.

III. Conclusion

NVRI hopes that these comments are useful to the Commission as it evaluates the enforcement procedures within FECA.

[5] In drafting this additional provision, we urge that the FEC not encourage an expansion of the subject of the confidentiality provision– which currently imposes no confidentiality obligation on the complainant with respect to filing the complaint, or on whether an attorney has been assigned to the matter.