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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

2006 FEB -6 P 5: 21

**AGENDA ITEM**

For Meeting of: 02-08-07

**SUBMITTED LATE**

February 6, 2007

MEMORANDUM

To: The Commission

From: Commissioner Michael E. Toner  
Commissioner Ellen L. Weintraub

MT  
ELW

Re: Policy Statement Establishing a Pilot Program for Probable Cause Hearings

Attached please find a policy statement we are offering for publication in the Federal Register. The policy statement would establish a pilot program for hearings for respondents prior to the Commission's consideration of the General Counsel's probable cause recommendations.

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**FEDERAL ELECTION COMMISSION**

**11 CFR Part 111**

**[NOTICE 2007-XX]**

**Policy Statement Establishing A Pilot Program For Probable Cause Hearings**

**AGENCY:** Federal Election Commission.

**ACTION:** Statement of Policy.

**SUMMARY:** The Federal Election Commission (“Commission”) is establishing a pilot program that will allow respondents in enforcement proceedings under the Federal Election Campaign Act, as amended (“FECA”), to have an oral hearing before the Commission. Hearings will take place prior to the Commission’s consideration of the General Counsel’s recommendation on whether to find probable cause to believe that a violation has occurred. The Commission will grant a request for a probable cause hearing if any two commissioners agree to hold a hearing. The program will provide respondents with the opportunity to present arguments to the Commission directly and give the Commission an opportunity to ask relevant questions. Further information about the procedures for the pilot program is provided in the supplementary information that follows.

**DATES:** Effective Date: February 8, 2007.

1 **FOR FURTHER**  
2 **INFORMATION**

3 **CONTACT:** Mark D. Shonkwiler, Assistant General Counsel, 999 E Street,  
4 N.W., Washington, D.C. 20463, (202) 694-1650 or (800) 424-  
5 9530.

6  
7 **SUPPLEMENTARY**

8 **INFORMATION:** The Federal Election Commission is establishing a pilot program  
9 to afford respondents in pending enforcement matters the opportunity to participate in  
10 hearings (generally through counsel) and present oral arguments directly to the  
11 Commissioners, prior to any Commission determination of whether to find probable  
12 cause to believe that respondents violated FECA.<sup>1</sup>

13 **I. Background**

14 On June 11, 2003, the Commission held a hearing concerning its enforcement  
15 procedures. The Commission received comments from those in the regulated  
16 community, many of whom argued for increased transparency in Commission procedures  
17 and expanded opportunities to contest allegations.<sup>2</sup> In response to issues raised at the  
18 hearing, the Commission has made a number of changes, such as allowing Respondents  
19 to have access to their deposition transcripts, See Statement of Policy Regarding  
20 Deposition Transcripts in Nonpublic Investigations, 68 FR 50688 (August 22, 2003), and  
21 clarifying questions concerning treasurer liability for violations of the FECA, See

<sup>1</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. See 2 U.S.C. 437g; 11 CFR Part 111.

<sup>2</sup> The comments from these 2003 proceedings are available online at <http://www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml>.

1 Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 FR 3  
2 (January 3, 2005).

3 On December 8, 2006, the Commission published a proposal for a pilot program  
4 for probable cause hearings, and sought comments from the regulated community. See  
5 Proposed Policy Statement Establishing Pilot Program for Probable Cause Hearings, 71  
6 FR 71088 (Dec. 8, 2006). The comment period on the proposed policy statement closed  
7 on January 5, 2007. The Commission received four comments, all of which endorsed the  
8 proposed pilot program for probable cause hearings. These comments are available at  
9 <http://www.fec.gov/law/policy.shtml#proposed> under the heading “Pilot Program for  
10 Probable Cause Hearings.”

