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January 5, 2009

BY HAND DELIVERY AND ELECTRONIC MAIL

Mr. Mark Shonkwiler
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

*Re: Comments on Policies and Procedures
of the Federal Election Commission*

Dear Mr. Shonkwiler:

I appreciate the opportunity to respond to the Federal Election Commission's request for public comment on its policies and procedures. *See* 73 Fed. Reg. 74494 (Dec. 8, 2008). The Commission's decision to take the initiative in revisiting its own practices, especially those relating to enforcement, is a refreshing and important step toward improving the agency's effectiveness, as well as bolstering public confidence in the process by which the agency meets its constitutionally sensitive statutory obligations. Commissioners and staff alike are to be commended for seeking constructive criticism. Periodically asking outside practitioners to comment on agency practices and procedures helps overcome the isolation that necessarily attends an agency whose activities often are required to be conducted out of public view.

The comments I am submitting are my own and are not submitted on behalf of any client. Nor do my views necessarily reflect the views of any client. By way of background, I am Chair of the Election and Political Law Practice Group of Covington & Burling LLP. Covington has one of the nation's oldest election and political law practices. We advise a wide variety of corporate and trade association clients, as well as political parties, PACs, lobbying firms, tax-exempt organizations, and individuals, concerning compliance with the federal election laws. Our election and political law clients include some of the nation's leading trade associations, financial institutions, and manufacturers. We regularly represent clients in enforcement matters before the Commission.

The Commission sought comments on a broad range of topics, largely related to the enforcement of the Federal Election Campaign Act ("FECA"). I have chosen to address the following eight topics:

January 5, 2009

Page 2

1. Settlements and Penalties
2. Motions Before the Commission
3. Appearances Before the Commission
4. Reports Analysis Division Practices
5. The “Reason to Believe” Standard
6. Deposition and Document Production Practices
7. Release of Documents Following Dismissal of a Complaint
8. Extensions of Time

1. Settlements and Penalties

The Commission should make public its methodology for making an initial assessment of penalties. This would make the enforcement process more fair and transparent, reduce the risk of improper strategic behavior by enforcement staff during conciliation negotiations, and greatly increase the incentive for voluntary disclosure of violations to the Commission.

Numerous federal agencies already disclose their methodologies for determining penalties. *See, e.g.*, 15 C.F.R. Part 766 Supps. 1 & 2 (Export Administration Regulations); 47 C.F.R. § 1.80 (FCC forfeiture proceedings); Economic Sanctions Enforcement Guidelines, 73 Fed. Reg. 51933 (Sept. 8, 2008) (OFAC economic sanctions programs); Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act, 49 Fed. Reg. 59770 (Sept. 10, 1980)¹; 2008 Federal Sentencing Guidelines Manual (Nov. 1, 2008)² (criminal proceedings); EPA Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy (Dec. 2007)³ (Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992); NRC Enforcement Policy (Jan. 14, 2005)⁴ (enforcement matters involving public radiological health and safety); RCRA Civil Penalty Policy (June 23, 2003)⁵ (Resource Conservation and Recovery Act); Combined Enforcement Policy for Section 112r of

¹ This and all other civil penalty policies issued by the Environmental Protection Agency (“EPA”) were modified by Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Sept. 21, 2004), *at* <http://www.epa.gov/compliance/resources/policies/civil/penalty/penaltymod-memo.pdf>.

² *At* <http://www.ussc.gov/2008guid/TABCON08.htm>.

³ *At* <http://www.epa.gov/compliance/resources/policies/civil/tsca/1018erpp-1207.pdf>.

⁴ *At* <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforc-pol.pdf>. This policy has been updated several times. Those updates are available on the NRC’s Internet website at <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html>.

⁵ *At* <http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf>. The penalty matrices for this policy were updated by Revised Penalty Matrices for the RCRA Civil Penalty Policy (Jan. 11, 2005), *at* <http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpprevisedtables2005.pdf>.

January 5, 2009

Page 3

the Clean Air Act (Aug. 15, 2001)⁶; Comptroller of the Currency Administrator of National Banks, Policies & Procedures Manual 5000-7 (June 16, 1993)⁷ (civil penalties); Polychlorinated Biphenyls (PCB) Penalty Policy (Apr. 9, 1990)⁸ (PCB rules).

