



FEDERAL ELECTION COMMISSION  
WASHINGTON, DC 20463

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2006 NOV 29 P 2:58

## Memorandum

**AGENDA ITEM**  
For Meeting of: 11-30-06

**SUBMITTED LATE**

**DATE:** November 29, 2006

**TO:** The Commission

**FROM:** Commissioner Steven T. Walther *STW*

**SUBJECT:** Proposed Amendments to Agenda Document No. 06-78 (Proposed Policy Statement Establishing a Pilot Program for Probable Cause Hearings)

I offer the following amendments to Agenda Document No. 06-78. For convenience, a redlined version of the document, reflecting my proposed amendments, is also attached.

1. Page 3, Line 11: Insert the following as a footnote "These comments are available at <http://www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml>." after the sentence ending with "contest allegations."
2. Page 3, Line 19: Replace "would" with "may".
3. Page 4, Line 5: Insert at the end of Line 5 "Any request for a hearing must state with specificity why the hearing is being requested and what issues the respondent expects to address."
4. Page 4, Line 12: Insert "Within 30 days of receiving a request for a hearing," at the beginning of the sentence that starts with "The Commission . . .".
5. Page 5, Line 8: Insert "Respondent or Respondent's" after "statement by".
6. Page 5, Line 13: Insert "Respondent may be bound by any representations made by Respondent or Respondent's counsel at a hearing." after the sentence ending with "made by the Commission."
7. Page 6, Line 7: Insert "; only Respondents and their counsel may attend. Attendance by any other parties must be approved by the Commission in advance." after "open to the public".

8. Page 7, Line 12: Insert “modify or” between “The Commission may” and “terminate”.
9. Page 7, Line 13: Insert “modification or” between “votes for” and “early”.
10. Page 8, Line 13: Insert “5 U.S.C. 605(b),” after “Regulatory Flexibility Act.”.
11. Page 9, Line 9: Insert “within five days of receipt” between 11 CFR 111.4,” and “the Office of General Counsel”
12. Page 9, Line 9: Insert “party determined to be a” after “notifies each”.
13. Page 9, Line 12: Insert “from receipt of the notification from the Office of General Counsel” between “15 days” and “to submit”.
14. Page 9, Line 19: Insert “(e.g., referrals from the Commission’s Audit or Reports Analysis Divisions)” after “internally-generated matters”.
15. Page 10, Lines 8-9: Replace “an investigation shall be conducted.” with “an investigation is conducted by the Office of General Counsel.”
16. Page 10, Line 10-12: Replace the sentence beginning on Line 10 with “Additionally, the Commission may issue subpoenas to order any person to submit sworn written answers to written questions, to provide documents, or to appear for a deposition.”

2 **FEDERAL ELECTION COMMISSION**

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4 **11 CFR Part 111**

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6 **[NOTICE 2006- ]**

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9 **PROPOSED POLICY STATEMENT ESTABLISHING A PILOT PROGRAM**  
10 **FOR PROBABLE CAUSE HEARINGS**

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12 **AGENCY:** Federal Election Commission

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14 **ACTION:** Draft Statement of Policy with Request for Comments

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16 **SUMMARY:** The Commission is issuing a proposed policy statement to  
17 establish a pilot program offering probable cause hearings to  
18 respondents in enforcement actions pending before the  
19 Commission. The pilot program would allow respondents to  
20 request a hearing directly before the Commission prior to the  
21 Commission's consideration of the General Counsel's probable  
22 cause recommendation. The program would provide respondents  
23 with the opportunity to present directly arguments to the  
24 Commission and give the Commission an opportunity to ask  
25 relevant questions. The Commission requests comments on this  
26 proposed pilot program.

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28 **DATE:** Comments must be submitted on or before January 5, 2007.  
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1 **CONTACT:**

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

21 **FOR FURTHER INFORMATION CONTACT:** Mark D. Shonkwiler, Assistant

22 General Counsel, 999 E Street, N.W., Washington, D.C. 20463,  
23 (202) 694-1650 or (800) 424-9530.

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**SUPPLEMENTARY**

**INFORMATION:** The Federal Election Commission is establishing a pilot program to afford respondents in pending enforcement matters the opportunity to participate in hearings before the Commission. During such a hearing, a respondent (generally through counsel) may present oral arguments directly to the Commissioners, prior to any Commission determination of whether to find probable cause to believe that respondents violated the Federal Election Campaign Act.

