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April 19, 2013

Ms. Shawn Woodhead Werth
Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Request for Comment on Enforcement Process

Dear Ms. Werth:

On behalf of the Perkins Coie, LLP Political Law Group, I write in response to the Federal Election Commission's January 18, 2013 Request for Comment on its enforcement process. We commend the Commission's decision to seek public input on this process, which requires transparency and close review for its fair and effective operation.

We also applaud the Commission for the enforcement procedures it has recently adopted. For example, the Commission's audit hearing process has helped surface and resolve legal and factual issues that the Commission was able to resolve more easily and timely. Similarly, the revised probable cause hearing process provides Commissioners a fuller understanding of the legal issues involved in an enforcement matter.

These processes and others help the Commission make correct decisions "based on a fair reading of the record and careful, thorough consideration of the issues." Federal Election Commission, Thirty Year Report, at 9 (Sept. 2005). As practitioners who regularly represent clients who in fact have complied with the law, we know very well how the changes in the enforcement and audit procedures have brought more fairness to those proceedings.

The Commission does not intend the enforcement process to be "an adversarial proceeding." *Id.* Yet historically, from a respondent's perspective, it *has* been adversarial, with the General Counsel frequently urging the Commission to accept novel interpretations of the law in

recommending a finding of probable cause and a civil penalty. This is especially troubling in cases where neither the Commission's regulations nor its advisory opinions provides a respondent with fair notice that its alleged conduct violated the law. The Commission enforcement process should not be used as a substitute for rulemaking. Rather, it should be reserved for clear violations, and not for the pursuit of novel theories of the law, no matter how well such a theory might be thought to advance the purposes of the law. Making the enforcement process more transparent to the public at large, and accessible to the respondents, is essential to this objective, and to the quality of the Commission's ultimate decision-making. Our comments below are offered with these considerations in mind.

A. Enforcement Process at the Pre-RTB Stage

1. Correctly identifying and notifying respondents

The Commission's initial process for reviewing a complaint is critical to the integrity of the overall enforcement process, and to the rights of those who participate in the political process. Being notified that one is a respondent in an administrative complaint before the Commission is a significant, negative event. Even in routine cases, it can trigger notifications to auditors, lenders and others who engage with the organization. It can easily chill what would otherwise be protected First Amendment activity. Notwithstanding the Act's confidentiality obligations, it can give rise to unwanted press or political attention.

It is accordingly important for the Commission to use great care when identifying and notifying each person who is a "respondent" under 11 C.F.R. §111.5(a). The Commission's current guidebook on its enforcement process defines a "respondent" as "a person or entity who is the subject of a complaint or referral . . . that alleges that the person or entity may have violated one or more of the federal campaign finance laws within the FEC's jurisdiction." Federal Election Commission, Guidebook for Complainants and Respondents in the FEC Enforcement Process, at 9 (May 2012). Nonetheless, there are still occasions when persons appear to receive respondent notifications simply because they have been mentioned in a complaint, even if the complaint does not allege that they violated the Federal Election Campaign Act ("the Act" or "FECA"). While the guidebook's definition of "respondent" is appropriate, the Commission should employ clear and uniform review procedures to see that it is consistently applied.

To aid the Commission, we would propose that it establish a strong presumption that only respondents named in the complaint as such be treated as respondents. While there may be times that unsophisticated complainants may neglect an obvious respondent, in the main, the Commission should assume complainants are well situated to identify those whom they allege to have violated the Act.

2. Statements of Designation of Counsel

A respondent must have immediate, effective access to counsel. This is critical at the earliest stage of a matter, where the respondent faces a 15-day deadline to respond to a complaint or seek an extension. *See* 2 U.S.C. § 111.6. Yet the Commission's current process for collecting Statements of Designation of Counsel can impede this objective, not promote it. Often, this process consumes respondent resources that would be better directed toward demonstrating "that no action should be taken on the basis of a complaint ..." *Id.* § 111.6(a).

