



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther  
Chairman *St. Walther*

DATE: June 23, 2009

RE: Agency Procedures Recommendations

For your review as we consider possible improvements to our agency's procedures and practices, I am attaching two lists of recommendations received to date in response to the Commission's Notice of Public Hearing and Request for Public Comments dated December 8, 2008. As you know, I have previously distributed these lists to the Commission by email on February 12, 2009 and May 12, 2009. The first list (Attachment A) organizes the recommendations by Commission division. The Second list (Attachment B) is organized to show how they might fulfill one or more of the three objectives of the process: to achieve greater efficiency, fairness and transparency.

## **Attachment A**

### **Agency Procedure: Recommendations (by Division) Prepared by the Office of Chairman Walther**

#### **I. REPORTS AND ANALYSIS DIVISION (RAD)**

##### **A. Filing reports with the Commission**

1. Improve the tools for filing. The current tools for filing are hard to use, and antiquated. Make it easy to file reports, with a Web 2.0-like web based filing system that could import Excel or a standard XML format files.
2. Make the filing appear on-line faster. Make the initial filings available on-line immediately, with appropriate legal language that states that the data has not been reviewed.
3. Improve electronic filing procedures so that data is not missing, incomplete or jumbled. Consider expanding the number and types of documents that must be filed electronically, especially complaints.
4. RAD should provide more information on how to comply with reporting requirements. Allow filers to submit questions electronically on the Commission's Web site, and post the questions and answers. Add a frequently asked questions section.

##### **B. Request for additional information (RFAI)**

1. RFAIs should be clearer and provide more guidance regarding information sought.
2. RFAIs should precisely identify every deficient entry in a report.
3. RFAIs should request only the information required to be reported by statute or regulations.
4. Stop making certain categories of RFAIs public: those that request confirmation of the accuracy of previously reported information, and those that have failed to reflect changes to election dates or electoral developments.
5. RAD should never send an identical RFAI about a different report that ignores the pendency of such an intervening submission.
6. RAD should not repeatedly request that the same committee state its "best efforts" policy simply because an RFAI addresses a different report.

##### **C. RFAI responses**

1. RAD should reply quickly to committee responses.
2. RAD should reply to any response to an RFAI that challenges the RFAIs legal presumption.
3. If RAD accepts a legal position expressed by a committee, it should say so.

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### **D. Referrals from RAD**

1. Disclose RAD referral thresholds.
2. Institute a trial program whereby potential respondents in a referral are given a written summary of the matter and an opportunity to respond in writing before the Commission makes its RTB finding.
3. If RAD refers a matter to OGC, ADR, the Audit Division or elsewhere, it should immediately notify the committee of that referral in a letter that is not posted on the Commission's Web site.
4. Examine which internal referral thresholds to OGC should be made public without compromising statutory requirements.
5. OGC should be engaged as necessary.

### **E. Other recommendations related to RAD:**

1. Review RAD completely and critically
2. Form an internal committee to supervise RAD.
3. Provide public review and comment if RAD wishes to make any changes in the reporting process.
4. RAD should provide consistent, transparent information.

## **II. ADMINISTRATIVE FINES (AF)**

- A. Expand the administrative fines program to 24 hour and 48-hour reports.

## **III. ALTERNATIVE DISPUTE RESOLUTION (ADR)**

- A. Permit respondents to request for ADR.
- B. Expand the ADR program to include other reporting violations outlined in the Act, such as the reporting requirements for independent expenditures, electioneering communications and internal communications involving express advocacy.
- C. Do not expand the ADR program.
- D. Set guidelines for negotiating penalties and other remedial measures.
- E. Focus on improving future compliance.
- F. While ADR is an efficient way to “resolve low level matters,” it should not be used to impose the same level of penalties as in Enforcement because it would “cease to be an efficient forum for resolving matters.”

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### **IV. AUDIT DIVISION**

#### **A. Audits generally**

1. Disclose audit thresholds.
2. Defer disputed legal issues to OGC for separate consideration.

#### **B. Interim Audit Report (IAR)**

1. Committee should not be presented with new information or “radically different findings” after interim report.

#### **C. Final Audit Report (FAR)**

1. Allow committees to be heard directly by the Commission before the final audit report (FAR) is issued, when committee request a hearings and two Commissioners agree or four Commissioners agree.
2. Do not make public the FAR until all enforcement decisions are made.

#### **D. Other recommendations related to Audit:**

1. Provide same safeguards as the Enforcement process.
2. Do not use the audit process to make new law.

### **V. ENFORCEMENT DIVISION**

#### **A. Complaints**

1. Designating a respondent:
  - a. Only individuals where a claim against them would survive a 12(b)(6) motion should be named as respondents.
  - b. Do not require complainants to designate respondents.
  - c. Require complaints to conform to 11 CFR 111.4(d).
  - d. Only designate those individuals who are specifically named in complaint as respondents.
2. Screening cases:
  - a. Release the current priority system to the public for comment.
  - b. Establish a set of criteria for processing MURs as to losing committees without assets, so as to avoid wasting money trying to get blood from a turnip.
3. Case activation/OGC deadline:

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- a. OGC should establish steps to enforce deadlines (*e.g.*, OGC should notify the Commission Secretary of case activations, and then place matters on the agenda for the first meeting following the expiration of a 60 or 90 day period).

