



FEDERAL ELECTION COMMISSION
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AGENDA ITEM
For Meeting of: 11-30-06
SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Lawrence H. Norton
General Counsel

Rhonda J. Vosdigh
Associate General Counsel

Mark D. Shonkwiler
Assistant General Counsel

April J. Sands
Attorney

SUBJECT: Draft Proposed Policy Statement Regarding Self-Reporting of Campaign Finance Violations (*Sua Sponte* Submissions)

Please find attached a draft Proposed Policy Statement Regarding Self-Reporting of Campaign Finance Violations (*Sua Sponte* Submissions). The Office of General Counsel has been asked to transmit this document to the Commission Secretary in anticipation of the Open Session on November 30, 2006.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 111**

3 **[NOTICE 2006-]**

4 **PROPOSED POLICY REGARDING SELF-REPORTING**
5 **OF CAMPAIGN FINANCE VIOLATIONS**
6 **(SUA SPONTE SUBMISSIONS)**

7 **AGENCY :** Federal Election Commission

8 **ACTION:** Proposed Statement of Policy with Request for Comments

9 **SUMMARY:** The Commission is seeking comments on a proposed policy statement to
10 clarify and memorialize its approach to enforcement actions arising from
11 self-reported violations (also known as *sua sponte* submissions). In order
12 to encourage the self-reporting of violations about which the Commission
13 would not otherwise have learned, the Commission proposes, in
14 appropriate cases warranting such mitigation, to offer significantly lower
15 penalties than the Commission would otherwise have sought in complaint-
16 generated matters involving similar circumstances. The Commission is
17 also outlining a new expedited procedure that it intends to use in a limited
18 number of situations through which the Commission may allow
19 individuals and organizations that self-report violations and that make a
20 complete report of their internal investigation to proceed directly into
21 conciliation prior to the Commission determining whether their conduct
22 may have violated statutes or regulations within its jurisdiction. The
23 proposed policy also addresses various issues that can arise in connection
24 with parallel criminal, administrative or civil proceedings.
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1 The Commission requests comments on this proposed policy.

2 **DATE:** All comments must be submitted on or before January 29, 2007.

3 **ADDRESSES:** All comments should be addressed to Mark Shonkwiler, Assistant General
4 Counsel, or April Sands, Attorney, and must be submitted in either
5 electronic or written form. Electronic mail comments should be sent to
6 selfreportpolicy@fec.gov and must include the full name, electronic mail
7 address and postal service address of the commenter. Electronic mail
8 comments that do not contain the full name, electronic mail address and
9 postal service address of the commenter will not be considered. If the
10 electronic mail comments include an attachment, the attachment must be
11 in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed
12 comments should be sent to (202) 219-3923, with printed copy follow-up
13 to ensure legibility. Written comments and printed copies of faxed
14 comments should be sent to the Federal Election Commission, 999 E
15 Street, N.W., Washington, D.C. 20463. Commenters are strongly
16 encouraged to submit comments electronically to ensure timely receipt
17 and consideration. The Commission will make every effort to post public
18 comments on its Web site within ten business days of the close of the
19 comment period.

20 **CONTACT:** Mark Shonkwiler, Assistant General Counsel, or April J. Sands, Attorney,
21 Enforcement Division, Federal Election Commission, 999 E Street N.W.,
22 Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.
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2 **SUPPLEMENTARY**
3 **INFORMATION:**

4 **I. Goals and Scope of the Policy**

5 The Commission periodically receives submissions from persons who self-report
6 statutory or regulatory violations of which the Commission had no prior knowledge. The
7 Commission considers such self-reports (which also are referred to as *sua sponte* submissions) as
8 information ascertained in the normal course of carrying out its supervisory responsibilities
9 pursuant to 2 U.S.C. § 437g(a)(2), and may investigate if it determines there is reason to believe
10 a violation has occurred. The Commission also investigates complaints reporting the potentially
11 illegal conduct of another, submitted pursuant to 2 U.S.C. § 437g(a)(1), but which also, by
12 implication, provide a basis for investigating the complainant itself.¹ As a general proposition,
13 self-reported matters, when accompanied by full cooperation, may be resolved more quickly and
14 on more favorable terms than matters arising by other means (e.g., those arising via external
15 complaints, referrals from other government agencies, or referrals from the Commission's Audit
16 or Reports Analysis Divisions).²

