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To: enfpro@fec.gov
cc:

Subject: Enforcement Procedures: Notice of Public Hearing and Request for Public Comment; Comments

To Susan Lebeaux:
Attached in Word format are comments submitted on behalf of our law firm, in response to the above-referenced Notice of Public Hearing and Request for Public Comment, 68 Fed. Reg. 23311 (May 1, 2003).

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May 30, 2003

Via E-Mail and First Class Mail

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

Re: Enforcement Procedures: Notice of Public Hearing and Request for Public Comment

Dear Ms. Lebeaux:

As practitioners before the Commission, we are submitting these comments in response to the above-referenced Notice of Public Hearing and Request for Public Comment, 68 *Fed. Reg.* 23311 (May 1, 2003). These comments are being submitted solely on our own behalf and do not necessarily represent the views of any client of this law firm.

We believe the Commission should be commended for this effort to examine its enforcement practices and procedures and we hope the Commission will indeed proceed to address many of the points raised in the Notice through appropriate future rulemakings and/or policy directives. Following are some observations on the topics listed in the Notice, from our standpoint as attorneys who have represented many respondents and witnesses before the Commission in enforcement proceedings.

We would request an opportunity to testify at any hearing to be held by the Commission on June 11, 2002 with respect to the matters raised in this Notice.

1. Designating Respondents in a Complaint

As the Notice recognizes, it is now standard practice for the Commission to designate respondents in addition to those named in a complaint. The Notice raises the question, "[i]n what circumstances and at what time is it appropriate to designate additional respondents?" 68 *Fed. Reg.* at 23312.

In our experience, it is all too common for the Commission to designate as respondents, entities or persons not named in the complaint and as to whom the complaint itself actually states no violation of the Federal Election Campaign Act of 1971 as amended (the Act) or the Commission's regulations. For example, many complaints charge that specific organizations or individuals have violated the Act, and then make some general reference to some involvement or fault of the "Democratic Party" or "Democrats." The Commission Office of General Counsel ("OGC") will then frequently name, as a respondent, our client the Democratic National Committee/DNC Services Corporation (the "DNC"), even though the DNC was not named in the complaint and even though the complaint does not actually allege any violation of any law or regulation by the DNC.

In our view, the Commission should issue a regulation or directive to the effect that an individual or entity should be named as a respondent only if the facts, as set forth in the complaint on its face and taken as true, would actually state a violation of the Act or Commission's rules by that specific individual or entity. OGC should not guess at what respondents mean when they refer to an entity nor, at the complaint stage, should OGC make any assumptions about what the complaining party "intended' to charge.

2. Confidentiality Advisement

The Commission should advise witnesses explicitly that the obligation to keep an investigation confidential does not apply to communications with respondents, including communications with third party witnesses that are initiated by respondents. The Commission is not obliged to inform witnesses that they can speak to respondents. However, the Commission's current form of advisement simply misstates the law, by failing to exempt communications with respondents.

3. Motions Before the Commission

No comment

4. Deposition and Document Production Practices

OGC should routinely provide copies of all deposition transcripts and documents to respondents at the earliest possible time prior to service of the brief of the General Counsel on probable cause. The Act itself, 2 U.S.C. §437g(a)(3), provides that, after

receipt of the General Counsel's brief on probable cause, "respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case and replying to the brief of general counsel." Yet OGC's current practice is to decline to make routinely available to respondents, prior to this phase, at least all of the transcripts of depositions and documents cited by or in any way relied upon in the General Counsel's brief.

This refusal to make all such cited materials routinely available to the respondent effectively deprives the respondent of her statutory right to submit a brief "replying to the brief of [the] general counsel." 2 U.S.C. §437g(a)(3). "The defendants must have a fair opportunity to review and respond to the FEC's findings and have notice of precisely what activities have been found to be violations of the Act." *Federal Election Comm'n v. National Rifle Ass'n*, 553 F. Supp. 1331, 1338-39 (D.D.C. 19893). Clearly a respondent cannot meaningfully reply to the General Counsel's brief citing documents and deposition transcripts, as evidence of an alleged violation, without any access to those documents or transcripts.