On June 11, 2003, the Commission held a hearing concerning potential changes to its enforcement procedures. The Commission received comments from those in the regulated community, many of whom argued for increased transparency in Commission procedures and expanded opportunities to contest allegations.<sup>1</sup> The Commission designed this pilot program with those concerns in mind. Proposed procedures for probable cause hearings are outlined below. The Commission seeks comment on all aspects of this proposal.

**Opportunity to Request a Hearing**

A hearing ~~may~~ take place before the Commission considers whether or not to make a finding of “probable cause to believe” that a respondent has violated the Act or Commission regulations.<sup>2</sup> A probable cause hearing may be requested by any respondent who reaches the probable cause determination stage (see 11 CFR 111.16 – 111.17) and submits a probable cause response brief to the Office of General Counsel. A cover letter

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<sup>1</sup> These comments are available at <http://www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml>.  
<sup>2</sup> The Commission is appending to this statement a general description of its enforcement procedures (“Basic Commission Enforcement Procedure”). These procedures are prescribed by statute and regulation, and the Commission is not requesting comment on them at this time.

1 attached to the probable cause brief will inform the respondent of the opportunity to  
2 request an oral hearing before the Commission. Hearings are voluntary and no adverse  
3 inference will be drawn by the Commission with respect to the request or waiver of such  
4 a hearing.

5 The General Counsel must receive the written request for a hearing at the same  
6 time that a respondent submits his or her timely response brief. 11 CFR 111.16(c). Any  
7 request for a hearing must state with specificity why the hearing is being requested and  
8 what issues the respondent expects to address. Absent good cause, to be determined at  
9 the sole discretion of the Commission, late requests will not be accepted. Respondents  
10 may make their request for a hearing by mail (including private delivery services), hand  
11 delivery, facsimile or email. Respondents are responsible for ensuring that their request  
12 is timely received.

13 The Commission will grant a request for an oral hearing when it concludes that a  
14 hearing would help resolve significant or novel legal issues, or significant questions  
15 about the application of the law to the facts. Within 30 days of receiving a request for a  
16 hearing, the Commission will grant a request for a probable cause hearing if any two  
17 commissioners agree to hold a hearing.

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20 Hearing Procedures

21 The purpose of the oral hearing is to provide a respondent an opportunity to  
22 present his or her arguments in person to the Commissioners *before* the Commission  
23 makes a determination that there is “probable cause to believe” that the respondent  
24 violated the Act or Commission regulations. Consistent with current Commission  
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1 regulations, any respondent may be represented by counsel, at the respondent's own  
2 expense, or may appear *pro se* at any probable cause hearing. See 11 CFR 111.23.  
3 Respondents will have the opportunity to present their arguments, and Commissioners,  
4 the General Counsel, and the Staff Director will have the opportunity to pose questions.  
5 Respondents may discuss any issues presented in the enforcement matter, including  
6 potential liability and calculation of a civil penalty.

7         The Commission will determine the format and time allotted for each hearing at  
8 its discretion. Among the factors that the Commission may consider are agency time  
9 constraints, the complexity of the issues raised, the number of respondents involved, and  
10 Commission interest. The Commission will determine the amount of time allocated for  
11 each portion of the hearing, and these time limits may vary from hearing to hearing. The  
12 Commission anticipates that most hearings will begin with a brief opening statement by  
13 Respondent or Respondent's counsel, followed by questioning from the Commissioners,  
14 General Counsel, and Staff Director. Hearings will normally conclude with the  
15 respondent's closing remarks.

16         The Commission will have transcripts made of the hearings. The transcripts will  
17 become a part of the record for the enforcement matter and may be relied upon for  
18 determinations made by the Commission. Respondent may be bound by any  
19 representations made by Respondent or Respondent's counsel at a hearing. The  
20 Commission will make the transcripts available to the respondent, who may, at his or her  
21 own expense, purchase copies of the transcript. Respondents will have access to the  
22 transcripts from their own hearing, but not transcripts of other co-respondents' separate  
23 hearings, unless co-respondents in the same matter specifically provide written consent to

1 the Commission granting access to such transcript(s). Transcripts will be made public  
2 after the matter is closed in accordance with Commission policies on disclosure.<sup>3</sup>

3 Third party witnesses or other co-respondents may not be called to testify at a  
4 respondent's oral hearing. However, the Commission may request that supplementary  
5 information be submitted after the probable cause hearing. The Commission discourages  
6 voluminous submissions. Supplementary information may not be submitted more than  
7 ten days after the oral hearing, unless submitted in response to a Commission request that  
8 imposes a different, Commission-approved deadline. Materials requested by the  
9 Commission, and materials considered by the Commission in making its "probable cause  
10 to believe" determination, may be made part of the record pursuant to the Commission's  
11 *Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files*, 68  
12 FR 70426 (Dec. 18, 2003). Hearings are confidential and not open to the public; only  
13 Respondents and their counsel may attend. Attendance by any other parties must be  
14 approved by the Commission in advance.

