



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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AGENDA ITEM
For Meeting of: 04-24-03
SUBMITTED LATE

April 18, 2003

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *[Signature]*
Staff Director

FROM: Lawrence H. Norton *[Signature]*
General Counsel

James A. Kahl *[Signature]*
Deputy General Counsel

Rhonda J. Vosdigh *[Signature]*
Associate General Counsel

SUBJECT: Draft Notice of Public Hearing and Request for
Comment Regarding Enforcement Procedures

Attached is a proposed draft of the subject document. We request that this draft be placed on the Agenda for April 24, 2003.

FEDERAL ELECTION COMMISSION

Enforcement Procedures

[NOTICE 2003 -]

- AGENCY:** Federal Election Commission.
- ACTION:** Notice of Public Hearing and Request for Public Comment.
- SUMMARY:** The Federal Election Commission is announcing a public hearing on the enforcement processes of the Federal Election Campaign Act of 1971, as amended (“the FECA” or “the Act”), and its implementing regulations. The Commission seeks comments from the public on the FECA’s enforcement procedures administered by the Commission.
- DATES:** Comments must be received on or before May 30, 2003. A public hearing will be held on Wednesday, June 11, 2003, from 10:00 a.m. to 5:00 p.m. at the Federal Election Commission, 999 E Street, NW, 9th floor Hearing Room, Washington, D.C. 20463. Commenters wishing to testify at the hearing must so indicate in their written or electronic comments.
- ADDRESSES:** All comments should be addressed to Susan L. Lebeaux, Assistant General Counsel, and must be submitted in either written or electronic form. Written comments should be sent to the Federal Election Commission, 999 E Street, NW, Washington, D.C. 20463.

24 Faxed comments should be sent to (202) 219-3923, with printed
25 copy follow-up to insure legibility. Electronic mail comments
26 should be sent to enfpro@fec.gov. Persons sending requests and
27 comments by electronic mail must include their full name,
28 electronic mail address and postal service address within the text of
29 the request or comments. If the electronic comments include an
30 attachment, the attachment must be in the Adobe Acrobat (.pdf) or
31 Microsoft Word (.doc) format. Commenters are strongly
32 encouraged to submit comments electronically to ensure timely
33 receipt and consideration. The Commission will make every effort
34 to post public comments on its Web site within ten business days
35 of the close of the comment period.

36 **FOR FURTHER**
37 **INFORMATION**
38 **CONTACT:**

Susan L. Lebeaux, Assistant General Counsel, Office of General
39 Counsel, or Ruth Heilizer, Staff Attorney, 999 E Street, NW,
40 Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

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43 **SUPPLEMENTARY**
44 **INFORMATION:**

45 **Background and Hearing Goals**
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47 The Commission is currently examining its enforcement practices and procedures.
48 The Commission is conducting this review to determine if issues have arisen that require
49 reexamination or adaptation of enforcement practices and procedures. The Commission
50 will use the comments received to determine whether internal directives or practices
51 should be adjusted, and/or whether rulemaking in this area is advised. The Commission
52 has made no decisions in this area, and may choose to take no action.

53 The Federal Election Act of 1971, as amended, 2 U.S.C. 431 et seq. (“FECA” or “the
54 Act”), grants to the Commission “exclusive jurisdiction with respect to civil
55 enforcement” of the provisions of the Act and Chapters 95 and 96 of Title 26. 2 U.S.C.
56 437c(b)(1). Enforcement matters come to the Commission through complaints from the
57 public, referrals from the Reports Analysis and Audit Divisions, referrals from other
58 agencies, sua sponte submissions, and through agency personnel. Enforcement matters
59 are processed, numbered as Matters Under Review (MURs), and assigned to enforcement
60 attorneys. The Commission investigates MURs pursuant to the compliance procedures
61 set forth at 11 CFR part 111, and various internal directives.

