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Mr. Stephen Gura, Deputy Associate General Counsel
Mr. Mark Shonkwiler, Assistant General Counsel
Federal Election Commission
990 E Street NW
Washington, DC 20463

RE: Comments in Response to Notice 2008-13, Agency Procedures

Dear Mssrs. Gura and Shonkwiler:

These comments are submitted in response to the December 8, 2008 Notice 2008-13 regarding procedures of the Federal Election Commission ("the Notice"). In addition to the comments below, I respectfully request the opportunity to testify at the public hearing scheduled for January 14, 2009 on the issues contained in the Notice.

Before responding to the voluminous number of questions contained in the Notice, I would first like to address the Commission's actions since the last hearing on agency procedures conducted in 2003. At that time, I submitted comments and appeared at the Commission's public hearing on this subject. In reviewing the comments submitted at that time, it seems only appropriate to initially discuss my experiences since the 2003 hearing.

The following is my "grading" of the progress of the Commission since 2003 on the various points contained in my earlier comments:

1. Overall Approach of the Commission to Procedural Due Process: C

There has been, in my view, a marked improvement in the attitude of the Office of General Counsel ("OGC") toward the constitutional obligations of the Commission to protecting the due process rights of respondents involved in proceedings in and before the Commission. While there have certainly been instances involving my clients during the past six years in which that has not been the case, as a general rule it is my considered opinion that those instances are the exception, rather than the rule. The Commission and the OGC are to be commended for considerable progress in this important and most fundamental area. However, absent attention to and resolution of the issues identified below, it is not possible for the Commission to receive more than a passing grade in the area of protecting and respecting the due process rights of those appearing in and before the Commission in various proceedings.

Further, the Commission deprives itself of a true opportunity to entertain both sides of any Matter Under Review ("MUR") because the OGC is, seemingly, the sole arbiter of the information provided to the Commission for its consideration. The Commission should review its entire process of receipt, review and development of the factual and legal analysis of a case,

with not only the OGC's representations and characterizations, but also a more proactive involvement of the analysis and arguments of Respondents. The Commission should develop new procedures that are a) reflective of a more balanced approach and b) publicly available.

2. Publication of the Commission's Enforcement Manual: F

I reiterate and incorporate by reference my comments from 2003 on this subject: The Commission's continued failure to publish its enforcement manual warrants ongoing criticism. The 'secrecy' of the procedural requirements that apparently bind the OGC attorneys in their negotiations and dealings with respondents is simply unacceptable. One should *not* have to have been employed by the Commission in order to have access to information that governs enforcement proceedings. The absence of a publicly available enforcement manual continues to be a source of concern and should be remedied.

3. Confidentiality as a protection to respondents, not the Commission: D-

Until the Commission publishes its enforcement manual and provides notice to the public of its enforcement procedures, "confidentiality" continues to be defined perversely by the Commission.

4. Commission definition of the roles and responsibilities – and legal liabilities – of treasurers and others involved in campaigns / committees: A

The Commission deserves praise for its policies and procedures delineating the personal legal exposure and liability of committee treasurers. The Commission's policy on this subject has been extremely helpful in advising individuals considering service as a committee treasurer to better understand their legal responsibilities and potential liability for failure to properly discharge their duties.

Questions in the Notice.

With respect to the specific questions posed by the Commission in 2003 and again in the Notice, I would offer the following comments:

First, I incorporate by reference the entirety of my 2003 comments, particularly insofar as those comments respond to many of the identical questions posed in the current Notice.

Without re-stating my earlier comments, I would supplement those as follows:

Motions before the Commission and Appearances. To amplify my earlier comments about appearances and motions before the Commission, the question the Commission should be asking isn't whether motions should be allowed (although the answer is yes, they should be allowed). Because the procedures manual is 'secret', the exact procedures the Commission follows in the

life of a complaint are not publicly disclosed. But from experience and observation, there appears to be a fundamental problem in the Commission's proceedings; namely, that the OGC is essentially the only voice heard by the Commission in its decision-making points related to enforcement matters.

