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Washington, D.C. 20463

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2007 FEB 27 A 9:52

February 27, 2007

AGENDA ITEM
For Meeting of: 03-01-07

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
Acting General Counsel

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Associate General Counsel

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Assistant General Counsel

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Attorney

SUBJECT: Draft Proposed Policy Statement Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process

Please find attached a draft Proposed Policy Statement Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process. The Office of General Counsel has been asked to submit this document to the Commission Secretary in anticipation of the Open Session on March 1, 2007.

Attachment

SUBMITTED LATE

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11 CFR Part 111

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[NOTICE 2007-]

**STATEMENT OF POLICY REGARDING
COMMISSION ACTION IN MATTERS AT THE
INITIAL STAGE IN THE ENFORCEMENT PROCESS**

AGENCY: Federal Election Commission

ACTION: Statement of Policy

SUMMARY: The Federal Election Commission (“Commission”) is issuing a Policy Statement to clarify the various ways that the Commission addresses Matters Under Review (“MURs”) at the initial stage of enforcement proceedings. The Commission may take any of the four following actions at this stage: (1) find “reason to believe,” (2) “dismiss,” (3) “dismiss with admonishment,” and (4) find “no reason to believe.”

EFFECTIVE

DATE: [Insert Date of Publication in Federal Register]

**FOR FURTHER
INFORMATION**

CONTACT: Mark Shonkwiler, Assistant General Counsel, or Lynn Tran,
Attorney, Enforcement Division, Federal Election Commission,
999 E Street N.W., Washington, D.C. 20463, (202) 694-1650 or
(800) 424-9530.

1 **SUPPLEMENTARY**
2 **INFORMATION:**
3

4 The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.*
5 (“FECA” or “the Act”), grants the Commission “exclusive jurisdiction with respect to
6 civil enforcement” of the provisions of the Act and Chapters 95 and 96 of Title 26.
7 2 U.S.C. § 437c(b)(1). Enforcement matters come to the Commission through
8 complaints from the public; information ascertained in the ordinary course of the
9 Commission’s supervisory responsibilities, including referrals from the Commission’s
10 Reports Analysis and Audit Divisions; referrals from other government agencies; and
11 self-reported submissions.

12 The FECA provides that “upon receiving a complaint” or upon the basis of
13 information ascertained in the course of carrying out its supervisory responsibilities, the
14 Commission “shall make an investigation of such alleged violation” of the Act where the
15 Commission, with the vote of four members, determines that there is “reason to believe
16 that a person has committed, or is about to commit” a violation of the Act. 2 U.S.C.
17 § 437g(a)(2); *see also* 11 C.F.R. § 110.10(f). Commission “reason to believe” findings
18 have caused confusion in the past because they have been viewed as definitive
19 determinations that a respondent violated the Act. In fact, “reason to believe” findings
20 indicate only that the Commission found sufficient legal justification to open an
21 investigation to determine whether a violation of the Act has occurred. Indeed, the
22 Commission has recommended that Congress modify the FECA to clarify this point. *See*
23 Legislative Recommendations in 2003 and 2004 FEC Annual Reports. Other kinds of
24 dispositions at this preliminary stage would also benefit from clarification to ensure

1 consistency and promote understanding of the Commission’s reasons for taking action.
2 Thus, the Commission is issuing this policy statement to assist complainants,
3 respondents, and the public in understanding the Commission’s findings at this stage of
4 the enforcement process.

5 Generally speaking, at the initial stage in the enforcement process, the
6 Commission will take one of the following actions with respect to a MUR: (1) find
7 “reason to believe” a respondent has violated the Act; (2) dismiss the matter; (3) dismiss
8 the matter with admonishment; or (4) find “no reason to believe” a respondent has
9 violated the Act. This policy statement is intended to clarify the circumstances under
10 which the Commission uses each of these dispositions.

11 **A. “Reason to believe”**

12 The Act requires that the Commission find “reason to believe that a person has
13 committed, or is about to commit, a violation” of the Act as a predicate to opening an
14 investigation into the alleged violation. 2 U.S.C. § 437g(a)(2). The Commission will
15 find “reason to believe” in cases where the available evidence in the matter is at least
16 sufficient to warrant conducting an investigation, and where the seriousness of the
17 alleged violation warrants either further investigation or immediate conciliation. A
18 “reason to believe” finding will always be followed by either an investigation or pre-
19 probable cause conciliation. For example:

- 20 • A “reason to believe” finding followed by an investigation would be appropriate
21 when a complaint credibly alleges that a significant violation may have occurred,
22 but further investigation is required to determine whether a violation in fact
23 occurred and, if so, its exact scope.

1 • A “reason to believe” finding followed by conciliation would be appropriate when
2 the Commission is certain that a violation has occurred and the seriousness of the
3 violation warrants conciliation.