For instance, the EPA lists on its Internet website civil penalty policies for a number of the laws it is charged with administering.⁹ One of several such policies sets settlement penalties in the Public Water System Supervision Program under the Safe Drinking Water Act (the “SDWA Policy”).¹⁰ The 14-page policy was introduced in 1994 and includes a worksheet for calculating settlement penalties. The policy sets forth the maximum penalties allowed by statute and then discusses a two-step process for calculating penalties, which includes a computation of an “economic benefit” component and a “gravity” component. SDWA Policy at 3. This figure is then adjusted based on a number of factors, including degree of willfulness, history of noncompliance, litigation considerations, and ability to pay. The policy gives detailed guidance regarding how the EPA arrives at each of these figures. It also gives the EPA the flexibility to reduce a penalty amount in exchange for the party completing an environmentally beneficial project. *See id.* at 12. The policy makes clear that it applies in settlement negotiations only and that the EPA will seek the statutory maximum in a litigation proceeding. EPA reserves the right to “change this policy at any time, without prior notice, or to act at variance to this policy” and the policy “does not create any rights, implied or otherwise, in any third parties.” *Id.* at 14.

The Commission should follow the lead of these several federal agencies that make public their methodologies for computing penalties. The Commission’s disclosure of its criteria for assessing penalties will likely give the regulated community a greater sense that the Commission is acting consistently and fairly. This will positively affect enforcement proceedings. Under the Commission’s current practice, penalties may vary widely in what appear to the outside world to be similar cases. This creates an appearance that the Commission is treating members of the regulated community in an arbitrary and unfair manner. Conciliation proceedings are likely to progress more smoothly when respondents feel they are being treated fairly and understand how the Commission arrives at an opening settlement offer.

In addition, significantly, self-reporting is likely to increase if the Commission’s methodology is clear. A potential respondent is more likely to make a *sua sponte* disclosure of a violation if it can accurately assess its likely penalties prior to contacting the Commission.

⁶ At <http://epa.gov/compliance/resources/policies/civil/caa/stationary/caa112r-enfpol.pdf>.

⁷ At <http://www.occ.treas.gov/ftp/bc/bc-273a.pdf>.

⁸ At <http://www.epa.gov/compliance/resources/policies/civil/tsca/pcbpen.pdf>.

⁹ See <http://cfpub.epa.gov/compliance/resources/policies/civil/penalty/>.

¹⁰ At <http://www.epa.gov/compliance/resources/policies/civil/sdwa/sdwapen.pdf>.

In 2007, the Commission adopted a policy statement on voluntary disclosures, which sought to encourage voluntary disclosures of FECA violations by offering to reduce penalties by 25% to 75%, if certain conditions are met. *See* Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions), 72 FR 16695 (Apr. 5, 2007). The Commission's voluntary disclosure policy is substantially undermined, however, by the fact that the Commission refuses to make public the methodology by which it makes an initial assessment of penalties. In the absence of clear and transparent standards for determining this initial assessment, it is difficult or impossible for the regulated community to predict the impact of the promised 25% to 75% reduction for a voluntary disclosure. Because the staff can simply adjust its initial assessment of the penalty upward to "compensate" for the effect of the 25% to 75% reduction -- and can do so in a manner that is permanently shrouded from public scrutiny -- the Commission's voluntary disclosure policy has had far less effect than it otherwise might have.

The Commission may fear that creating a formula and applying it consistently will impair its ability to exercise discretion to adjust penalties in appropriate circumstances. However, all of the agency methodologies cited above provide for adjustments based on mitigating factors, aggravating factors, and/or other circumstances (such as ability to pay). The Commission's criteria likewise could incorporate limited adjustments or exceptions the Commission feels it should have the discretion to apply, as the Commission has already done in its policy statement on voluntary disclosures.