The "Statement of Designation of Counsel" form is not required by statute nor by Commission regulation. It is an administrative device which the Commission presumably uses to comply with the confidentiality requirements of 2 U.S.C. § 437g(a)(12). Delay in the Commission's acceptance of this form can make it harder for respondents to seek extensions in a timely manner, or to obtain information through their attorneys about the complaint. Because the forms do not exist in the rules, it is not always clear why some are accepted, and others rejected. Sometimes, a treasurer may sign a form on behalf of a committee, and yet remain unrepresented because the form did not make explicit that the attorney was also representing the signatory. In other cases, a law firm can represent a committee through three years of audit, only to have the Office of General Counsel require a new designation of counsel form before discussing the administrative complaint that arose from the same audit.

Criminal prosecutors operate under grand jury secrecy rules that are no less stringent than FECA's confidentiality requirements. Yet a prosecutor will communicate with attorneys on their verbal affirmations that they represent the client involved. Bar rules and general criminal laws make these affirmations reliable. Attorneys falsely representing to a Federal agency that they are counsel to a party are subject to severe sanction. Moreover, bar rules prohibiting lawyers (including government lawyers) from communicating with represented parties, as well the Sixth Amendment's guarantee of the right to counsel, may at times be in conflict with the Commission's current practice.

The Commission should streamline the process for designating counsel. There is no reason why it should not allow an attorney to say that he or she is representing a respondent in initial correspondence with the Commission, and then communicate with that attorney on a going-forward basis. Additionally, when the Commission is aware that an attorney represents a particular respondent from its own records, it would be helpful for the Commission to reach out directly to that attorney when providing notification of a complaint in the first instance.

3. Scope of pre-RTB review

The Commission has asked what information it may consider while evaluating a complaint, before taking the required affirmative vote of four Commissioners to "make an investigation . . ."

2 U.S.C. §437g(a)(2). Beyond considering the facts recited in the complaint and any responses, the Commission should consider only those facts already in its own possession as a result of its day-to-day activity. This includes: (1) facts contained in regular public reports submitted to the agency; (2) facts from any other complaints against the same or related respondents; (3) facts submitted by respondents, including affidavits and other exhibits; and (4) facts contained in reports or submissions from state or federal agencies, if any. If the Commission considers facts from such sources, then it should consider all such facts, including any exculpatory or mitigating facts.

Congress wrote FECA to place limits on what the Commission may do at the pre-reason to believe, or "pre-RTB" phase. Early versions of S. 3065, which President Ford ultimately signed into law as the Presidential Election Campaign Act Amendments of 1976, contained language that expressly provided for investigation before a finding of reason-to-believe. As reported initially by the Senate Rules Committee, the bill amended 2 U.S.C. § 437g to provide:

The Commission, *upon receiving a complaint under paragraph 1, or if it has reason to believe that any person has committed a violation of this Act* or of chapter 95 or 96 of the Internal Revenue Code of 1954, shall notify the person involved of such alleged violation and *shall make an investigation of such alleged violation* in accordance with the provisions of this subsection.

S. 3065, 94th Cong. § 108 (1976), *available at*, Federal Election Commission, Legislative History of Federal Election Campaign Act Amendments of 1976, at 236 (1977). However, the legislation ultimately passed by Congress was substantially different. The amendment to 2 U.S.C. § 437g ultimately provided:

The Commission, *upon receiving a complaint under paragraph 1, and if it has reason to believe that any person has committed a violation of this Act*, or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, *or, if the Commission, on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred*, shall notify the person involved of such alleged violation and *shall make an investigation of such alleged violation* in accordance with the provisions of this section.

Federal Election Campaign Act Amendments of 1976, § 109, 90 Stat. 475, 483 (1976) (current version at 2 U.S.C. § 437g(a)(2)).

Section 437g's evolution shows clearly that Congress did not intend for the Commission to conduct an investigation before finding reason to believe. The draft bill would have allowed the Commission to "make an investigation" without any such finding. The Commission would have been able to "make an investigation" simply "upon receiving a complaint." But the final bill

narrowed the Commission's authority on this front. It required the Commission to find reason to believe *before* it could "make an investigation" – *either* upon receiving a complaint, *or* upon ascertaining information in the normal course of carrying out its supervisory responsibilities. In either case, a Commission reason to believe finding became a condition precedent for Commission investigation. This remained true even when Congress amended section 437g(a)(2) into its substantially current form in 1979.

