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May 23, 2011

Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Disclosure of Documents and Information in Enforcement Process

On behalf of the Perkins Coie LLP Political Law Group, we write in response to the Commission's May 9, 2011, request for public comments. Our comments reflect our experience as practitioners over many years; we are not expressing the views of particular clients. We appreciate the opportunity to make our views known on the subject of the agency's procedures regarding disclosure of relevant information gathered by the Commission in its enforcement proceedings.

INTRODUCTION

We are pleased that the Commission has chosen to undertake a critical review of its current practices regarding disclosure to respondents of relevant information gathered by the Commission in the investigative stage of its enforcement proceedings. While courts have held that the constitutional principles which require disclosure of exculpatory evidence in the criminal context do not apply in administrative proceedings, *Mister Discount Stockbrokers v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985), a number of agencies have formally adopted disclosure policies in enforcement proceedings. *See, e.g.*, Federal Energy Regulatory Commission, Policy Statement on Disclosure of Exculpatory Materials, Docket No. PL 10-1-000, *available at* www.ferc.gov/whats-new/comm-meet/2009/121709/M-2.pdf. In the Congressional context, ethics rules expressly provide for the disclosure of exculpatory information to respondents during the course of an investigation. *See* House Comm. on Ethics R. 25; Office of Cong. Ethics R. 4(F).

A formal policy regarding disclosure of favorable or relevant information to respondents during an administrative investigation is a critical step toward eliminating uncertainty in the enforcement process. Additionally, a formal policy will ensure that respondents are treated fairly

throughout the investigation and that the Commission's ultimate decision is reached with maximum impartiality, furthering the Commission's goal of open, fair and just investigations and enforcement proceedings.

DISCUSSION

The Federal Election Campaign Act implies, and the Commission has always assumed, that the civil enforcement process is an impartial exercise in reasoned agency decision-making. As an expert, independent agency, the Commission's goal is to reach decisions on the dispassionate advice of its general counsel, while affording respondents the opportunity to present facts and arguments throughout the investigative process.

In our experience, however – and there are, of course, exceptions – the process is functionally adversarial. In most cases, on a close, controversial question, the respondent will vigorously assert its innocence; the general counsel will vigorously assert its culpability; and the Commission will have to sort the matter out. The adversarial nature of the process lends itself poorly to a scheme where a formal policy on disclosure of exculpatory or relevant information is not in place. Without such information, respondents may be unable to adequately respond to adverse recommendations of the general counsel, frustrating the Commission's ability to reach an adequate resolution. Therefore, we would respectfully submit, that the Commission should adopt a formal policy in accordance with the recommendations below.

The adoption of a formal policy is a logical, and necessary, extension of the current Commission practice regarding disclosure of documents to respondents. It incorporates the current practice, under which documents cited and relied upon in the general counsel's brief are provided to respondents upon request. However, it removes the unnecessary element of uncertainty that inevitably accompanies any informal practice or procedure. Instead, the policy formally requires that the Commission disclose any exculpatory documents which are favorable or relevant to a respondent, subject to the relevant privileges and confidentiality. The policy also sets forth a procedural framework within which disclosures are made. This formalization serves to strengthen the overall effectiveness of the Commission's enforcement procedures.

First, the required disclosure is consistent with the basic fairness of the treatment of a respondent under investigation by a government agency. Respondents faced with a recommendation to find probable cause must have the opportunity to review the information which led to the recommendation, if they are to appropriately respond. And the Commission must have the opportunity to hear a respondent's arguments about such information before making a final determination. While the Commission has provided certain exculpatory material to respondents in the past, formalizing the process and scope of such disclosure promotes maximum fairness.

Additionally, as we have noted, the adversarial nature of most proceedings before the Commission makes the need for the adoption of a formal policy regarding disclosure critical. A respondent should be able to know with absolute certainty that exculpatory documents or documents the general counsel's office relied on in making its recommendation will be disclosed, subject to all applicable privileges and confidentiality provisions. Currently, the lack of a formal policy creates inconsistency in how documents are produced. A formal policy helps ensure that matters are treated alike, and ultimately allows for a more efficient resolution of issues regarding disclosure of exculpatory material.

The underlying elements of fairness and certainty dictate that disclosure to respondents of relevant documents should occur at both the pre-probable cause conciliation stage and the probable cause stage of the enforcement process. In determining whether to authorize pre-probable cause conciliation, the Commission considers exculpatory evidence and any other relevant information obtained up to that point. Since the Commission may rely on such information in making its final determination, respondents must be given an opportunity to review and respond to that information. The same is true at the probable cause stage. If the Commission is to make an informed decision about the parameters of conciliation or a finding of probable cause, it should know what the respondents have to say about the relevant evidence. The most efficient way to do this is to adopt a formal policy detailing the process by which the Commission may disclose such information to respondents.

Finally, we support the disclosure of relevant documents provided to the Commission by another co-respondent, with the incorporation of certain safeguards to ensure confidentiality. Requiring the Commission to obtain a confidentiality waiver from the co-respondent who provided the document or about whom the document relates is a necessary provision. Further, it is appropriate to require the respondent receiving such documents to sign a nondisclosure agreement to keep any information obtained from the Commission confidential, given the sensitive nature of the information the Commission frequently seeks. Absent these waivers and agreements, redacting the portions of the material that are subject to confidentiality is the most efficient way to balance the competing interests of confidentiality and disclosure. A formal policy providing for the involvement of the Commissioners in the determination of disclosure, if waivers are not obtained and redaction is not possible, ensures that the Commission is making every effort to provide respondents with the opportunity to review and respond to any relevant information, while ensuring that the confidentiality rights of the co-respondents are respected. The inclusion of this provision in the policy underscores the Commission's ultimate goal of providing open, fair and just investigations and enforcement proceedings.

We appreciate the opportunity to discuss these matters, and would like the opportunity to testify in open hearing.

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Very truly yours,

Perkins Coie, LLP

A handwritten signature in blue ink, consisting of several overlapping, slanted strokes that form a stylized, illegible name.

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Judith L. Corley
Brian G. Svoboda
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