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#### 16 Cases Involving Multiple Respondents

17 In cases involving multiple respondents, the Commission will decide on a case-  
18 by-case basis how to structure any hearing(s). Respondents are encouraged to advise the  
19 Commission of their preferences. Such respondents may request joint hearings if each  
20 participating respondent provides an unconditional waiver of confidentiality with respect  
21 to other participating co-respondents and their counsel and a nondisclosure agreement.

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<sup>3</sup> *Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files*, 68 FR 70426 (Dec. 18, 2003) is hereby amended to include disclosure of transcripts from probable cause hearings.



1 Scheduling of Hearings

2           The Commission will seek to hold the hearing in a timely manner after receiving  
3 Respondents' request for a hearing. The Commission will attempt to schedule the  
4 hearings on a mutually acceptable date and time. However, if a respondent is unable to  
5 accommodate the Commission's schedule, the Commission may decline to hold a  
6 hearing. The Commission reserves the right to reschedule any hearing. Where  
7 necessary, the Commission reserves the right to request from a respondent an agreement  
8 tolling any upcoming deadline, including any statutory deadline or other deadline found  
9 in 11 CFR part 111.

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12 Pilot Program

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          The pilot program will last eight months from the time that this policy is  
15 approved. After eight months, a vote will be scheduled on whether the program should  
16 continue. The program will remain in effect until that vote is taken. Four votes will be  
17 required to extend or make permanent the program. The program will be terminated after  
18 that vote if there are not four affirmative votes to make the program permanent or to  
19 extend it for some time period. The Commission may modify or terminate this pilot  
20 program prior to the eighth month of the program if there are four affirmative votes for  
21 modification or early termination. If the pilot program is terminated, any previously  
22 requested hearings will still be held.

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24 Conclusion

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1           The Commission urges Respondents to consider carefully the costs and benefits  
2 of proceeding to probable cause briefings and/or hearings. The hearings are optional and  
3 no negative inference will be drawn if Respondents do not request a hearing. The  
4 majority of the agency's cases are settled through pre-probable cause conciliation.  
5 Proceeding to probable cause briefing requires a substantial investment of the  
6 Commission's limited resources. Consistent with the goal of expeditious resolution of  
7 enforcement matters, the Commission seeks to promote pre-probable cause conciliation.  
8 To encourage this, the Commission has a practice in many cases of reducing the civil  
9 penalty it seeks through its opening settlement offer. However, once the Office of  
10 General Counsel has terminated pre-probable cause conciliation negotiations, this  
11 reduction (normally 25%) is no longer available and the civil penalty will generally  
12 increase.

13           All requests for hearings, scheduling and format inquiries, document submissions,  
14 and anything else related to the probable cause hearings should be directed to the Office  
15 of General Counsel.

16           This notice represents a general statement of policy announcing the general  
17 course of action that the Commission intends to follow. This policy statement does not  
18 constitute an agency regulation requiring notice of proposed rulemaking, opportunities  
19 for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the  
20 Administrative Procedures Act ("APA"). As such, it does not bind the Commission or  
21 any member of the general public. The provisions of the Regulatory Flexibility Act, 5  
22 U.S.C. 605(b), which apply when notice and comment are required by the APA or  
23 another statute, are not applicable.

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Michael E. Toner  
Chairman  
Federal Election Commission

DATED: \_\_\_\_\_  
BILLING CODE: 6715-01-U

1 Appendix:  
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3 Basic Commission Enforcement Procedure<sup>4</sup>

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5 The Commission's enforcement procedures are set forth at 11 CFR part 111. An  
6 enforcement matter may be initiated by a complaint or on the basis of information  
7 ascertained by the Commission in the normal course of carrying out its supervisory  
8 responsibilities. 11 CFR 111.3. If a complaint substantially complies with certain  
9 requirements set forth in 11 CFR 111.4, within five days of receipt the Office of General  
10 Counsel notifies each party determined to be a respondent that a complaint has been filed,  
11 provides a copy of the complaint, and advises each respondent of Commission  
12 compliance procedures. 11 CFR 111.5. A respondent then has 15 days from receipt of  
13 the notification from the Office of General Counsel to submit a letter or memorandum to  
14 the Commission setting forth reasons why the Commission should take no action on the  
15 basis of the complaint. 11 CFR 111.6.

