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MEMORANDUM

AGENDA ITEM

For Meeting of: 8-29-02

TO: The Commission
FROM: James A. Pehrkon
Staff Director 
SUBJECT: ADR Program Evaluation
DATE: August 21, 2002

Attached for your approval is a report, prepared by ADR Vantage, Inc., entitled "Evaluation of the Federal Election Commission's Pilot Alternative Dispute Resolution Program," dated August 16, 2002. This report was prepared in accordance with the recommendation contained in the ADR Pilot Plan, approved by the Commission on July 25, 2000. The objective of the report is to provide the Commission, prior to determining the future of the ADR Program, with an:

- independent evaluation of the ADR Program;
- appraisal of how effective the Program has been in meeting the goals listed in the Plan; and
- assessment of how the Program has been viewed by respondents whose cases have been assigned ADR.

The report primarily evaluates the ADR Program's first year of activity, covering the period from October 1, 2000 through September 30, 2001. During that period, the ADR Office processed 61 cases, of which 43 were assigned to ADR—28 cases resulted in negotiated agreements, 26 of which were approved by the Commission; 11 were returned to OGC; four were subsequently concluded with negotiated agreements; one was withdrawn by the Commission; and one is currently in process.

It is important to note that this report represents the first step of an ongoing evaluation of the ADR Program. In fact, ADR Vantage is currently conducting interviews with a select group of: FEC complainants whose complaints were processed through the ADR Program; FEC respondents who opted for ADR, but whose complaints were not handled through ADR; and FEC respondents who chose not to use the ADR Program. It is my belief that ongoing evaluations are essential to the continued success of any program and the ADR program is no exception.

I am pleased with the results of this evaluation and believe it clearly demonstrates that the pilot program has been a success and should be continued on a permanent basis.

Recommendations:

It is my recommendation that the Commission:

- 1) Accept the report titled "Evaluation of the Federal Election Commission's Pilot ADR Program," prepared by ADR Vantage, Inc.;
- 2) Conclude the ADR Pilot Program and establish a permanent Office of Alternative Dispute Resolution; and
- 3) Instruct the Staff Director to report back to the Commission with recommendations as to how the ADR Program could be improved.

Attachment: (1) Report from ADR Vantage, Inc. titled "Evaluation of the Federal Election Commission's Pilot Alternative Resolution Program"



Evaluation of the Federal Election Commission's Pilot Alternative Dispute Resolution Program

REPORT

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August 16, 2002

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OGC Case Hours by Disposition, 2000 Election Cycle Report, Source: FEC CMS

Chapter 1: Background -- The Federal Election Commission's Pilot ADR Program and Its Evaluation

Section 1.1 Background

In August 2000, the Federal Election Commission (FEC) decided to initiate a new voluntary program designed to promote compliance with the Federal Election Campaign Act (FECA) and Commission regulations by encouraging settlements outside the traditional enforcement regimes. This Pilot Alternative Dispute Resolution (ADR) Program (the ADR Program) seeks to expedite resolution of some enforcement matters, reduce the cost of processing complaints, and enhance overall compliance with the FECA and FEC regulations. Its overall goal is to resolve complaints and referrals of campaign finance violations expeditiously through both bilateral and, when necessary, mediated negotiations.

The Pilot ADR Program was officially launched as of October 1, 2000 under the direction of the FEC Staff Director. The ADR Office reviews and evaluates complaints forwarded to it from the Office of General Counsel (OGC), the Audit and Reports Analysis Divisions, or the Commission itself to determine whether the case is appropriate for the ADR Program. If determined to be appropriate by the ADR Program staff, the Commissioners review the case and make a determination as to whether the case should permanently be assigned to the ADR Office. In addition to meeting certain procedural requirements for a case to be considered for ADR treatment, a respondent who wants his/her case to be considered for ADR must express a willingness to engage in the ADR process, agree to set aside the statute of limitations while the case is pending in the ADR Office, and agree to participate in bilateral negotiations and, if necessary, mediation.

At program inception, respondents received a letter generated by the Office of General Counsel notifying them of a complaint and mentioning the availability of the ADR option. Early in 2001, the content and timing of the notification letter changed. As a result, respondents now receive a letter from the ADR Office notifying them of the availability of the ADR option once the Commissioners have determined that the case should be assigned to the ADR Office for processing. The bilateral negotiations offered in the first phase of the ADR Program are oriented toward reaching an expeditious resolution in a manner that is both satisfying to the respondent and in compliance with the FECA. Any resolution reached in negotiations is submitted to the Commissioners for final approval.

If a resolution is not reached in bilateral negotiation, the case is either returned to the Office of General Counsel or would proceed to mediation. To date, the mediation phase of the program has not been utilized. Under the ADR Program's procedures, the mediation phase would begin with the selection of a mediator -- chosen from a FEC panel of experienced mediators from the private sector -- agreed upon by the respondent and the ADR Office. Agreements reached in mediation would be forwarded to the Commissioners for their approval. If no agreement results from mediation, then the case would be returned to the Office of General Counsel for processing using the existing compliance and enforcement parameters. All cases involved in the ADR process remain confidential until closed by the Commission and placed on the public record.

A key component of the Pilot ADR Program's design was an evaluation of the Program's operations after the end of the first year of operation. At the time the Program was established, it was recommended that the Pilot Program be evaluated by an outside firm to obtain a fair and objective review of the Program's effectiveness and its success in meeting its stated goals. In June 2002, the Commission contracted with *ADR Vantage, Inc.* to undertake this assessment. The *ADR Vantage* Evaluation Team includes five professionals, all of whom are ADR practitioners with extensive knowledge of the ADR programs operating throughout the Federal government. Two members of the team also are attorneys, in addition to being professional mediators.

Section 1.2 Evaluation Design

The period of review covered by the evaluation was specified by the Commission and was to cover the first year of ADR Program operations from October 1, 2000 to September 30, 2001. There were a total of 61 cases that were "processed"¹ during the first year of the Pilot ADR Program from October 2000 through September 30, 2001. There were 43 cases assigned to the ADR Office, of which 28 cases were resolved by ADR Program staff. Twenty-six of those cases were approved by the Commission within the first year of the Pilot Program and two ADR agreements were rejected by the Commission after being negotiated by the ADR Program staff. These cases are the focus of the evaluation. Of the remaining cases from the pool of 43 referred, 13 complaints were settled with negotiated agreements accepted by the Commission; one was withdrawn by the Commission and one remains in negotiation, but these cases were outside of the scope of this evaluation.

