

American Federation of Labor and Congress of Industrial Organizations



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January 5, 2007

Mark D. Shonkwiler
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**Re: Notice 2006-19, "Proposed Policy
Statement Establishing a Pilot Program
for Probable Cause Hearings"**

Dear Mr. Shonkwiler:

I am writing on behalf of the AFL-CIO, the national labor federation whose 10 million members belong to 54 national and international union affiliates, regarding the proposed pilot program for oral arguments by respondents before the Commission at the probable-cause stage of an enforcement proceeding.

The AFL-CIO supports adoption of the policy statement, modified as suggested below. An opportunity for oral argument prior to a probable-cause determination would ameliorate a longstanding deficiency in the Commission's administrative enforcement process – namely, the inadequate ability of a respondent, including as compared with that of the Office of General Counsel (OGC), to present pertinent facts and argument to the Commission before it makes its critical determination regarding the respondent's culpability under the Act.

While it is true that, as a technical matter, OGC is not an adversary of the respondent during an investigation, and the Commission does not perform an adjudicatory function during or after the investigation, as a very real practical matter OGC is highly adversarial to a respondent and the Commission's probable-cause decision is quasi-adjudicatory in its consideration and its highly consequential effect on the disposition of a complaint on its merits. OGC undertakes an investigation with a variety of discovery tools, aided by compulsory process, to which a respondent is, of course, directly adverse. OGC enjoys access to the Commission throughout an investigation unfettered by any formal constraints; a respondent, by contrast, is largely restricted to communicating with OGC itself, and to the Commission only through written submission

under limited circumstances. For example, when discovery disputes arise, OGC as the proponent of the discovery at issue can freely make its case to the Commission in response to a respondent's motion to quash, but the respondent is limited to its written submission and has no access to OGC's written or other submissions to the Commission. Although the proposed pilot program would not directly address that inequity, it would provide an important opportunity for subsequent mutual engagement between a respondent and the Commission before the probable cause issue is determined.

Oral argument when two or more Commissioners believe that it "would help resolve significant or novel legal issues, or significant questions about the application of the law to the facts," self-evidently could only benefit the Commission in its deliberations at the probable-cause stage. Particularly in the wake of BCRA, and at this time of considerable legal uncertainty regarding key issues arising under the Act, direct engagement between respondent's counsel and the Commission appears to provide only advantages for the Commission, the parties, and the attainment of due process and reasoned decisionmaking. We believe that oral argument both would assist the Commission in reaching appropriate probable-cause decisions, and would enable respondents, OGC and the Commission to make better-informed judgments as to how to proceed if probable cause is found. We see no likely disadvantage other than a modest increase in the Commission's workload.

We do suggest several modifications in the pilot program. As proposed, at oral argument both the General Counsel and the Staff Director could ask questions. In our view, by this point in the enforcement proceeding – after "completion of the investigation," 11 C.F.R. § 111.16(a) -- the General Counsel has had a full opportunity to make inquiries via compulsory process and otherwise, and, of course, the General Counsel has submitted his recommendation to the Commission that it find probable cause. The oral argument should enable the respondent to address the Commission and the Commission to question the respondent, rather than extend the investigation itself. Of course, OGC would be free to suggest lines of inquiry to Commissioners, but the balance of fairness would be better struck by the General Counsel not participating in the hearing as an interlocutor.

We also suggest that the Staff Director not participate in the hearing, both because the purpose of the hearing is for the respondent to engage with the Commission, and because the Staff Director simply has no substantive role in enforcement proceedings. We realize that the Staff Director is routinely afforded an opportunity at public meetings to question witnesses testifying with respect to regulatory and similar matters, but that courtesy ought not to be extended to oral arguments in active enforcement proceedings.

We also suggest that the proposed policy statement be clarified in an important respect. The proposal states that "the Commission may request that supplementary information be submitted after the probable cause hearing." Because this hearing would occur after the investigation is over, any such "request" should be just that, and not pursuable by compulsory process. Moreover, just as a respondent's decision whether or not to seek a hearing at the probable-cause state would be "voluntary" with "no adverse inference... drawn" from that

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decision, the same treatment should be accorded to a respondent's agreement or not to a Commissioner's post-investigation "request" for additional "information."

We also note that a hearing may generate interest in a legal issue that was either not addressed or inadequately addressed in the probable-cause briefs, and as to which the Commission might benefit from some further briefing. We suggest that the policy statement expressly provide that the Commission may "request" that sort of submission as well, subject to the same ten-day timetable as for "information," and with the respondent's compliance optional and entailing no adverse inferences. The policy statement should further specify that the respondent is entitled to receive any post-hearing submission by OGC to the Commission.

Finally, we note that we do not believe that the welcome additional due process and pre-decisional illumination that oral argument would afford will unduly delay the disposition of enforcement cases. The Commission has full ability to manage this new process efficiently, and, after all, this would be a pilot program whose impact on case management will be put to the test. We are confident that hearings are just as likely to expedite as to delay the ultimate resolution of enforcement matters overall, inasmuch as they will enhance the Commission's factual and legal understanding of matters under review when it renders its probable-cause determinations on them. And, even if it were determined that some delays did occur, the benefits of a hearing to the probable-cause stage process would more than compensate for them.

Thank you for your consideration of these comments.

Yours truly,



Laurence E. Gold
Associate General Counsel

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