



Republican National Committee

Counsel's Office

April 19, 2013

Via Email

Ms. Shawn Woodhead Werth
Secretary and Clerk of the Commission
Federal Election Commission
999 E Street NW
Washington, DC 20463

RE: Comments on Enforcement Process at the Pre-RTB Stage

Dear Ms. Werth:

These comments on the FEC's policies, practices, and procedures during the pre-RTB stage of the enforcement process are filed on behalf of the Republican National Committee (the "RNC"). The RNC not only has direct experience with the FEC enforcement process, but, more significantly, actively works with and advises Republican state party committees involved in the enforcement process. The state party committees often lack sufficient personnel, funds, and related resources to contend with FEC investigations without serious harm to their daily operations. As such, their interest in a fair, transparent, statute-based enforcement process is particularly strong.

The FEC is to be commended for its ongoing comprehensive review of its enforcement policies, practices, and procedures; and especially the recent adoption of new procedures related to advisory opinions, the audit process, the reports analysis process, and various aspects of the enforcement process.

I. Statutory and Regulatory Framework

Under section 437g of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §437g, and part 111 of the Regulations, 11 CFR part 111, any person who believes that a violation of any statute or regulation over which the Commission has jurisdiction has occurred, or is about to occur, may file a complaint with the Commission. 2 U.S.C. §437g(a)(1); 11 CFR § 111.4. Any such complaint shall be in writing, signed, sworn to by the person filing the complaint, notarized, and made upon penalty of perjury. 2 U.S.C. §437g(a)(1); 11 CFR §111.4(a). Commission regulations further provide that the complaint should clearly identify as a respondent each person or entity who is alleged to

have committed a violation, contain a clear and concise recitation of the facts which describe a violation of any statute or regulation over which the Commission has jurisdiction; and, critically, statements which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainant's belief in the truth of such statements. 11 CFR §111.14 (b) and (d).

The FECA provides that within five days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed a violation of any statute or regulation over which the Commission has jurisdiction. 2 U.S.C. §437g(a)(1). The FECA further provides that the respondent has 15 days from receipt of the complaint to demonstrate why the Commission should not take action based on the complaint. 2 U.S.C. §437g(a)(1). Commission regulations provide that the Office of General Counsel ("OGC") reviews the complaint and notifies each respondent named in the complaint that the complaint has been filed. 11 CFR §111.5. Commission regulations further provide that the OGC may make a recommendation to the Commission that it should find reason to believe ("RTB") that the respondent has committed or is about to commit a violation. 11 CFR §111.7(a).

If the Commission determines, by an affirmative vote of four of its members, that it has reason to believe that a respondent has violated any statute or regulation over which the Commission has jurisdiction, the respondent shall be so notified by letter, setting forth the sections of the statute or regulations alleged to have been violated and the alleged factual basis supporting the finding. 2 U.S.C. §437g(a)(2); 11 CFR § 111.9(a). An investigation shall be conducted in any case in which the Commission finds reason to believe that a violation of a statute or regulation over which the Commission has jurisdiction has occurred. 2 U.S.C. §437g(a)(2); 11 CFR §111.10.

Any analysis of the Commission's practices related to the pre-RTB stage of the enforcement process must start with the statute, and the statute does not appear to contemplate an investigation prior to a finding of RTB by an affirmative vote of four members of the Commission. As the D.C. Circuit Court of Appeals has explained, "[m]ere 'official curiosity' will not suffice as the basis for FEC investigations" *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981).

II. Discussion

The Commission seeks comments on two of the OGC's current practices related to the pre-RTB stage of the enforcement process: (1) whether the OGC may consider additional facts, not presented in the complaint or addressed in the response to the complaint, to support or augment allegations contained in a complaint; and (2) whether the OGC may pursue additional potential violations of a statute or regulation over which the Commission has jurisdiction even though the violations, or the legal basis for such violations, have not been specifically stated in the complaint, as well as several approaches that the Commission could take with respect to OGC's pre-RTB process.¹

¹ The Request for Comment on Enforcement does not provide any historical perspective on the development or adoption of these practices. For example, are the OGC's current practices related to the pre-RTB stage of the enforcement process the direct result of the cited case law, or did they develop independently of the case law that purports to support them? When were they adopted by the Commission, and under what justification?