Using the goals outlined in the ADR Program Plan (set forth in Section 1.3 below), the Evaluation Team developed an evaluation design.

The design included an internal review of documents and data and a series of in-person and telephone interviews. The data sources for the internal review included:

- *Management Review of the Federal Election Commission*, produced by PricewaterhouseCoopers, 1999
- The Alternative Dispute Resolution Pilot Project Design Report, produced by the Federal Mediation and Conciliation Service (FMCS)
- The FEC Pilot ADR Program Plan, created in the fall of 2000
- Enforcement statistics for the 2000 Election Cycle, prepared by the FEC Staff Director and submitted to the Chair of the House Appropriations Subcommittee on Treasury, Postal Service, and General Government on April 25, 2002
- ADR Settlement Agreements through the period of review
- ADR Log of Activity, dated May 31, 2002
- Case Management and Financial Statistics prepared by the FEC Staff Director from FEC's Case Management System, produced in April 2002
- Participant satisfaction surveys

¹ This report includes as "processed" any case where action other than to dismiss it was taken by the FEC.

Categories of individuals were identified for interviews during Phase One of the evaluation study and they represented a wide range of interests and experience with the Pilot ADR Program. The evaluation design included the following categories of individuals who would be included in Phase One of the evaluation study.² The categories and numbers of interviewees per category are as follows; a total of 49 interviews were completed:

- FEC Commissioners (6) and their executive staff (6);
- Management and senior staff within the Office of General Counsel (OGC) (5);
- FEC's Staff Director, a management official within the office and the ADR Program staff (4);
- Respondents or their representatives to those cases submitted to ADR for resolution during the first 12 months of the pilot program – October 1, 2000 through September 30, 2001(17);
- Members of the Election Law Bar who had either direct experience resolving ADR cases or whose organizations (e.g., law firms and Congressional campaign committees) that had represented clients in such cases (11).

For Phase One, a universe of approximately 80 possible individuals – both internal and external to the FEC – were identified. In addition to the FEC Commissioners and staff, the Evaluation Team determined that at least one representative from each of the 61 case files would be contacted either in person or via the telephone. Some individuals were no longer available for comment. In thirteen cases, the campaign headquarters had been relinquished or phone numbers for former campaign managers, treasurers, or candidates were no longer valid. A total of 49 interviews were ultimately conducted during the months of June and July 2002, of which 28 interviews were conducted with respondents and/or their legal representatives and the remaining 21 interviews were internal to the Commission.

The Evaluation Team developed a series of interview guides to employ when interviewing those in the above categories. Where possible, face-to-face interviews were conducted. Thus, the majority of individuals based in Washington, DC participated in in-person interviews that typically lasted about twenty to thirty minutes. Because of other events occurring at the time of this evaluation (i.e., campaign finance reform hearings on Capitol Hill and rulemaking at the FEC), letters of introduction were sent out from *ADR Vantage, Inc.* introducing this evaluation project and the Evaluation Team to some members of the Election Law Bar, all of whom are based in Washington, DC, to enhance the response rate. This strategy was effective, since the Evaluation Team interviewed all of the targeted law firms with knowledge

² A second phase will be conducted in August and early September that will include interviews with a sampling of FEC complainants whose complaints were processed through the ADR Program; FEC respondents whose complaints were not handled in the ADR Program, although they had requested ADR; and FEC respondents who chose not to use the ADR Program.

of the ADR Program and both Republican and Democratic Congressional campaign committees.³

It should be noted that the Evaluation Team has used the terms "respondent" and "participant" to include the wide array of individuals designated to assist in resolving a FEC complaint, such as campaign treasurers, campaign managers, candidates, and legal counsel. Legal counsel includes members of the legal profession who represent respondents before the FEC. These attorneys included those practicing law in Washington, DC as well as those in practice in other parts of the United States.

Section 1.3 Evaluation Criteria

The Federal Election Commission's Pilot ADR Program was based on an ADR Pilot Plan guided by the following overarching objectives:

- Promoting compliance with the Federal Election Campaign Act (FECA);
- Expanding the tools for resolving selected enforcement matters that come before the Commission;
- Enhancing the FEC's enforcement efforts by freeing up resources from less compelling disputes; and
- Providing the Commission the benefits of ADR in handling selected FECA complaints and audit referrals.

The specific ADR Program goals that were identified in the ADR Program Plan and have been used as the framework for this evaluation study are as follows:

- Increasing the number of campaign finance related complaints and referrals processed;
- Reducing the amount of time required to process campaign finance related complaints and referrals processed;
- Reducing the cost of processing complaints;
- Increasing the satisfaction level on the part of users with the FEC's handling of complaints and referrals; and
- Securing user satisfaction with the effectiveness of the mediation process.

No mediations had taken place within the scope of the study, so Goal #5 could not be assessed at this time.

³ The Evaluation Team used interview guides to conduct these interviews, but the team did not record specific scores from this limited sample of interviewees. Furthermore, the team promised confidentiality and "no attribution" and therefore, did not seek confirmation from interviewees regarding their remarks.

Chapter 2: Specific ADR Program Goals

Section 2.1 General observations

In seeking to appraise the overall effectiveness of the Pilot ADR Program, the Evaluation Team asked stakeholders a series of questions related to the specific programmatic goals set forth in the ADR Pilot Plan as well as broader observations about the impact of the ADR Program on the Commission's mission. This chapter represents the Evaluation Team's analysis of whether the ADR Program achieved the goals stated in the ADR Program Plan. Chapter 3 addresses the impact and potential impact of ADR on the FEC's overarching objectives.

Based on comments from interviewees, the Pilot ADR Program has achieved its stated goals, with one unique exception. Nearly all of those interviewed, both internally and externally, saw value in the bilateral negotiations conducted by the ADR Program staff in terms of enhancing FEC's compliance and enforcement efforts. The goal of securing user satisfaction with the effectiveness of mediation process is the one exception. Since there have been no mediations held during the pilot phase, it was not possible to evaluate this goal.

