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Re: Notice 2008-13 Agency Procedures

Dear Sirs:

This letter responds to the Federal Election Commission's request for public comments on it review of the policies and procedures of the agency. I am not representing any client or organization, but am filing my comments as a private citizen. My recommendations are based on my experience as a Commissioner from 2006 to 2007, and my general experience as an attorney for the Justice Department.

In general, I believe that the FEC has made significant progress over the last few years working towards two laudable goals: improving its internal procedures and the speed of its enforcement process, and making its policies and practices more transparent to the regulated community. A good example of this is the policy the FEC adopted in 2007 providing targets of agency investigations (" Respondents") with the opportunity for an oral hearing before the Commission at the probable cause stage of a matter under review. The lack of such a hearing was a basic violation of due process and the American Bar Association had recommended that the FEC provide such a procedure for more than 25 years.

The FEC has also borne the brunt of a great deal of unfair and vitriolic criticism by some who disregard the practical problems involved in investigating possible

violations of the Federal Election Campaign Act ("FECA") and enforcing an overly complex and at times ambiguous and confusing statute. These critics tend to confuse disagreements over substance and procedures. Your hearings and subsequent consideration of these issues will be most fruitful if procedural considerations are kept free of substantive and ideological quarrels.

This point is well illustrated by an example of which I have personal knowledge. The 2006-2007 conciliation agreements in the various "527" cases prompted loud protests from the FEC's most frequent and consistent critics who claimed the resolutions of these cases were "too little, too late." The issue of "too little" is, of course, an issue of substance. The issue of "too late" is one of procedure. I encourage the Commission to consider at length the issue of whether its enforcement process results in matters being resolved "too late" and what if anything, can be done to correct any perceived problems in that area. I would also encourage the Commissioners to keep in mind that most of the "too late" critics have never represented any actual Respondents before the FEC in enforcement actions and, therefore, have no firsthand knowledge of how the enforcement process works (or should work).

To the extent that issues of substance and procedure are treated as one and the same, you should keep in mind that the First Amendment rights of Respondents rightfully trump any sense of the Commissioners that they should mete out swift justice for the sake of discouraging others to not undertake similar political activities. The speech and associational rights of Respondents entitle them to a careful and considered hearing, which necessarily takes time and resources.

It should also be kept in mind that even experienced attorneys within the Office of General Counsel ("OGC") and the six Commissioners that head up the agency sometimes reasonably disagree on what the law and regulations require. When the agency charged with enforcing a statute cannot itself agree on the meaning of its provisions, it is unfair and an abuse of the law enforcement process for a federal agency to prosecute individuals in the regulated community for supposed violations.

Some of the "too little, too late" criticisms of the FEC also show a cavalier disregard for the First Amendment. When carrying out its enforcement responsibilities, the FEC must always be sensitive to its responsibility to protect the First Amendment rights of individuals, candidates, and organizations to engage in unfettered political speech and political activity. FECA comes dangerously close to (and, in my opinion, in many instances crosses over the line of) violating fundamental rights to participate in the political arena. This brings up a very basic issue: When there is disagreement within the agency or when there is any doubt over what the law requires, the agency should always err in favor of allowing political activity that is protected by the First Amendment. Indeed, this is not just a sound policy position for the FEC to assume, it is what the First Amendment requires in a close case. As the Supreme Court correctly said in the *Wisconsin Right to Life* decision, when there is any doubt, you must err in favor of free speech.

That said, there are a number of areas where the FEC could improve its procedures, particular when it comes to protecting the due process rights of individuals who are targets of enforcement investigations or who are otherwise interacting with the agency.

Advisory Opinions.

The FEC should revise its procedures to allow the Requestor of an Advisory Opinion ("AO") to appear before the Commission at the time that the draft AO is being considered at a public meeting.

As you know, under it current procedures, the FEC posts draft AO's prior to its meeting on its website. The public may submit written comments on the draft AO. At the public meeting, OGC makes a presentation explaining the Advisory Opinion request and the legal reasons for the draft response according to the General Counsel's interpretation of applicable law and regulations. The Commissioners then ask questions of the General Counsel and discuss among themselves the validity of the draft AO. Finally, a vote is taken on whether to approve the draft, which may incorporate amendments made at the table.

