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Mark D. Shonkwiler, Esquire  
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Enforcement Division  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

*Via Electronic Mail:*  
probablecausehearings@fec.gov

Re: Comments on Notice of Draft Statement  
of Policy: Probable Cause Hearings

Dear Mr. Shonkwiler:

We hereby submit these comments on the Notice of ~~Draft~~ Statement of Policy ("NDSP"), regarding probable cause hearings. *See* 71 Fed. Reg. 71088 (Dec. 8, 2006). We appreciate the opportunity to submit written comments, and in the event the Commission holds a hearing on this matter, would like to testify.

We support the Commission's efforts to draft a Statement of Policy that permits respondents in pending enforcement matters an opportunity to request a hearing. In our experience, it comes as a great surprise to many that a respondent in a Commission enforcement matter never actually appears before the Commission itself. The basic tenets of due process consist of notice and an opportunity to be heard – and unfortunately, many go away from the Commission's enforcement process feeling as though they have not been afforded an opportunity to be heard. Thus, allowing for the possibility of some sort of hearing would have the benefit of enhancing the Commission's credibility and fairness in the eyes of the regulated community.

Moreover, the proposed hearings will aid the Commission by granting respondents the ability to present unfiltered, direct arguments to the Commission prior to making a probable cause determination, and similarly, allow the Commission to directly

ask questions it may have. This ought to have the benefit of expediting the enforcement process.

Additionally:

- Prior to any such hearing, all the evidence gathered by the Office of General Counsel ("OGC") should be available to both the Commission itself and the respondent(s). By having an opportunity to make arguments concerning all the evidence obtained during the course of an investigation, a respondent's argument will be that much more complete and beneficial to the Commission.
- Similarly, the Commission should require OGC to disclose to respondent(s) any exculpatory evidence obtained during its investigation of a pending matter. *See Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant."). Since the Commission's proposal already requires a respondent to waive the confidentiality requirements for hearings involving multiple respondents, the production of such evidence does not raise confidentiality concerns. After all, if the Commission chose to litigate a matter, such information would be discoverable.
- Finally, the ability to request a hearing should not be limited solely to the probable cause phase of the enforcement process. By broadening the timing of a hearing, the Commission would not only expedite the enforcement process, but also preserve Commission resources.

Thank you for the opportunity to submit these comments.

Respectfully submitted,



Donald F. McGahn II