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MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan
Acting General Counsel

BY: Rhonda J. Vosdingh *RJ*
Associate General Counsel

Mark D. Shonkwiler *MS*
Assistant General Counsel

April J. Sands *AS*
Attorney

SUBJECT: Policy Regarding Self-Reporting of Campaign
Finance Violations (*Sua Sponte* Submissions)

AGENDA ITEM
For Meeting of: 03-22-07

SUBMITTED LATE

Please find attached the proposed Policy Regarding Self-Reporting of Campaign Finance Violations (*Sua Sponte* Submissions). The Office of General Counsel submits this document to the Commission Secretary in anticipation of the Open Session on March 22, 2007.

Attachment

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11 CFR Part 111

[NOTICE 2007-]

**POLICY REGARDING SELF-REPORTING
OF CAMPAIGN FINANCE VIOLATIONS
(SUA SPONTE SUBMISSIONS)**

AGENCY : Federal Election Commission

ACTION: Statement of Policy

SUMMARY: In order to encourage the self-reporting of violations about which the Commission would not otherwise have learned, the Commission will generally offer penalties between 25% and 75% lower than the Commission would otherwise have sought in identical matters arising by other means. The Commission will also use a new expedited procedure through which the Commission may allow individuals and organizations that self-report violations and that make a complete report of their internal investigation to proceed directly into conciliation prior to the Commission determining whether their conduct may have violated statutes or regulations within its jurisdiction. This policy also addresses various issues that can arise in connection with parallel criminal, administrative or civil proceedings.

DATE: [INSERT PUBLICATION DATE]

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

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

4 **I. Goals and Scope of the Policy**

5 The Commission periodically receives submissions from persons who self-report
6 statutory or regulatory violations of which the Commission had no prior knowledge. The
7 Commission considers such self-reports (which also are referred to as *sua sponte* submissions) as
8 information ascertained in the normal course of carrying out its supervisory responsibilities
9 pursuant to 2 U.S.C. § 437g(a)(2), and may investigate if it determines there is reason to believe
10 a violation has occurred. The Commission also investigates complaints reporting the potentially
11 illegal conduct of another, submitted pursuant to 2 U.S.C. § 437g(a)(1), but which also, by
12 implication, provide a basis for investigating the complainant itself.¹ As a general proposition,
13 self-reported matters, when accompanied by full cooperation, will be resolved more quickly and
14 on more favorable terms than identical matters arising by other means (e.g., those arising via
15 external complaints, referrals from other government agencies, or referrals from the
16 Commission's Audit or Reports Analysis Divisions).²

17 The Commission recently has seen an increase in self-reported violations, which may be
18 attributable, at least in part, to greater attention being placed on compliance programs for areas
19 of potential organizational liability, and recognition that addressing a problem through
20 self-auditing and self-reporting may help minimize reputational harm. The increase in the

¹ If a person who self-reports a violation of the FECA also makes specific allegations as to other persons not joining in the submission, and particularly where the person making the submission seeks to assign primary responsibility for the violations to another person (including an organization's former officers or employees), the Commission, acting through its Office of General Counsel, may advise the self-reporting person that a portion of the relevant materials should be re-submitted as a complaint to which other persons would be allowed to respond prior to any findings by the Commission.

² When violations are found, FECA requires the Commission to attempt to correct or prevent violations through conciliation agreements before suit may be filed in federal district court.

1 number of self-reported matters has highlighted the need to increase the transparency of
2 Commission policies and procedures. Moreover, the Commission seeks to provide appropriate
3 incentives for this demonstration of cooperation and responsibility.

4 On December 8, 2006, the Commission published a proposed policy statement on self-
5 reporting of violations. *See Proposed Policy Regarding Self-Reporting of Campaign Finance*
6 *Violations (Sua Sponte Submissions)*, 71 FR 71090 (December 8, 2006). The comment period
7 ended on January 29, 2007. Two comments were received. One of the comments supported the
8 proposed policy and suggested some minor revisions. The other comment opposed the proposed
9 policy.

10 This policy provides an overview of the factors that influence the Commission's handling
11 and disposition of self-reported matters. It should be noted that while cooperation in general,
12 and self-reporting in particular, will be considered by the Commission as mitigating factors, they
13 do not excuse a violation of the Act or end the enforcement process. Also, this policy does not
14 confer any rights on any person and does not in any way limit the right of the Commission to
15 evaluate every case individually on its own facts and circumstances.³

16 **II. Self-Reporting of FECA Violations**

17 Self-reporting of violations typically allows respondents to resolve their civil liability in a
18 manner which has the potential to: (1) reduce the investigative burden on both the Commission
19 and themselves; (2) demonstrate their acceptance of organizational or personal responsibility and
20 commitment to internal compliance; and (3) conclude their involvement in the Commission's
21 enforcement process on an expedited basis. As a result, a person who brings to the
22 Commission's attention violations of the FECA and Commission regulations and who cooperates

³ Some violations, for instance, are subject to a mandatory minimum penalty prescribed by statute. *See* 2 U.S.C. § 437g(a)(6)(C).