62 In the course of addressing its administrative obligations, the Commission
63 periodically reviews its programs. For example, the Commission recently reviewed its
64 Alternative Dispute Resolution and Audit procedures and is currently reviewing its
65 Reports Analysis Division procedures. The intent behind this Notice of Inquiry is to
66 examine the enforcement practices and procedures, many of which have been in place

67 since the Commission was founded; and to give the regulated community and
68 representatives of the public an opportunity to bring general enforcement policy concerns
69 before the Commission.

70 In inviting a constructive dialogue concerning its enforcement procedures, the
71 Commission asks those who submit comments to be cognizant of the fact that statutory
72 requirements, such as confidentiality and privacy mandates, may be implicated by certain
73 proposals. Thus, the Commission would appreciate if participants would specify in their
74 written remarks whether their proposals are compatible with applicable statutes or would
75 require legislative action.

76 The Commission would like to see addressed the issues that face counsel who
77 practice before the Commission, complainants and respondents who directly interact with
78 the FEC, witnesses, other third parties, and the general public. The Commission seeks
79 general comments on how the FEC's enforcement procedures have been helpful or
80 unhelpful in working through enforcement cases. The Commission is not interested in
81 complaints or compliments about individual FEC employees, but seeks input on
82 structural and policy issues. The Commission would also benefit from hearing about
83 practices and procedures used by other civil law enforcement agencies when acting in a
84 prosecutorial (i.e., non-adjudicative) capacity. For example, do such agencies provide
85 greater or lesser transparency? What opportunities exist for presenting or addressing
86 issues, evidence, or potential claims that might be the basis of a subsequent adjudicative
87 proceeding? The Commission would also be interested in any studies, surveys, research
88 or other empirical data that might support changes in its enforcement procedures.

89

90 **General Topics for Specific Comments**

91 The Commission welcomes input on any aspect of its enforcement procedures.

92 Among the topics on which the Commission will accept comment are those below.

93 However, the list is not seen as exhaustive and comments are encouraged on other issues
94 as well.

95 1. Designating Respondents in a Complaint

96 In addition to respondents named in the complaint, the Commission may designate
97 additional respondents from information ascertained in the normal course of carrying out
98 its supervisory responsibilities. 2 U.S.C. 437(a)(2); 11 CFR 111.8(a). As a simple
99 example, a complaint may allege that a campaign accepted an illegal contribution from
100 Corporation X, but name only the campaign as a respondent. The Commission may add
101 the alleged donor as a respondent. This has been done on a case-by-case basis. In some
102 cases, the Commission has been criticized for designating too many additional
103 respondents who may only have tangential interaction with the allegations in the
104 complaint. At other times, the Commission has been criticized for failing to give early
105 notice and an opportunity to address allegations that give rise to potential liability to
106 persons who may be generated as respondents at the reason to believe stage or after the
107 investigation is underway. The Commission seeks comments as to how the Commission
108 designates respondents. In what circumstances and at what time is it appropriate to
109 designate additional respondents? What criteria should the Commission apply?

110 2. Confidentiality advisement

111 Under 2 U.S.C. 437g(a)(12), an investigation shall not be made public without the
112 consent of the respondents. To ensure the confidentiality of investigations, including the

113 protection of respondents from premature disclosure, Commission staff advises witnesses
114 (usually orally, but sometimes in writing) of this statutory requirement. The Commission
115 has received comments in the past from respondents that this advisement has been
116 interpreted by some third party witnesses (such as vendors) as preventing them from
117 speaking to respondents and thus interfering with the respondent's own investigation of
118 the events in question. See generally MUR 4624 Coalition; Carol F. Lee, The Federal
119 Election Commission, The First Amendment, and Due Process, 89 Yale L.J. 1199, 1209-
120 1210 (1980). Should the Commission clarify its confidentiality advisement to address
121 this issue? If so, how? What, if any, language should be included in an oral or written
122 advisement to explicitly exclude communications with third party witnesses that are
123 initiated by respondents? Is the Commission obliged to inform witnesses that they can
124 speak to respondents? Is the Commission permitted to identify the respondents so as to
125 convey such permission? Is there a better way to ensure confidentiality?

