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RE:

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2003 MAY 30 P 3:18

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VIA FACSIMILE & FIRST CLASS MAIL

May 30, 2003

Commissioners
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
2003 MAY 30 P 3:19

Re: Enforcement Procedures

Dear Commissioners:

On behalf of the law firm of Perkins, Coie, I am submitting the following comments in response to the Commission's request for public comment on its enforcement procedures. Our firm has over twenty years of experience representing clients before the Commission and is pleased to be given the opportunity to share with the Commission our views on how the Commission's enforcement process can be reshaped to better meet the needs of the affected public. I would like to request an opportunity, along with my partner, Marc Elias, to testify at the Commission's hearing on this subject.

Our comments follow the order in which the issues are presented in the public notice.

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Perkins Coie LLP (Perkins Coie LLC in Illinois)

1. Designating Respondents in a Complaint

The current practice of the Commission is to delegate to the General Counsel the responsibility for designating the persons that are to be treated as respondents in enforcement matters. The General Counsel discharges this responsibility on a case-by-case basis ungoverned by any preset standards. This approach works reasonably well in cases where the violation is clearly alleged in the complaint. In those instances, the General Counsel will name any person who is alleged to have violated the law along with any person whose wrongful participation in the violation would likely have been necessary to its accomplishment. The example given in the notice where a complaint alleges an illegal receipt of a corporate contribution by a campaign well illustrates the General Counsel's approach. In that case, even though the complaint only alleged a violation by the campaign, the General Counsel would also designate the corporation as a respondent.

Understanding why naming the corporation as a respondent in the example is appropriate may shed some light on how the General Counsel should exercise his discretion in naming additional respondents. The reason that corporation could properly be named as a respondent is because facts have been alleged in the complaint or are otherwise available to the Commission that if proven true would constitute a violation of law by the corporation. Naming the corporation as an additional respondent is not mere guesswork or even informed speculation. Rather it is a matter of logical induction from assumed fact. It follows then that General Counsel can comfortably name the corporation as a respondent because the facts that the General Counsel is assuming to be true would constitute a violation of law by the corporation.

The naming of additional respondents is not a whimsical process, though at times to outsiders it may seem so. To the contrary it is almost always the product of the unarticulated factual assumptions under which the General Counsel is operating. Making those assumptions explicit and known to the respondent would strengthen the process. It would have internal and external benefits. Internally it would provide focus for the investigation. As different attorneys become engaged in a matter, particularly those with multiple respondents, it would provide them with an understanding of the theory of the case. Externally it would provide respondents something to meaningfully respond to. Too often respondents are named in a matter, the case lingers for years and they are then inexplicably dropped. If respondents are provided with a brief statement setting forth the reasons that they have been designated as respondents, they will be more likely to give a full response. As a result the Commission will be able to conclude matters more expeditiously.

The General Counsel may worry that setting forth the factual assumptions under which a person is made a respondent will tie his hands in an investigation. This is an unfounded concern. The bounds of all investigations are the facts actually discovered. If facts are discovered during the course of an investigation that reveal different violations than originally assumed, the General Counsel is free to pursue those violations notwithstanding his initial theory of the case. Regularly articulating his theory of a case during the course of an investigation disciplines the investigation.

No one likes to be accused of violating the law. To the Commission naming a person as a respondent may seem an insignificant act. To a respondent it is often of major consequence. It may require hiring of an attorney. It can create paralyzing fear that

something that they did or might do may expose them to significant civil and potentially criminal liability. The uncertainty and accompanying anxiety are exacerbated when the respondent is not even informed of the reasons that he or she is being investigated. By providing a respondent with a brief statement setting forth the reason for his or her inclusion in an enforcement matter, the Commission can alleviate the problem.

A related problem is the practice of naming treasurers of committees as respondents. The Commission should expressly inform the treasurer if he or she is being named in a personal or in a representational capacity. The interests of the treasurer and the committee are not always coincident. Consequently, if a matter risks exposing the treasurer to personal liability for a violation, the treasurer should be informed upfront about this prospect. If a treasurer is initially designated as respondent only in a representational capacity and during the course of the investigation that changes, the Commission should expressly inform the treasurer of the change. Important choices such as selection of counsel and invocation of the right against self-incrimination may turn on this knowledge. A benefit to the Commission of such a practice is that a treasurer who is confident that their testimony is not exposing them to personal liability may be more forthcoming.