Making such materials available was endorsed in the American Bar Association, Standing Committee on Election Law, Report to the House of Delegates at 13 (1994): "The Committee recommends that in cases involving complex factual and/or sensitive legal issues, the Commission should provide to respondents at appropriate stages any written material that the Commission receives from staff and an opportunity to submit written responses to such material."

For these reasons, it makes sense to require OGC to make available all documents and deposition transcripts to the respondent, when the brief of the General Counsel is served. If there is concern that this process "can cause delay" because respondents may need more time to review the materials, Notice, 68 *Fed. Reg.* at 23313, the proper solution is for OGC to make such materials available at the earliest possible time—i.e., at the completion of the investigation and before the General Counsel's brief on probable cause is served.

The Notice raises the concern that full access, by respondents, to deposition transcripts of all other respondents would "increase the likelihood of a public disclosure" in violation of 2 U.S.C. §437g(a)(12). *Id.* That concern is misplaced. Respondents have no incentive whatsoever to make public any materials from an investigation. Indeed, it is impossible, by definition, for a respondent to violate section 437g(a)(12) since every respondent has the inherent statutory right to waive the confidentiality protection.

Nor is it a legitimate concern that full access to transcripts, and all documents gathered by the Commission, would "compromise the effectiveness of the Commission's investigations." *Id.* If the success of a particular Commission investigation depends on keeping the evidence secret from the target of the investigation even at the probable cause

stage—in violation of every fundamental principle of due process—that should be a pretty good indication that there is something wrong with the investigation.

5. Extensions of Time

We do not believe that extensions of time in which to respond to a General Counsel's brief on probable cause, or other responses, should be contingent on the respondent's agreement to toll the statute of limitations for the extension period. Five years is more than ample time for the Commission to complete an investigation and conciliation proceedings, even in the most complex case. What is causing the Commission to take so much time to dispose of MURs is lack of full implementation of the Enforcement Priority System. See our comments on number 10 below.

Further, in that regard, the amount of time left before the statute is tolled should not be a factor in determining whether an extension should be granted. Rather, that determination should be based on the merits of the extension request and should involve consideration of such factors as the size of the record and complexity of the legal and factual issues involved.

6. Appearance Before the Commission

The question of permitting respondents and their counsel to appear before the Commission implicates the broader issue of affording respondents true due process before the Commission itself, in enforcement proceedings. It is clear that, ordinarily, no agency can impose a civil penalty without holding some kind of physical hearing, whether formal or informal, and affording the respondent appropriate procedural protections. See ABA Section of Administrative Law & Regulatory Practice, *A Guide to Federal Agency Adjudication* 33-34 (M. Asimow ed. 2003). These may include some or all of the procedures specified for formal adjudication under section 554 of the Administrative Procedure Act, 5 U.S.C. §554. *See e.g., Greene v. Babbitt*, 63 F.3d 1266, 1274-75 (9th Cir. 1995). Since none of these procedures are followed by the Commission, it is indisputable that under the Commission's enforcement procedures, taken in isolation, "individuals and committees accused of violations are denied due process." K. Gross & K.P. Hong, *The Criminal and Civil Enforcement of Campaign Finance Laws*, 10 STAN. L. & POL'Y REV. 51, 52 (1998) See also, K. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 286 (1991).

The only reason that the Commission's procedures do not in fact violate the Constitution, of course, is that respondents are afforded an opportunity for trial de novo in court. *See* Administrative Procedure Act, 5 U.S.C. §554(a)(1)(formal adjudication procedures not required to the extent there is involved "a matter subject to a subsequent trial of the law and the facts de novo in a court"). The real question, then, is whether the

Commission, as a matter of policy, wants to force more matters into civil enforcement proceedings in the federal courts, or rather wants to resolve more matters at the administrative level.

While few cases currently result in civil enforcement litigation, the advent of the Bipartisan Campaign Reform Act, with its vast, sweeping new reach into every aspect of political expression, association and advocacy in America, and its severe new civil as well as criminal penalties; and given the Commission's insistence, in court, that much of the litigation of the constitutionality of BCRA must await "as applied" challenges, the Commission must anticipate a flood of new enforcement litigation under section 437g(6). Such a new wave of litigation would obviously strain the Commission's resources.

