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Washington, DC 20463

AGENDA ITEM

For Meeting of: 3-14-02

MEMORANDUM

SUBMITTED LATE

TO: Commissioners

James A. Pehrkon
Staff Director

Lawrence H. Norton
General Counsel

FROM: Commissioner Darryl R. Wold *DRW*

DATE: March 12, 2002

RE: Pending Rulemakings—Revisions to Administrative Fines Program

At our open meeting on Thursday, March 21 the Commission will consider promulgating an NPRM concerning amendments to the regulations governing the administrative fines program (the "AFP"). This is one of our priority rulemakings.

A number of possible amendments have been suggested, including those in the memorandum from Alison Doone dated January 25, 2002; in OGC's memorandum that was attached to that memorandum; and in additional materials provided to the Regs Committee by OGC, presently being revised to circulate to the Commissioners for an open meeting discussion. Commissioners themselves have noted possible areas for amendment during the course of the administration of the AFP since its adoption effective July, 2000.

Notwithstanding the variety of issues that might be dealt with, it may be necessary that we include only a limited number of amendments in the NPRM at this time, in large part to expedite the process so that the amendments can be effective for the filings for the second quarter reports that will be due by July 15, 2002. Meeting that deadline means that a final rule would have to be promulgated by early June, to allow 30 days to run before the effective date, as required by the APA. If we want to allow 30 legislative days to run also, we would have to promulgate a final rule earlier than that.

The question before the Commission on March 21, therefore, will be what amendments if any to the AFP should be included in a rulemaking at this time. Any amendments not included at this time will be deferred, probably until a comprehensive review of the AFP in connection with a renewal or permanent establishment of the AFP by Congress.

After discussions in the Regs Committee about procedures for bringing this matter to the Commission for a vote, and providing information in a timely manner, I thought it important that the Commissioners be provided with a list of potential issues that might be dealt with well in advance of the March 21 meeting, so we could begin considering how many, if any, of these issues it would be important to deal with at this time. I have therefore prepared the list in this memorandum, based on what I could glean from the materials provided by the offices of the Staff Director and the General Counsel, and concerns expressed by Commissioners. The Regulations Committee previously asked that this subject be put on the agenda for the meeting of March 14 for a brief preliminary discussion, in advance of the Commission's consideration of an NPRM on March 21. I have asked that this memorandum be an agenda item for that meeting, to introduce the subject.

The "issues" that I have identified that might be dealt with by a rulemaking at this time -- or postponed to a later date -- are listed below. Some of these can also be dealt with in part by changes in administrative procedures. Commissioners or staff may have additional issues to be considered.

CALCULATION OF FINES

Fines for committees going out of business. We have found that committees for candidates who lose an election, particularly a primary election, often lose interest in continuing to file reports. Even though these committees often have relatively low levels of activity on their last reports, the fines can be substantial because they completely fail to file. The core purposes of the Act are only marginally implicated in such cases. The fines nevertheless create a hardship on candidates with no more fundraising ability, and on their treasurers who are often volunteers but liable for the fines.

RAD and the Information Division are taking steps to inform such committees of the need to continue to file until they terminate, and to expedite the termination process. We don't know yet what effect these steps will have.

In this rulemaking, we could reduce the fine schedule for committees with low levels of activity on their current report to ameliorate hardship in the case of such committees. The draft NPRM we will consider on March 21 will include a reduction in the fine schedule.

Fines for committees with high levels of activity. The amount of fines for committees with higher levels of activity, especially when the recidivism factor will take effect for repeat violations, can be very substantial. The Commission could consider whether such substantial fines are necessary to achieve a satisfactory level of compliance with the requirements for timely filing, and lower this portion of the fine schedule in this rulemaking. The draft NPRM we will consider on March 21 will include a reduction in the fine schedule that would include the high end of the schedule also.

Exclusion of non-federal activity in calculating fines. Fines are calculated on total receipts and disbursements on a non-timely report, which in the case of some committees includes both federal and non-federal activity. For a few such committees the non-federal portion is far greater than a relatively small amount of federal activity. If those committees file late, however, the fines are disproportionately large compared to the federal activity. We could exclude non-federal activity from the calculation of fines. The draft NPRM we will consider on March 21 will include this subject.

Calculation of fines where report covers more than one period. Where a report is filed late but includes a subsequent period for which it is timely, we should codify the proper method of estimating the amount of activity that is reported late, for purposes of calculating the administrative fine.

Extraordinary circumstances. On several occasions the Commission has encountered circumstances that appeared to make the imposition of the full penalty for a late filing arguably unfair, but has felt limited in its options. These have included cases of courier services misdelivering reports. In AF #167 we considered the difficulties with referring administrative fine matters to OGC to handle in the enforcement track or utilizing other administrative procedures, but our only other options appeared to be to terminate the proceeding completely, or impose the full fine. We could consider giving the Commission greater flexibility in adjusting the amount of the fine in circumstances where the Commission considers it warranted.

(The Commission will consider including a recommendation that filing by courier services be given a safe harbor in the same manner as filing by certified or registered mail is at the present time, in our legislative recommendations to Congress.)

CLARIFYING REGULATIONS

There are various revisions that could be made to the regulations that may clarify the rules for filers, and ease the administrative workload on RAD and OAR.

Treasurer incapacity or unavailability. A frequent defense that the OAR has to deal with is that the committee's treasurer has suffered some event that resulted in a late filing. We have not considered those events as an extraordinary circumstance excusing a

late filing, but that is not affirmatively stated in the regulations. We could add appropriate language to the regulations making it clear that this is not an excuse.

Reliance on supposed verbal staff advice concerning due dates. We have seen cases in which late filers contend that staff advised them contrary to the filing dates in the regulations and other materials published by the Commission. We could provide an explicit statement in the regulations that informal verbal advice from staff is not a defense to failure to comply with the requirements in the regulations.

Electronic filers who file on paper. The E&J for the electronic filing regulations explains that the Commission may treat the filing of reports on paper, which should have been filed electronically, as not having been filed. The Commission could consider making that explicit in the regulations, and making it clear that such filings will be subject to the AFP, by including it in the AFP regulations.

Consistent terminology. The Commission could consider conforming terminology where appropriate between "remit payment", "send payment", or "transmit payment", and between "submit a written response" and "file a written response".

Prior violations. OAR has received questions concerning the timing of the imposition of the civil money penalty as it relates to prior violations, and suggests clarification of the procedure in the regulations.

48 hour notice violations. OAR has received questions about the calculation of the penalty for 48-hour violations, where notice of a number of contributions subject to the requirement were due on the same day but not given. The Commission could consider clarifying the regulations, including the penalty schedule, in this regard.

NOTICES TO FILERS

Waiver of defenses. The current regulations in 11 C.F.R. § 111.38 provide that that failure to raise defenses in the administrative fine process waives the right to do so in an appeal in court. Respondents are not routinely given additional notice of this in the administrative fine process, however, until receipt of the final determination letter. We could add an advisement to this effect at an earlier stage by including it in the RTB letter. OGC does not feel that changes are needed to the regulations in this regard.

Adequate notice to late filers. We have seen cases in which late filers contend they did not receive the first notice that they had failed to file, apparently due to a change of address of the treasurer or committee after a campaign was over. Through RAD and the Information Division we could emphasize the need to provide notice of any change of address. We could also provide a more definitive statement in the regulations that notifications will be sent to the most recent address on file with the Commission.