



FEDERAL ELECTION COMMISSION  
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June 24, 2009

**MEMORANDUM**

TO: The Commission

FROM: Vice Chairman Matthew S. Petersen *MSP*  
Commissioner Caroline C. Hunter *CH*  
Commissioner Donald F. McGahn II *DM*

Subject: Proposed Rule of Agency Procedures: Notice to Respondents in Non-Complaint Generated Matters

**AGENDA ITEM**  
For Meeting of: 06-25-09

**SUBMITTED LATE**

Attached is a proposed rule of agency procedure. We have asked to place this draft on the agenda for June 25, 2009.

Attachment

**FEDERAL ELECTION COMMISSION**

**11 CFR Part 111**

**[NOTICE 2009-XX]**

**Procedural Rule For Notice to Respondents In Non-Complaint  
Generated Matters**

**AGENCY:** Federal Election Commission

**ACTION:** Rule of Agency Procedure

**SUMMARY:** The Federal Election Commission (“Commission”) is establishing a new rule of agency procedure that will provide respondents in certain enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (“FECA”) with notice of the basic charges, including the factual and legal basis therefore, and an opportunity to respond thereto, prior to the Commission’s consideration of whether it has reason to believe that a violation of the Act has been or is about to be committed by such respondent. This program will provide respondents in internally generated matters similar due process protections as respondents in complaint-generated matters. Further information about the procedures for providing notice to respondents in internally generated matters is provided in the supplementary information that follows.

**DATES:** Effective [15 days from the date of publication in the Federal Register].

**FOR FURTHER  
INFORMATION  
CONTACT:**

\_\_\_\_\_, Assistant General Counsel, or \_\_\_\_\_,  
Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-  
1650 or (800) 424-9530.

**SUPPLEMENTARY  
INFORMATION:**

## **I. BACKGROUND**

On June 11, 2003, the Commission held a hearing concerning its enforcement procedures. The Commission received comments from the public, many of which argued for increased transparency in Commission procedures and expanded opportunities to contest allegations. Comments and statements for the record are available at: <http://www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml>. In response to issues raised at the hearing, the Commission issued new rules of agency procedure. See Statement of Policy Regarding Deposition Transcripts in Nonpublic Investigations, 68 Fed. Reg. 50688 (Aug. 22, 2003); Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 1 (Jan. 3, 2005).

On December 8, 2008, the Commission issued a notice of public hearing and request for public comment on the compliance and enforcement aspects of its agency procedures. Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74495 (Dec. 8, 2008). On January 14-15, 2009, the Commission received comment and testimony. The comments received by the Commission, as well as the transcript of the hearing are available at: <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>.

The Commission received numerous comments regarding notice to respondents in internally generated matters. One commentator opined that the Commission should never find reason to believe that a violation occurred without first giving the respondent the opportunity to respond to the underlying complaint. Another commenter recommended instituting a program whereby potential respondents in internally generated matters are given a written summary of the matter and an opportunity to respond in writing before the Commission makes an RTB finding, in order to put respondents on notice about the potential outcome of the proceeding. Other commenters urged the Commission to adopt procedures to notify committees of any internal referral, and to implement procedures to provide respondents with the opportunity to review and respond to any adverse course of action recommended by the Commission's Office of General Counsel before the Commission considers such recommendation.

## **II. PROCEDURES FOR NOTICE TO RESPONDENTS IN NON-COMPLAINT GENERATED MATTERS**

The Commission is issuing a new rule of agency procedure to provide notification to respondents of enforcement proceedings based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. 437g. In matters generated by complaints, the Commission may take no action on the complaint (other than dismissal) until respondents have at least 15 days after notification of the allegations contained in the complaint to answer the allegations. See 2 U.S.C.

437g(a)(1). However, respondents in matters arising from enforcement matters generated by the Commission itself based on information ascertained in the normal course of carrying out its supervisory responsibilities (so-called “internally generated matters”) are afforded no such procedural protections. This rule of agency procedure is intended to provide respondents in internally generated enforcement matters with notice of the basis of the allegations, and an opportunity to respond.

For internally generated matters arising from a referral from the Commission’s Reports Analysis Division or Audit Division (“internal referrals”), respondents shall be notified of the referral within five days of receipt of the referral by the Office of General Counsel. Thereafter, the general counsel shall provide to the respondent a memorandum stating the position of the Office of General Counsel on each of the legal and factual issues contained in the referral. The respondent shall then be given an opportunity to demonstrate that no action should be taken based on the general counsel’s memorandum, by submitting, within 15 days from receipt of a copy of the general counsel’s memorandum, a written explanation of why the Commission should take no action. The Commission shall not take any action, or make any finding against a respondent based on an internal referral unless it has considered such response or unless no such response has been served upon the Commission within 15 days.

Under current Commission practice, internally generated matters based on referrals from the U.S. Department of Justice or any other law enforcement or governmental agency (“external referrals”) are also deemed to be matters based on information ascertained in the normal course of carrying out its supervisory responsibilities. If the Office of General Counsel intends to initiate an enforcement proceeding based on an external referral, the notice of the referral shall be served on respondents in the same manner as an internal referral. However, where immediate notification to a respondent of an external referral is deemed inappropriate, the Office of General Counsel shall notify the Commission of the referral within 5 days of receipt of the referral from the governmental agency. Furthermore, absent exercise of the Commission’s discretion (by the affirmative vote of four Commissioners), the Office of General Counsel shall not proceed with an enforcement proceeding based on an external referral until the referral is served on the respondent.

### **III. CONCLUSION**

This notice establishes rules of agency practice or procedure. This notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedures Act (“APA”). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.