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January 5, 2009

Steven Gura, Deputy Associate General Counsel
Mark Shonkwiler, Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Notice, "Agency Procedures," 76 Fed. Reg. 74494 (Dec. 8, 2008)

Dear Mr. Gura and Mr. Shonkwiler:

I comment below on the Commission's unprecedented and ambitious request for comments on virtually every aspect of the Commission's operations. I do so as a regular practitioner before the Commission in my respective capacities as Associate General Counsel of the AFL-CIO and as counsel to numerous organizations and individuals who engage with the Commission and whose activities are routinely regulated by the Federal Election Campaign Act ("the Act") and the Commission's regulations. First, however, let me briefly reiterate some of the points I made in a December 17, 2008 letter to the Commissioners that sought an enlargement of the comment period.

The Commission's notice solicits comments concerning 16 distinct areas of Commission operations, and asks, by my count, 130 specific questions about them, as well as "welcomes comments on other issues relevant to these enforcement policies and procedures, including any comments concerning how the FEC might increase the fairness, substantive and procedural due process, efficiency and effectiveness of the Commission." 73 Fed. Reg. 74494, 74500.

I welcome this initiative and believe that many aspects of the Commission's enforcement and administrative practices merit review and change. But I believe the Commission's abrupt timetable for public input does not do justice to the undertaking. The Commission's appeal to practitioners, candidates, political parties, political committees, other regulated organizations and the general public was unexpected and provided only a 30-day comment period that included the holiday season and ended today, the first regular business day of the New Year, to be followed by a hearing in nine days. Yet no court order, statutory directive or other external command required this review or its timetable, and, while the matters presented in the notice are important, none of them is especially urgent to address. More time to comment would have been appropriate and useful.

I recommend that the Commission instead treat the current comment period and the January 14 hearing as the first step of an ongoing review, and afford further opportunities this year for written comments and public hearings in order to secure adequate public participation and enable full and fair consideration by the Commission. On the point, my first substantive comment on the notice is that the Commission should provide as much opportunity for public comment on matters before it as possible in light of the scope and time sensitivity of the subject matter.

In response to the current notice, I also submit the following comments in the form of recommendations that, due to time constraints, I do not elaborate upon further here. I request the opportunity to testify at the public hearing on January 14. As the notice requests commenters to specify, see 73 Fed. Reg. 74494, 74496, I believe that all of the recommendations in this letter are compatible with applicable statutes and would not require legislative action.

1. The Commission should accord greater enforcement priority to matters that concern more objectively determinable violations of the Act, such as excessive or otherwise prohibited monetary or in-kind contributions. The Commission should afford lesser priority to matters that concern less objectively determinable violations, such as alleged unlawful coordination and alleged violations of other speech and associational restrictions, including express advocacy and solicitations.

2. The Commission should modify the respondent-designation procedures that it adopted after its public review in 2003, discussed at 73 Fed. Reg. at 74498, by requiring a complainant to clearly identify, in so many words, who the intended respondents are. If a complainant fails to do so, then the Commission should require that it do so in writing before processing the complaint further.

3. The Commission should seek notice and comment for a policy statement that sets forth with clarity and explanation the meaning of the statutory “reason to believe” standard, 2 U.S.C. § 437g(a)(2), the critical threshold finding that triggers an investigation. The Commission has treated this standard inconsistently, and has even sometimes termed it a “reason to investigate” standard, which the Act does not support.

4. Respondents and others who file motions to quash subpoenas should be provided with a copy of any submission by the Office of General Counsel (OGC) to the Commission regarding the motion, an opportunity to reply to OGC, and, if requested, an opportunity to present argument before the Commission. The Commission should provide the respondent with a written explanation of its disposition of the motion, rather than, as is current practice, a terse denial (and I believe it virtually always is a denial).

5. If OGC recommends a finding of probable cause to believe that a respondent has violated the Act, then at the very least OGC should be required to cite the investigative materials that OGC relied upon, as well as the materials that OGC acknowledges do *not* support such a finding, and the respondent should be provided either copies of those materials or sufficient access to them in order to prepare an informed and useful response to OGC’s recommendation.

6. Extensions of time to respond to probable cause recommendations (as well as to other notifications) should be freely granted, in light of the usual factual and legal complexities that attend such matters. No tolling of the limitations period should be required as a condition to granting such an extension except in unusual circumstances, such as an extension of more than 40 days or perhaps an imminent termination of the limitations period.

7. The notice asks questions about the timelines of the Commission's processing of enforcement matters, see 73 Fed. Reg. at 74498, but public information about Commission staffing and other resource allocation is scant, so an informed recommendation is difficult to make. The Commission should disclose detail about both its staff and other resource allocations to its various functions and programs (OGC, for example, should be broken down in that manner). The Commission should facilitate better contact with practitioners and regulated committees and groups by publishing a staff directory that contains names, positions, phone numbers and email addresses.

8. Many of the instructions for completing Form 3X are difficult to comprehend, inadequate or missing key information. The Commission should undertake a thorough review of the instructions through a public process. Meanwhile, committees should not be treated adversely or subjected to requests for additional information ("RFAIs") as to matters where the instructions provide inadequate guidance.

9. The Commission's Statement of Policy Guidance, "Purpose of Disbursement Entries for Filing with the Commission," 72 Fed. Reg. 887 (Jan. 9, 2007), updated March 5, 2007, merits review because, for the most part, it does not reflect explicable or useful distinctions between adequate and inadequate descriptions of purposes of disbursements.

10. The Reports Analysis Division's (RAD) practices warrant a through reexamination and overhaul, as this division's operations are inscrutable at best. Here are a few suggestions. The form RFAI letters should be rewritten for clarity and brevity. RFAIs should precisely identify every assertedly deficient entry in a committee's report rather than leave the committee to figure out which entries the RFAI is addressing. RAD should reply to any response to an RFAI that challenges the RFAI's legal presumption rather than ignore the response, as RAD customarily does. And, RAD should never send an identical RFAI about a different report that ignores the pendency of such an intervening submission. OGC should be engaged as necessary on such matters, and in each such instance OGC at least informally should directly engage with the committee on the issue at hand. If RAD accepts a legal position expressed by a committee, it should say so rather than, as now, rarely if ever acknowledge that it has done so. RAD should reply quickly to committee responses. If RAD refers a matter to OGC, ADR, the Audit Division or elsewhere, it should immediately notify the committee of that referral, and in a letter that is not posted on the Commission's website. RAD should not repeatedly request that the same committee state its "best efforts" policy simply because an RFAI addresses a different report.

11. The Commission's system for determining "threshold requirements for substantial compliance with the Act" related to audits, 2 U.S.C. § 438(b), should be published, subjected to public review and comment, and then, as revised, incorporated in either a regulation or a policy

statement. The public availability of these requirements would *foster*, not reduce, compliance by committees. There should be greater proportionality between the scope of an audit and the reporting deficiencies that prompted the audit.

12. The Commission should extend the administrative fines program to so-called 24-hour and 48-hour reports.

13. OGC draft advisory opinions should be made available for public comment at least seven days before the deadline for comments, except in circumstances when the advisory opinion has been accorded expedited consideration; and, even in those circumstances, the Commission should use its best efforts to provide a seven-day comment period.

Thank you for your consideration.

Yours truly,

A handwritten signature in black ink that reads "Laurence E. Gold". The signature is written in a cursive, flowing style.

Laurence E. Gold