2. Confidentiality Advisement

As the notice points out, the confidentiality provision 2 U.S.C. 437g(a)(12) can be wrongly understood by witnesses to bar them from speaking to respondent's counsel. It is the practice of the Commission to advise a witness that he or she is prohibited from discussing the matter under investigation with any outside party. Because

witnesses often are unaware of who the respondents are in a matter, witnesses assume that the safest course is to talk to no one about the matter. This in turn impairs the ability of respondent's counsel to represent his or her client. To some extent the problem can be alleviated if witnesses are informed in writing of the scope of the prohibition and expressly advised that the witness can speak with respondent's counsel. Rather than having the Commission identify for the witness all the respondents in a matter, the witness acting in good faith should be able to rely upon a representation made by counsel that he or she represents a respondent in the matter. Counsel making false representations could be disciplined by the bar or by the Commission.

Beyond the issue of advisements, the Commission should more broadly address its procedures governing confidentiality. One issue that stands out is the practice of publicly releasing audit reports that suggest violations of law prior to the final resolution of those matters. Serious allegations of violations of law are made by Commission staff and referred to the General Counsel for further investigation without the respondent being extended the protections afforded by confidentiality provisions of the statute. This is done under the fiction that there is a distinction between audits conducted pursuant to 2 U.S.C. 437g and 2 U.S.C. 438. From the respondent's perspective there is no difference. Audits that are initiated under Section 438 become Section 437g investigations once the auditors discover evidence of violations of law that are subject to referral to the General Counsel office. Public disclosure and discussion of those issues should be subject to confidentiality under 437g(a)(12). The problem is accentuated by the fact that what is being put on the public record are mere staff conclusions with respect to both fact and law. The

Commission may disagree with both, but the public is led to believe that the findings in the report are the "Commission's". The damage is done and the harm that the confidentiality provision is intended to prevent is exacted upon the respondent.

Another issue relating to confidentiality is the Commission's failure in light of the District Court's decision in the *AFL-CIO* case to conform its procedures. Apparently protected records are still being publicly made available. The interests of respondents and witnesses alike are being sacrificed because of Commission self-paralysis. The Commission needs to resolve openly and publicly how it intends to balance its interest in public transparency and the respondent's interest in privacy. Politically and personally sensitive private information is entitled to protection unless there is a compelling need to make the information available in order to explain publicly a Commission's decision.

3. Motions Before the Commission

The Commission acknowledges in the notice that it entertains motions filed in enforcement proceedings. The Commission concedes that it does so in the absence of formal procedures governing their consideration. In the notice the Commission notes that it is not required by the Administrative Procedures Act, 5 U.S.C. 551 *et seq.* to consider motions made by respondents in non-adjudicative proceedings. The fact that the Commission is not required to entertain motions does not undercut the solid administrative justification for doing so. Particularly during the discovery stage of a proceeding the choice for the Commission is often between entertaining the motion or having to resort to court action to obtain the desired evidence. For all parties involved

administrative consideration is usually preferable to judicial. Allowing respondents to file appropriate motions then is sound practice.

The notice indicates no intention on the part of the Commission to depart from its current practice. The question is to what extent should those practices be formalized and made public. Establishing and then publishing the Commission procedures makes a good deal of sense. What motions the Commission will entertain should not be shrouded in mystery. Nor should the fate of a motion be determined by the inventiveness of counsel in styling the motion. The Commission should examine the range of motions typically available in adjudicative proceedings and determine which motions and under what conditions such motions should be available in Commission enforcement proceedings.