1 with any resulting investigation will also generally receive appropriate consideration in the terms
2 of an eventual conciliation agreement. For example, the Commission may do one or more of the
3 following:

- 4 • Take no action against particular respondents;
- 5
- 6 • Offer a significantly lower penalty than what the Commission otherwise
7 would have sought in a complaint-generated matter involving similar
8 circumstances or, where appropriate, no civil penalty;
- 9
- 10 • Offer conciliation before a finding of probable cause to believe a violation
11 occurred, and in certain cases proceed directly to conciliation without the
12 Commission first finding reason to believe that a violation occurred;
- 13
- 14 • Refrain from making a formal finding that a violation was knowing and
15 willful, even where the available information would otherwise support such a
16 finding;
- 17
- 18 • Proceed only as to an organization rather than as to various individual agents
19 or, where appropriate, proceed only as to individuals rather than
20 organizational respondents;
- 21
- 22 • Include language in the conciliation agreement that indicates the level of
23 cooperation provided by respondents and the remedial action taken.
- 24

25 Additionally, in cases where the submission includes privileged or sensitive information,
26 the Commission may work with the submitter to protect privileged information from public
27 disclosure while still allowing the Commission to verify the sufficiency of the submission.

28 **III. Factors Considered in Self-Reported Matters**

29 The Commission may take into account various factors in considering how to proceed
30 regarding self-reported violations. In general, more expedited processing and a more favorable
31 outcome will result when the self-reporting party can show that upon discovery of the potential
32 violations, there was an immediate end to the activity giving rise to the violation(s); the
33 respondent made a timely and complete disclosure to the Commission and fully cooperated in the
34 disposition of the matter; and the respondent implemented appropriate and timely corrective

1 measures, including internal safeguards necessary to prevent any recurrence. Further detail as to
2 these factors is supplied below.

3 Nature of the Violation

4 **(1) The type of violation:** whether the violation was knowing and willful, or resulted
5 from reckless disregard for legal requirements or deliberate indifference to indicia of
6 wrongful conduct; negligent; an inadvertent mistake; or based on the advice of counsel;⁴

7 **(2) The magnitude of the violation:** whether the violation resulted from a one-time
8 event or an ongoing pattern of conduct repeated over an extended period of time (and
9 whether there was a history of similar conduct); how many people were involved in or
10 were aware of the violation and the relative level of authority of these people within the
11 organization; whether individuals were coerced into participating in the violation; the
12 amount of money involved either in terms of absolute dollar amount or in terms of the
13 percentage of an entity's activity; and the impact the violation may have had on any
14 federal election;

15 **(3) The origin of the violation:** whether the conduct was intended to advance the
16 organization's interests or to defraud the organization for the personal gain of a particular
17 individual; whether there were compliance procedures in place to prevent the type of
18 violation now uncovered and, if so, why those procedures failed to stop or deter the
19 wrongful conduct; and whether the persons with knowledge of the violation were high-
20 level officials in the organization.

⁴ A respondent seeking to defend conduct based on advice of counsel may not simultaneously withhold documentary or other evidence supporting that assertion based on the attorney-client privilege.

Extent of Corrective Action and New Self-Governance Measures

1
2 (4) **Investigative and corrective actions:** whether the violation immediately ceased
3 upon its discovery; how long it took after discovery of the violation to take appropriate
4 corrective measures, including disciplinary action against persons responsible for any
5 misconduct; whether there was a thorough review of the nature, extent, origins, and
6 consequences of the conduct and related behavior; whether the respondent expeditiously
7 corrected and clarified the public record by making appropriate and timely disclosures as
8 to the source and recipients of any funds involved in a violation; whether a federal
9 political committee promptly made any necessary refunds of excessive or prohibited
10 contributions; and whether an organization or individual respondent waived its claim to
11 refunds of excessive or prohibited contributions and instructed recipients to disgorge such
12 funds to the U.S. Treasury;

13 (5) **Post-discovery compliance measures:** whether there are assurances that the
14 conduct is unlikely to recur; whether the respondent has adopted and ensured
15 enforcement of more effective internal controls and procedures designed to prevent a
16 recurrence of the violation; and whether the respondent provided the Commission with
17 sufficient information for it to evaluate the measures taken to correct the situation and
18 ensure that the conduct does not recur.