While Congress specifically narrowed the Commission's pre-RTB investigative authority, Commission Directive 6 attempts to expand it. Saying that "[t]he legislative history of Section 437g goes no further than the statutory language in describing what is meant by information obtained by the Commission in the normal course of carrying out its supervisory duties", Directive 6 claims the authority to generate enforcement actions not simply from internal referrals, or from referrals from other law enforcement agencies, but through staff-initiated "non routine reviews," and even reviews of news articles. Directive 6 at 2, 4-5 (internal quotations omitted). Moreover, when receiving a complaint, the Commission has a current practice of seeking external information to verify its allegations, including consulting web searches, media reports, and subscription news services for facts not contained in the complaint, or other material not previously provided to the Commission. This current practice can result in the Commission relying on unreliable information that has not been subjected to the same requirements as complaints themselves, which must be signed, sworn and notarized. Unlike the information in a sworn complaint or a publicly filed FEC report, the information that Commission staff may find on the Internet can be obscure and haphazard, and it can provide the basis for a reason to believe finding even while the respondent has no opportunity to identify its deficiencies.

Neither *Antosh v. FEC*, 599 F. Supp. 850 (D.D.C. 1984), nor *In Re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044 (D.D.C. 1979), supports expansive Commission fact-finding before a reason to believe finding. Both can be understood to require Commission review only of the information it already has through the normal operation of the statute. *Antosh* involved the Commission's failure to consider information that was already within its domain through normal operation of FECA – namely, reports filed pursuant to 2 U.S.C. § 434(a) that tended to show that the complaint's allegations were correct, and that the respondent's affidavit, on which the Commission relied to dismiss the matter, was not. *See* 599 F. Supp. at 855. *In Re Federal Election Campaign Act Litigation* found that the Commission's decision *not* to investigate an administrative complaint "was eminently reasonable." 474 F. Supp. at 1046. The court said that, when reviewing a complaint, "the Commission must take into consideration all available information concerning the alleged wrongdoing" and "may not rely solely on the facts presented by the sworn complaint when deciding whether to investigate." *Id.* However, the court envisioned review of "the individual sworn complaint, other sworn complaints, and facts which the FEC has ascertained in the normal course of carrying out its supervisory responsibilities." *Id.* It did not call for the accumulation of evidence, beyond that which the Commission already possessed in the ordinary course under the statute.

FECA provides that the Commission will receive certain types of information in the ordinary course of its business – whether through sworn administrative complaints, audits, required reports, or referrals from other governmental agencies. There is a difference between a "rational review" of a complaint, in which the Commission does not willfully blind itself to the information it already lawfully has, *Antosh*, 599 F. Supp. at 855, and an initiative that seeks new information through the enforcement process. That difference is called an "investigation," which Congress purposely reserved for a discrete stage of the process triggered only by an affirmative vote of four Commissioners. *See* 2 U.S.C. § 437g(a)(2).

B. Civil Penalties

FECA sets maximum penalty amounts for particular types of violations. *See* 2 U.S.C. §§ 437g(a)(5). Judicial precedent sets forth further conditions that must be considered in determining whether to obtain penalties, and if so, how high they should be: (1) the good or bad faith of the respondent, (2) the injury to the public, (3) the defendant's ability to pay, and (4) the need to vindicate the Commission's authority. *See FEC v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989). *Accord FEC v. Friends of Jane Harmon*, 59 F. Supp. 2d 1046, 1058 (C.D. Cal. 1999); *FEC v. Kalogianis*, 2007 WL 4247795 (M.D. Fla. Nov. 30, 2007). The Commission's recent disclosures of how it calculates opening settlement offers are laudable, insofar as they bring transparency to a negotiation process marked by its opacity. However, these same disclosures show how untethered the penalty process is to the judicial standards – or, indeed, to any empirical yardstick other than the theoretical statutory maximums.