126 3. Motions before the Commission

127 Both complainants' and respondents' attorneys have occasionally put forward
128 motions for the Commission to consider, including motions to dismiss and reconsider.
129 Although neither the FECA nor the Commission's regulations provide for consideration
130 of such motions, and the Administrative Procedure Act, 5 U.S.C. 551 et seq. ("APA")
131 does not require that agencies entertain such motions in nonadjudicative proceedings,¹ the
132 Commission has reviewed these motions on a case-by-case basis. The Commission
133 requests comments on whether procedures for consideration of these motions should be
134 formalized in a rulemaking. If yes, what motions should be considered and what should

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¹ Note, however, that unless otherwise prohibited by law, it is always within the agency's discretion to afford more procedure than that required by the APA. Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

135 the time frame be for consideration? Should there be a requirement that in order to
136 trigger the Commission's review, the motion must contain genuinely new material that
137 respondents had no opportunity to present previous to the subject findings? Should the
138 motions be considered even though this would extend the time that a MUR remains
139 active? Should parties be required to toll the statute of limitations for periods in which
140 motions are under consideration by the Commission?

141 4. Deposition and Document Production Practices

142 When Commission attorneys take a respondent's sworn testimony at an enforcement
143 deposition authorized by section 437d(a)(4), only the deponent and his or her counsel
144 may attend. The respondent has the right to review and sign the transcript, but normally a
145 respondent is not allowed to obtain a copy of, or take notes on, his or her own transcript
146 until the investigation is complete, i.e. after all depositions have been taken.

147 If the General Counsel decides to recommend that the Commission find probable
148 cause to believe that a respondent has violated the Act, the Act requires that the General
149 Counsel so notify the respondent, and provide a brief on the legal and factual issues in the
150 case. The Act entitles respondents to submit, within 15 days, a brief stating their position
151 on the factual and legal issues of the case. 2 U.S.C. 437g(a)(3). Although nothing in the
152 FECA requires that documents or deposition transcripts be provided to respondents at this
153 stage, respondents are generally provided, upon request, with the documents and
154 depositions of other respondents and third party witnesses that are referred to in the
155 General Counsel's brief. Respondents, however, may deem other information that the
156 Commission does not disclose as valuable to the respondents' defense. Note that this
157 practice can cause delay because, upon receiving these documents and depositions,

158 respondents' counsel often seek an extension of time since counsel must submit the reply
159 brief within 15 days of receiving the General Counsel's probable cause brief. Should
160 counsel have access to all documents prior to the probable cause stage?

161 The Commission's practice in providing depositions and documents to respondents
162 contrasts with the practice of some other civil law enforcement agencies during the
163 investigative stage of their proceedings, in which the only deposition transcript supplied
164 to the respondent is the respondent's own deposition. Further, during the pendency of an
165 investigation, section 6b of the APA, 5 U.S.C. 555(c), grants investigative agencies the
166 right to deny the request of a witness for copies of transcripts of his or her own testimony
167 based on "good cause," such as concerns that witnesses still to be examined might be
168 coached. Commercial Capital Corp. v. SEC, 360 F.2d 856, 858 (7th Cir. 1966). On the
169 other hand, it can be suggested the Commission's practice contrasts with procedural
170 rights afforded in litigation matters under the Federal Rules of Civil Procedure, which
171 give litigants the right to attend the depositions of all persons deposed in their case and
172 obtain copies of all deposition transcripts.

173 The Commission would like comments on whether and when the respective
174 depositions (respondent, other respondents, and witness) should be released and to whom
175 the depositions should be released. Should respondents be allowed full access to the
176 depositions of all other respondents, including those with the same and those with
177 competing interests, prior to the Commission's decision to sue in court? If so, should this
178 occur only at the probable cause stage or at some point during the investigation? If the
179 latter, when? Would full access to the deposition transcripts of all other respondents
180 increase the likelihood of a public disclosure in violation of 2 U.S.C. 437g(a)(12)? If full

181 access were to be granted prior to the probable cause stage, would it compromise the
182 effectiveness of the Commission's investigations? Should respondents be allowed to
183 attend depositions of other respondents, including those with the same and those with
184 competing interests? If so, in what circumstances? One change in practice to make
185 transcripts of a respondent's own testimony more readily available would be for the
186 Office of General Counsel routinely to allow deponent- respondents to procure
187 immediately a copy of their own transcript unless on a case-by-case basis the General
188 Counsel concludes (or the Commission concludes, on the recommendation of the General
189 Counsel) that it is necessary to the successful completion of the investigation to withhold
190 the transcript until completion of the investigation.