Section 2.2 Impact on the number of complaints on which action is taken

The ADR Program has enabled the Commission to increase significantly the number of cases processed by reviewing 61 complaints for appropriateness and then engaging 43 respondents in bilateral negotiations. The Commissioners and OGC staff acknowledged that the majority of enforcement cases referred to ADR during this time period might otherwise have been dismissed; instead the FEC took some action. A 1999 PricewaterhouseCoopers report, *Management Review of the Federal Election Commission*, prepared with data from January 1994 – September 1998, found that 59 percent of 1,179 cases were dismissed by the FEC during this time period.⁴ During the 2000 Election Cycle, the percentage of dismissals was reduced to only 32 percent of those cases processed. There were 47 matters dismissed in Election Year 2000, of which 45 were OGC matters and two were ADR Program matters.⁵

This reduction in the percentage of dismissals cannot be attributed solely to the inception of the ADR Program; however, of the 43 cases referred to the ADR Program, 28 respondents reached a settlement with the ADR Program staff, of which 26 ADR agreements were approved by the Commission. This is a settlement rate of 93 percent. The remaining cases were still pending when the aforementioned data was released to Congress, but most have subsequently been completed and approved by the Commission. Additionally, those with first-hand knowledge of the FEC – its leadership, staff, and members of the Election Law Bar -- thought the ADR option preferable to the practice of "MUR dumping" that had occurred during the end of the millennium. Furthermore, most commented that ADR Program has helped the Commission meet a perceived Congressional desire to process more cases.

⁴ PricewaterhouseCoopers, *Management Review of the Federal Election Commission*, 1999, p. 4-66.

⁵ Data derived from FEC's Case Management System, the ADR Monthly Log, and a response to a Congressional Inquiry regarding 2000 Election Cycle, report submitted to Chair of the House Appropriations Subcommittee on Treasury, Postal Service, and General Government on April 25, 2002.

Section 2.3 Impact on reducing the processing time for complaints and referrals

The general opinion of those interviewed was that the ADR Program offered expeditious resolution of the complaints processed through ADR. In fact, all Commissioners, their staff and OGC staff, along with the vast majority of respondents, highlighted that the ADR Program has offered timely action on those enforcement, audit and RAD cases under its jurisdiction. When asked why respondents chose to enter the ADR Program, all respondents indicated that the ability to reduce the complaint processing time was the *most important motivating reason* to utilize ADR. During the interviews, fifteen respondents specifically mentioned their enthusiasm for the expedited ADR Program, knowing that the complaint might otherwise remain unaddressed for months. The Evaluation Team heard this reason given more often from those campaigns that had not fielded successful candidates and wished to close down their organizations; however, all of the members of the Election Law Bar interviewed cited the reduction in processing time as major incentive for participating in the ADR process.

Several Commissioners, along with all respondents and all members of the Election Law Bar interviewed, mentioned that they would like to see the trend in reducing complaint processing time continue with the objective of either dismissing or assigning cases to the ADR Office more rapidly. At the outset of the Pilot ADR Program, the process of selecting cases to be referred to the ADR Office took much longer than today, which now is typically about 90 days.⁶ This is the result of streamlined efforts within the Office of General Counsel and the change in the notification procedure, which occurred in early 2001.

Section 2.4 Impact on reducing the cost of processing complaints

Specific data on costs associated with processing complaints through the ADR Program were not readily available; yet, the general opinion of respondents was that participation in the ADR Program saved them at least modest amounts of time and legal fees. None of them had quantified these costs, and cost did not appear to be a very important motivating factor for the majority of respondents. There were three respondents who commented that the complaint brought against them should have simply been dismissed because the charge could not be substantiated and was simply politically motivated. Only one respondent mentioned that the time and cost of the phone negotiations of using ADR were burdensome to the leadership of this political committee and the initial terms proposed by the ADR staff for settlement would have placed a significant financial burden on the committee. Through negotiations, this respondent found an acceptable compromise, still requiring some penalty payment and action by the committee.

All OGC staff and several Commissioners questioned whether the ADR Program saves the Commission resources overall, noting that there are obvious resource costs associated with processing cases that would have been dismissed in the absence of the ADR Program. According to the OGC senior staff, when the ADR Program was first under discussion and being implemented, there was no budget category against which OGC staff could charge their time. As examples, the OGC staff highlighted the time their attorneys and paralegal staff must

⁶ This statistic was provided by a senior staff member within the FEC's Office of the General Counsel.

spend on ADR activities, such as selecting cases, tracking case status, attending ADR Working Group meetings, and briefing the General Counsel on ADR agreements prior to Commission meetings.⁷ Furthermore, the OGC staff added that much of the work done by OGC's Central Enforcement Docket (CED) with regard to ADR is commingled with its work related to processing complaints received as part of the regular enforcement process, and therefore, it is not easily documented. For these reasons, the OGC staff believed that the time devoted to ADR Program activities is under-reported.

Other FEC staff responded by pointing out that, at least on the basis of available statistics, ADR's time burdens on OGC and others outside the ADR Office appeared to be modest based on data from FEC's internal Case Management System. While acknowledging hidden costs to OGC, the average reported time spent by OGC staff on cases that were ultimately dismissed exceeded 85 hours during the 2000 Election Cycle as compared to 10.5 hours on average for cases sent to ADR (see appendix). The Evaluation Team analyzed the case status data provided to a Congressional committee regarding the 2000 Election Cycle and calculated the average penalty, recognizing that this figure is not the mean, but simply the average. The results of the traditional enforcement program and the ADR Program are nearly identical -- the average penalty amount for 2000 Election Cycle cases with disposition was \$642 compared to \$649 in cases settled in ADR⁸ (see appendix for charts). The Evaluation Team compared the total number of OGC cases (164) with the total number of ADR cases settled (28) during the 2000 Election Cycle. The team acknowledges that this average penalty for the OGC case figures includes cases that were dismissed early in the enforcement process and in which no civil penalties were assessed.

The Evaluation Team concludes that close to 90 percent of the respondents interviewed, and in particular legal counsel based in Washington, DC, believed that they saved resources -- time and money -- using the ADR Program, while the net savings to the FEC is unclear in light of the comments from OGC and a lack of cost-related data. The Commissioners might examine in the future the cost of operating the ADR Program as an offset by the added benefit of processing more complaints, thereby collecting more civil penalties and educating respondents about their campaign finance obligations.