16 Following receipt of such letter or memorandum, or expiration of the 15-day  
17 period, the Office of General Counsel may recommend to the Commission whether or not  
18 it should find "reason to believe" that a respondent has committed or is about to commit a  
19 violation of the Act or Commission regulations. 11 CFR 111.7(a).<sup>5</sup> With respect to  
20 internally-generated matters (e.g., referrals from the Commission's Audit or Reports  
21 Analysis Divisions), the Office of General Counsel may recommend that the Commission  
22 find "reason to believe" that a respondent has committed or is about to commit a

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<sup>4</sup> The Commission provides this overview of enforcement procedures for informational purposes only. The Commission is not seeking comment on this section.

<sup>5</sup> The Office of General Counsel may also recommend that the Commission find no "reason to believe" that a violation has been committed to is about to be committed, or that the Commission otherwise dismiss a complaint without regard to the provisions of 11 CFR 111.6(a). 11 CFR 111.7(b).

1 violation of the Act or Commission regulations on the basis of information ascertained by  
2 the Commission in the normal course of carrying out its supervisory responsibilities, or  
3 on the basis of a referral from an agency of the United States or any state. If the  
4 Commission determines by an affirmative vote of four members that it has “reason to  
5 believe” that a respondent violated the Act or Commission regulations, the respondent  
6 must be notified by letter of the Commission’s finding(s). 11 CFR 111.9(a).<sup>6</sup> The Office  
7 of General Counsel will also provide the respondent with a Factual and Legal Analysis,  
8 which will set forth the bases for the Commission’s finding of reason to believe.

9 After the Commission makes a “reason to believe” finding, an investigation is  
10 conducted by the Office of General Counsel, in which the Commission may undertake  
11 field investigations, audits, and other methods of information-gathering. 11 CFR 111.10.  
12 Additionally, the Commission may issue subpoenas to order any person to submit sworn  
13 written answers to written questions, to provide documents, or to appear for a deposition,  
14 11 CFR 111.11 – 111.12. Any person who is subpoenaed may motion the Commission  
15 for it to be quashed or modified. 11 CFR 111.15.

**Deleted:** an investigation shall be conducted

**Deleted:** Additionally, the Commission may order any person to submit sworn written answers to written questions, issue subpoenas and subpoenas *duces tecum*, or take depositions.

16 Following a “reason to believe” finding, the Commission may attempt to reach a  
17 conciliation agreement with the respondent(s) prior to reaching the “probable cause”  
18 stage of enforcement (*i.e.*, a pre-probable cause conciliation agreement). See 11 CFR  
19 111.18(d). If the Commission is unable to reach a pre-probable cause conciliation  
20 agreement with the respondent, or determines that such a conciliation agreement would  
21 not be appropriate, upon completion of the investigation referenced in the preceding  
22 paragraph, the Office of General Counsel prepares a brief setting forth its position on the

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<sup>6</sup> If the Commission finds no “reason to believe,” or otherwise terminates its proceedings, the Office of General Counsel shall advise the complainant and respondent(s) by letter. 11 CFR 111.9(b).

1 factual and legal issues of the matter and containing a recommendation on whether or not  
2 the Commission should find “probable cause to believe” that a violation has occurred or  
3 is about to occur. 11 CFR 111.16(a).

4 The Office of General Counsel notifies the respondent(s) of this recommendation  
5 and provides a copy of the probable cause brief. 11 CFR 111.16(b). The respondent(s)  
6 may file a written response to the probable cause brief within fifteen days of receiving  
7 said brief. 11 CFR 111.16(c). After reviewing this response, the Office of General  
8 Counsel shall advise the Commission in writing whether it intends to proceed with the  
9 recommendation or to withdraw the recommendation from Commission consideration.  
10 11 CFR 111.16(d).

11 If the Commission determines by an affirmative vote of four members that there  
12 is “probable cause to believe” that a respondent has violated the Act or Commission  
13 regulations, the Commission authorizes the Office of General Counsel to notify the  
14 respondent by letter of this determination. 11 CFR 111.17(a). Upon a Commission  
15 finding of “probable cause to believe,” the Commission must attempt to reach a  
16 conciliation agreement with the respondent. 11 CFR 111.18(a). If no conciliation  
17 agreement is finalized within the time period specified in 11 CFR 111.18(c), the Office of  
18 General Counsel may recommend to the Commission that it authorize a civil action for  
19 relief in the appropriate court. 11 CFR 111.19(a). Commencement of such civil action  
20 requires an affirmative vote of four members of the Commission. 11 CFR 111.19(b).

21 The Commission may enter into a conciliation agreement with respondent after

22 | authorizing a civil action. 11 CFR 111.19(c).

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