### **B. Responses to complaints**

1. Frivolous complaints:
  - a. OGC should immediately notify the Commissioners of frivolous complaints, and absent objection, send a copy of the complaint to the respondent (as required by statute) but explain that the Commission believes the complaint is frivolous and intends to dismiss.
2. Motion to dismiss:
  - a. Consider/adopt motion to dismiss and adopt a more specific definition of “dismissal” that comports with 12(b)(6).

### **C. Reason to believe (RTB)**

1. Use of publicly available information:
  - a. OGC should not use publicly available information in analyzing RTB.
2. First General Counsel’s Report (FGCR):
  - a. OGC should get FGCR to Commission as soon as possible, without trying to predict Commissioners’ positions.
3. Appearance before the Commission prior to RTB:
  - a. Permit respondents to appear before the Commission prior to RTB findings.
  - b. Respondents should always be provided an opportunity to address any allegations prior to a finding of RTB.
4. Motions at RTB:
  - a. Motion to dismiss - Adopt motion to dismiss/motion to reconsider within 30 days of receiving a factual and legal analysis (F&LA), and limit such motions to factual errors in F&LA or response to legal inquiries raised in F&LA.
  - b. Motion to find no RTB - Consider motion to find no RTB.

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- c. Motion to reconsider - Permit motion to reconsider for RTB. Adopt motion to dismiss/motion to reconsider within 30 days of receiving F&LA, and limit such motions to factual errors in F&LA or response to legal inquiries raised in F&LA.
5. Timing of RTB:
    - a. Dismiss if an RTB finding is not made within two years of the initial complaint.
  6. Other recommendations related to RTB:
    - a. Change the RTB standard to “reason to investigate.”
    - b. Do not use the RTB stage to make findings of knowing and willful intent.
    - c. Seek comments on the RTB standard.

### D. Investigation

1. Scope of investigation:
  - a. Focus on finding out what happened and whether the facts establish a violation of law, rather than focusing on proving that a violation occurred.
  - b. Limit wide-ranging investigations.
2. Direct communications with Commissioners:
  - a. Establish a formal policy allowing the subjects of FEC investigations to communicate directly with Commissioners early in the investigative process.
3. Access to depositions:
  - a. Permit respondent’s counsel to attend all depositions.
4. Access to documents:
  - a. Make all deposition transcripts and documents, upon which OGC relies on, available to respondents at least 10 days prior to service of a probable cause (PC) brief.
  - b. Give respondents access to all deposition transcripts, witness interviews and other documents without need for a request, regardless of whether OGC relies on those documents in its recommendations. FEC should pay all copying costs. Commission has the right to withhold sensitive documents, but it should be the

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exception, and documents should only be withheld after respondent has opportunity to respond to the Commission's ground for denying access.

- c. Provide respondents with: (1) exculpatory documents/depositions that may provide a defense or that create a reasonable doubt; and (2) documents/depositions that accompany a PC brief that form OGC's conclusion of violation.
- d. Parties should have full access to documents.
- e. OGC now takes fewer depositions and more interviews in which there are no transcripts for respondents to obtain.

### 5. Accuracy of documents:

- a. Recommends providing witnesses with opportunity to correct transcripts.

### 6. Motion to quash:

- a. Adopt a motion practice for motion to quash.
- b. Provide written explanations in motions to quash.
- c. Provide an opportunity to appear before the Commission on motion to quash.

## **E. Probable cause to believe (PCTB)**

### 1. Extensions:

- a. Grant extensions of time for responses to PC briefs.
- b. Adopt automatic 15-day extensions of time for response to PC brief.
- c. Recommend to Congress that the 15-day period for submitting a reply brief be extended to 30 days, but in the meantime grant an automatic extension of 15 days without the need for a request.

### 2. Probable cause (PC) hearings:

- a. PC hearings should include precise written follow-up questions (approved by Commission) directed to respondent/counsel. Apart from that, in favor of limiting personal appearance option.

### 3. Direct communications with Commissioners:

- a. Adopt a process to file briefs directly with Commissioners (thus the briefs are read directly by Commissioners).

### 4. Motion to reconsider:

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- a. Permit motion to reconsider probable cause to believe (PCTB) findings provided there are appropriate standards and time frames to discourage dilatory tactics.

### F. Settlement/civil penalty

1. Information sharing:
  - a. Sharing more information with respondents earlier in the process would help settle cases.
2. Authority to negotiate:
  - a. Adopt a mechanism to either empower OGC staff attorney to settle cases or an individual Commissioner or a group of Commissioners to meet to settle cases.
3. Communicating directly with Commissioners:
  - a. Clarify policies to ensure respondents that their proposals are being heard (*e.g.*, negotiations at PC or pre-PC stages are handled by OGC, but OGC will circulate respondent's offer to Commissioners, upon the requestor's request.
  - b. Possibly adopt a process whereby OGC keeps Commissioners apprised of offers.
  - c. Adopt policy to permit respondents to make offers directly to Commissioners, rather than to OGC.
4. Admonishments:
  - a. Do not issue admonishments.
5. Calculating civil penalties:
  - a. Do not calculate civil penalties based on sampling.
  - b. Use *Furgatch* guidelines in determining penalties, specifically the good or bad faith of the respondent, the injury to the public and the ability to pay. Give a clear indication of how a proposed civil penalty fits within these guidelines.
  - c. Stop citing past FEC settlements as precedent.
6. Making public civil penalty formula:
  - a. Do not make public the Commission's civil penalty structure.



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- b. Make public general factors considered in calculating civil penalties, but not the actual mechanical formulas.
- c. Make public the Commission's base civil penalty formulas, but do not release the adjustments made for aggravating and mitigating factors.
- d. Seek comments from the public concerning a civil penalty system, adopt a system, and release it to the public.