In my experience, there were times when factual questions arose that the General Counsel could not answer, but that the Requestor or the Requestor's counsel could have. In many instances, the Requestor's counsel was actually sitting in the audience at the public meeting but unable to directly answer the question because the FEC's procedures do not currently allow the Requestor to appear before or address the Commission. This puts the agency in the awkward and incongruous position of having the individual who could answer Commissioners' questions present but not allowed to speak.

The FEC should allow the Requestor of an AO (or his counsel) to make a short presentation to the Commissioners following the General Counsel's presentation. This of course would not be required, but would be an option made available to the Requestor that would give the Requestor the opportunity to further engage the Commissioners, to state whether he agrees with the General Counsel, and if he disagrees, to explain why the General Counsel's interpretation of FECA as applied to the facts in the request is incorrect. This would also allow the Requestor to answer any other questions that the Commissioners have about the AO request or comments received from the public. While the Requestor currently has the opportunity to submit written comments in response to the draft AO, this opportunity is inadequate for two reasons. First, Requestors often are not provided with adequate time to respond in writing to draft AO's. Second, there is no substitute for an oral presentation and a direct exchange between Commissioners and the Requestor.

This process would improve the quality of the Commission's work. It would ensure that the Commissioners have all of the relevant facts they need to make an informed decision when voting on the AO. Additionally, it would ensure that the Commissioners have heard and considered all of the Requestor's legal arguments, and

that those legal arguments were not the product of a hurried last-minute written response to a late-submitted document.

Other individuals and organizations do not need to be permitted to appear - they have already had their opportunity to weigh in on the AO request and the draft response through written comments. Rather, the Requestor's oral presentation is simply an extension of the correspondence that Requestors typically have with OGC staff.

Such a procedure would in no way delay the AO process. It fact, it could prevent the delays that occur when AO's are tabled until the next public meeting of the FEC because questions raised by the Commissioners about the request cannot be answered by the General Counsel. This change is well within the general authority of 2 U.S.C. §437d and can be made by the Commission without any requirement for a legislative amendment to FECA.

The Commissioners should consider implementing a trial program, as it did with probable cause hearings.

Motions Before the Commission.

As the Commissioners know only too well, the very formal procedural process set out in §437g of FECA makes it extremely difficult for the target of a complaint to have a frivolous complaint dismissed before incurring a great deal of time, resources, and attorneys' fees responding to the complaint and an FEC investigation. It is also virtually impossible for a Respondent to bring to the attention of the Commissioners mistakes, errors, or abuses that the Respondent believes are being made by the attorneys in OGC who are investigating a complaint.

The FEC should establish a formal policy allowing the subjects of FEC investigations to communicate directly with Commissioners early in the investigative process. The optional written response to the complaint is Respondent's opportunity to argue against an RTB ("Reason To Believe" that a violation has occurred) finding, but it does not offer the Respondent the opportunity to argue about the investigative process itself (which necessarily begins only after Respondent's written response is received).

Due process considerations call for Respondents to have a limited opportunity to file procedural motions of the type that parties can file in federal court, including over the actual investigation of the complaint by FEC staff. Respondents should be given the ability to respond to the "scope" of an OGC investigation. Specifically, they should be afforded the opportunity to file "motions" similar to motions to dismiss if they assert that even if all of the facts asserted in a complaint are assumed to be true, there is no violation of FECA.

Respondents should also be able to file motions similar to motions for protective orders when investigations or requests for depositions may be too broad, too voluminous, abusive or seek information not relevant to the merits of a particular complaint. Such

motions should be served on both OGC and the Secretary of the Commission so that both the General Counsel and the Commissioners are immediately notified of such motions. Respondents should not be entitled to an oral hearing on a motion unless the Commissioners decide to grant one.

In my own experience, OGC staff usually acted in good faith when conducting investigations. However, current procedures vest considerable discretion with the staff with respect to conducting investigations. In my view, discretionary decision making is properly vested in the Commissioners rather than staff. The procedures outlined above would afford the Commissioners an opportunity to resolve some of the discretionary decisions and issues that arise during investigations.