19 Disclosure and Cooperation

20 (6) **Full disclosure of the violation to the Commission:** whether steps were taken
21 upon learning of the violation; whether the disclosure was voluntary or made in
22 recognition that the violation had been or was about to be discovered, or in recognition
23 that a complaint was filed, or was about to be filed, by someone else; and whether a

1 comprehensive and detailed disclosure of the results of its internal review was provided
2 to the Commission in a timely fashion;

3 **(7) Full cooperation with the Commission:** whether the respondent promptly made
4 relevant records and witnesses available to the Commission, and made all reasonable
5 efforts to secure the cooperation of relevant employees, volunteers, vendors, donors and
6 other staff without requiring compulsory process; whether the respondent agreed to waive
7 or toll the statute of limitations for activity that previously had been concealed or not
8 disclosed in a timely fashion.

9 The Commission recognizes that all of the above-listed factors will not be relevant in
10 every instance of self-reporting of potential FECA violations, nor is the Commission required to
11 take all such factors into account. In addition, these factors should not be viewed as an
12 exhaustive list.

13 **IV. Reduction in Penalties for Self-Reporting Matters**

14 The Commission will generally reduce opening civil penalty offers by between 25% and
15 75% compared with identical matters arising from a complaint or by other means. The amount
16 of the reduction depends on the facts and circumstances of a particular case. The Commission
17 will consider the factors set forth above.

18 Absent unusual circumstances, the Commission will grant a civil penalty reduction of
19 50% to respondents who meet the following criteria:

- 20 • Respondents alert the Commission to potential violations before the violation had
21 been or was about to be discovered by any outside party, including the
22 Commission;
- 23 • The violation immediately ceased and was promptly reported to the Commission
24 upon discovery;

- 1 • Respondents take appropriate and prompt corrective action(s) (e.g., changes to
2 internal procedures to prevent a recurrence of the violation; increased training;
3 disciplinary action where appropriate);
- 4 • Respondents amend reports or disclosures to correct past errors, if applicable;
- 5 • Any appropriate refunds, transfers, and disgorgements are made and/or waived;
6 and
- 7 • Respondents fully cooperate with the Commission in ensuring that the *sua sponte*
8 submission is complete and accurate.

9
10 In addition, the Commission may grant a civil penalty reduction of up to 75% to
11 respondents for violations in *sua sponte* submissions based on other factors such as submissions
12 that were uncovered as a result of independent experts that were hired by respondents to conduct
13 a thorough review, investigation or audit, or an equally comprehensive internal review,
14 investigation or audit. In order to receive this reduction, respondents must also meet the above
15 criteria for a 50% reduction and provide the Commission with all documentation of the experts'
16 review, investigation, or audit.⁵

17 The required scope of the review, investigation or audit will depend on the
18 circumstances. For example, if an organization discovers that an employee, stockholder or
19 member may have reimbursed political contributions with organization funds, the Commission
20 would consider a thorough review to include: identification of all political contributions made by
21 the suspect employee subsequent to and for at least three years prior to the suspected
22 reimbursement (and extending further if additional suspect contributions are found); a review of
23 contributions by anyone associated with the organization (including, but not limited to, relatives
24 and subordinates) corresponding in time or recipient to the suspected reimbursed contributions; a
25 review of the organization's compensation (especially bonus) and expense reimbursement

1 policies and practices for the relevant periods to identify potential contribution reimbursements.
2 Similarly, if an organization discovers it has misstated financial information on its reports, the
3 Commission would consider a through review to include: an audit reconciling bank and internal
4 financial records with FEC reports for the period in which the error was discovered, any
5 subsequent reporting periods, and prior reporting periods for at least a year prior to the error (and
6 extending further if additional errors are found); a review addressing internal controls and
7 reporting procedures and identifying weaknesses contributing to the errors and remedies for
8 those weaknesses.

9 The Commission will be the sole arbiter of whether the facts of each case warrant a
10 particular reduction in the penalty. The Commission will generally not give a respondent the
11 benefit of this policy if the respondent is the subject of a criminal or other government
12 investigation. In considering appropriate penalties, the Commission will also consider the
13 presence of aggravating factors, such as knowing and willful conduct or involvement by senior
14 officials of an entity.