### G. Closed files

1. Permit respondents to determine whether their responses to a complaint or PC brief should be placed on the public record (as the Commission is only required by statute to disclose conciliation agreements and determinations that a person has not violated the Act).
2. Maintain current policy of releasing closed MURs in the normal course of business.
3. Follow internal procedures and do not allow pending elections to interfere with release of information/filing suit.
4. Operate to the greatest extent possible to avoid influencing elections.
5. Follow a policy similar to DOJ when filing a suit close to an election, and should wait to file suit until after the election occurs.
6. Adopt a formal policy to always notify enforcement matter respondents before conciliation agreements are made public.

### H. Other recommendations related to Enforcement:

1. Motion to appear before the Commission:
  - a. Consider a motion for a hearing when a respondent requests a hearing and four commissions agree.
  - b. Experiment with hearings on motions.
  - c. Consider requests for an oral hearing on motions (similar to PC hearings). The Commission should retain discretion on whether to grant an oral hearing.
  - d. Permit respondents to attend hearings via telephone.
  - e. Extend hearings to other situations in enforcement context – to resolve disputes between respondents and OGC. Such hearings should be discretionary.
  - f. Respondents should be able to communicate directly with the Commission.
2. Motion to vacate:
  - a. Adopt motion to vacate (*e.g.*, respondents who had adverse findings based on the Millionaires' Amendment).

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3. Motion standards:
  - a. Standardize motion filing procedure through regulation and specify types of motions that may be filed beyond motions to modify or quash subpoenas.
  - b. Require parties filing motions to set forth a specific request, production of a piece of evidence, or ruling on a question of law.
  - c. OGC should make a recommendation to Commission on motions within a set number of days, and allow an oral hearing request to be granted by an affirmative vote of two Commissioners, as with PC hearings.
  - d. Detail procedures for filing motions on the Web site.
4. Other recommendations related to Motion Practice:
  - a. Changes to motion practice should be done on a trial basis.
  - b. Consultation between respondent's counsel and OGC prior to the filing of motions (so as to narrow the issues or to even come to a determination that the motion is unnecessary or could be unopposed) would be fruitful.
  - c. Do not condition motions on tolling agreements.
  - d. Consider respondent's interest in prompt administrative resolution of allegations when considering procedural changes.
  - e. Motions practice is an unconstitutional "judiciary action." Nonetheless, allowing parties to appear before the Commission is a matter of "fairness."
  - f. Require respondents to serve motions to both OGC and the Commission Secretary (so that Commissioners are immediately aware).
  - g. Set aside time each month for the Commission to consider motions.
5. Memorandum of understanding (MOU) generally:
  - a. Maintain MOU.
  - b. Do not yield to the Justice Department any further.
6. Changes to MOU:
  - a. Amend the MOU to mandate better and strengthened cooperation and coordination between DOJ and the FEC.
  - b. DOJ should inform the FEC earlier in the process when a respondent may be under investigation by both DOJ and the FEC.
  - c. Changes that authorize increased felony, as opposed to misdemeanor, prosecutions suggest that that potential criminal violations be evaluated by DOJ before any alternative

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administrative disposition is considered, and that in such situations all administrative dispositions be coordinated with a federal prosecutor.

- d. Update and clarify the MOU.
- e. DOJ should request courts to grant exemptions to Rule 6 for the FEC.

### 7. Periodic Review Process:

- a. Identify cases that Commissioners are interested for periodic review.

### 8. Miscellaneous recommendations related to Enforcement Division:

- a. Do not retreat from dealing with matters involving complex issues just because they are difficult.
- b. Do not use the enforcement process to make new law.
- c. Commission could issue notice of continuing requirement of confidentiality to prevent premature disclosure.
- d. Consider respondent's interest in prompt administrative resolution of allegations when considering procedural fairness.

## **VI. POLICY DIVISION/ADVISORY OPINIONS (AOs)**

### **A. Advisory Opinion requests**

1. Make transparent the criteria for AO requests.

### **B. Blue drafts/public comment**

1. End practice of submitting late Blue Drafts.
2. Provide requesters/public with five business days to file responses to draft AOs.
3. Provide public with at least seven days to file responses to draft AOs.

### **C. Appearance before Commission**

1. Permit requestors to answer Commissioners' questions.
2. Permit requestors to testify/appear before the Commission as a pilot program providing such opportunities to appear at the Commission's discretion.
3. Adopt a hearing procedure for genuinely new and uncertain issues.
4. Adopt a hearing procedure for AOs, particularly where there are competing drafts being considered. Model the hearings after the probable cause (PC) hearings, permit public comment, and release the transcript of hearings for public comment.

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### **D. Other recommendations related to Policy Division/AOs:**

1. Do not use the AO process to “prejudge pending enforcement matters.”
2. Do not use the AO process to set “new, binding norms.”
3. Commission should “more clearly and contemporaneously describe its actions” in AOs.

## **VII. INFORMATION TECHNOLOGY (IT) DIVISION**

### **A. Accuracy:**

1. Ensure that the data that is being collected is accurate.
2. Investigate whether the FEC needs to impose new restrictions on donor verification.
3. Increase frequency of master data updates. (Currently, master files are uploaded to the FEC’s FTP site weekly.)
4. Create a “service ticket system” for tracking errors and corrections that both the FEC staff and the public can monitor.