The Commission also may fear that disclosing its penalty structure will permit bad actors to calculate the costs of their violations in advance and, thus, to figure them into "the cost of doing business." However, the penalty structure itself can take into account such persons' knowing and willful intent to violate the law, and any person acting with such intent may already be subject to criminal sanctions. Moreover, if the Commission believes that its lawfully authorized civil penalties are not sufficient to deter unlawful behavior when those penalties are transparent to the regulated community, then the solution is to seek statutory increases in those penalties, not to cloak the existing penalty regime under a veil of secrecy.¹¹

2. Motions Before the Commission

Currently, Commission regulations provide limited opportunities to submit motions. *See, e.g.*, 11 CFR 111.15 (authorizing motions to quash or modify subpoenas). Some parties before the Commission also engage in informal motions practice, even where motions are not specifically authorized by the Commission's regulations. Such *ad hoc* motions are sometimes used to bring matters to the attention of the Commissioners, where efforts to resolve a dispute directly with the staff seem futile.

¹¹ For example, the Federal Sentencing Guidelines set forth very high but very clear penalties. *See* 2008 Federal Sentencing Guidelines Manual, *supra*.

The Commission should set forth by regulation a standardized procedure for filing motions to provide greater procedural consistency and fairness. In an investigatory proceeding, a respondent should be allowed to file a motion, at a minimum, prior to the Office of General Counsel's ("OGC") recommendation that the Commission find "reason to believe" and prior to OGC's recommendation of probable cause. Motions also should be allowed during other proceedings when necessary to resolve an unclear question of law. For instance, a person being audited should be able to file a motion following receipt of the Preliminary Audit Report in order to challenge a legal conclusion upon which an audit finding is based.

A party filing a motion should be required to set forth a specific request for action, such as dismissal of a matter, production of a particular piece of evidence, or a ruling on a question of law, and should be permitted to submit written argument to the Commission in support of that motion. At the time the party files the motion, the party could request an oral hearing on the motion. Following submission of a motion, the OGC should have a set number of days in which to recommend to the Commission how the motion should be resolved. Upon an affirmative vote of two Commissioners (the same threshold that the Commission presently applies to granting requests for probable cause hearings), the Commission should be able to grant a confidential hearing to question the person filing the motion, if appropriate.

Filing a motion should not permit either OGC or the respondent to delay or postpone investigation of an alleged violation. OGC could continue to pursue its investigation while motions are pending, but respondents would not be required to toll the statute of limitations solely because a motion has been filed.

In addition to promoting fairness among parties before the Commission, providing a consistent motions practice would promote efficiency. By acting on a motion, the Commission often will be able to resolve unclear or disputed questions early in a case. Resolution of a single question may resolve the entire matter or at least bypass a dispute that otherwise would become a stumbling block to settlement. Although in some cases allowing a motions practice will slow the Commission's time to process a particular matter, the Commission's overall effectiveness in bringing matters to conclusion will increase if the Commission can resolve issues as they arise. Allowing a motions practice may understandably increase staff time in processing cases, but this is a cost borne by both sides. The expense of having lawyers prepare motions will serve as a constraint on abuse of the practice.

One compelling reason to formalize the Commission's motions practice is to ensure that the already existing informal motions practice does not remain an open secret among experienced practitioners, which tends to create inequities in the due process afforded to the many respondents who appear before the Commission. The current informal and *ad hoc* motions practice tends to favor those with sophisticated and experienced FEC counsel, to the detriment of those whose access to counsel is limited by cost, geography, and other factors. Any person reading the Commission's regulations and policy statements should be able to determine both the availability of, and procedures for, motions practice before the Commission. For this same reason, the Commission should ensure that its enforcement policies are readily available and easily located on its website. This should include the Commission's internal policy "directives,"

January 5, 2009

Page 6

which are currently available in the Public Records Office at the Commission's Washington, D.C., headquarters, but which inexplicably are not available on the Commission's website.

3. Appearances Before the Commission

The Commission's current practice of allowing a party to request an oral hearing prior to the Commission's vote on a recommendation of probable cause has been a positive reform. *See* 72 Fed. Reg. 64919 (Nov. 19, 2007). The Commission also would benefit from allowing appearances by parties (i) in relation to written motions filed with the Commission (as discussed above), (ii) during public consideration of advisory opinions, and (iii) during presentations of Final Audit Reports to the Commission.