Section 2.5 ADR Program Administration

In both phone interviews with respondents and written participant survey results, the comments were overwhelming positive about the ADR process and the professionalism of the ADR staff. Twenty-two participants (respondents and/or their legal representatives) completed a written evaluation survey following their ADR settlement. All of them rated themselves as highly satisfied with the timeliness of the ADR process itself and the professionalism of ADR Office staff. This was echoed by the phone interviews as well.

⁷ As of March 2000, staff members within OGC began recording time by task.

⁸ See appendix for the *Enforcement Statistics for 2000 Election Cycle* derived from FEC's Case Management System, in response to a Congressional Inquiry regarding 2000 Election Cycle, report submitted to Chairman of the House Appropriations Subcommittee on Treasury, Postal Service, and General Government on April 25, 2002. The formula used was Total Civil Penalties Assessed (\$105,280) divided by Total Cases with Disposition (164) = Average Penalty Per Case (\$641.95) versus Total Civil Penalties Assessed (\$18,175) divided by Total ADR Cases Settled (28) = Average Penalty Per Case (\$649.10).

Without exception, those surveyed by phone or mail complimented the ADR Program staff; typical comments were "competent, fair negotiator" and "not in a 'hide-the-ball' mode." On the written evaluations, four participants took the time to reinforce their appreciation of the ADR staff by writing specific complimentary comments. Several pointedly compared the process with traditional enforcement's procedural constraints and appreciated the differences in terms of approach.

The Evaluation Team noted a few recurrent exceptions to the otherwise positive tone of the responses to two general areas of review. These complaint themes revolved around case selection and ADR Program expectations:

- *Case selection process.* Some respondents were unclear about why their complaint had been recommended to the ADR Program for processing. Additionally, members of the Election Law Bar remarked that the FEC staff would not respond to their requests to use the ADR Program when future complaints arose, and they sought clarification of the case selection process for cases being referred to the ADR Program. Based on their initial ADR experiences at the FEC, ten out of eleven members of the local Election Law Bar indicated that they had asked to use ADR with other clients' cases but that they had not received a response from the FEC acknowledging such requests.
- *Dismissal of cases in lieu of ADR.* Four respondents, particularly those who entered the ADR process in the early stage of the program's inception, and several legal representatives complained that they were asked to make concessions when they viewed their transgression as a "minor offense" and not worthy of FEC action. They would have preferred to have their cases dismissed without FEC action.

These types of complaints seem to stem in part from a lack of understanding or clarity about some of the ADR Program aspects, including the case selection process. These complaints will be discussed further in the following subsections. Respondents, however, did offer some suggestions for improvement that are summarized as follows. One suggestion is for the Commission to be more explicit with potential (i.e., invited) respondents about the nature of bilateral negotiations and the expectations of those participating in the ADR Program to enter into bilateral negotiations to ensure compliance. While this information is described in the FEC's brochure, some respondents did not recognize that they had ready access to it.

Legal representatives would like to be able to make a formal request to use the ADR option for certain types of complaints, particularly those with mistakes or minor violations and those involving minor civil penalties. The OGC staff, however, reminded the Evaluation Team that the Commission's process of determining which matters are eligible for ADR is contained in its overall case prioritization systems, the specific criteria of which are not disclosable pursuant to Exemptions 2 and 7 (c) of the Freedom of Information Act and 11 CFR §4.5(a)(2) and (7). Yet, legal counsel to respondents repeatedly requested additional clarification on this issue from the Evaluation Team.

Case intake. These administration-related criticisms involved case selection or approval:

- As highlighted above, many respondents thought that the FEC should provide more information on its selection criteria and procedure for accepting cases into ADR.
- Among respondents favoring ADR, nearly all favored a procedure whereby they could request a referral to the ADR Program or even for mediation of higher rated matters.
- The notification letter to respondents regarding the ADR Program changed over the course of the Pilot Program.⁹ Although respondents liked the two-tiered notification process (an initial letter from OGC and a subsequent letter from the ADR Office), the letter written by the ADR staff is understood by some individuals, both those internal and external to the FEC, as introducing an option that led some to feel that their choice was not wholly voluntary. For example, several respondents (all of whom were located outside the greater Washington, DC area) were not sure that they could opt out of ADR, even though they felt that their case did not warrant any expenditure of FEC staff time or resources.

ADR Office case handling. In the written survey, participants were asked to rate whether their case was appropriate for ADR. Nineteen strongly agreed that their case was appropriate for ADR, whereas three indicated that their cases were not appropriate. Even so, all of the twenty-two respondents who completed the written survey indicated that they would recommend ADR to others and potentially use it in the future. This sentiment was shared by over 95 percent of the respondents who participated in the phone interviews.

Although the ADR Program has not consistently met its internal performance schedules -- averaging 148 days from referral to conclusion, rather than the goal of 77 days -- not a single respondent raised a concern about the timeliness of the negotiation process and nearly all found it highly expeditious.

Roles of the ADR staff. Several OGC senior staff and Executive Assistants expressed some misapprehension about the role of the ADR staff as the principal negotiator for the FEC. In addition, some Commissioners and the same group of FEC employees raised a concern about the dual role that the ADR Office staff is asked to play as both program administrator and Commission representative in the bilateral ADR negotiations. They ask whether this dual role may promote confusion or mistrust among respondents who might see the ADR staff acting as the Commission's advocate in their cases and then acting as the program administrator if the case is later referred to mediation.

The Evaluation Team understands that the use of external mediators was anticipated in the ADR Program Plan, and that the ADR Program staff would then play the role of case administrator. The Team's understanding is that the external mediators will conduct and administer the cases assigned to them by the ADR Program staff, and so this concern may be unfounded.

⁹ The Evaluation Team is referring only to the two notification letters used for CED cases during the designated pilot period, not the notification letters used for audit or RAD cases.

Commission review of settlements. The Evaluation Team found that the role of the Commission in reviewing ADR settlement agreements was consistent with the ADR Program Pilot Plan. The Plan specifically provides for no formal review prior to the Commission's action on the negotiated agreements, thereby allowing the ADR Program staff maximum flexibility to use their problem-solving approach to fashion a settlement that presumably both the Commissioners and the respondent(s) can endorse. The result has been that the Commission has accepted 39 out of the 41 ADR agreements occurring during the pilot phase.