## 11

## 12 **II. Procedures for Probable Cause Hearings**

### 13 A. Opportunity to Request a Hearing

14 A respondent may request a probable cause hearing when the enforcement  
15 process reaches the probable cause determination stage (see 11 CFR 111.16 – 111.17)  
16 and the respondent submits a probable cause response brief to the Office of General  
17 Counsel. The General Counsel will attach a cover letter to its probable cause brief to  
18 inform the respondent of the opportunity to request an oral hearing before the  
19 Commission. See 11 CFR 111.16(b). Hearings are voluntary and no adverse inference  
20 will be drawn by the Commission based on a respondent’s request or waiver of such a  
21 hearing. The respondent must include a written request for a hearing as a part of its  
22 properly and timely filed reply brief under 11 CFR 111.16(c). Any request for a hearing  
23 must state with specificity why the hearing is being requested and what issues the

1 respondent expects to address. Absent good cause, to be determined at the sole discretion  
2 of the Commission, late requests will not be accepted. Respondents are responsible for  
3 ensuring that their request is timely received. All requests for hearings, scheduling and  
4 format inquiries, document submissions, and any other inquiries related to the probable  
5 cause hearings should be directed to the Office of General Counsel.

6         The Commission will grant a request for an oral hearing if any two  
7 Commissioners agree that a hearing would help resolve significant or novel legal issues,  
8 or significant questions about the application of the law to the facts. The Commission  
9 will inform the respondent whether the Commission is granting the respondent's request  
10 within 30 days of receiving the respondent's brief. Respondents who submitted their  
11 probable cause briefs prior to the effective date of this policy statement may request in  
12 writing a probable cause hearing if the Commission has not made its probable cause  
13 determination.

14         Two commenters suggested that the Commission offer oral hearings at other  
15 stages of the enforcement process, including prior to a Commission decision to enter into  
16 pre-probable cause conciliation. The commenters provided no specific suggestion as to  
17 how such hearings at other stages of the enforcement process would benefit the decision-  
18 making process. The Commission declines to adopt such an expansion of the pilot  
19 program at this time.

## 20

### 21         B.     Hearing Procedures

22         The purpose of the oral hearing is to provide a respondent an opportunity to  
23 present his or her arguments in person to the Commissioners before the Commission

1 makes a determination that there is “probable cause to believe” that the respondent  
2 violated the Act or Commission regulations. Consistent with current Commission  
3 regulations, any respondent may be represented by counsel, at the respondent’s own  
4 expense, or may appear pro se at any probable cause hearing. See 11 CFR 111.23.  
5 Respondents (or their counsel) will have the opportunity to present their arguments, and  
6 Commissioners, the General Counsel, and the Staff Director will have the opportunity to  
7 pose questions to the respondent, or respondent’s counsel, if represented. One  
8 commenter suggested that the proposed probable cause hearing procedure be revised to  
9 exclude any questioning of respondents or respondents’ counsel by the Commission’s  
10 General Counsel or Staff Director, as this would be a continuation of the completed  
11 investigation and would offer little value to the Commission. The Commission rejects  
12 this suggestion. The Commission believes that the participation of the General Counsel  
13 and Staff Director in the hearings is appropriate and may often prove helpful to the  
14 Commission.

15 Respondents may discuss any issues presented in the enforcement matter,  
16 including potential liability and calculation of a civil penalty. Hearings are confidential  
17 and not open to the public; generally only respondents and their counsel may attend.  
18 Attendance by any other parties must be approved by the Commission in advance.

19 The Commission will determine the format and time allotted for each hearing at  
20 its discretion. Among the factors that the Commission may consider are agency time  
21 constraints, the complexity of the issues raised, the number of respondents involved, and  
22 Commission interest. The Commission will determine the amount of time allocated for  
23 each portion of the hearing, and these time limits may vary from hearing to hearing. The

1 Commission anticipates that most hearings will begin with a brief opening statement by  
2 respondent or respondent's counsel, followed by questioning from the Commissioners,  
3 General Counsel, and Staff Director. Hearings will normally conclude with the  
4 respondent or respondent's counsel's closing remarks.

5 Third party witnesses or other co-respondents may not be called to testify at a  
6 respondent's oral hearing, nor may a respondent's counsel call the respondent to testify.  
7 However, the Commission may request that the respondent submit supplementary  
8 information or briefing after the probable cause hearing. The Commission discourages  
9 voluminous submissions. Supplementary information may not be submitted more than  
10 ten days after the oral hearing, unless the Commission's request for information imposes  
11 a different, Commission-approved deadline. Materials requested by the Commission, and  
12 materials considered by the Commission in making its "probable cause to believe"  
13 determination, may be made part of the public record pursuant to the Commission's  
14 Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68  
15 FR 70426 (Dec. 18, 2003).