17 The Commission recently has seen an increase in self-reported violations, which may be
18 attributable, at least in part, to greater attention being placed on compliance programs for areas
19 of potential organizational liability, and recognition that addressing a problem through
20 self-auditing and self-reporting may help minimize reputational harm. The increase in the

¹ If a person who self-reports a violation of the FECA also makes specific allegations as to other persons not joining in the submission, and particularly where the person making the submission seeks to assign primary responsibility for the violations to another person (including an organization's former officers or employees), the Commission, acting through its Office of General Counsel, may advise the self-reporting person that a portion of the relevant materials should be re-submitted as a complaint to which other persons would be allowed to respond prior to any findings by the Commission.

² When violations are found, FECA requires the Commission to attempt to correct or prevent violations through conciliation agreements before suit may be filed in federal district court.

1 number of self-reported matters has highlighted the need to increase the transparency of
2 Commission policies and procedures. Moreover, the Commission seeks to provide appropriate
3 incentives for this demonstration of cooperation and responsibility.

4 This policy provides an overview of the factors that influence the Commission's handling
5 and disposition of certain kinds of matters. It should be noted that while cooperation in general,
6 and self-reporting in particular, will be considered by the Commission as mitigating factors, they
7 do not excuse a violation of the Act or end the enforcement process. Also, this policy does not
8 confer any rights on any person and does not in any way limit the right of the Commission to
9 evaluate every case individually on its own facts and circumstances.³ Nevertheless, as explained
10 below, the Commission may provide appropriate consideration to respondents who voluntarily
11 disclose and who fully cooperate with the Commission's disposition of the matter.

12 II. Self-Reporting of FECA Violations

13 Self-reporting of violations typically allows respondents to resolve their civil liability in a
14 manner which has the potential to: (1) reduce the investigative burden on both the Commission
15 and themselves; (2) demonstrate their acceptance of organizational or personal responsibility and
16 commitment to internal compliance; and (3) conclude their involvement in the Commission's
17 enforcement process on an expedited basis. A person who brings to the Commission's attention
18 violations of the FECA and Commission regulations and who cooperates with the resulting
19 investigation may also receive appropriate consideration in the terms of an eventual conciliation
20 agreement. For example, the Commission may do one or more of the following:

- 21 • Take no action against particular respondents;
- 22
- 23 • Offer a significantly lower penalty than what the Commission otherwise
- 24 would have sought in a complaint-generated matter involving similar

³ Some violations, for instance, are subject to a mandatory minimum penalty prescribed by statute. See 2 U.S.C. § 437g(a)(6)(C).

1 circumstances or, where appropriate, no civil penalty;

- 2
- 3 • Offer conciliation before a finding of probable cause to believe a violation
- 4 occurred, and in certain cases proceed directly to conciliation without the
- 5 Commission first finding reason to believe that a violation occurred (see
- 6 discussion below);
- 7
- 8 • Refrain from making a formal finding that a violation was knowing and
- 9 willful, even where the available information would otherwise support such a
- 10 finding;
- 11
- 12 • Proceed only as to an organization, rather than as to various individual agents
- 13 or, where appropriate, proceed only as to individuals rather than
- 14 organizational respondents;
- 15
- 16 • Include language in the conciliation agreement that indicates the level of
- 17 cooperation provided by respondents and the remedial action taken by the
- 18 persons.
- 19

20 **III. Factors Considered in Self-Reported Matters**

21 The Commission may take into account various factors in considering how to proceed
22 regarding self-reported violations. In general, more expedited processing and a more favorable
23 outcome will be possible when the self-reporting party can show that upon discovery of the
24 potential violations, there was an immediate end to the activity giving rise to the violation(s); the
25 Respondent made a timely and complete disclosure to the Commission and fully cooperated in
26 the disposition of the matter; and the Respondent implemented appropriate and timely corrective
27 measures, including internal safeguards necessary to prevent any recurrence. Further detail as to
28 these factors is supplied below.