Some Commissioners, their Executive Assistants, and all OGC senior staff raised questions about the lack of internal legal review of the ADR agreements, while others outside the FEC were confused about the Commissioners' role, suspecting that the Commissioners may be "tinkering" with ADR agreement prior to voting on them. Some Executive Assistants and OGC senior staff postulated that the ADR Program might undermine the Commissioners' role as the final agency arbiter. Several respondents, on the other hand, commented that they liked the assurance that the Commissioners would not modify the settlement terms they negotiated with the ADR staff.

Several Commissioners raised the topic of legally correct and legally binding ADR agreements as an issue. They noted that during this pilot phase, some ADR agreements contained incorrect legal citations or drew wrong legal conclusions about violations. Yet, these same Commissioners, along with the members of Staff Director's team and several OGC staff, indicated they have seen significant improvement and this problem has diminished considerably as the ADR staff has had more opportunity to write ADR agreements.

A few Commissioners and the OGC senior staff favored closer coordination between the ADR and OGC staff, thereby ensuring an opportunity for legal consultation and review of draft ADR agreements, either before they are finalized with the parties or when agreements are sent forward to the Commission for ratification. Yet, the Evaluation Team did not hear anyone (internally or externally) suggest that the relationship between the Office of General Counsel and the ADR Program should change fundamentally. Instead some FEC staff, including Executive Assistants and OGC staff, suggested that one way to address their desire for closer legal scrutiny might be hire a lawyer-advisor within the ADR Office who could ensure that enforcement and legal issues are addressed during the bilateral negotiations.

In sum, the ADR Program staff has followed the ADR Pilot Plan in administering the program during the pilot phase. The ADR staff received numerous "kudos" for their case handling and negotiation skills. Their dual role status was raised internally as a future issue for consideration. The Commissioners followed the Pilot Plan procedure outlined for reviewing the negotiated ADR agreements. In the course of their review, several Commissioners and their staff and OGC staff highlighted the need for legally and technically correct ADR agreements and that led to some discussion of possible alternatives for ensuring that future ADR agreements meet that standard.

Section 2.6 Stakeholder satisfaction with FEC handling of complaints and referrals

The primary stakeholders identified for Phase One of the Program Evaluation included respondents (which includes their legal counsel), FEC Commissioners and their staff, management and senior staff within the Office of General Counsel, the Staff Director and his executive staff, including the ADR Program staff. The results of interviews with these stakeholder groups are summarized below.

Respondents. Nearly 90 percent of respondents, including their legal counsels, indicated, either in writing or orally, that they were satisfied or highly satisfied with the ADR process. The respondents represented a wide array of respondent types, including candidate or state party committees, PACs, corporations, and individual respondents. All agreed or strongly agreed that the ADR Program offered timely and useful information, that the resolution was quick and efficient, and that they received fair treatment from the ADR Office. All indicated that they would consider using the ADR program again and would recommend it to others.

As referenced earlier, several respondents expressed dissatisfaction with specific aspects of the ADR Program, perhaps because of a misinterpretation of the ADR Program expectations. A major disappointment for some -- especially among those involved in earlier ADR cases -- involved the ADR Office's approach to negotiations and the process's substantive outcome. They said they had anticipated that the FEC would be "more forgiving" in ADR regarding civil penalties and have more "realistic" penalty expectations that took into account one's ability to pay, lack of prior wrongdoing, or inadvertence. Several went further, citing savings they saw for the FEC in using ADR; they would like to see the FEC give respondents some explicit incentive for participating in ADR to reflect agency resource savings. A few even suggested incentives, such as "discounting" penalties, so that respondents would want to utilize this program option.

Overall, approximately 95 percent of respondents were impressed with the ADR Program. Many thought that the availability of ADR would make them more likely to request or choose this option in the future, because the ADR approach affords them the opportunity to work out small violations, unintended violations, and misunderstandings. Many commented that they especially liked that the ADR process offers an educational opportunity that will make respondents less likely to commit similar violations in the future.

FEC staff. The Evaluation Team interviewed the members of the ADR Working Group, including the Staff Director and his executive staff, Executive Assistants to the Commissioners, and OGC senior staff. The Team found a greater divergence of views internally than externally. Even so, nearly all FEC staff, including Commissioners, saw some degree of benefit in the ADR Program.

As previously mentioned in Section 2.5, some OGC staff and Commissioners had criticisms, to varying degrees, of the quality of the legal representation by ADR Office personnel in ADR negotiations and potential negative impacts on long-term enforcement. The suggestions on how to address this issue ranged from having an OGC attorney representing the FEC in ADR's bilateral negotiations to pre-settlement review by an attorney in the ADR Program office. At least one OGC staff member saw value in adjusting the balance at the "negotiating

table” with the presence of an OGC attorney. Under this model, the ADR staff presumably would be used as program administrators and neutrals by arranging for the negotiation session and then serving as a neutral facilitator/ADR professional during the negotiations. The Team acknowledges that this is inconsistent with the current ADR Program Plan, which would be a factor in future consideration of this suggestion.

The following three concerns were those most frequently expressed by the OGC attorneys interviewed. They are as follows:

- *Appropriateness of the “no violation” finding.* There is concern that the number of ADR agreements that fall into a category that they referred to as agreements with a finding of “no violation” has been on the increase and that negotiating case outcomes without a complete and balanced investigation will impact negatively on the overall enforcement effort. The concern is that the ADR process may sometimes fail to identify possible wrongdoing that might have occurred, since there is no investigation or discovery in enforcement types of cases referred to ADR.
- *Precedent setting.* Some OGC staff are fearful that ADR agreements will be cited as precedent or incorporated into future traditional enforcement case arguments by counsel for respondents.¹⁰ OGC staff expressed the view that ADR agreements that lack legal rigor may undermine the FEC’s key enforcement role. Additionally, they voiced their concern that legal representatives and respondents are savvy and they will begin to reference the terms of prior ADR agreements when arguing for similar settlement terms in future enforcement cases processed through the traditional enforcement track, even though the issue of precedent has been addressed in the ADR proceedings.
- *Time commitment to ADR.* The ADR efforts distract OGC attorneys from handling priority cases. Now cases that would have been dismissed require more of their attention.

In response to the first concern listed above, the Evaluation Team reviewed all of the ADR agreements to determine what specific language was used in the agreements as well as the number of incidences in which this pattern may have occurred. The Team found 12 agreements that contained language indicating that the claim was “unsubstantiated.” This language was not used in any of the first eighteen cases, so the unsubstantiated finding likely evolved as the ADR Program staff became more experienced in examining the documents presented during and as follow-up to ADR sessions.