This is another basic procedural due process step that would improve the fairness of the Commission's investigative and adjudicative process. This step would also have the added benefit of better involving the Commissioners in what is, in many cases, the most sensitive part of the enforcement process. Finally, it should actually increase the efficiency of the agency's enforcement. While it will take time for the Commissioners to respond to these motions, it nonetheless should provide for speedier resolution of genuinely frivolous complaints and curtailment of overly expansive discovery. This will save both time and staff resources.

Deposition Practices.

The FEC change of policy in 2003 regarding depositions was a much needed change. Prior to 2003, the FEC would not provide a deponent with the transcript of his own deposition until an investigation was completed. The FEC initiated a new policy, however, that provides a copy of a transcript to the deponent upon request unless the General Counsel specifically certifies that withholding the transcript is necessary to the successful completion of the investigation (something that rarely happens). The FEC's prior policy on this issue was a basic deprivation of due process rights.

A further change is needed. Currently, when the FEC sends a Respondent a probable cause brief, Respondents are generally provided (upon request) the documents and depositions that are referred to in the General Counsel's brief and that form the basis of the General Counsel's conclusion that a violation of FECA has occurred. However, Respondents should also be entitled to receive any other exculpatory documents and depositions that may provide a defense to the claimed violation of FECA or that create a reasonable doubt that any violation has occurred. For example, documents or testimony obtained from other witnesses should be available to Respondents, as it is in any judicial proceeding.

While the Office of General Counsel carries out a civil law enforcement investigation of a complaint that FECA has been violated, the entire adjudicative process as set out in FECA is very similar to an administrative law court proceeding. The Commissioners act much like administrative judges in deciding whether a violation of the law has occurred and whether a civil penalty and a settlement should be negotiated with a

Respondent. Under such circumstances, it is a basic due process requirement that a Respondent receive any information developed or discovered by the FEC that shows that, in fact, no violation of the law occurred. OGC should be prepared to forward all such information to a Respondent.

Releasing Documents or Filing Suit before an Election.

The Commission should not allow pending elections to influence the timing of its release of documents regarding a closed enforcement matter or the filing of an enforcement action in federal court. The agency should follow its internal procedures as strictly as possible and release all such files as soon as possible after a case is closed or to file suit as soon as settlement efforts have failed. The agency has had a very good history of not allowing partisan considerations to influence its enforcement practices. During my time on the Commission, and in fact during the overall history of the Commission, the number of times that votes on enforcement matter have resulted in a split vote is less than 1%. The vast majority of votes on enforcement matters are unanimous. Any consideration of election matters would damage the nonpartisanship of the enforcement determinations and open up the agency to accusations that it is timing its actions to influence the outcomes of elections. This should be avoided at all costs.

Memorandum of Understanding with the Department of Justice.

This memorandum should be amended to strengthen (and require) cooperation and coordination between the FEC and the Department of Justice. The agencies have not always conducted joint investigations in the past when such joint enforcement actions would have benefited both agencies, as well as improved the efficiency (and speed) of enforcement, while minimizing duplicative actions.

Additionally, the Department of Justice has unfortunately been too reluctant in the past to forward information to the FEC on a timely basis that is developed through its criminal investigations, sometimes waiting until after a defendant has been convicted and sentenced.

With some rare exceptions, DOJ has also not been willing to seek court orders within the exceptions provided in Rule 6(e)(3) of the Federal Rules of Criminal Procedure to provide the FEC with information of FECA violations obtained as a result of grand jury investigations.

DOJ prosecutes criminal violations of FECA; the FEC prosecutes civil violations of FECA. Often, and certainly more frequently since the passage of the Bipartisan Campaign Reform Act, a Respondent violating FECA incurs both criminal and civil penalties. But DOJ often waits too long to inform the FEC of information relevant to its civil enforcement responsibilities that is obtained during a criminal investigation, and will not provide information that it claims is privileged or protected by grand jury secrecy requirements. This substantially hobbles the FEC's civil enforcement process including making it impossible for the FEC to request that the judge in the criminal prosecution

consider the imposition of civil penalties at the same time as criminal penalties during sentencing.