Regarding motions hearings, the Commission should be free to grant an oral hearing on a motion whenever it believes doing so would be helpful to it in understanding the legal or factual issues presented by the motion. The process for such hearings should mirror the process adopted with respect to probable cause hearings. *See id.* A party should request an appearance at the time it files the motion and should indicate in the request why the hearing is necessary and what specific issues the party expects to address before the Commission. The Commission should determine the format and time allotted for the hearing based on the same factors the Commission uses when authorizing a probable cause hearing. As with probable cause hearings, hearings on other motions filed in investigatory proceedings should be confidential unless the respondent requests otherwise, so as to protect a respondent's rights under 2 U.S.C. § 437g(a)(12). *See* 72 Fed. Reg. at 64920 (discussing the confidentiality of probable cause hearings). The Commission can determine on a case-by-case basis whether co-respondents should be allowed to attend. *See id.*

The Commission also should create a process whereby it can ask a requester questions that arise in the course of the Commission's public consideration of an advisory opinion. Presently, if Commissioners have factual questions or wish to understand the implication of changes to language in an advisory opinion submitted by OGC, the Commissioners either recess the hearing to allow OGC to ask the requester (or requester's counsel), look for nods or shakes of the head from the requester in the audience, or have the requester submit answers to these questions in the form of handwritten notes. This process is inefficient and the Commission could easily remedy it by providing a process whereby it could, when appropriate, simply call upon the requester to stand before it and answer the questions (if present) or contact the requester by telephone.

In addition, the Commission should provide an opportunity for a person being audited by the Commission to request to appear before the Commission when auditors present their Final Audit Report. The Commission should also, on a case-by-case basis, consider whether to offer a similar opportunity to appear to any third party who is not the subject of the audit but who is referenced in the Final Audit Report in a manner suggesting that the third party may have violated the law. When findings by FEC auditors suggest potential legal violations, the auditors may refer those findings to OGC for further investigation, and the Final Audit

January 5, 2009

Page 7

Report may form a significant basis for a later investigatory proceeding or civil action against the person being audited, or against a third party mentioned in the audit report.

Providing an opportunity to those accused of wrongdoing in a Final Audit Report to present their position orally will enhance the Commission's ability to identify and resolve factual and legal disputes that often are not highlighted in the Final Audit Report. Moreover, it may obviate the need for subsequent costly and time-consuming enforcement actions, thus conserving the Commission's limited resources. Finally, it would eliminate the unfairness inherent in the current system, in which third parties in particular may learn long after the fact that auditors have accused them of wrongdoing, and that the accusation is contained in a report that has already been adopted by the Commission.

The Commission should not be obligated to grant any of these appearances as a matter of right. However, it should provide a means for a person to appear when doing so will facilitate the Commission's collection and distillation of information that will help it fairly and expeditiously dispose of a matter. The fact that some entities regulated by the Commission are located away from Washington, D.C. has limited bearing on whether the Commission should allow appearances in appropriate circumstances. The Commission can follow the modern practice of many judges and magistrates and conduct hearings by conference call or by teleconference when a hearing in person is impractical or infeasible. A party's decision not to request an oral hearing should not bear on the Commission's careful consideration of a matter. *See id.* at 64920 ("Probable cause hearings are optional and no negative inference will be drawn if respondents do not request a hearing.").

4. Reports Analysis Division Practices

The Commission should bring the decision-making process of the Reports Analysis Division ("RAD") further into the spotlight. RAD would be required to send fewer Requests for Additional Information ("RAFI") if it were to provide consistent, transparent guidance on how to complete the forms filed with the Commission. Currently, obtaining clear answers to filing questions can be discouraging for filers. Although RAD analysts are readily available to discuss filing questions by telephone, a filer may receive a different answer to the same question, depending on which analyst is assigned to the committee. This is not a criticism of the highly skilled and dedicated RAD staff, but rather a criticism of the process by which RAD interacts with the regulated community.