As a matter of standard practice, respondents should not be asked to toll the statute of limitation as a condition for the Commission's consideration of a motion. Filing a proper motion to protect an asserted right should not prejudice a respondent. For example, if a respondent files a motion to quash a subpoena in the good faith belief that evidence that the Commission is seeking is constitutionally privileged, the respondent should not be disadvantaged by his action. This is not to argue that it is never appropriate for the Commission to ask for a tolling of the statute of limitation before a requested action is granted. Respondent's counsel should not be able to thwart the timely conclusion of an investigation with frivolous motions. On the other hand the Commission should not be able to avoid its obligation to timely prosecute matters by artificially extending the statute of limitation by routinely requiring tolling.

The Commission should require tolling only where its interest in the proper administration of the law would be seriously prejudiced. Tolling should not be the price exacted from a respondent for the Commission's failure to timely and properly investigate and prosecute a matter. For example, the General Counsel should not be free to embark on a major fishing expedition, knowing that respondent's counsel is being given the Hobson choice of moving to limit discovery and thus extending the statute of limitations or complying with the discovery request and harming his client's interest. Procedural rules should limit the opportunity for legal gamesmanship by respondent and Commission counsel alike.

4. Deposition and Document Production Practices

The current Commission practice is to deny witnesses the opportunity to obtain a copy or take notes on his deposition transcript until the entire investigation is complete. Testifying before a federal agency is a serious matter. False statements can give rise to criminal prosecution. During deposition witnesses are often asked far ranging questions on matters on which their personal knowledge is limited and often dated. Often the question will relate to a matter upon which the witness has had little opportunity to refresh his memory. Under these circumstances questions can often be misunderstood. Mistakes in testimony can be made.

A degree of self-doubt haunts any witness who testifies extensively on a matter. A witness knowing that his testimony becomes a secret record will become shy in offering his testimony, fearful that his desire to be helpful and fully candid will be used against him. By denying the witness his own testimony, the Commission limits his opportunity to correct or amplify his statements. Mistakes remain uncorrected on

the record and can form the basis for wrongful judgments by the Commission. Consequently, Commission policy can be counterproductive.

The apparent purpose for the Commission practice is to prevent the coaching of witnesses. One wonders whether the Commission practice actually serves this purpose. If it is an important safeguard, then why do other agencies find it unnecessary?[1] Other agencies may well have concluded that the notes taken by a respondent's counsel during a deposition undermine any value to the agency of restricting access to the actual deposition. The Commission needs to ask itself whether in light of actual practice the quality of its investigation is enhanced by the restriction. Is there any evidence to suggest that the existence of the practice actually results in less "coaching" of witnesses? In fact, it might result in more "coaching". As suggested above, a witness's counsel may instruct his client to volunteer little information and to avoid any speculation because there will be no opportunity to review his precise testimony for accuracy. So even a witness who wants to be fully cooperative may be cautioned by counsel because of the rule to be more circumspect in his answers.

The Commission also seeks comment on its procedures governing a respondent's access to the depositions of others. The numerous questions that the Commission asks

[1] It is worth noting that the case that the Commission cites *Commercial Capital Corp. v SEC*, 360 F2d 856 involves an agency, the Securities Exchange Commission, that generally provides witnesses with access to transcripts of their testimony. 17 C.F.R. 203.6

on this topic underscore the difficult and potential costs of expanding access to raw investigatory materials prior to the conclusion of the Commission's investigation. The danger of premature disclosure of an investigation is undoubtedly heightened when broad access is given to investigatory materials. Factual disagreements among witnesses and respondents can easily become the fodder for press stories. The confidentiality provisions of the statute are intended to protect respondents in this regard. As a general rule, restricting respondent's access to investigatory materials prior to the probable cause stage is sound policy.

At the probable cause stage, a respondent should be given access to any evidence that the General Counsel relies upon in recommending to the Commission that it find probable cause to believe that the respondent violated the law. The scope of access should be determined on a case by case basis, but should be broad enough for the respondent to be able to fully evaluate the evidence in context. In making evidence available to respondents the Commission needs to balance a number of competing interests including protecting the integrity of their investigation, maintaining confidentiality, facilitating conciliation, and treating respondents fairly. The decision to withhold evidence from a respondent should be the product of evaluating these interests. Access should never be denied on the basis that providing the evidence would weaken the General Counsel's recommended disposition of the matter. Consequently, exculpatory evidence should be identified and made available to a respondent for use in preparation of the respondent's response brief.