191 Similarly, the Commission seeks comments on whether all relevant documents that
192 would be required to be disclosed in civil litigation pursuant to Federal Rule of Civil
193 Procedure 26(a) should be provided with the probable cause brief. Would it be practical
194 to do so in cases involving voluminous records and multiple respondents? Who should
195 bear the costs of copying documents and ordering deposition transcripts from court
196 reporters? Would providing all such materials and allowing time for their review further
197 delay the submission of responsive briefs? Would doing so compromise investigations?
198 Should this be done on a case-by-case basis? Would some standard other than Rule 26(a)
199 of the Federal Rules of Civil Procedure provide a more workable standard?

200 The Commission seeks comments on these or other approaches to balancing its need to
201 conduct effective investigations with the interests of respondents seeking to support their
202 positions before the Commission.

203

203 5. Extensions of Time

204 Under what circumstances, if any, should extensions of time be granted to respondents
205 to respond to the probable cause brief? Are there particular situations in which
206 extensions of time should be denied? If extensions are granted, should they be contingent
207 on respondents' agreements to toll the statute of limitations for the extension period?

208 6. Appearance Before the Commission

209 Pursuant to the FECA, Respondents are permitted to present their position through
210 written submissions in response to the complaint and the General Counsel's probable
211 cause brief, and may also do so at the reason-to-believe stage pursuant to Commission
212 practice. Neither the FECA nor the APA specifically provides that respondents also be
213 permitted the opportunity to appear and present their positions in person, and the
214 Commission has no procedure allowing such appearances in the context of MURs.² The
215 Commission seeks comment on whether respondents should be entitled to appear before
216 the Commission, either pro se or through counsel, at the probable cause stage and on
217 motions to quash subpoenas. If so, should appearances be limited to certain types of
218 hearings and cases? If so, what should be the limiting criteria? What should be the scope
219 and form of the personal appearance? Should the Commission be permitted to draw an
220 adverse inference if respondents decline to answer certain questions or do not fully
221 answer them? Allowing counsel to appear would add an additional procedural right, but
222 would also lengthen the enforcement process. How would this additional step be
223 balanced with the timeliness of completing a MUR? Is the Commission justified in
224 prolonging the process? Would this complicate the process or add unnecessary time

² However, the Office of General Counsel, which may be recommending action adverse to the respondent, is present to answer questions of law and fact for the Commission.

225 constraints? What would respondents achieve that they are not already afforded by the
226 statutory process? Would affording the opportunity to appear in person before the
227 Commission at the probable cause stage diminish respondents' interest in conciliating at
228 an earlier stage? Would it place respondents with limited resources, or those located far
229 from Washington, at a comparative disadvantage, and if so, is this a valid reason to
230 restrict personal appearances for all respondents? In cases involving multiple
231 respondents, how would the Commission protect the confidentiality of other respondents
232 also wishing to appear? The Commission would also benefit from hearing about whether
233 other civil law enforcement agencies provide for personal appearances before agency
234 decision-makers.

235 7. Releasing Documents or Filing Suit Before an Election

236 The Commission's practice is to release to the public closed enforcement matters in
237 the normal course of business, even if this occurs immediately prior to, or following, an
238 election that may involve one of the respondents in the matter. Upon resolution of an
239 enforcement matter, the Commission could not deny a FOIA request for disclosure of
240 conciliation agreements or other dispositions simply because of the proximity of an
241 upcoming election. Furthermore, the FECA provides for expedited conciliation
242 immediately prior to an election, which allows voters to consider a Commission
243 determination that a campaign has not violated the FECA as alleged in a complaint, or
244 alternatively, that a campaign has accepted responsibility for an election law violation.
245 2 U.S.C. 437g(a)(4)(A)(ii).

