



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

TO: The Commission

FROM: Steven T. Walther *Stew*
Chairman

DATE: July 15, 2009

RE: Agency Procedure for Notice to Potential Respondents in Enforcement Matters

AGENDA ITEM
For Meeting of: 07-16-09

SUBMITTED LATE

Attached is a proposed agency procedure for notice to potential respondents in enforcement matters.

I have asked to place this draft on the agenda for July 16, 2009.

Attachment

FEDERAL ELECTION COMMISSION

[NOTICE 2009-XX]

**Agency Procedure for Notice to Potential Respondents
in Enforcement Matters**

AGENCY: Federal Election Commission

ACTION: Notice of Agency Procedure

SUMMARY: The Federal Election Commission (“Commission”) is establishing a new rule of agency procedure that will provide potential respondents in certain complaint-generated enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”) with notice of allegations and an opportunity to respond thereto, prior to the Commission’s consideration of whether it has reason to believe (“RTB”) that a violation of the Act has been or is about to be committed by such respondents. Specifically, for complaint-generated matters this policy will provide persons who have not been specifically named in a complaint, but about whom the Commission’s Office of General Counsel (“OGC”) has ascertained information that the person may have violated the Act, with notice and an opportunity to respond prior to the OGC making a recommendation that the Commission find RTB that a violation has taken place.

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 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 FR 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>. Comments and testimony received in this proceeding urged the Commission to provide further transparency, fairness and efficiency in Commission procedures and additional opportunities to contest allegations.

This new agency procedure, along with a new procedure for notice to named respondents of additional material facts or additional potential violations, are among the most recent in a series of new agency procedures that have been recently adopted by the Commission in response to the received comments and testimony. See Advisory Opinion Procedures, 74 FR 32160 (July 7, 2009); Procedural Rules for Audit Hearings, 74 FR 33140 (July 10, 2009); Procedural Rule for Notice to Respondents in Non-Complaint Generated Matters, 74 FR ____ (July X, 2009). This new agency procedure differs from the new procedure for notice to named respondents of additional material facts or additional potential violations in that this procedure applies to persons who are not yet respondents in a complaint-generated matter pursuant to section 437g of FECA, whereas the new procedure for notice to named respondents of additional material facts or additional potential violations applies to persons who are, and have already been notified as, respondents in a complaint-generated enforcement matter.

Under section 437g of FECA, 2 U.S.C. 437g, and part 111 of the Commission's regulations, 11 CFR part 111, any person who believes that a violation of any statute or regulation over which the Commission has jurisdiction has occurred, or is about to occur, may file a complaint with the Commission. 2 U.S.C. 437g(a)(1); 11 CFR 111.4. Upon receipt of the complaint, the OGC reviews the complaint and notifies each respondent named in the complaint that the complaint has been filed. 2 U.S.C. 437g(a)(1); 11 CFR 111.5. The OGC notification also provides the respondent with a copy of the complaint. 11 CFR 111.5(b). The respondent is then provided with 15 days from receipt of the complaint to demonstrate why the Commission should not take action based on the complaint. 2 U.S.C. 437g(a)(1); 11 CFR 111.6. Only after the expiration of this 15 day period, or receipt of a response from the respondent, whichever occurs first, may the OGC make a recommendation to the Commission that it should find

RTB that the respondent has committed or is about to commit a violation.
2 U.S.C. 437g(a)(1); 11 CFR 111.6(b).

In the course of developing its RTB recommendation to the Commission, the OGC will on occasion determine, based on the facts alleged in the complaint or from facts the OGC otherwise ascertains, that a person who has not been specifically identified in a complaint may nevertheless have committed a violation of a statute or regulation over which the Commission has jurisdiction. Similarly, in the course of an investigation after the Commission has made an RTB finding based on a complaint, the OGC will on occasion determine that a person who has not been specifically identified in the complaint may nevertheless have committed a violation. The Commission's current procedures do not formally include a procedure by which the Commission would notify these potential new respondents to provide them with an opportunity to respond prior to the OGC making its RTB recommendation to the Commission.

II. Agency Procedure for Potential Respondents Who Have Not Been Named in a Complaint

As stated above, after a complaint has been filed with the Commission, the OGC will on occasion acquire additional information, in the course of developing its RTB recommendation to the Commission, that a person who has not been specifically identified in a complaint may nevertheless have committed a violation. The OGC may also acquire such additional information, regarding a person who has not been specifically identified in a complaint, in the course of a formal investigation commenced after the Commission has found RTB against one or more respondents who were named in the complaint.

The Commission is issuing a new agency procedure to provide any person who is not identified in a complaint, but who may be added as a respondent in a complaint-generated matter, with written notification and an opportunity to respond to the alleged violations. Accordingly, this agency procedure will provide potential respondents in complaint-generated matters who were not identified in a complaint with notice of the basis of allegations and an opportunity to respond, essentially the same as the notice provided to respondents who have been named in the complaint.

The Commission is hereby formalizing a procedure that the Commission has been following for approximately two years.

This new agency procedure provides as follows:

- A. Any potential respondent who has not been named in a complaint, and who therefore has not been provided with a copy of the complaint¹ or with an opportunity to respond, shall be notified by the OGC that the OGC is considering recommending that the Commission find RTB that the potential respondent may have committed a violation.
- B. The notice will be in writing from the OGC and shall contain the following:
 - 1. An explanation of the Commission's enforcement process;
 - 2. A description of the potential violation or violations based upon the facts available to the OGC; and
 - 3. A recitation of the material facts available to the OGC upon which the OGC intends to rely in making its RTB recommendation to the Commission, and the source or sources of those facts, unless the Commission determines that good cause exists for withholding such source or sources.
- C. The potential respondent shall then be given an opportunity to demonstrate that no action should be taken by submitting, within 15 days from receipt of the OGC notice, a written explanation of why the Commission should take no action.
- D. The Commission shall not make any RTB finding against such a potential respondent unless it has considered the response or unless no such response has been received by the Commission within 15 days.

III. Conclusion

This notice establishes a new 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 Procedure Act ("APA"). The provisions of

¹ Absent written consent from the respondents named in a complaint, the Commission is prohibited from sending the potential respondent a copy of the complaint itself. See 2 U.S.C. 437g(a)(12)(A); 11 CFR 111.21.

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.

Steven T. Walther
Chairman
Federal Election Commission

DATED _____
BILLING CODE: 6715-01-P