



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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## AGENDA ITEM

For Meeting of: 07-16-09

**SUBMITTED LATE** July 15, 2009

### MEMORANDUM

TO: The Commission

FROM: Chairman Steven T. Walther *STW*  
Vice Chairman Matthew S. Petersen *MSP*  
Commissioner Cynthia L. Bauerly *CB*  
Commissioner Caroline C. Hunter *CH*  
Commissioner Donald F. McGahn II *DM*  
Commissioner Ellen L. Weintraub *ELW*

Subject: Proposed Agency Procedure: Notice to Respondents in Non-Complaint  
Generated Matters

Attached is a proposed rule of agency procedure. We have asked to place this draft on the agenda for July 16, 2009.

Attachment

**FEDERAL ELECTION COMMISSION**

**[NOTICE 2009-XX]**

**Agency Procedure For Notice to Respondents In Non-Complaint  
Generated Matters**

**AGENCY:** Federal Election Commission

**ACTION:** Agency Procedure

**SUMMARY:** The Federal Election Commission (“Commission”) is establishing a new agency procedure that will provide respondents in certain enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (“FECA”) with notice of a non-complaint generated referral and an opportunity to respond thereto, prior to the Commission’s consideration of whether it has reason to believe that a violation of the Act has been or is about to be committed by such respondent. This program will provide respondents in non-complaint generated matters procedural protections similar to those of respondents in complaint-generated matters. Further information about the procedures for providing notice to respondents in non-complaint generated matters is provided in the supplementary information that follows.

**DATES:** Effective upon publication in the Federal Register.

**FOR FURTHER  
INFORMATION**

**CONTACT:** \_\_\_\_\_, Assistant General Counsel, or \_\_\_\_\_,  
Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-  
1650 or (800) 424-9530.

**SUPPLEMENTARY  
INFORMATION:**

## **I. BACKGROUND**

On June 11, 2003, the Commission held a hearing concerning its enforcement procedures. The Commission received public comments, many of which argued for increased transparency in Commission procedures and expanded opportunities to contest allegations. Comments and statements for the record are available at: <http://www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml>. In response to issues raised at the hearing, the Commission issued new agency procedures. See Statement of Policy Regarding Deposition Transcripts in Nonpublic Investigations, 68 Fed. Reg. 50688 (Aug. 22, 2003); Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 1 (Jan. 3, 2005).

On December 8, 2008, the Commission issued a notice of public hearing and request for public comment on the compliance and enforcement aspects of its agency procedures. Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74495 (Dec. 8, 2008). On January 14-15, 2009, the Commission received comment and testimony. The comments received by the Commission, as well as the transcript of the hearing are available at: <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>.

The Commission received numerous comments regarding respondents in non-complaint generated matters not receiving notice when a matter has been referred to the Commission's Office of General Counsel ("OGC") for enforcement. One commenter opined that the Commission should never find reason to believe ("RTB") that a violation occurred without first giving the respondent the opportunity to respond. Another commenter recommended instituting a program whereby potential respondents in non-complaint generated matters are given a written summary of the matter and an opportunity to respond in writing before the Commission makes an RTB finding, in order to put respondents on notice about the potential outcome of the proceeding. Other commenters urged the Commission to adopt procedures to notify committees of any internal referral, and to implement procedures to provide respondents with the opportunity to review and respond to any adverse course of action recommended by OGC before the Commission considers such recommendation.

## **II. PROCEDURES FOR NOTICE TO RESPONDENTS IN NON-COMPLAINT GENERATED MATTERS**

The Commission is issuing a new agency procedure to provide notification to respondents of enforcement proceedings based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities (i.e., non-complaint generated matters). See 2 U.S.C. 437g. In matters generated by complaints, the Commission may take no action on the complaint (other than dismissal) until respondents have at least 15 days after notification of the allegations contained in the complaint to answer the

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allegations. See 2 U.S.C. 437g(a)(1). However, the statute does not afford respondents the same opportunity to answer allegations in non-complaint generated matters. This agency procedure is intended to provide respondents in non-complaint generated enforcement matters with notice of the basis of the allegations, and an opportunity to respond.

For matters arising from a referral from the Commission's Reports Analysis Division or Audit Division ("internal referrals"), respondents will be notified of the referral within five days of receipt of the referral by OGC. The notice will contain a copy of the referral document and a cover letter setting forth the basis of the referral and potential violations of the Act and/or Commission regulations that arise based upon the referral. The respondent will then be given an opportunity to demonstrate that no action should be taken based on the referral, by submitting, within 15 days from receipt of the referral document and cover letter, a written explanation of why the Commission should take no action. The Commission will not take any action, or make any RTB finding against a respondent based on an internal referral unless it has considered such response or unless no such response has been served upon the Commission within 15 days.

Under current Commission practice, non-complaint generated matters based on referrals from the U.S. Department of Justice or any other law enforcement or governmental agency ("external referrals") are also deemed to be matters based on information ascertained in the normal course of carrying out its supervisory responsibilities. Under the new procedures, if OGC intends to initiate an enforcement proceeding based on an external referral, notice of the referral will be provided to respondents in the same manner as an internal referral. However, where immediate notification to a respondent of an external referral is deemed inappropriate, the Office of General Counsel shall notify the Commission of the referral within 5 days of receipt of the referral from the governmental agency. In cases where, due to law enforcement purposes, the referral document may not be provided to a respondent, OGC will provide the respondent with a letter containing sufficient information regarding the facts and allegations to afford the respondent an opportunity to demonstrate that no action should be taken. Absent exercise of the Commission's discretion (by the affirmative vote of four Commissioners), the OGC shall not proceed with an enforcement proceeding based on an external referral until the referral or substitute informational letter is provided to the respondent.

### **III. CONCLUSION**

This notice establishes agency practices or procedures. This notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedures Act ("APA"). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.

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