5. Extensions of Time

Extensions of time should be routinely granted at the probable cause stage. In any complex matter, the statutory time frame of fifteen days is insufficient to adequately respond to the legal and factual claims made in the General Counsel's brief. To expect respondent's counsel to able to respond in such a short time frame to evidence accumulated in a multi-year investigation and frequently to novel legal theories is unrealistic. Granting two weeks extensions should be a matter of course and longer extensions should be granted upon a showing of good cause. For extensions of two weeks or less tolling of the statute of limitations should not be required. The General Counsel should anticipate the granting of a two-week extension and therefore it should be reflected in the office's timetable for the consideration and prosecution of a matter. The Commission's planning process needs to be improved so that the statute of limitations does not become an excuse for not providing the normal and necessary courtesy of an extension.

6. Appearances Before the Commission

The Commission seeks comments on whether respondents should be given the opportunity to appear before the Commission. From this firm's vantage point, it is hard to imagine how this idea would be put into practice. Adopting such a procedure would fuzz the line between an investigation and adjudication. If a respondent appeared before the Commission, would the respondent be put under oath and questioned by the General Counsel and the Commission? Could the respondent offer evidence? Would the General Counsel then be allowed to put on rebuttal evidence?

It is hard to imagine how the internal dynamics of the Commission would not be seriously and negatively changed by the adoption of such a procedure. Almost as a matter of human nature, each Commissioner would give greater weight to the testimony provided in a hearing and subject to their inquiry than to other evidence in the record. The hearing would become a mini-trial eclipsing the importance of the investigation.

7. Releasing Documents or Filing Suit Before an Election

The Commission's practice of releasing to the public closed enforcement matters in the normal course of business even if this occurs immediately prior to an election in which a respondent is involved needs to be revisited. The Commission should not run the risk of influencing the outcome of an election by the public release of the results of an investigation. Requiring a respondent to divert time and energy from his or her campaign to publicly rebut claims made by the Commission or by witnesses in an unresolved matter is unjustified. In effect it imposes a penalty without the procedural protection that a respondent is entitled to under the statute. The press and the public with the tireless assistance of the opposing candidate may give great weight to claims made by the Commission that are legally and factually wrong. Governmental agencies should go to great lengths not to intervene in campaigns. The Department of Justice has guidelines in this regard. Like the Commission, it must deal with dilatory tactics and statute of limitations issues. The Commission may find the Department's policies instructive as it fashions its own.

8. Public Release of Directives and Guidelines

Keeping the Commission's penalty guidelines secret serves no apparent purpose. Experienced counsel develops over time a sense of those guidelines. For others, conciliating with the General Counsel is like negotiating with a used car salesman but with the car dealer one has the advantage of the Blue Book price. No one is going to knowingly violate the law because he knows the size of the likely penalty, for the simple reason that a knowing and willful violation is subject to different penalties. The risk of calculating the penalty before violating the law is the risk of going to jail. Therefore if respondent gaming the system is not a risk, it is unclear what purpose keeping the penalty guidelines secret serves.

9. Timeliness

There is no doubt that the Commission has serious problems in timely disposing of matters. This is actually a blessing for those respondents who are immune to the pain and anxiety of uncertainty. It is true that the innocent sleep easier when they expect a quick resolution of a matter. On the other hand, the guilty usually sleep very well during dormant investigations. At the risk of sounding unduly cynical, timeliness is foremost an issue with which Commission must internally grapple. Improvement in this area must begin with candid self-examination of the problem.