The Commission could alleviate this problem by setting aside a portion of its Internet website where RAD could provide information on how to comply with reporting requirements. The Commission's website currently contains general filing instructions and deadlines, but it would be helpful to the regulated community to have additional information providing answers to specific questions that arise. One possibility would be for the Commission to establish a process through which filers could pose reporting questions to RAD and answers to those questions would be published for all to see. The website also could contain a list of frequently asked questions and other guidance helpful to committees and other filers.

5. “Reason to Believe” Standard

In its 2004 Annual Report, the Commission recommended that Congress change the phrase “reason to believe” contained in 2 U.S.C. § 437g(a)(2) to “reason to open an investigation.” FEC Annual Report 2004, at 42.¹² The Commission explained that the “statutory phrase ‘reason to believe’ is misleading and does a disservice to both the Commission and the respondent” because it “implies that the Commission has evaluated the evidence and concluded that the respondent has violated the Act” when actually “the Commission has not yet established that a violation has, in fact, occurred.” *Id.* (emphasis added). The Commission requested that Congress “substitute words that sound less accusatory and that more accurately reflect what, in fact, the Commission is doing at this early phase of enforcement.” *Id.*

I strongly agree with the Commission that the “reason to believe” language in the statute is misleading and recommend that the Commission continue to pursue a statutory amendment to make clear that a decision to open an investigation does not imply a finding -- even a preliminary finding -- of wrongdoing.

The Commission is to be commended for reiterating in 2007 that “‘reason to believe’ findings indicate only that the Commission found sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred.” 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007). The Commission should continue to make clear in all its communications that a reason to believe determination does not constitute a conclusion regarding underlying facts.

Moreover, because under current practice a finding of reason to believe simply reflects a finding that there is a sufficient basis to open an investigation, and not “that the Commission has evaluated the evidence and concluded that the respondent has violated the Act,” FEC Annual Report 2004, at 42, the Commission absolutely should not express any view regarding the respondent’s state of mind at the reason to believe stage of the proceedings. Specifically, the Commission should not issue a statement that it has reason to believe respondent committed a “knowing and willful” violation. Making even a preliminary determination of this kind that a respondent may have acted with the specific intent to violate the law -- a predicate for criminal prosecution -- is flatly inconsistent with the legal requirement, and conceded position of the Commission, that a reason to believe finding is nothing more than a decision to open an investigation.

The Commission has in recent years appeared more frequently than before to include findings of knowing and willful conduct in reason to believe letters. Moreover, OGC staff have then used the “knowing and willful” language in the reason to believe letter as a

¹² *At* <http://www.fec.gov/pdf/ar04.pdf>.

January 5, 2009

Page 9

bargaining chip to obtain a larger cash settlement offer from the respondent. That is, staff have quite transparently offered to delete the “knowing and willful” language if the staff’s desired cash amount for the civil penalty is agreed to -- again, even though a reason to believe finding is supposed to be nothing more than a decision to investigate.

The exploitation of premature findings regarding state of mind to facilitate early and generous conciliation offers is improper. It highlights how, notwithstanding the Commission’s own supposed position that the term “reason to believe” is “misleading,” the Commission in fact leverages reason to believe letters for tactical advantage, even going so far as to suggest criminal intent. The Commission should adopt a policy never to include “knowing and willful” findings at the reason to believe stage.

6. Deposition and Document Production Practices

In its request for comments, the Commission noted that it generally allows a deponent to obtain a copy of his or her personal transcript, unless the General Counsel determines in a particular case that there is “good cause” for withholding the deposition. *See* 5 U.S.C. § 555(c). In addition, after OGC has recommended that the Commission find probable cause, the Commission normally allows a respondent to request and obtain access to other documents referenced in OGC’s probable cause brief.

At the latest, once OGC has recommended probable cause, the Commission should provide all documents referenced in OGC’s brief to the respondent as a matter of course. The Commission’s current practice of requiring a respondent to specifically request these documents following its receipt of the probable cause brief creates unnecessary delay and an institutional advantage for OGC, especially as OGC is the arbiter of requests from respondents for extensions.