FEC Commissioners. All Commissioners were interviewed and nearly all indicated satisfaction with the current ADR Program. Most Commissioners were very complimentary of the caliber of the ADR Program operations and its success in negotiating ADR agreements that enhance FECA compliance. It is in the area of possible expansion of the ADR Program

¹⁰ The Evaluation Team noted that all ADR agreements contain the following clause: “It is understood that this agreement will have no precedential value relative to any other matters coming before the Commission.”

where the opinions of Commissioners diverge. Most Commissioners appear to favor expansion of the ADR Program into areas that are not now handled by the Program.

In summary, respondents, a key stakeholder group, indicated that they were highly satisfied with the ADR Program process and administration. A majority of respondents and most Commissioners commented that the ADR Program has been tested and proven to be successful. As a result, some respondents, including legal representatives, encouraged the Commission to consider further expansion of the ADR Program's scope. Most OGC staff, along with some Commissioners and Executive Assistants, continued to express concerns about expanding the scope of the Program but acknowledged its existing contributions.

Chapter 3: ADR and Commission Objectives

Section 3.1 General observations

As previously stated, respondents, legal representatives and most Commissioners and staff expressed positive views about the value that the ADR Program brought to the Commission's compliance efforts. Respondents saw the ADR Program approach as uniquely different from the traditional enforcement process and welcomed this new approach. This chapter will focus on the views expressed by respondents, including legal representatives, and those within the FEC, as they relate to the ADR Program's impact on the stated overarching objectives for the Commission and the potential for the broader use of ADR on FECA compliance.

Section 3.2 Promoting compliance with the Federal Election Campaign Act

Those who view the FEC's role primarily in terms of pursuing civil penalties vigorously tended to be most critical of the ADR Program's potential compliance impact. Those who fear the FEC may be overburdening small campaigns and thereby having a chilling effect on political activity believed that the ADR Program helps to promote compliance through a more remedial or educational role. Still others expressed the view that balanced, effective enforcement involves simultaneous, complementary efforts to educate political activists about how to comply and to penalize major wrongdoers; they tended to view the ADR Program as a useful complement to the traditional enforcement actions, acknowledging that the Program might be improved or fine-tuned as a result of this evaluation.

In particular, issues that were raised regarding ways to mesh the ADR Program with overall compliance included:

- *Importance of having staff with sufficient knowledge of election and campaign finance law.* Commissioners and OGC staff noted that election and campaign finance law comprise an esoteric legal practice area; most thought that the ADR staff have become more familiar with the FECA and FEC regulations over time with improved ADR agreements resulting from such knowledge. Several Commissioners, Executive Assistants and OGC staff commented that access to legal expertise in this area should be readily available to the ADR staff. It should be noted that this issue did not surface among the respondents or their legal representatives. In fact, all external respondents commented regularly on the professionalism, knowledge, and competency of the ADR staff, and their comments were highly complimentary.
- *"Unsubstantiated" settlement language in some ADR cases.* This topic was introduced in Section 2.6 and has been highlighted here, because legal representatives for respondents and OGC senior staff commented on this language. As previously stated, OGC attorneys expressed concern that "unsubstantiated" claim finding noted in some ADR agreements might have a long-term negative impact on the Commission's overall enforcement efforts. On the respondent side, a few members of legal profession commented that availability of such a finding was highly desirable to their clients and placed a high value on the chance to obtain it. Other respondents

commented on this as well but suggested that an alternative approach might be just as acceptable to them (see fourth bulleted item below).

The following suggestions emerged as possible ways to address these concerns from individual interviews. (These do not reflect the opinions of the Evaluation Team.)

- Enhance the ADR Office's coordination with OGC by designating an OGC liaison for regular consultation, and perhaps review, of proposed ADR agreements.
- Place an attorney-advisor with election law expertise within the ADR Office. The opinions of OGC staff, Executive Assistants, and Commissioners differed as to whether this staff attorney should be someone "detailed" to the ADR Program from OGC or an attorney hired to work directly for the ADR Program Director.
- Obtain legal review from the Commissioners and their legal staff before the ADR agreements are finalized and signed by the respondent. Those FEC staff advocating this suggestion stated that this would provide the Commissioners with the opportunity to ensure that the legal framework for the agreement is referenced correctly.
- Develop another set of alternative statements to enhance settlement options. Most respondents suggested that the Commission develop either an ADR approach in which ADR agreements would include no statements regarding culpability or would include a "no contest" statement. It may be worth noting that other federal agencies often make no statements regarding culpability as noted in the U.S. Equal Employment Opportunity Commission's standard ADR language (see below). However, in some instances, outside legal counsel acknowledged that respondents might willingly admit to a minor, unintentional violation, but then these respondents would like to claim "no contest" and negotiate a fair settlement using the ADR approach.¹¹

Section 3.3 Expanding the tools for resolving selected enforcement matters

The ADR Program has succeeded in introducing innovative enforcement options in an array of cases involving diverse substantive issues. While some of the non-penalty remedies included in ADR agreements have been used previously by the Commission, their greater use in the ADR agreements seems to have encouraged others at the Commission to focus on these types of remedies as well. Legal representatives, particularly those who are based in Washington, DC, noted that the ADR negotiations offered a wider array of settlement terms than they had experienced in the traditional enforcement process. Respondents from campaigns commented that the ADR settlement terms offered them the opportunity to learn from their mistakes rather than being penalized in monetary terms. Two respondents specifically mentioned that the FEC training they attended as required in their ADR agreement was very beneficial. One respondent suggested that the training be offered regionally on a more frequent basis with the goal of ensuring greater compliance through education.

¹¹ The standard language found in EEOC's mediated settlement agreement, where discrimination has been alleged but not determined, states: "The parties agree that nothing contained in this Agreement shall constitute or be treated as an admission of liability or wrongdoing by the employer".

An OGC attorney indicated that the conciliation approach to enforcement has always been flexible in adopting relief other than civil penalties. Yet, many within the FEC thought that these ADR agreements "opened the eyes" of the Commission to new possibilities for improving reporting, reducing future complaints, changing behavior, and offering potential incentives for campaigns to reduce violations. And, as previously stated, many outside the Commission expressed the view that future FEC enforcement activities will benefit from this remedial flexibility. They said that education opportunities that some agreements promote should reduce similar violations in the future.