1 Nature of the Violation

2 **(1) The type of violation:** whether the violation was (a) knowing and willful, or
3 resulted from reckless disregard for legal requirements or deliberate indifference to
4 indicia of wrongful conduct; (b) negligent; (c) an inadvertent mistake; or (d) based on the
5 advice of counsel;⁴

6 **(2) The magnitude of the violation:** whether the violation resulted from a one-time
7 event or an ongoing pattern of conduct repeated over an extended period of time (and
8 whether there was a history of similar conduct); how many people were involved in or
9 were aware of the violation and the relative level of authority of these people within the
10 organization; whether individuals were coerced into participating in the violation; the
11 amount of money involved either in terms of absolute dollar amount or in terms of the
12 percentage of an entity's activity; and the impact the violation may have had on any
13 federal election;

14 **(3) How the violation arose:** whether the conduct was intended to advance the
15 organization's interests or to defraud the organization for the personal gain of a particular
16 individual; whether there were compliance procedures in place to prevent the type of
17 violation now uncovered and, if so, why those procedures failed to stop or deter the
18 wrongful conduct; and whether the persons with knowledge of the violation were high-
19 level officials in the organization.

20 Extent of Corrective Action and New Self-Governance Measures

21 **(4) Have all needed investigative and corrective actions been taken:** whether the
22 violation immediately ceased upon its discovery; how long it took after discovery of the

⁴ A respondent seeking to defend conduct based on advice of counsel may not simultaneously withhold documentary or other evidence supporting that assertion based on the attorney-client privilege.

1 violation to take appropriate corrective measures, including disciplinary action against
2 persons responsible for any misconduct; whether there was a thorough review of the
3 nature, extent, origins, and consequences of the conduct and related behavior; whether the
4 respondent expeditiously corrected and clarified the public record by making appropriate
5 and timely disclosures as to the source and recipients of any funds involved in a violation;
6 whether a federal political committee promptly made any necessary refunds of excessive
7 or prohibited contributions; and whether an organization or individual respondent waived
8 its claim to refunds of excessive or prohibited contributions and instructed recipients to
9 disgorge such funds to the U.S. Treasury.

10 **(5) Have more effective compliance measures been implemented:** whether there
11 are assurances that the conduct is unlikely to recur; whether the respondent has adopted
12 and ensured enforcement of more effective internal controls and procedures designed to
13 prevent a recurrence of the violation; and whether the respondent provided the
14 Commission with sufficient information for it to evaluate the measures taken to correct
15 the situation and ensure that the conduct does not recur.

16 Disclosure and Cooperation

17 **(6) Was the violation fully disclosed to the Commission:** whether steps were taken
18 upon learning of the violation; whether the disclosure was voluntary or made in
19 recognition that the violation had been or was about to be discovered, or in recognition
20 that a complaint was filed, or was about to be filed, by someone else; and whether a
21 comprehensive and detailed disclosure of the results of its internal review was provided
22 to the Commission in a timely fashion;

1 **(7) Was there full cooperation with the Commission:** whether the respondent
2 promptly made relevant records and witnesses available to the Commission, and made all
3 reasonable efforts to secure the cooperation of relevant employees, volunteers, vendors,
4 donors and other staff without requiring compulsory process; whether the respondent
5 agreed to waive or toll the statute of limitations for activity that previously had been
6 concealed or not disclosed in a timely fashion.