10. Prioritization

The Commission asks to what extent should it give emphasis to cases that presents issues on which there is little consensus about the application of the law. It is unclear

from the notice where this lack of consensus resides. The foremost obligation of the Commission is tell the public what the law is. If there is no consensus on the Commission on what the law requires, it should not pursue a case to discover the applicable law. There is of course a difference between what individual Commissioners may think the law ought to be and what the law, as previously announced by the Commission, is. No respondent should be made a sacrificial lamb in order for the Commission to receive instruction from a court on how the law should be enforced. If the lack of consensus is between the Commission and some in the regulated community, then it is certainly appropriate and often desirable for the Commission to bring a case to resolve significant disagreements. Litigation is not, however, a substitute for rulemaking. Where possible, rulemaking is the best vehicle for the Commission to clarify the law.

11. Memorandum of Understanding with the Department of Justice

The new criminal penalties under BCRA elevate the importance of the Commission's agreement with the Department of Justice. Adherence not only to the letter but also to the spirit of the agreement is critical. Civil enforcement of the law should generally be preferred. The Commission's expertise should not be slighted. The Commission is often in a better position to determine when a violation is knowing and willful and when it is significant and substantial enough to merit criminal prosecution. Overly aggressive criminal enforcement can have a profound chilling effect on our political process. If history is a guide, criminal enforcement is open to political abuse. The partisan balance on the Commission is an important safeguard against the

politicization of our campaign finance laws. Consequently the Commission should do whatever it can to assure that its role in enforcement is not diminished under BCRA.

12. <u>Dealing With 3-3 Votes at "Reason to Believe" Stage</u>

The statute at 2 U.S.C. 437g(a)(2) clearly requires an affirmative vote of four Commissioners for the Commission to find reason to believe that a person has committed a violation of law. To suggest that a tie can be broken without a change in the vote by one or more Commissioners cannot be reconciled with the express unambiguous requirements of the statute.

13. <u>Other Issues</u>

A. *Naming Treasurers as Respondents*

As recommended above, the Commission should expressly identify whether the treasurer is being named a respondent in a representational or personal capacity. If the treasurer is being named in a representational capacity, then the current treasurer should be named and not the treasurer at the time of the alleged violation. Treasurers are often volunteers and regularly relinquish their responsibilities when a conflict arises with job or family. It is not uncommon for a past treasurer to have moved away from the area or to otherwise have severed all relationship with the committee. Under these circumstances there should a compelling reason to include such a person as a respondent in a matter. Unless the complaint alleges that the treasurer was personally involved in the violation or other facts available to the Commission suggest that the treasurer actually assisted in the accomplishment of the violation, the Commission should not name a prior treasurer as a respondent. Certainly adoption of this policy

does not in any manner preclude the Commission from seeking evidence from the former treasurer.

For similar reasons the Commission should never name a current treasurer as respondent in their personal capacity unless the treasurer is responsible for the acts that constitute the alleged violation. One can hardly overstate how emotionally and even financially disruptive it can be for an innocent individual to be named as a respondent in a matter in which he or she had absolutely no involvement. Imagine the position that such an individual is placed when filling out an application to refinance their home and are confronted with the question whether they are the party to any legal proceeding. Do they answer truthfully and risk not qualifying for a loan to pay for a child's education? The Commission answer to this question should serve as sufficient justification for the Commission to change it policy.

B. *Statement of Designation of Counsel*

Requiring respondents to sign a designation of counsel is totally unnecessary. If courts do not require such statements, what purpose does the Commission believe its requirement serves? Any attorney who falsely represents he or she is serving as a respondent's counsel is subject to severe discipline from the bar and can be prohibited from future practice before the Commission. In light of these penalties there is no justification for this statement. As a matter of administrative convenience, counsel will provide the contact information when requested. Often the information will already be in the possession of the Commission.

In closing, I want to thank the Commission for this important initiative. The Commission's willingness to consider these issues at a time when the demands being placed on the Commission by the new law are so great is to be applauded. This effort holds substantial promise for everyone involved. Regulation of politics is a delicate matter. It requires that the Commission remain ever sensitive to the real costs that accompany enforcement. While the Commission has the responsibility of enforcing the law and it cannot shy away from that duty, it also must remain ever cognizant of the precious activity that it is regulating. This proceeding is a welcome display of the Commission's appreciation of this obligation.

Very truly yours,

Robert F. Bauer

RFB:mjs