A. Threshold Question: OGC's Recommendation to Find RTB

Any analysis of the Commission's practices related to the pre-RTB stage of the enforcement process must start with the statute, and the statute does not appear to contemplate an investigation by the OGC prior to a finding of RTB by the Commission. Commission regulations apparently "empower" the general counsel to "recommend to the Commission whether or not to find RTB that there has been a violation of the Act." Request for Comment on Enforcement Process, 78 Fed. Reg. 4081, 4083 (Jan. 18, 2013). However, the statute provides that a respondent has 15 days from receipt of a complaint to demonstrate why the Commission should not take action based on the complaint. The General Counsel's recommendation on whether the Commission should find RTB in complaint-generated matters, at 11 C.F.R. §111.7, is a creature of regulation, not statute.² Accordingly, as a threshold matter, we urge the Commission to consider whether this regulatory creature is consistent with the statute, or whether it undermines the Commission's authority and is contrary to the statutory requirement that before the Commission conduct an investigation there be an affirmative vote of four of its members that it has reason to believe that a respondent has violated a statute or regulation over which the Commission has jurisdiction.

Assuming that the Commission decides to continue to "empower" the general counsel to make recommendations on whether to find RTB, any pre-RTB investigatory activities by the general counsel raise procedural and due process concerns. Currently, "in the course of developing its RTB recommendation, OGC may reference publicly available information, including public information not contained in either the complaint(s) or responses. Public sources for those additional facts have included, among other things, Internet Web sites (most frequently, the Commission's own website), media reports, subscription databases, public information filed with other governmental entities, and respondents' own public statements and Web sites." 78 Fed. Reg. at 4084. When the OGC's recommendation to the Commission is based on information not referenced in the complaint or response, the respondent is denied the due process protections set forth in the statute. The statute requires that a complaint is in writing, signed, sworn to by the person filing the complaint, notarized, and made upon penalty of perjury. 2 U.S.C. §437g(a)(1); 11 CFR §111.4(a).

When OGC's recommendation to the Commission regarding whether to find RTB is based on additional facts or raises new legal theories not included in the complaint, it is akin to an amended complaint that does not meet these requirements (the OGC essentially steps into the slightly-used shoes of the complainant). For example, "media reports" of the type relied upon by OGC frequently use second-hand accounts or unnamed sources.³ Moreover, OGC's recommendations in such instances may be based on additional facts which are not based upon personal knowledge of the general counsel and are not accompanied by an identification of the source of information which gives rise to the complainant's belief in the truth of such statements.

² On the other hand, the FECA specifically contemplates a recommendation by the general counsel to the Commission to proceed to a vote on probable cause, 2 U.S.C. §437g(a)(3), suggesting that if Congress had contemplated such a role for the OGC at the RTB stage, it would have written the statute accordingly. But it did not.

³ See MUR 6056 (Protect Colorado Jobs, Inc., *et al.*), Statement of Reasons of Vice Chair Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 1-2 ("The basis for OGC's position that coordination may have occurred is one newspaper article, which was not referenced in the complaint, in which anonymous sources from the Complainant's campaign alleged that [the respondent and another group] coordinated the content and distribution of the mailer through an intermediary. OGC discovered the article after searching publicly available information following receipt of the complaint. Thus, the newspaper article functioned essentially as a second, unsworn complaint consisting of unsubstantiated allegation of dubious reliability, made by anonymous sources associated with the Complainant.").

See 11 CFR §§111.14 (b) and (d). When OGC uses such “publicly available information,” how can this be reconciled with the statutory prohibition on complaints from persons whose identity is not disclosed?

B. Current Practice

The Commission’s practice of considering material not specifically referenced or included in a complaint prior to a vote by the Commission to find RTB is not mandated by the case law. For example, in reviewing the Commission’s decision to dismiss a plaintiff’s complaints that he had filed with the FEC, the court stated that, “the Commission must take into consideration all available information concerning the alleged wrongdoing... [i]n other words, the Commission may not rely solely on the facts presented by the sworn complaint when deciding whether to investigate.” *FECA Litigation*, 474 F. Supp. 1044, 1046 (D.D.C. 1979). But in finding that the Commission’s decision was not contrary to law, the court held that “the plaintiff has not shown that the Commission had before it any evidence of wrongdoing apart from the allegations contained in the sworn complaints which he filed, and the Commission’s decision not to investigate the sworn complaints filed by Mr. Walther was neither arbitrary nor capricious.”⁴ *Id.* The court did not suggest that the Commission was in fact required to launch an investigation prior to dismissing the matter. And in *Antosh v. FEC*, the court found that the Commission, *after* finding reason to believe that a violation had occurred, “apparently ignored persuasive evidence in the administrative record,” and held the Commission’s dismissal of the matter on the grounds of prosecutorial discretion was contrary to law because it was based upon a “misrepresentation of the facts.” 599 F. Supp. 1044 (D.D.C. 1979).