7 The Commission recognizes that all of the above-listed factors will not be relevant in
8 every instance of self-reporting of potential FECA violations, nor is the Commission required to
9 take all such factors into account. In addition, these factors should not be viewed as an
10 exhaustive list. The Commission will continue to resolve matters based on the facts and
11 circumstances of each case.

12 The Commission seeks to encourage the self-reporting of violations. To that end, the
13 Commission will consider reducing opening civil penalty offers⁵ by up to 75%. The amount of
14 the reduction depends on the facts and circumstances of a particular case. The Commission will
15 consider the factors set forth above. In order to provide more concrete guidance, the
16 Commission may establish a policy setting forth the weight it will give to some of the facts and
17 circumstances.

18 The Commission is considering adopting a policy of granting a civil penalty reduction of
19 up to 50% to respondents who meet the following criteria:

- 20
- 21 • Respondents alert the Commission to potential violations before the violation had
22 been or was about to be discovered by any outside party, including the FEC;

⁵ The Commission normally applies standard civil penalty calculations and then adjusts the figure for aggravating or mitigating circumstances. For example, if the standard civil penalty calculation were \$20,000 it might be raised for an aggravating factor, such as failure to timely file an election sensitive report. Once the initial calculation is reached, respondents normally receive a 25% discount off of this penalty for settling during the pre-probable cause conciliation stage. Any discounts pursuant to this policy will be applied after this reduction.

- 1 • Respondents amend reports or disclosures to correct past errors, if applicable;
- 2 • Any appropriate refunds, transfers, and disgorgements are made and/or waived;
- 3 • The violation immediately ceased upon discovery; and
- 4 • Respondents fully cooperate with the Commission in ensuring that the sua sponte
- 5 submission is complete and accurate and in taking corrective measures.

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7
8 The Commission is considering adopting a policy of granting a civil penalty reduction of
9 up to 75% to respondents who meet the above criteria plus the following criteria:

- 10 • Respondents hired independent experts to conduct a thorough review,
- 11 investigation, or audit;
- 12 • Respondents provide the Commission with all documentation of the experts’
- 13 review, investigation, or audit; and
- 14 • Respondents took appropriate corrective action(s) such as disciplinary action
- 15 against any persons responsible for misconduct and made changes to internal procedures
- 16 to prevent a recurrence of the violation.

17
18 Alternatively, the Commission is considering adopting a policy of generally granting a
19 civil penalty reduction of 50% to respondents that voluntarily self-report violations to the
20 Commission, and of raising or lowering that discount depending on the aggravating and
21 mitigating factors outlined above. The discount could be as high as 75% or as low as 25%,
22 depending on the facts of the case in question.

23
24 The Commission will be the sole arbiter of whether the facts of each case warrant a
25 particular reduction in the penalty. The Commission will generally not give a respondent the
26 benefit of this policy if the respondent is the subject of a criminal or other government
27 investigation. In considering appropriate penalties, the Commission will also consider the
28 presence of aggravating factors, such as knowing and willful conduct or involvement by senior
29 officials of an entity. The Commission may also consider other factors not enumerated in this
30 policy for the purposes of applying or withholding a possible discount.

1 **IV. Fast-Track Resolution**

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3 The Commission will generally not make a reason-to-believe finding or open a formal
4 investigation for respondents that self-report violations, if: (1) all potential respondents in a
5 matter have joined in a self-reporting submission that acknowledges their respective violations of
6 the FECA; (2) those violations do not appear to be knowing and willful; and (3) the disclosure is
7 substantially complete and the submission reasonably addresses the significant questions or
8 issues related to the violation. Accordingly, the Commission is modifying its current practice to
9 allow for an expedited Fast-Track Resolution (“FTR”) for a limited number of matters involving
10 self-reported violations. This procedure would be available at the Commission’s discretion, but
11 may be requested by respondents.