### **B. API (Application Programming Interfaces):**

1. Provide open-source public APIs so that other on-line Web sites can download the data. Make sure these are in the most popular programming languages, like PHP, Java, C#.

### **C. Accessibility:**

1. Publish data in a reliable way that is accessible.

### **D. Content:**

1. Public means online – if a document is “public” make it available online.
2. Describe “more clearly and contemporaneously” civil penalties and other enforcement matters when announcing matters to the public. These should be announced in a clear manner that promotes understanding and deterrence, and should be easily accessible on the Commission’s Web site.
3. Detail procedures for filing motions on the FEC Web site.
4. Require Commissioners and FEC Senior Staff to report online within 72 hours any significant contact with the regulated community relating to a request for FEC action.
5. Make available online all correspondence between the Commission and regulated entities.
6. Maintain a web-accessible archive of all old versions of each form, schedule, or set of filing instructions, with information about when such documents were valid.

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7. Maintain a chronological list of changes to all forms either from the inception of the Commission or at least for recent years.
8. Consider the right of the public to access historical filing data to be as important as the need for vendors to produce filings in the current format and provide a list of all historical file formats on its web site, linked to complete documentation of those formats.
9. Make available online the original filings from before 2000.
10. Negotiate with NIC Technologies to obtain full human-readable source code to the current and all past versions of programs under an “open source” license approved by the Open Source Initiative, and make that code publicly available.

### **E. Data formatting ambiguities:**

1. Document how each ambiguity is resolved and disclose any communications with software vendors..
2. Define a new filing data format without the unnecessary complexity of the original filing formats, and which is flexible enough to be used into the future without backwards/incompatible changes. Document format properly, with as little ambiguity as is practical. Require new electronic filings to be in this format. Write and publish software to translate all old filings to this new format.

### **F. User friendly:**

1. Use internet tools to make it easier for the public find and use information
2. Improve Web site by: (1) using simple language laypersons can understand; (2) providing data in new ways that take advantage the Internet’s “dynamic nature”; and (3) structuring the Web site in ways people have come to expect to use the Internet (*e.g.*, update outmoded site functions that require users to have special knowledge in order to find information).
3. Provide new web services that make data more usable, such as services that allow data from an official FEC search to be syndicated to other Web sites. Also, end users should be able to link to search results from FEC records in e-mails and other Web sites. The FEC should change the way the Web site stores data relating to enforcement matters by identifying the type of violation alleged to have occurred.
4. Provide services around particular legislators/candidates (*e.g.* picture, percentage of money received from in state/out of state) .
5. Improvements to the structure of the Web site are of secondary importance to improvements to the available data, but concurs with Sunlight recommendations.

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### **G. Web site searches:**

1. Make the search page more searchable by search engines (*e.g.*, Google, Yahoo) so that the data is available through natural search.
2. Use RSS syndication technology for searches.
3. Provide one big search box.
4. Provide feed for searches (currently, the Commission has two feeds – one for treasurers and one for press).
5. Increase the width of the search fields.

### **H. Other recommendations related to IT Division/Commission Web site:**

1. Ask for help – the Commission has a community of interested parties that wants to help out.
2. Standardize format to post information to the Commission’s Web site, rather than the proprietary and generally closed format that the Commission uses currently.

## **VIII. INFORMATION DIVISION**

### **A. Changes to FEC forms:**

1. Create a separate line item to show the net result/to show that a campaign has no cash but only debt.
2. Create a separate line item segregating in-kind contributions from the candidate or others.

### **B. Educational outreach:**

1. Provide an online course for campaign treasurers, broken into sections for each type of transaction and available at will.
2. Provide a small group of FEC employees in each time zone who are available to answer questions.

## **IX. OTHER COMMISSION POLICIES AND PRACTICES**

### **A. Recovering fees/costs:**

1. Allow those who successfully challenge FECA or regulations to recover fees and costs.

### **B. Appearances before the Commission:**

1. Allow parties to appear before the Commission as a matter of “fairness”.
2. Right to appear before the Commission is essential for respondents to obtain due process.

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3. *See also* AUDIT DIVISION, ENFORCEMENT DIVISION, POLICY/ADVISORY OPINIONS

### **C. Make public:**

1. Make public the Commission's base civil penalty formulas.
2. Make public a compliance manual (enforcement, audit and ADR procedures).
3. Make public staffing priorities.
4. Make public staff directory.
5. Make public the internal "enforcement manual" used by OGC to better illuminate the process.
6. Make public exactly when in each process the Commission has access to/reviews documents filed by respondents.
7. Make transparent the criteria for AO requests.

### **D. Reporting:**

1. Add individual donors of \$200 or less to the "master individual donations" file.
2. Require disclosure of the summary amount from unitemized individuals on FEC Form 3P. Also consider using a single form for all types of candidates – Congress and presidential.
3. Provide and require the use of relevant expenditure categories.
4. Add a "Country" field.
5. Require information on the means by which campaign contributions are raised (e.g. money raised via Internet).

### **E. Commission documents:**

1. Provide pinpoint cites and corresponding URLs.
2. Include all facts in a section on facts and do not introduce new facts in the discussion section.
3. Abandon the phrase "regulated community" and replace it with "public" or "general public."

### **F. Commission resources:**

1. Do not use Commission resources to "test novel theories of enforcement or to stretch the boundaries of the law."
2. Make public staffing priorities.
3. Seek Commissioner staff's advice on whether the current staffing of Commissioner offices allows the lawyers to advise Commissioners fully.
4. Afford priority to "objectively" determinable violations and give less priority to less objectively determinable violations such as coordination and express advocacy.