The Commission is best able to resolve investigations fairly and expeditiously if both OGC and the respondent are able to brief their arguments fully. To assist respondents in presenting a complete argument, the Commission should make available to a respondent transcripts of all other depositions taken during the course of its investigation, as well as witness statements and other documents collected during the investigation and relevant to the respondent’s defense, regardless of whether OGC relies on those documents in its probable cause brief. Understandably, in very limited instances the Commission may have good cause for withholding certain documents. However, such instances should be the exception and not the rule, and the Commission should only reach such a decision after giving the respondent an opportunity to respond to the Commission’s grounds for denying access. Importantly, the Commission should not deny a respondent access to exculpatory evidence obtained during its investigation. *Cf. 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.”). Withholding exculpatory deposition transcripts and interview materials at the probable cause stage raises serious due process concerns.

January 5, 2009

Page 10

Providing these documents to a respondent does not violate the confidentiality provision at 2 U.S.C. § 437g(a)(12); if anything, providing these documents furthers the purpose of this provision, which is to protect those being investigated by the Commission. Subsection (a)(12)(A) provides that neither the Commission nor any other person may make “public” any “notification or investigation” absent the consent of the person being investigated.¹³ In other words, (a)(12)(A) places the right of disclosure squarely in the hands of the person who is being investigated, not the Commission. OGC has in the past sometimes treated this provision as if it were intended to protect the Commission, rather than the respondent.

Subsection (a)(12)(A) contrasts sharply with another confidentiality provision in the same section. 2 U.S.C. § 437g(a)(4)(B)(i) relates to the confidentiality of conciliation proceedings and provides that “[n]o action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission . . . may be made public by the Commission without the written consent of the respondent and the Commission” (emphasis added). Congress clearly distinguished between conciliation proceedings and investigatory proceedings. Confidentiality in conciliation proceedings protects both the Commission and the respondent while they attempt to reach a settlement; therefore, both must agree to disclosure. On the other hand, in an investigatory proceeding, the confidentiality provision protects the person being investigated; therefore, only that person’s permission is required prior to disclosure. *See In re Sealed Case*, 237 F.3d 657, 666–67 (D.C. Cir. 2001) (holding that § 437g(a)(12)(A) “plainly prohibit[s] the FEC from disclosing information concerning ongoing investigations under any circumstances without the written consent of the subject of the investigation”), *quoted in AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003).

Because the confidentiality provision is meant to protect the person being investigated, providing documents obtained in an investigation to that person cannot constitute a violation of § 437g(a)(12)(A). This is so, regardless of whether a matter involves multiple respondents. Providing documents containing references to one respondent to another respondent does not constitute making them “public” in any traditional sense of the word, as a respondent is one person, not the “public” at large. *See Common Cause v. FEC*, 83 F.R.D. 410, 412 (D.D.C. 1979) (“The carefully qualified conditions under which certain Commission materials are made available to [complainant] Common Cause does not make them public within the meaning of [the confidentiality provision].”). The Commission can help assure that co-respondents do not make documents public by providing them under conditions of

¹³ In full, the provision provides, “Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.” 2 U.S.C. § 437g(a)(12)(A).

January 5, 2009

Page 11

confidentiality, and a respondent who violates § 437(a)(12)(A) is subject to penalties under § 437g(a)(12)(B).¹⁴

The Commission should bear the cost of providing copies of deposition transcripts. It is the Commission, not the respondent, that initiates an enforcement action, and the costs of that action should not be imposed on a respondent prior to any determination by the Commission that the respondent violated the law. The attorneys fees and costs of defending against a Commission enforcement action are already prohibitive for many individuals and small political committees.

7. Release of Documents Following the Dismissal of a Complaint

Because the right of confidentiality is meant to protect the respondent, in cases where the FEC dismisses a complaint against the respondent, the respondent should have the right to determine whether its response to the complaint or to the OGC's probable cause brief should become part of the public record. Otherwise, private parties can use the process of filing an FEC complaint as a discovery device to extract information about the respondent. *Cf. AFL-CIO v. FEC*, 333 F.3d at 178 (noting that the Commission's former policy of automatically disclosing all documents following the conclusion of an investigation "encourages political opponents to file charges against their competitors to . . . learn[] their political strategy so that it can be exploited to the complainant's advantage") (quotation omitted). Allowing private parties to do so encourages frivolous filings and waste of Commission resources.