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 as soon as practicable  
21 after the hearing, and the respondent may purchase copies of the transcript. Transcripts

1 will be made public after the matter is closed in accordance with Commission policies on  
2 disclosure.<sup>3</sup>

3 C. Cases Involving Multiple Respondents

4 In cases involving multiple respondents, the Commission will decide on a case-  
5 by-case basis whether to structure any hearing(s) separately or as joint hearings for all  
6 respondents. Respondents are encouraged to advise the Commission of their preferences.  
7 Co-respondents may request joint hearings if each participating co-respondent provides  
8 an unconditional waiver of confidentiality with respect to other participating co-  
9 respondents and their counsel and a nondisclosure agreement. If separate hearings are  
10 held, each respondent will have access to the transcripts from his/her/its own hearing, but  
11 not transcripts of other co-respondents' hearings, unless co-respondents specifically  
12 provide written consent to the Commission granting access to such transcript(s).

13 D. Scheduling of Hearings

14 The Commission will seek to hold the hearing in a timely manner after receiving  
15 respondents' request for a hearing. The Commission will attempt to schedule the  
16 hearings at a mutually acceptable date and time. However, if a respondent is unable to  
17 accommodate the Commission's schedule, the Commission may decline to hold a  
18 hearing. The Commission reserves the right to reschedule any hearing. Where  
19 necessary, the Commission reserves the right to request from a respondent an agreement  
20 tolling any upcoming deadline, including any statutory deadline or other deadline found  
21 in 11 CFR part 111.

<sup>3</sup> The Commission's 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 E. Pilot Program

2 The pilot program will last eight months from the time that this policy is  
3 approved. After eight months, a vote will be scheduled on whether the program should  
4 continue. The program will remain in effect until that vote is taken. Four affirmative  
5 votes will be required to extend or make permanent the program. The program will be  
6 terminated after that vote if there are not four affirmative votes to make the program  
7 permanent or to extend it for some time period. The Commission may terminate or  
8 modify this pilot program through additional policy statements prior to the eighth month  
9 of the pilot program by an affirmative vote of four of its members. If the pilot program is  
10 terminated, previously requested hearings may still be held.

11  
12 F. Conclusion

13 The Commission urges respondents to consider carefully the costs and benefits of  
14 proceeding to probable cause briefings and/or hearings. The hearings are optional and no  
15 negative inference will be drawn if respondents do not request a hearing. Currently, the  
16 majority of the Commission's cases are settled through pre-probable cause conciliation.  
17 Proceeding to probable cause briefing requires a substantial investment of the  
18 Commission's limited resources. Consistent with the goal of expeditious resolution of  
19 enforcement matters, the Commission encourages pre-probable cause conciliation. The  
20 Commission has a practice in many cases of reducing the civil penalty it seeks through its  
21 opening settlement offer in pre-probable cause conciliation. However, once pre-probable  
22 cause conciliation has been terminated, this reduction (normally 25%) is no longer  
23 available and the civil penalty will generally increase.

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

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Robert D. Lenhard  
Chairman  
Federal Election Commission

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

1 **Appendix:**

2 Basic Commission Enforcement Procedure

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

14           Following receipt of such letter or memorandum, or expiration of the 15-day  
15 period, the Office of General Counsel may recommend to the Commission whether or not  
16 it should find "reason to believe" that a respondent has committed or is about to commit a  
17 violation of the Act or Commission regulations. 11 CFR 111.7(a).<sup>4</sup> With respect to  
18 internally-generated matters (e.g., referrals from the Commission's Audit or Reports  
19 Analysis Divisions), the Office of General Counsel may recommend that the Commission  
20 find "reason to believe" that a respondent has committed or is about to commit a  
21 violation of the Act or Commission regulations on the basis of information ascertained by  
22 the Commission in the normal course of carrying out its supervisory responsibilities, or

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

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

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

<sup>5</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 the Commission should find “probable cause to believe” that a violation has occurred or  
2 is about to occur. 11 CFR 111.16(a).

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

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