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5. Request adequate resources.

### **G. Deadlines:**

1. Give staff deadlines for pending work.
2. Provide respondents with an equal amount of time, or even a percentage of the time taken by OGC since its last submission.
3. Establish and enforce deadlines on the Commission's own actions, as well as on the actions of other participants in Commission proceedings.

### **H. Party caucuses:**

1. Stop the practice of holding party caucuses before executive and open sessions.

### **I. Ambiguity in the law:**

1. Implement regulations to address the problem of vagueness and case-by-case enforcement currently inherent in the law and the Commission's regulations concerning: (1) electioneering communications, (2) the definition of express advocacy, and (3) the definition of major purpose.
2. Resolve ambiguity in a statute or regulation in favor of the speaker or the political participant.
3. Determine which regulations are unclear or poorly constructed and address them through the rulemaking process.

### **J. Ex parte:**

1. Draft regulations that would require Commissioners and certain senior officials to report online within 72 hours any significant contact relating to a request for Commission action.
2. Make available online all correspondence between the Commission and regulated entities.

### **K. Miscellaneous recommendations:**

1. IRS uses a "primary purpose" test similar to the "major purpose." Work with the IRS to harmonize the definitions of the two terms.
2. Contribution limits in a free society are "ludicrous," although candidates should be limited to the total amount they can raise.
3. Relax the reporting requirements to twice a year.



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### Agency Procedure: Recommendations (by efficiency, fairness and transparency) Prepared by the Office of Chairman Walther

#### EFFICIENCY

##### Filing reports

- Improve the tools for filing. The current tools for filing are hard to use, and antiquated. Make it easy to file reports, with a Web 2.0-like web based filing system that could import Excel or a standard XML format files.
- Allow filers to submit questions electronically on the Commission's Web site, and post the questions and answers. Add a frequently asked questions section.
- Improve electronic filing procedures so that data is not missing, incomplete, or jumbled. Consider expanding the number and types of documents that must be filed electronically, especially complaints.
- Make the filing appear on-line faster. Make the initial filings available on-line immediately, with appropriate legal language that states that the data has not been reviewed.

##### Reports Analysis Division (RAD)

- RAD should reply quickly to committee responses.

##### Alternative Dispute Resolution (ADR) - Penalties

- Focus on improving future compliance.
- While ADR is an efficient way to "resolve low level matters," it should not be used to impose the same level of penalties as in Enforcement because it would "cease to be an efficient forum for resolving matters."

##### Documents

- Provide pinpoint cites and corresponding URLs.
- Include all facts in a section on facts and do not introduce new facts in the discussion section.

##### Periodic Review Process

- Identify cases that Commissioners are interested for periodic review.

##### Office of the General Counsel (OGC) deadlines

- OGC should get FGCR to Commission as soon as possible, without trying to predict Commissioners' positions.
- OGC should establish steps to enforce deadlines (*e.g.*, OGC should notify the Commission Secretary of case activations, and then place matters on the agenda for the first meeting following the expiration of a 60 or 90 day period).
- Give staff deadlines for pending work.
- Provide respondents with an equal amount of time, or even a percentage of the time taken by OGC since its last submission.

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- Establish and enforce deadlines on the Commission's own actions, as well as on the actions of other participants in Commission proceedings.

### Motions

- Set aside time each month for the Commission to consider motions.

### Conciliation agreements

- Possibly adopt a process whereby OGC keeps Commissioners apprised of offers.
- Adopt policy to permit respondents to make offers directly to Commissioners, rather than to OGC.
- Adopt a mechanism to either empower OGC staff attorney to settle cases or an individual Commissioner or a group of Commissioners to meet to settle cases.
- Clarify policies to ensure respondents that their proposals are being heard (*e.g.*, negotiations at probable cause (PC) or pre-PC stages are handled by OGC, but OGC will circulate respondent's offer to Commissioners, upon the requestor's request.

### MOU - Generally

- Maintain MOU.
- DOJ should request courts to grant exemptions to Rule 6 for the FEC.
- Do not yield to the Justice Department any further.

### MOU - Changes

- Amend the MOU to mandate better and strengthened cooperation and coordination between DOJ and the FEC.
- DOJ should inform the FEC earlier in the process when a respondent may be under investigation by both DOJ and the FEC.
- Changes that authorize increased felony, as opposed to misdemeanor, prosecutions suggest that that potential criminal violations be evaluated by DOJ "before any alternative administrative disposition is considered, and that in such situations all administrative dispositions be coordinated with a federal prosecutor."
- Update and clarify the MOU.

### Web site - API (Application Programming Interfaces)

- Provide open-source public APIs so that other on-line Web sites can download the data. Make sure these are in the most popular programming languages, like PHP, Java, C#.

### Web site - Searches

- Make the search page more searchable by search engines (*e.g.*, Google, Yahoo) so that the data is available through natural search.
- Use RSS syndication technology for searches.
- Provide one big search box.
- Provide feed for searches (currently, the Commission has two feeds – one for treasurers and one for press).

### Web site - User friendly

- Use internet tools to make it easier for the public find and use information.