It would make sense for the Commission to minimize, as much as possible, the inducements for respondents to force the Commission into court to resolve enforcement cases. If and to the extent that respondents feel they have been afforded a full opportunity to present their case at the administrative level, they would be somewhat less likely to want to try the case all over again in court.

As a policy matter, then, the Commission should allow respondents and their counsel to appear before the Commission to address the issue of whether the Commission should find probable cause. Although the Notice raises the concern that affording such an opportunity will prolong the enforcement process, the right answer is not to deprive respondents of procedural rights, but to direct OGC to stop wasting time with low-priority cases and in conducting lengthy investigations in cases where the material facts are largely undisputed.

The Notice raises the question of "[w]hat would respondents achieve that they are not already afforded?" The ABA Standing Committee addressed this question in its 1994 Report as follows:

> The Commission recommends also that especially in such cases, the Commission should reconsider its sweeping refusal to allow hearings before the Commission and should exercise its discretion to grant fairer process.
>
> Fuller opportunity for respondents is particularly appropriate for sensitive issues or complex factual determinations, such as cases involving possible 'knowing and willful' misconduct. For example, in cases that may depend for resolution on the assessment of witness credibility, only the Office of the General Counsel's assessment of credibility is heard, but fair process considerations strongly favor some access by the respondent to the Commission.

ABA Standing Committee Report at 13.

For these reasons, the Commission should institute a procedure or practice of routinely granting requests by respondents and their counsel to appear before the Commission at the probable cause stage.

7. Releasing Documents or Filing Suit Before an Election

No comments

8. Public Release of Directives and Guidelines

The Commission should make public its penalty guidelines in a manner similar to the publication of the federal sentencing guidelines. The Commission need not give up its discretion and flexibility to depart from its guidelines based on the circumstances in a particular case, as long as the guidelines spell out the circumstances and factors to be considered in reducing or increasing a penalty- –just as the sentencing guidelines do. We do believe, as the Notice suggests, that such guidelines would help to minimize negotiations over what constitutes an appropriate penalty, and thereby enable the Commission to process and dispose of Matters Under Review more quickly.

9. Timeliness

See comments under 10, below.

10. Prioritization

In our experience, the Enforcement Priority System is not functioning fully as intended. OGC still expends a huge amount of resources on cases involving small amounts and/or unimportant issues; routine unintentional violations of the Act or Commission's regulations that are more suitable for mediation or quick conciliation; and cases in which the material facts are not genuinely in dispute but in which OGC feels compelled to conduct a full-scale investigation anyway.

We strongly support the focusing of enforcement resources on cases, as described by the Notice, that require complex investigations and/or raise issues where there is little consensus about the application of the law and/or involve significant sums. Implementation of such prioritization would go a long way to addressing the concerns, understandably expressed throughout the Notice, about the time the Commission still takes to resolve many MURs.

11. Memorandum of Understanding With the Department of Justice

No comment.

12. Dealing With 3-3 Votes at "Reason to Believe" Stage

We do not believe that the Commission can or should adopt a policy of proceeding with an investigation where the six Commissioners split 3-3 on whether to find "reason to believe" and to conduct an investigation. First, permitting an investigation in such circumstances would clearly require amending the Act, which explicitly requires "an affirmative vote of 4 of its members" to find reason to believe and to "make an investigation." 2 U.S.C. §437g(a)(2). *See* S.E. Thomas & J.H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 AD. L. REV. 575, 592 (2000)("*Congress* could direct that an investigation would proceed in those instances where the Commission deadlocks on a General Counsel...recommendation to find reason to believe and investigate a matter")(emphasis added).

Second, even if the Commission had the authority to institute such a policy, it should not do so. Instituting an investigation is a commitment of significant Commission resources. It means lengthening the time to resolve other cases. It often means highly intrusive inquiries into past conversations and activities in areas of great First Amendment sensitivity. The decision to institute an investigation should not be made lightly. If the General Counsel cannot convince a majority of the Commission that a situation even warrants further investigation of the facts, such an investigation should not take place. Congress was wise to adopt the 4-vote requirement in section 437g(a)(2) and there is no good reason to change it.

In conclusion, we again believe the Commission should be applauded for beginning the process of addressing these very important issues relating to the enforcement process and hope that the regulated community can have constructive input into that process.

Respectfully submitted,

Joseph E. Sandler

Neil P. Reiff