15 **V. Fast-Track Resolution**

16 The Commission will generally not make a reason-to-believe finding or open a formal
17 investigation for respondents that self-report violations, if: (1) all potential respondents in a
18 matter have joined in a self-reporting submission that acknowledges their respective violations of
19 the FECA; (2) those violations do not appear to be knowing and willful; (3) the submission is
20 substantially complete and reasonably addresses the significant questions or issues related to the
21 violation; and (4) the factual and legal issues are reasonably clear. Accordingly, the Commission
22 is modifying its current practice to allow for an expedited Fast-Track Resolution (“FTR”) for a
23

⁵ As discussed above, the Commission will, where appropriate, work with the submitter to protect privileged information from public disclosure.

1 limited number of matters involving self-reported violations. This procedure is available at the
2 Commission's discretion, but may be requested by respondents.

3 Respondents eligible for the FTR process will meet with the Office of General Counsel to
4 negotiate a proposed conciliation agreement before the Commission makes any formal findings
5 in the matter. Although the Commission is always free to reject or seek modifications to a
6 proposed conciliation agreement, it is expected that this process will allow for more expedited
7 processing of certain types of violations where factual and legal issues are reasonably clear. It
8 also will allow respondents to resolve certain matters short of the Commission finding that there
9 is reason to believe that a violation has occurred. Examples of matters that might be eligible for
10 such treatment include:

- 11 • Matters in which an individual contributor discovers that he or she
12 inadvertently violated the individual aggregate election cycle
13 contribution limit contained in 2 U.S.C. § 441a(a)(3);
- 14 • Matters in which a political committee seeks to disclose and correct
15 relatively straightforward reporting violations;
- 16 • Matters in which a contributor and a political committee jointly seek
17 to resolve their liability for a simple and inadvertent excessive or
18 prohibited contribution; and
- 19 • Matters in which the initial self-reporting submission by the respondents
20 is sufficiently thorough that only very limited, if any, follow-up by the
21 Office of the General Counsel is necessary to complete the factual
22 record.

24 **V. Parallel Proceedings**

25
26 The Commission recognizes that persons self-reporting to the Commission may face
27 special concerns in connection with parallel criminal investigations, State administrative
28 proceedings, and/or civil litigation. The Commission expects that persons who self-report to the
29 Commission will inform the Commission of any existing parallel proceedings. The Commission

1 encourages persons who self-report to the Commission also to self-report related violations to
2 any law enforcement agency with jurisdiction over the activity. This will assist the Commission,
3 where appropriate and possible, in working with other federal, state, and local agencies to
4 facilitate a global and/or contemporaneous resolution of related violations by a self-reporting
5 person. The possibility of such a resolution is enhanced when the self-reporting person
6 expresses a willingness to engage other government agencies that may have jurisdiction over the
7 conduct and to cooperate with joint discovery and disclosure of facts and settlement positions
8 with respect to the different agencies.

9 In situations where contemporaneous resolution of parallel matters is not feasible, the
10 Commission will consider whether terms contained in a conciliation agreement with the
11 Commission may affect potential liability the same respondent realistically faces from another
12 agency. In appropriate cases, where there has been self-reporting and full cooperation, the
13 Commission may agree to enter into conciliation without requiring respondents to admit that
14 their conduct was knowing and willful, even where there is evidence that may be viewed as
15 supporting this conclusion. The Commission has followed this practice in several self-reported
16 matters where the organizational respondents promptly self-reported and took comprehensive
17 and immediate corrective action that included the dismissal of all individual corporate officers
18 whose actions formed the basis for the organization's potential knowing and willful violation.

19 The Commission has the statutory authority to refer knowing and willful violations of the
20 FECA to the Department of Justice for potential criminal prosecution, 2 U.S.C. § 437g(a)(5)(C),
21 and to report information regarding violations of law not within its jurisdiction to appropriate law
22 enforcement authorities. 2 U.S.C. § 437d(a)(9). The Commission will take into consideration the
23 fact of self-reporting in deciding whether to refer a matter. However, the Commission will not

1 negotiate whether it refers, reports, or otherwise discusses information with other law
2 enforcement agencies. Although the Commission cannot disclose information regarding an
3 investigation to the public, it can and does share information on a confidential basis with other
4 law enforcement agencies.

5 **VI. Conclusion**

6 The Commission seeks to encourage the self-reporting of violations. To that end, the
7 Commission has adopted this policy that explains that *sua sponte* submissions will, in general,
8 receive more expedited processing and more favorable outcomes than identical matters arising
9 by other means.

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

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21 _____
22 Robert D. Lenhard
23 Chairman
24 Federal Election Commission

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26 DATED: _____
27 BILLING CODE: 6715-01-U
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