FECA only requires the Commission to disclose conciliation agreements and Commission determinations "that a person has not violated the Act," but the Commission's current policy on the release of documents following the closing of an enforcement proceeding provides for disclosure of respondent's responses to the complaint, the finding of reason to believe, and OGC's recommendation of probable cause. 2 U.S.C. § 437g(a)(4)(B)(ii); *see* 68 Fed. Reg. 70426, 70427 (Dec. 18, 2003). However, when disclosing those filings will require disclosure of information that is politically or personally sensitive to respondent, respondent's interest in keeping that information confidential outweighs any FEC interest in disclosure. *Cf. AFL-CIO v. FEC*, 333 F.3d at 176 (explaining that courts "facing a constitutional challenge to a disclosure requirement" must "balance the burdens imposed on individuals and associations against the significance of the government interest in disclosure and consider the degree to which the government has tailored the disclosure requirement to serve its interests") (striking down the FEC's regulation regarding disclosure at 11 C.F.R. § 5.4(a)(4)).

In most cases, respondents will likely want to disclose their FEC filings, perhaps in redacted form, in order to clear their good name. However, where a respondent desires to

¹⁴ A person who violates § 437g(a)(12)(A) is subject to a \$2,200 fine. 2 U.S.C. § 437g(a)(12)(B); 11 C.F.R. § 111.24(b) (adjusting for inflation). The fine increases to \$6,500 for knowing and willful conduct. *Id.*

January 5, 2009

Page 12

withhold disclosure, 2 U.S.C. § 437g(a)(12)(A) should permit respondent to do so. Such a policy would encourage more comprehensive responses to complaints and would reduce the risk that frivolous complaints will be filed with the intent of forcing discovery.

8. Extensions of Time

The Commission has requested comments regarding its practice of granting extensions of time to file a response to OGC's probable cause briefs. I emphasize at the outset that the 15-day time period set by statute in which to respond to a recommendation of probable cause (or, for that matter, to a complaint) is usually grossly inadequate. *See* 2 U.S.C. § 437g(a)(1), (3). A respondent can rarely, if ever, prepare in 15 days an adequate response to a probable cause brief that OGC may have spent six to eight months drafting, particularly when the brief is based on an investigation that may have taken place over the course of years. Respondents generally have no warning as to when a probable cause brief will appear on their doorstep, requiring a thorough response within 15 days. Often, the respondent is unaware of arguments or evidence put forth by OGC until the respondent receives the probable cause brief.

While OGC routinely grants extensions to this 15-day filing deadline, the requirement of seeking an extension creates unnecessary uncertainty for respondents and also creates unhealthy incentives for OGC to use the power to grant or deny extensions to obtain concessions on collateral issues.

The Commission should seek from Congress a statutory change to § 437g(a)(1) and (3) to extend the period of time in which a respondent can respond to a complaint or to a probable cause recommendation to at least 30 days. A 30-day time period is consistent with the time period provided for responding to a brief in federal court. *See* Fed. R. App. P. R. 31(a).

However, until Congress enacts a statutory fix, the Commission should grant an extension of at least 15 days as a matter of course and should not require any showing of cause or any tolling of the statute of limitations before granting such an extension. If a particular respondent requires additional extensions, the Commission can evaluate on a case-by-case basis whether granting the extension is reasonable and whether the respondent should be required to toll the statutory limitations period. In no case should the Commission be permitted to extract from a respondent a tolling of the limitations period beyond the period of the extension granted.

January 5, 2009

Page 13

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Thank you for permitting me to comment on the above policies and procedures. I would like to request an opportunity to testify at the Commission's January 14, 2009 hearing, so that I may present an overview of these comments and respond to any questions Commissioners may have.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Kelner', with a long horizontal flourish extending to the right.

Robert K. Kelner

CC: Mr. Stephen Gura, Deputy Associate General Counsel, FEC