Commissioners and respondents alike commented on the use of mediation as an ADR tool for enforcement. Most agreed that based on their knowledge of its use in other legal settings, mediation could be an effective tool for obtaining greater compliance. Most Commissioners had some thoughts on how mediation might be utilized in the future and those are set forth in Section 3.5.

Section 3.4 Enhancing enforcement efforts by freeing up resources

Opinions among those interviewed differed on FEC resource allocation and enforcement-related expenditures. These opinions ranged from expressing concern over the distraction of processing cases that would otherwise be dismissed versus seeing value in processing more complaints with a wide range of settlement terms, including monetary penalties.

A recurrent theme from the internal interviews was the need for clearer accounting of staff resources expended on ADR activities. The OGC staff supported the view that the Commission should recognize that the ADR Program does utilize the staff resources of the Office of General Counsel and this has not been accurately assessed to date in terms of OGC staff time and related costs. Additionally, they noted that if legal staff is not hired within the ADR office, then OGC would have to continue to devote staff time and resources to the ADR Program either with or without full acknowledgment and awareness of the Program's resource implications.

Notwithstanding these concerns, some statistics, cited in Section 2.4, indicate that ADR offers comparable monetary penalties (on average) to enforcement in an expedited process. More accurate tracking of staff time spent on ADR cases weighed against the civil penalties levied will presumably be important in the resource allocation discussions in future fiscal years.

Section 3.5 Providing the benefits of ADR in handling selected FECA matters

Most interview sources, both internal and external to the FEC, described the ADR Program's efforts as "value added" to the Commission. Opinions diverged as to whether these benefits warranted the expenditure of Commission resources; even some individuals among the generally supportive respondents anticipated that the ADR Program had had only a marginal impact on the FEC's enforcement mission. Even more dramatic was the varied opinions on the value of expanding the scope of ADR use significantly.

Most Commissioners expressed their interest in seeing the ADR Program continue. Likewise, the OGC staff agreed that the ADR Program has demonstrated its merits and served the FEC's enforcement mission (especially if their concerns can be met). Yet, they expressed a consistent and strong view that it did not need to be expanded to include more complex cases. OGC attorneys saw the enforcement priority as creating legal precedent to guide future conduct and enforcing the law. The OGC senior staff believed that staff attorneys already engage actively in conciliation at any stage, which they characterized as very similar to the bilateral negotiations that occurs in the ADR Program.

Most Commissioners, other FEC staff (except OGC staff), and nearly everyone interviewed outside the FEC expressed enthusiasm about continuing the ADR initiative and potentially expanding its use. These interview sources noted that mediation is simply assisted negotiation, and thought that using mediators in conciliating selected non-precedential cases could speed resolution of lesser cases and free lawyers to concentrate on major ones. Numerous respondents saw considerable potential for greater use of mediators during difficult conciliation proceedings. They stated that this could signal to respondents that the conciliation process has value -- something many of them said they had been dubious about. They, along with most Commissioners, expressed their support for expanding ADR Program case selection criteria and testing out ADR in more complex cases, including cases in the pre-Probable Cause phase, some conciliations, audit and RAD cases.

Suggestions for expanding the scope of the ADR Program ranged from increasing the use of mediation where appropriate throughout the enforcement process to continuing to assign a broader array of cases to ADR. Most Commissioners and the majority of legal representatives in the Washington area expressed the view that the future use of mediation to resolve a greater array of FEC complaints now seemed warranted. The suggestions for mediation applications included its use during the conciliation process when an impasse is reached and litigation seems inevitable, or as a final step in the Administrative Fines Program before litigation, and perhaps when the Commissioners are evenly split on what action should be taken. Several internal staff commented that the ADR Program staff might serve as an effective case administrator while drawing upon the expertise and neutrality of the external panel of mediators already available to the FEC. Other Commissioners indicated that it might be timely to fine-tune the ADR Program within the existing ADR Pilot Plan.

Whether or not ADR opportunities are formally expanded, many from both inside and outside the Commission believed that FEC staff would likely benefit from receiving greater education about what Alternative Dispute Resolution is, how it is applied within the FEC, and how to participate effectively in the FEC's ADR Program. Indeed, non-FEC interview sources with extensive ADR experience differentiated FEC's "conciliation" and "ADR process" from the tools that are typically considered under the banner of Alternative Dispute Resolution. Most would acknowledge that FEC's ADR model is a non-traditional, yet tailor-made model. Typically though, Federal government ADR offices focus on the use of third party neutrals, such as mediators. The FEC's ADR office is a dispute resolution office whose principal process is negotiation and joint problem solving.

Several respondents, particularly their legal counsel, advocated that the FEC reach out systematically for interaction and dialogue with other ADR professionals, not to force added ADR use for its own sake but to explore when and how ADR might merit a closer look. They indicated that the FEC has the opportunity, if it wishes, to draw upon a very active, knowledgeable federal ADR community that includes individuals with extensive experience to offer in ADR enforcement applications.

In summary, the ADR Program has promoted the objective of increased compliance with federal election and campaign finance laws by using a problem-solving negotiation model to handle complaints. The ADR Program staff has done so by using a creative array of settlement options that are at times remedial and, at other times, future-oriented. Generally, respondents value and support this new approach to compliance and enforcement. Internally, Commissioners and all affected FEC staff may benefit from the opportunity to fully explore how best to utilize the ADR Program by either fine-tuning it within its existing scope or by expanding its programmatic scope.