1. The Use of Factual Information Beyond the Complaint

The Commission asks for comment regarding its approach to the use of factual information beyond the complaint, and whether this approach should be changed. First, even assuming that Directive 6 is consistent with the Act, it references “internal generation of MURs,” not internal investigations of allegations in complaints that have already been filed. Thus, either the Commission should amend Directive 6 to make it explicitly applicable to complaint-generated matters (provided that any such amendment is consistent with the Act and Commission regulations, which is not clear), or the OGC should refrain from using it as authority to conduct pre-RTB investigative activity in a complaint-generated matter.

Second, the contours of the Commission’s “current approach” are not entirely apparent. It seems that the OGC uses a case-by-case approach in determining whether, and if so, how, to use factual information beyond the complaint – which creates due process problems in its application. For example:

- Does the OGC conduct an Internet search of every respondent in every complaint, or is there a prioritization?
- What guidance is given to staff regarding in which cases such factual information may be sought and used as part of a recommendation to the Commission? If the Commission adopts such guidance in the future, would it be made public, or developed with public input?

⁴ See also MUR 4960, Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1 (“The Commission may find ‘reason to believe’ only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA.”).

- How does the OGC treat conflicting publicly available information? What if the information in a media account relied upon in the OGC’s recommendation is subsequently found to contain inaccurate information?
- Is the OGC required to disclose in its RTB recommendation to the Commission all information gathered, or only that information that supports its recommendation?

Unanswered questions such as these, and their implications for the due process rights of respondents, demonstrate some of our concerns with what seems to be the “current approach.” As the D.C. Circuit Court of Appeals has explained, “[m]ere ‘official curiosity’ will not suffice as the basis for FEC investigations” *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981). Unless and until the Commission can resolve the important procedural issues raised by its current approach to the use of factual information not included in the complaint or response, we urge the Commission to discontinue this practice. Any revised procedure should provide ample opportunity for any respondent to have notice and opportunity to address the results of any such investigative activity.

The statute does not require the Commission to ignore all publicly available information. The OGC can review material already available to the Commission, such as a committee’s disclosure reports (which are filed under penalty of perjury, as is required of a complaint) and other public information posted on the Commission’s own Web site. Such materials are in the Commission’s possession as a result of the normal course of carrying out its supervisory responsibilities and do not carry with them some of the concerns associated with other types of public “information” (e.g. anonymous quotes in blogs posts, which could even have been published for the purpose of providing fodder for a complaint). But “available” is something less than “attainable,” and the statute simply cannot be read – at least not without destroying due process rights – as an invitation for the Commission to search beyond these materials and scour the earth for other “available” information.⁵

Regarding exculpatory evidence, the Commission should be mindful that while use of factual information beyond the complaint to support an RTB recommendation implicates a respondent’s constitutional rights, the converse is not true – the Commission does not run the risk of violating a respondent’s rights by considering exculpatory evidence in its possession prior to making an RTB recommendation.

2. Scope of Legal Theories Presented in the Complaint

The Commission’s existing approach of integrating additional legal theories not specifically included in a complaint into an existing complaint-generated matter seems at odds with the statutory provision that the respondent has 15 days from receipt of the complaint to demonstrate why “the Commission should not take action based on the complaint.” 2 U.S.C. §437g(a)(1). It also raises the same due process concerns as the Commission’s use of factual information beyond that which is included in the complaint.

⁵ See *FEC v. Machinists Non-Partisan League*, 655 F.2d at 388 (noting that the FEC does not have the same “roving statutory functions” as other agencies (such as the SEC), and that an investigation can begin only if an individual first files a signed, sworn, notarized complaint with the Commission, and the Commission’s duty thereafter is “expeditiously” to conduct a confidential investigation of the complaint).

The FECA provides that any person who believes that a violation of any statute or regulation over which the Commission has jurisdiction has occurred, or is about to occur, may file a complaint with the Commission, and the complaint must meet certain sufficiency requirements. These requirements, taken together, serve the beneficial purposes of issue-narrowing, and eliminating meritless or unsubstantiated claims. Requesting “further input from a complainant” does not cure the problem with the Commission’s existing approach. 78 Fed. Reg. at 4086. The FECA does not authorize the Commission to right every wrong, or investigate every possible violation. Either a violation has been alleged or it has not. Either the complaint is sufficient or it is not. The Commission should not (and is not authorized to) be in the business of trying to ascertain a complainant’s “intent” in filing a complaint.

III. Conclusion

Given how burdensome pre-RTB investigations can be, and the limited resources often available to state party committees, the threat to their due process rights, as a practical matter, is especially great.

We appreciate the opportunity to express these concerns, and if the Commission decides to hold a hearing on this issue, we respectfully request an opportunity to testify.

Respectfully submitted,



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Republican National Committee