246 On the other hand, the Commission is sensitive to the fact that releasing documents or
247 filing suit before an election, even when it occurs in the normal course of business, may

248 influence election results. The Commission seeks comment on whether consideration of
249 an upcoming election should or should not be considered when releasing documents. In
250 particular, should the Commission adopt a policy of not releasing outcomes of cases for
251 some period immediately preceding an election? If so, should that policy apply only to
252 violations from a previous cycle? Would such a policy invite respondents to employ
253 dilatory tactics for the apparent purpose of keeping information confidential until the
254 election is over? Should the same considerations apply to when the Commission has
255 completed the administrative process and is prepared to file an enforcement action in
256 federal court? What if the statute of limitations is due to run before or shortly after the
257 election?

258 8. Public Release of Directives and Guidelines

259 In an effort to assure greater uniformity in sentencing, the Federal courts in the 1980s
260 adopted sentencing guidelines. Should the Commission make public its penalty
261 guidelines in a similar manner? Do other civil law enforcement agencies do so? If the
262 Commission publishes such guidelines, would they be applicable without exception or
263 with only a few specified exceptions? Should the Commission give up its discretion and
264 flexibility to depart from its guidelines in instances when it feels that fairness or public
265 policy requires another result? Would such guidelines minimize or even eliminate
266 negotiations over what constitutes an appropriate penalty? Are there other directives that
267 should be publicly available, including those pertaining to enforcement procedures?
268 Should more procedural information be available via the Web site and other publications?
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269 9. Timeliness

270 Though the Commission in recent years has reduced its case backlog, it has still been
271 criticized in some quarters for lack of timeliness. Are there specific practices or
272 procedures that the Commission could implement, consistent with the FECA and the
273 APA, that could reduce the time it takes to process MURs? Does the agency have too
274 few staff assigned to handle its workload? Can the Commission afford respondents with
275 more procedural rights without sacrificing its goal of conducting timely investigations?
276 Should respondents be afforded more process than is required by the FECA or the APA
277 when the likely result will be longer proceedings? How should a respondent's timeliness
278 in responding to discovery requests and subpoenas and orders, or the lack thereof, be
279 weighed in the balance? Has any particular stage of the enforcement procedure been a
280 source of timeliness problems?

281 10. Prioritization

282 The Commission has adopted an Enforcement Priority System to focus resources on
283 cases that most warrant enforcement action. Should the Commission give lesser or
284 greater priority to cases that require complex investigations and/or raise issues where
285 there is little consensus about the application of the law—such as coordination, qualified
286 non-profit corporation status, and express advocacy/issue ad analysis? Since cases
287 involving these issues often involve large amounts of spending, and hence large potential
288 violations, should these be the cases given high priority?

289 11. Memorandum of Understanding with the Department of Justice

290 The Commission for years has divided responsibility for the enforcement of FECA
291 with the Department of Justice. A 1977 Memorandum of Understanding has dictated that

292 the Department of Justice should handle “significant and substantial knowing and
293 willful” violations and the Commission should handle the rest. Is this still a valid
294 demarcation of responsibility? Does anything in BCRA suggest a different approach is
295 appropriate?

296 12. Dealing with 3-3 votes at “reason to believe” stage

297 On some occasions the six Commissioners split 3-3 on whether to find “reason to
298 believe” and hence whether to conduct an investigation of the alleged violations in a
299 complaint. Should the Commission adopt a policy of proceeding with an investigation in
300 such circumstances where the Office of General Counsel has so recommended? Would a
301 legislative change be required to permit an investigation in such circumstances?

302 13. Other Issues

303 As noted above, the Commission welcomes comments on other issues relevant to the
304 processing of MURs.

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Ellen L. Weintraub
Chair
Federal Election Commission

DATED _____