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- Improve Web site by: (1) using simple language laypersons can understand; (2) providing data in new ways that take advantage the Internet's "dynamic nature"; and (3) structuring the website in ways people have come to expect to use the Internet (*e.g.*, update outmoded site functions that require users to have special knowledge in order to find information).
- Provide new web services that make data more usable, such as services that allow data from an official FEC search to be syndicated to other websites. Also, end users should be able to link to search results from FEC records in e-mails and other Web sites. The FEC should change the way the website stores data relating to enforcement matters by identifying the type of violation alleged to have occurred.
- Provide services around particular legislators/candidates (*e.g.* picture, percentage of money received from in state/out of state).
- Improvements to the structure of the Web site are of secondary importance to improvements to the available data, but concurs with Sunlight recommendations.

### Web site - Other recommendations

- Increase the width of the fields.
- Ask for help – the Commission has a community of interested parties that wants to help out.
- Standardize format to post information to the Commission's Web site, rather than the proprietary and generally closed format that the Commission uses currently.

### Prioritization - Commission resources

- Do not use Commission resources to "test novel theories of enforcement or to stretch the boundaries of the law."
- Seek Commissioner staff's advice on whether the current staffing of Commissioner offices allows the lawyers to advise Commissioners fully.
- Afford priority to "objectively" determinable violations and give less priority to less objectively determinable violations such as coordination and express advocacy.

### Prioritization – other recommendations

- Do not retreat from dealing with matters involving complex issues just because they are difficult.
- Release the current priority system to the public for comment.
- Establish a set of criteria for processing MURs as to losing committees without assets, so as to avoid wasting money trying to get blood from a turnip.

### Timeliness

- Dismiss if a reason to believe (RTB) finding is not made within two years of the initial complaint.
- Limit wide-ranging investigations.
- Stop the practice of holding party caucuses before executive and open sessions.
- Request adequate resources.

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### Reporting/user-friendly

- Provide experienced campaign treasurer to work with the FEC programmers to simplify, streamline and make the reporting program more user friendly.

## **FAIRNESS**

### Advisory Opinions (AOs)

- Do not use the AO process to “prejudge pending enforcement matters.”
- Do not use the AO process to set “new, binding norms.”
- Commission should “more clearly and contemporaneously describe its actions” in AOs.

### AOs - Blue Drafts

- End practice of submitting late Blue Drafts.
- Provide requesters/public with five business days to file responses to draft AOs.
- Provide public with at least seven days to file responses to draft AOs.

### AOs - Hearing/opportunity to appear before the Commission

- Permit requestors to answer Commissioners’ questions.
- Permit requestors to testify/appear before the Commission as a pilot program providing such opportunities to appear at the Commission’s discretion.
- Adopt a hearing procedure for genuinely new and uncertain issues.
- Adopt a hearing procedure for AOs, particularly where there are competing drafts being considered. Model the hearings after the PC hearings, permit public comment, and release the transcript of hearings for public comment.

### Appearances before the Commission

- Allow parties to appear before the Commission as a matter of “fairness.”
- Right to appear before the Commission is essential for respondents to obtain due process.
- *See also* Motions, Audit - Hearing/opportunity to appear before the Commission, AOs - Hearing/opportunity to appear before the Commission

### RAD

- If RAD accepts a legal position expressed by a committee, it should say so.

### RAD – Referrals

- Institute a trial program whereby potential respondents in a referral are given a written summary of the matter and an opportunity to respond in writing before the Commission makes its RTB finding.
- If RAD refers a matter to OGC, ADR, the Audit Division or elsewhere, it should immediately notify the committee of that referral in a letter that is not posted on the Commission's website.

### RAD – Requests for additional information (RFAIs)

- RAD should reply to any response to an RFAI that challenges the RFAIs legal presumption.

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- RAD should never send an identical RFAI about a different report that ignores the pendency of such an intervening submission.
- RAD should not repeatedly request that the same committee state its "best efforts" policy simply because an RFAI addresses a different report.
- RFAs should be clearer and provide more guidance regarding information sought.
- RFAs should precisely identify every deficient entry in a report.
- RFAs should request only the information required to be reported by statute or regulations.
- Stop making certain categories of RFAs public: those that request confirmation of the accuracy of previously reported information and those that have failed to reflect changes to election dates or electoral developments.

### ADR – Penalties

- Set guidelines for negotiating penalties and other remedial measures.

### ADR – Requests

- Permit respondents to request for ADR.

### Audit - Hearing/opportunity to appear before the Commission

- Allow committees to be heard directly by the Commission before the final audit report (FAR) is issued, when committee request a hearings and two Commissioners agree or four Commissioners agree.

### Audit – Other recommendations

- Provide same safeguards as the Enforcement process.
- Committee should not be presented with new information or “radically different findings” after interim report.
- Do not make public the FAR until all enforcement decisions are made.
- Do not use the audit process to make new law.

### Frivolous complaints

- OGC should immediately notify the Commissioners of frivolous complaints, and absent objection, send a copy of the complaint to the respondent (as required by statute) but explain that the Commission believes the complaint is frivolous and intends to dismiss.

### Designating respondents

- Only individuals where a claim against them would survive a 12(b)(6) motion should be named as respondents.
- Do not require complainants to designate respondents.
- Require complaints to conform to 11 CFR 111.4(d).
- Only designate those individuals who are specifically named in complaint as respondents.

### RTB

- OGC should not use publicly available information in analyzing RTB.
- Change the RTB standard to “reason to investigate.”
- Do not use the RTB stage to make findings of knowing and willful intent.

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- Seek comments on the RTB standard.
- Respondents should always be provided an opportunity to address any allegations prior to a finding of RTB.