12 Respondents eligible for the FTR process will meet with the Office of General Counsel to
13 negotiate a proposed conciliation agreement before the Commission makes any formal findings
14 in the matter. Although the Commission is always free to reject or seek modifications to a
15 proposed conciliation agreement, it is expected that this process will allow for more expedited
16 processing of certain types of violations where factual and legal issues are reasonably clear. It
17 also will allow respondents to resolve certain matters short of the Commission finding that there
18 is reason to believe that a violation has occurred. Examples of matters that might be eligible for
19 such treatment include:

- 20 • Matters in which an individual contributor discovers that he or she
21 inadvertently violated the individual aggregate election cycle
22 contribution limit contained in 2 U.S.C. § 441a(a)(3);
- 23 • Matters in which a political committee seeks to disclose and correct
24 relatively straightforward reporting violations;
- 25 • Matters in which a contributor and a political committee jointly seek
26 to resolve their liability for a simple and clearly inadvertent excessive
27 or prohibited contribution; and

- Matters in which the initial self-reporting submission by the respondents is so thorough that only very limited follow-up by the Office of the General Counsel is necessary to complete the factual record.

V. Parallel Proceedings

The Commission recognizes that persons self-reporting to the Commission may face special concerns in connection with parallel criminal investigations, State administrative proceedings, and/or civil litigation. The Commission expects that persons who self-report to the Commission will inform the Commission of any existing parallel proceedings. The Commission encourages persons who self-report to the Commission also to self-report related violations to any law enforcement agency with jurisdiction over the activity. This will assist the Commission, where appropriate and possible, in working with other federal, state, and local agencies to facilitate a global and/or contemporaneous resolution of related violations by a self-reporting person. The possibility of such a resolution is enhanced when the self-reporting person expresses a willingness to engage other government agencies that may have jurisdiction over the conduct and to cooperate with joint discovery and disclosure of facts and settlement positions with respect to the different agencies.

In situations where contemporaneous resolution of parallel matters is not feasible, the Commission will consider whether terms contained in a conciliation agreement with the Commission may affect potential liability the same respondent realistically faces from another agency. In appropriate cases, where there has been self-reporting and full cooperation, the Commission may agree to enter into conciliation without requiring respondents to admit that their conduct was “knowing and willful,” even where there is evidence that may be viewed as supporting this conclusion. (The civil penalty, however, may be based on “knowing and willful” conduct.) The Commission has followed this practice in several self-reported matters where the

1 organizational respondents promptly self-reported and took comprehensive and immediate
2 corrective action that included the dismissal of all individual corporate officers whose actions
3 formed the basis for the organization’s potential “knowing and willful” violation.

4 The Commission, which has the statutory authority to refer “knowing and willful”
5 violations of the FECA to the Department of Justice for potential criminal prosecution, 2 U.S.C.
6 § 437g(a)(5)(C), and to report information regarding violations of law not within its jurisdiction
7 to appropriate law enforcement authorities, 2 U.S.C. § 437d(a)(9), will not negotiate whether it
8 refers, reports, or otherwise discusses information with other law enforcement agencies.

9 Although the Commission cannot disclose information regarding an investigation to the public, it
10 can and does share information on a confidential basis with other law enforcement agencies.

11 **VI. Conclusion**

12 In light of the considerations explained above, the Commission is considering issuing a
13 policy statement to clarify how it exercises its discretion in enforcement matters involving self-
14 reported violations of the FECA. The Commission invites comments on any aspect of the
15 proposed policy statement, including:

16 (A) Whether and to what extent the Commission should consider the various factors
17 described above, and/or other factors, in resolving self-reported violations of the FEC; and

18 (B) Whether and how to apply the new proposed Fast Track Resolution process in
19 resolving self-reported violations of the FECA.

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Michael E. Toner
Chairman
Federal Election Commission

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DATED: _____
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