This problem must be remedied and can be done by amending the Memorandum of Understanding to mandate better cooperation and to require DOJ to request courts to grant exemptions under Rule 6 for the FEC.

Settlements and Penalties.

Letters of Admonishment

Section 437g of FECA provides authority for the FEC to impose civil penalties through a conciliation process or by filing suit in federal court if no settlement can be reached. The statute does not provide any authority for the agency to send letters of "admonishment" to targets of its investigations. The agency, however, has an unfortunate practice of sending out such letters.

I would recommend that the agency cease issuing any admonishments or other such findings or letters of rebuke. Either an individual or organization has violated FECA and incurs a financial penalty or it has not. If the Commissioners believe a violation has occurred, then they should vote to find a violation and determine the appropriate amount of a civil penalty. Otherwise, the matter should be dismissed. The agency should not attempt to occupy a middle ground by imposing an indeterminate penalty that is not specifically authorized by the statute.

The Use of Sampling

Another area of concern is the calculation of fines based on sampling used by the Audit Division when it audits campaign organizations and their activities. Sampling may be an appropriate analytic tool to determine if a violation of the law has occurred. It may also be a sufficient basis on which to make an RTB finding by the Commissioners. However, it is not an appropriate basis on which to calculate the amount of the civil penalty generated by violations of the law. With sampling, there is no actual knowledge of the exact extent of the violation – just an estimate based on the problems found within the sample. It can never be guaranteed that the sample itself accurately represented the full data set.

If a federal law enforcement agency such as the FEC is determined to fine an individual or an organization engaged in political activity protected by the First Amendment, it should only do so based on a complete and thorough review of all of the materials and information in the case. No penalty should be calculated based on only a sample and an estimate of the amount of wrongdoing. The calculation of a civil penalty should be based only on *actual* evidence found by the agency's lawyers, investigators, and auditors.

Reports Analysis.

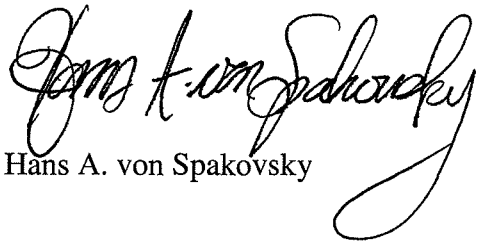
The regulated community's most common interaction with the agency on a day-to-day basis is with the Reports Analysis Division ("RAD"). RAD regularly issues Requests For Additional Information ("RFAI's") based on its analysis of submitted financial disclosure reports. RAD operates under the guidelines approved by the Commissioners. However, in my own experience, there is relatively little supervision by the Commissioners of RAD's activities.

As was the case with OGC, my experience indicated that RAD staff act in good faith when conducting reports analyses and applying the guidelines approved by the Commissioners. However, current procedures vest considerable discretion with the staff with respect to this analysis. As I mentioned before, discretionary decision making is properly vested in the Commissioners rather than staff, particularly since it is the Commissioners who are ultimately answerable to both Congress and the public for the enforcement of FECA.

I recommend that the Commissioners form a separate internal committee, similar to the long-standing committees that the Commissioners utilize to monitor other areas such as litigation and regulations, to more closely monitor and supervise RAD. This committee could meet on a regular basis to review all RFAI's that have been issued. This sort of review would give the Commissioners a better sense of what reporting problems are most common, which would allow the Commission to then be more proactive in terms of fixing reporting problems before they occur. Commissioners would also be able to put an end to the issuance of RFAI's that seek information the Commission deems unnecessary. I believe the regulated community would be well served by, and grateful for, such efforts.

I want to compliment the Commissioners on initiating this review of the FEC's internal procedures and their goal of improving the functions of the agency to the benefit of the public and the regulated community. If the Commissioners would like oral testimony on these issues, I would be happy to provide it when it holds its public hearing on these very important matters on January 14, 2009.

Sincerely yours,



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