### Depositions

- Consider respondent's interest in prompt administrative resolution of allegations when considering procedural fairness.
- Recommends providing witnesses with opportunity to correct transcripts.
- Permit respondents' counsel to attend all depositions.
- Commission could issue notice of continuing requirement of confidentiality to prevent premature disclosure.
- Focus on finding out what happened and whether the facts establish a violation of law, rather than focusing on proving that a violation occurred.

### Motion to dismiss

- Consider/adopt motion to dismiss and adopt a more specific definition of "dismissal" that comports with 12(b)(6).
- Adopt motion to dismiss within 30 days of receiving a factual and legal analysis (F&LA), and limit such motions to factual errors in F&LA or response to legal inquiries raised in F&LA..

### Motion to find no RTB

- Consider motion to find no RTB.

### Motion to quash

- Adopt a motion practice for motion to quash.
- Provide written explanations in motions to quash.
- Provide an opportunity to appear before the Commission on motion to quash.

### Motion to reconsider

- Permit motion to reconsider for RTB and probable cause to believe (PCTB) findings provided there are appropriate standards and time frames to discourage dilatory tactics.
- Adopt motion to reconsider within 30 days of receiving F&LA, and limit such motions to factual errors in F&LA or response to legal inquiries raised in F&LA.

### Motion to vacate

- Adopt motion to vacate (*e.g.*, respondents who had adverse findings based on the Millionaires' Amendment).

### Motion to appear before the Commission

- Consider a motion for a hearing when a respondent requests a hearing and four commissions agree.
- Experiment with hearings on motions.
- Consider requests for an oral hearing on motions (similar to PC hearings). The Commission should retain discretion on whether to grant an oral hearing.
- Permit respondents to attend hearings via telephone.

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- Permit respondents to appear before the Commission prior to RTB findings.
- Extend hearings to other situations in enforcement context – to resolve disputes between respondents and OGC. Such hearings should be discretionary.
- Respondents should be able to communicate directly with the Commission.
- PC hearings should include precise written follow-up questions (approved by Commission) directed to respondent/counsel. Apart from that, in favor of limiting personal appearance option.
- Adopt a process to file briefs directly with Commissioners (thus the briefs are read directly by Commissioners).

### Motion standards/procedures

- Standardize motion filing procedure through regulation and specify types of motions that may be filed beyond motions to modify or quash subpoenas.
- Require parties filing motions to set forth a specific request, production of a piece of evidence, or ruling on a question of law.
- OGC should make a recommendation to Commission on motions within a set number of days, and allow an oral hearing request to be granted by an affirmative vote of two Commissioners, as with PC hearings.
- Detail procedures for filing motions on the Web site.

### Motions – Other recommendations

- Do not condition motions on tolling agreements.
- Changes to motion practice should be done on a trial basis.
- Consultation between respondent's counsel and OGC prior to the filing of motions (so as to narrow the issues or to even come to a determination that the motion is unnecessary or could be unopposed) would be fruitful.
- Establish a formal policy allowing the subjects of FEC investigations to communicate directly with Commissioners early in the investigative process.
- Consider respondent's interest in prompt administrative resolution of allegations when considering procedural changes.
- Motions practice is an unconstitutional "judiciary action." Nonetheless, allowing parties to appear before the Commission is a matter of "fairness."
- Require respondents to serve motions to both OGC and the Commission Secretary (so that Commissioners are immediately aware).

### Extensions

- Grant extensions of time for responses to PC briefs.
- Adopt automatic 15-day extensions of time for response to PC brief.
- Recommend to Congress that the 15-day period for submitting a reply brief be extended to 30 days, but in the meantime grant an automatic extension of 15 days without the need for a request.

### Penalties/settlements

- Do not calculate civil penalties based on sampling.

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- Use *Furgatch* guidelines in determining penalties, specifically the good or bad faith of the respondent, the injury to the public and the ability to pay. Give a clear indication of how a proposed civil penalty fits within these guidelines.
- Stop citing past FEC settlements as precedent.
- Allow those who successfully challenge FECA or regulations to recover fees and costs.

### Conciliation agreements

- Adopt a formal policy to always notify enforcement matter respondents before conciliation agreements are made public.

### Penalties/settlements - Admonishments

- Do not issue admonishments.

### Releasing documents/filing suit before an election

- Maintain current policy of releasing closed MURs in the normal course of business.
- Follow internal procedures and do not allow pending elections to interfere with release of information/filing suit.
- Permit respondents to determine whether their responses to a complaint or PC brief should be placed on the public record (as the Commission is only required by statute to disclose conciliation agreements and determinations that a person has not violated the Act).
- Operate to the greatest extent possible to avoid influencing elections.
- Follow a policy similar to DOJ when filing a suit close to an election, and should wait to file suit until after the election occurs.

### Enforcement process

- Sharing more information with respondents earlier in the process would help settle cases.
- Do not use the enforcement process to make new law.

## **TRANSPARENCY**

### AO requests

- Make transparent the criteria for AO requests.

### RAD

- Provide public review and comment if RAD wishes to make any changes in the reporting process.
- RAD should provide more information on how to comply with reporting requirements. Filers should be allowed to submit questions electronically via the Commission's website, and then have the questions and answers publicly posted on the website. More information should be posted on the website and a frequently asked questions section should be added.

### RFAIs

- RAD should provide consistent, transparent information.



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### RAD referrals

- Disclose RAD referral thresholds.
- Examine which internal referral thresholds to OGC should be made public without compromising statutory requirements.

### Audit thresholds

- Disclose audit thresholds.