4 A “reason to believe” finding by itself does not establish that the law has been
5 violated. When the Commission later accepts a conciliation agreement with a
6 respondent, the conciliation agreement speaks to the Commission’s ultimate conclusions.
7 When the Commission does not enter into a conciliation agreement with a respondent,
8 and does not file suit, a Statement of Reasons, a Factual and Legal Analysis, or a General
9 Counsel’s Report may provide further explanation of the Commission’s conclusions.

10 The Commission has previously used the finding “reason to believe, but take no
11 further action” in cases where the Commission finds that there is a basis for investigating
12 the matter or attempting conciliation, but the Commission declines to proceed for
13 prudential reasons. As discussed below, the Commission believes that resolving these
14 matters through dismissal or dismissal with admonishment more clearly conveys the
15 Commission’s intentions and avoids possible confusion about the meaning of a reason to
16 believe finding.

17 **B. Dismissal and Dismissal with Admonishment**

18 Under *Heckler v. Chaney*, 470 U.S. 821 (1985), the Commission has broad
19 discretion to determine how to proceed with respect to complaints or referrals. The
20 Commission has exercised its prosecutorial discretion under *Heckler* to dismiss matters
21 that do not merit the additional expenditure of Commission resources.¹ As with other

¹ The FECA and Commission regulations also recognize the Commission’s authority to dismiss enforcement matters. See 2 U.S.C. § 437g(a)(1); 11 C.F.R. §§ 111.6(b) and 111.7(b).

1 actions taken by the Commission, dismissal of a matter requires the vote of at least four
2 Commissioners.

3 Pursuant to the exercise of its prosecutorial discretion, the Commission will
4 dismiss a matter when the matter does not merit further use of Commission resources,
5 due to factors such as the small amount or significance of the alleged violation, the
6 vagueness or weakness of the evidence, or likely difficulties with an investigation, or
7 when the Commission lacks majority support for proceeding with a matter for other
8 reasons. For example, a dismissal would be appropriate when:

- 9 • The seriousness of the alleged conduct is not sufficient to justify the likely cost
10 and difficulty of an investigation to determine whether a violation in fact
11 occurred; or
- 12 • The evidence is sufficient to support a “reason to believe” finding, but the
13 violation is minor.

14 The Commission may also dismiss when, based on the complaint, response, and
15 publicly available information, the Commission concludes that a violation of the Act did
16 or very probably did occur, but the size or significance of the apparent violation is not
17 sufficient to warrant further pursuit by the Commission. In this latter circumstance, the
18 Commission will send a letter admonishing the respondent. For example, a dismissal
19 with admonishment would be appropriate when:

- 20 • A respondent admits to a violation, but the amount of the violation is not
21 sufficient to warrant any monetary penalty; or
- 22 • A complaint convincingly alleges a violation, but the significance of the violation
23 is not sufficient to warrant further pursuit by the Commission.

1 **C. “No reason to believe”**

2 The Commission will make a determination of “no reason to believe” a violation
3 has occurred when the available information does not provide a basis for proceeding with
4 the matter. The Commission finds “no reason to believe” when the complaint, any
5 response filed by the respondent, and any publicly available information, when taken
6 together, fail to give rise to a reasonable inference that a violation has occurred, or even if
7 the allegations were true, would not constitute a violation of the law. For example, a “no
8 reason to believe” finding would be appropriate when:

- 9 • A violation has been alleged, but the respondent’s response or other evidence
10 convincingly demonstrates that no violation has occurred;
- 11 • A complaint alleges a violation but is either not credible or is so vague that an
12 investigation would be effectively impossible; or
- 13 • A complaint fails to describe a violation of the Act.

14 If the Commission, with the vote of at least four Commissioners, finds that there
15 is “no reason to believe” a violation has occurred or is about to occur with respect to the
16 allegations in the complaint, the Commission will close the file and respondents and the
17 complainant will be notified.

18 **D. Conclusion**

19 This policy enunciates and describes the Commission’s standards for actions at
20 the point of determining whether or not to open an investigation or to enter into
21 conciliation with respondents prior to a finding of probable cause to believe. The policy
22 does not confer any rights on any person and does not in any way limit the right of the
23 Commission to evaluate every case individually on its own facts and circumstances.

1 This notice represents a general statement of policy announcing the general
2 course of action that the Commission intends to follow. This policy statement does not
3 constitute an agency regulation requiring notice of proposed rulemaking, opportunities
4 for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the
5 Administrative Procedures Act ("APA"). As such, it does not bind the Commission or
6 any member of the general public. The provisions of the Regulatory Flexibility Act, 5
7 U.S.C. 605(b), which apply when notice and comment are required by the APA or
8 another statute, are not applicable.