OFFICE OF GENERAL COUNSEL

<u>CASE STATUS</u>		<u>CASE DISPOSITIONS</u>		<u>FINAL VOTES</u>	
<i>Total Complaints Received</i>	243	<i>Dismissed/low rated</i>	32	6-0	101
<i>Total Internal</i>	46	<i>Dismissed/stale</i>	6	5-0	41
<i>Total External</i>	197	<i>Dismissed/other</i>	7	5-1	5
<i>Total cases with Disposition</i>	<u>164</u>	<i>No RTB</i>	39	4-0	4
<i>Total Cases Open</i>	79	<i>RTB/NFA</i>	15	4-1	6
		<i>No PCTB</i>	0	4-2	4
		<i>PC/NFA</i>	0		
		<i>Transferred to ADR</i>	43		
		<i>Conciliation</i>	19		
		<i>Suit Authorization</i>	0		
		<i>Transferred to Admin</i>			
		<i>Fines*</i>	1		
		<i>Merged with another case</i>	1		
		<i>Referral rescinded by originating office*</i>	1		
TOTAL CIVIL PENALTIES ASSESSED		TOTAL	164	Total*	164
\$105,280					

<u>NUMBER</u>		<u>DISPOSITIONS</u>	
<i>Total Respondents for election cycle</i>	1471	<i>Dismissed/low rated</i>	205
<i>Total Respondents with disposition</i>	<u>876</u>	<i>Dismissed/stale</i>	82
<i>Total Respondents Open</i>	595	<i>Dismissed/other</i>	78
		<i>No RTB</i>	255
		<i>RTB/NFA</i>	46
		<i>No PCTB</i>	0
		<i>PC/NFA</i>	0
		<i>Transferred to ADR</i>	168
		<i>Conciliation</i>	37
		<i>Suit Authorization</i>	0
		<i>Transferred to Admin</i>	
		<i>Fines*</i>	1
		<i>Merged with another case</i>	2
		<i>Referral rescinded by originating office*</i>	2
		Total	<u>876</u>

ADMINISTRATIVE FINES DETERMINATIONS

Total Fines Collected 405
 Total Amount Collected \$514,499

Admin Fine Votes	
6-0	380
5-0	17
5-1	4
4-0	3
4-1	1

VIOLATIONS -- Sec. 434 Reporting Requirements

ALTERNATIVE DISPUTE RESOLUTIONS

Total Cases Transferred from OGC 43
 Total Cases Settled 28
 Total Cases Returned to OGC 6
 Total Cases Pending 9

Total Civil Penalties Assessed \$18,175

ADR Votes	
6-0	39
5-0	2
5-1	1
4-0	1

Violations

Sec. 431 - Definitions	8
Sec. 432 - Organization of Political Committee	2
Sec. 433 - Registration of Political Committee	1
Sec. 434 - Reporting requirements	**9
Sec. 439a- Use of Contributed amounts for certain purposes	2
Sec. 441a - Prohibited Contributions	***5
Sec. 441b - Corporate Contributions	6
Sec. 441d - Disclaimer	3
Sec. 441f - Contributions in name of another prohibited	2

*Cases with this issue also include 432,433 and 434
 **Cases with this issue also include 431, 432, 433, 441a, and 441d
 ***Cases with this issue also include 441b

No. of Days from Receipt of Complaint in OGC to Assignment in ADR (252)	No. of Days from Assignment in ADR to Sent to Commission (116)	No. of Days from Sent to Commission to Approval or Rejection (21)
252	116	21

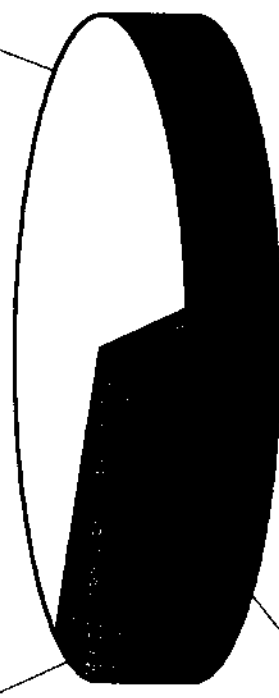
AVERAGE NUMBER OF DAYS FOR ADR CASES SETTLED

FY 2001
(Total: 27)

No. of Days from Receipt of Complaint in OGC to Assignment in ADR (252)
65%

No. of Days from Sent to Commission to Approval or Rejection (21)
6%

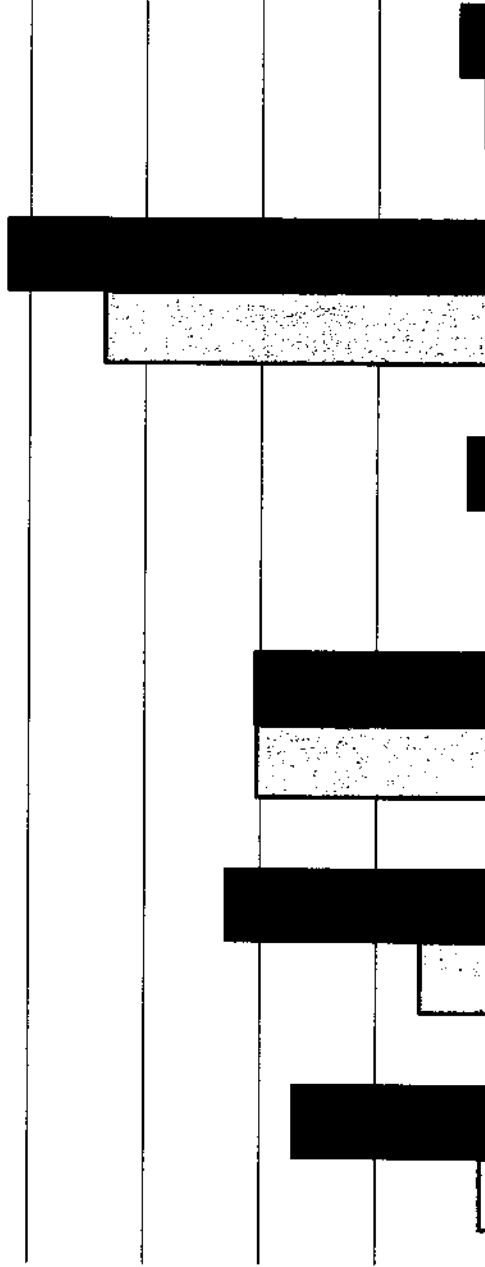
No. of Days from Assignment in ADR to Sent to Commission (116)
30%



	Dismissed	No RTB	RTB/NFA	ADR	Transferred to	Conciliation	Other
Median	5	31	101.5	2	167.5	3.5	
Average	85.32	114.6	102.13	10.53	209.03	14.5	

OGC CASE HOURS BY DISPOSITION 2000 ELECTION CYCLE

HOURS



	Dismissed	No RTB	RTB/NFA	Transferred to ADR	Conclusion	Other
Median	5	31	101.5	2	167.5	3.5
Average	85.32	114.6	102.13	10.53	209.03	14.5