### Access to documents

- Make all deposition transcripts and documents, upon which OGC relies on, available to respondents at least 10 days prior to service of PC brief.
- Give respondents access to all deposition transcripts, witness interviews and other documents without need for a request, regardless of whether OGC relies on those documents in its recommendations. FEC should pay all copying costs. Commission has the right to withhold sensitive documents, but it should be the exception, and documents should only be withheld after respondent has opportunity to respond to the Commission's ground for denying access.
- Provide respondents with: (1) exculpatory documents/depositions that may provide a defense or that create a reasonable doubt; and (2) documents/depositions that accompany a PC brief that form OGC's conclusion of violation.
- Parties should have full access to documents.
- OGC now takes fewer depositions and more interviews in which there are no transcripts for respondents to obtain.

### Releasing civil penalties calculation

- Do not make public the Commission's civil penalty structure.
- Make public general factors considered in calculating civil penalties, but not the actual mechanical formulas.
- Make public the Commission's base civil penalty formulas, but do not release the adjustments made for aggravating and mitigating factors.
- Seek comments from the public concerning a civil penalty system, adopt a system, and release it to the public.

### Penalties

- Commission should "more clearly and contemporaneously" describe civil penalties and other enforcement matters when announcing matters to the public. These should be announced in a clear manner that promotes understanding and deterrence, and should be easily accessible on the Commission's website.

### Web site - Accessibility

- Publish data in a reliable way that is accessible.

### Web site - Content

- Describe "more clearly and contemporaneously" civil penalties and other enforcement matters when announcing matters to the public. These should be announced in a clear

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manner that promotes understanding and deterrence, and should be easily accessible on the Commission's website.

- Detail procedures for filing motions on the FEC website.
- Require Commissioners and FEC Senior Staff to report online within 72 hours any significant contact with the regulated community relating to a request for FEC action.
- Make available online all correspondence between the Commission and regulated entities.
- Maintain a web-accessible archive of all old versions of each form, schedule, or set of filing instructions, with information about when such documents were valid.
- Maintain a chronological list of changes to all forms either from the inception of the Commission or at least for recent years.
- Consider the right of the public to access historical filing data to be as important as the need for vendors to produce filings in the current format and provide a list of all historical file formats on its web site, linked to complete documentation of those formats.
- Make available online the original filings from before 2000.
- Negotiate with NIC Technologies to obtain full human-readable source code to the current and all past versions of programs under an "open source" license approved by the Open Source Initiative, and make that code publicly available.

### Web site - data formatting ambiguities

- Document how each ambiguity is resolved and disclose any communications with software vendors.
- Define a new filing data format without the unnecessary complexity of the original filing formats, and which is flexible enough to be used into the future without backwards/incompatible changes. Document format properly, with as little ambiguity as is practical. Require new electronic filings to be in this format. Write and publish software to translate all old filings to this new format.

### Make public

- Make public staff directory.
- Make public staffing priorities.
- Make public a compliance manual (enforcement, audit and ADR procedures).
- Make public the internal "enforcement manual" used by OGC to better illuminate the process.
- Make public exactly when in each process the Commission has access to/reviews documents filed by respondents.
- Public means online – if a document is "public" make it available online.

### Changes to FEC forms

- Create a separate line item to show the net result/to show that a campaign has no cash but only debt.
- Create a separate line item segregating in-kind contributions from the candidate or others.

### Educational outreach

- Provide an online course for campaign treasurers, broken into sections for each type of transaction and available at will.

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- Provide a small group of FEC employees in each time zone who are available to answer questions.

### Reporting

- Add individual donors of \$200 or less to the “master individual donations” file.
- Require disclosure of the summary amount from unitemized individuals on FEC Form 3P. Also consider using a single form for all types of candidates – Congress and presidential.
- Provide and require the use of relevant expenditure categories.
- Add a “Country” field.
- Require information on the means by which campaign contributions are raised (e.g. money raised via Internet).

## **OTHER RECOMMENDATIONS**

### RAD

- Review RAD completely and critically.
- Form an internal committee to supervise RAD.

### Administrative Fines - Scope

- Extend the administrative fines program to 24 hour and 48-hour reports.

### ADR - Scope

- Extend the ADR program to include other reporting violations outlined in the Act, such as the reporting requirements for independent expenditures, electioneering communications and internal communications involving express advocacy.
- Do not expand the ADR program

### Audit – Legal issues

- Defer disputed legal issues to OGC for separate consideration.

### Web site - Accuracy

- Ensure that the data that is being collected is accurate.
- Investigate whether the FEC needs to impose new restrictions on donor verification.
- Increase frequency of master data updates. (Currently, master files are uploaded to the FEC’s FTP site weekly.)
- Create a “service ticket system” for tracking errors and corrections that both the FEC staff and the public can monitor.

### Ambiguity in the law

- Implement regulations to address the problem of vagueness and case-by-case enforcement currently inherent in the law and the Commission’s regulations concerning: (1) electioneering communications, (2) the definition of express advocacy, and (3) the definition of major purpose.
- Resolve ambiguity in a statute or regulation in favor of the speaker or the political participant.

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- Determine which regulations are unclear or poorly constructed and address them through the rulemaking process.

### Documents

- Abandon the phrase “regulated community” and replace it with “public” or “general public.”

### Other recommendations

- IRS uses a “primary purpose” test similar to the “major purpose.” Work with the IRS to harmonize the definitions of the two terms.
- Contribution limits in a free society are “ludicrous,” although candidates should be limited to the total amount they can raise.
- Relax the reporting requirements to twice a year.