"The assessment of civil penalties is discretionary." *FEC v. Ted Haley Congressional Committee*, 852 F. 2d 1111 (9th Cir. 1988). Yet the norm is to assume that penalties are inevitable, and should be calculated by starting from the maximum and working down. The chart approach outlined by the Commission in its Request for Comment embraces this assumption. Yet the Commission ought to seek no greater penalties than a court may lawfully impose, which is *not* always the same as the statutory maximum. *See Furgatch*, 869 F.2d at 1258. It should be no less "guided by sound legal principles" than a court would be. *Ted Haley*, 852 F. 2d at 1116. The Commission should develop and build a metric for seeking penalties that is organized around the four *Furgatch* factors. These factors do not include any imagined notion of a "cost of doing business," which actual experience does not support. 78 Fed. Reg. at 4,089. The main deterrent in the enforcement process is the stigma of an adverse Commission finding or an admitted violation. Especially for those who hold and seek federal office, an adverse finding is far more injurious than the amount of the civil penalty paid.

C. Alternative Dispute Resolution

The ADR program was conceived as a way to expedite the resolution of simple matters through expanded use of negotiations, and was initially focused on promoting compliance through

mutually agreeable settlements. *See, e.g.*, Federal Election Commission, Annual Report 2002, at 14-15. By and large, when operated as originally conceived, it has been an efficient way of promoting compliance with FECA.

Increasingly, however, the ADR program has become more of a parallel administrative fine program, to which the Commission's Reports Analysis and Audit Divisions send reporting violations for resolution at penalty levels broadly directed by the Commission. ADR is an attractive option for a committee that wishes to resolve enforcement matters at a lower overall cost – not just in terms of penalties, but also in terms of legal fees and organizational costs. It is well-suited also for committees that would benefit from a thoughtful review of their internal compliance processes and practices. The Commission should retain the ADR program, but should focus it more closely on its original, stated objectives.

As the Request for Comment notes, there have been some recent ADR matters in which settlements have been negotiated, only for the Commission not to adopt them. The best way to avoid this situation is to improve the quality of referrals to ADR. Especially when matters are referred by the Reports Analysis Division, it can be hard for the committee and the ADR office to have a shared understanding of the conduct that must be remedied, because of the subjectivity involved in the referral. Both with respect to ADR and the regular enforcement process, the Commission should review closely the criteria that are applied to generate referrals. The Commission's process for seeking review of legal questions in the report process may ultimately prove helpful toward this end, and should continue.

D. Unsworn Complaints Stemming from *Sua Sponte* Submissions

The Act itself contains no provision for *sua sponte* submissions. Nevertheless, in 2007, the Commission adopted a policy establishing a process whereby a party can disclose its own violations of the Act *sua sponte*. Whatever the merits of that policy, in some instances it has proved to be a vehicle whereby a party seeks dispensation from the Commission not only for disclosing its own actions, but for disclosing the alleged wrongful actions of others as well. Thus, for example, a corporation might make a *sua sponte* submission disclosing that it unlawfully facilitated contributions to a candidate. Yet in the course of that submission, it will also disclose that one or more of its officers "consented" to the violation.

Under current practice, the Commission will find reason to believe against the officers, claiming that it discovered the alleged violation "in the ordinary course of its supervisory responsibility." This is, of course not true. In fact, the Commission will have learned of the potential violation through the *sua sponte* submission – essentially, an unsworn complaint. The officer/respondent will have been deprived of important statutory and procedural rights, including (1) a sworn complaint; and (2) an opportunity to respond to the complaint prior to an RTB finding.

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The Commission should revise its *sua sponte* policy to require that such submissions be sworn under oath and that any potential respondents be identified in accordance with the normal statutory process, as discussed in our comments on the pre-RTB process above.

We appreciate the opportunity to comment on these matters.

Very truly yours,

A handwritten signature in blue ink, consisting of several overlapping, fluid strokes that are difficult to decipher but appear to be a name.

Marc Erik Elias
Brian G. Svoboda