A good test of whether this is an accurate observation would be for the Commission to go back through enforcement actions over the past five years. How many times has the Commission dismissed a case *after* an RTB finding? It has never happened to any of my clients – which causes me to believe that once an RTB finding has been made, the die is cast and there is no set of facts or legal arguments that can persuade the Commission that, after further consideration, the MUR should be dismissed. The procedures adopted by the Commission have essentially collapsed the two-step process into one. My perception is that because the OGC is invested in a 'guilty' verdict after the RTB finding, there is nothing a respondent can argue or present subsequently to the OGC that results in a decision not to proceed further. Perhaps my experience is unique and it is common for the Commission to dismiss cases *after* the RTB finding, determining upon further review and analysis that there is no probable cause to proceed. If that is not occurring in at least some considerable numbers of cases, then there is a serious flaw in either the Commission's procedures, or else the statute should be amended to eliminate the two step process because it is a fiction.

One obvious possibility (and, indeed a *probability)* could be that there is not sufficient opportunity for true adversarial proceedings in and before the Commission itself. The Commission should develop a process that fundamentally shifts the process from arguing to the OGC to submission of arguments to the Commission itself. On more than one occasion I have experienced the futility of presenting arguments in a brief knowing full well that those arguments and authorities are essentially being submitted to opposing counsel.

Motion practice and appearances before the Commission are both important aspects of an adversarial proceeding – but that should be part of an overhaul of the assumptions employed by the Commission in its approach to consideration of MURs. The OGC should be responsible for arguing to the Commission its view of the case – and respondents should have that same privilege without the OGC acting as a filter characterizing respondents arguments and analyses.

The Commission, to my knowledge, has not published data or statistics regarding the number of appearances and arguments allowed since the Commission authorized such appearances. My requests for appearances have not been granted, so I cannot speak to the efficacy of the existing program. Accordingly, I simply reiterate that the Commission should establish procedures for adversarial proceedings that allow a more thorough development of the presentation to the Commission of the arguments and positions of respondents.

Deposition and Document Production. In my earlier comments, I discussed the Commission's practice of not allowing witnesses to review their deposition transcripts – and the Commission made changes to that practice. However, since that time, my experience has been that fewer depositions are taken by OGC. Rather, OGC more commonly now conducts

'interviews'…thus avoiding the obligation to furnish copies of a transcript to a witness or respondent. Again, this question avoids the more fundamental issue of the Commission's proceedings: whether the Commission should assume greater responsibility for serving as the neutral arbiter of facts and the law presented equally by not only the OGC but also respondents. If considered in that context, it is vital that the Commission establish procedures for making documents on which the OGC relies available to respondents. It is fundamental to protecting the procedural due process rights of respondents.

Extensions of Time, Timeliness and Prioritization. It is more than telling that the Commission's 'Overview of Process and Applicable Timeframes' regarding an enforcement action leaves blank important timeframe obligations of the Commission, to-wit:

Stage	**Number of Days**
Complaint Received	
Complaint Notification	5 Days
Response to Complaint	15 Days
Reason to Believe Finding	
Investigation	
Pre-Probable Cause Conciliation	60 Days
General Counsel's Brief	
Response to General Counsel's Brief	15 Days
Probable Cause to Believe	
Probable Cause to Believe Conciliation	30-90 Days
Disposition	

http://www.fec.gov/pages/brochures/complain.shtml, accessed January 5, 2009

Note the highlighted areas above: there are *no* obligations for timely action on the part of the OGC in the *most* important aspects of the life of a MUR. The suggestion that the OGC is 'understaffed' to properly service its caseload is preposterous. Every attorney representing respondents before the FEC has multiple cases and clients – and should *not* be expected to drop everything else to meet the truncated timeframes allocated to respondents after the OGC has had months or even years between submissions.

The "hurry up and wait" approach taken by the OGC is, to put it mildly, one of the single most infuriating aspects of dealing with the agency. Some suggestions to 'level the playing field' between respondents and the OGC:

- Respondents should have an equal amount of time, or even some percentage of the time taken by the OGC since its last submission, for filing respondent's responsive pleading. For example, if the OGC has taken six months to submit its RTB Finding, the Respondent should be allowed extensions equivalent to either the identical or some substantial percentage of the same amount of time to respond.
- If the OGC has not filed its RTB finding within two years of the initial notice of the complaint, the MUR should be dismissed. It is ridiculous for committees to be forced to continue to file reports and remain 'open' due to a pending MUR when the OGC has not seen fit to communicate with the respondent for two years.
- A set of criteria related to the timeliness of processing MURs involving losing campaign committees should be established. It is absurd for the OGC to treat defunct committees with no assets as it does any other committee - - and to literally *waste* the taxpayers money seeking the proverbial blood from the turnip. The longer a proceeding drags on beyond the election day loss, the harder it is to expect there will be funds available to pay any penalty – but the OGC is seemingly oblivious to this reality.

The concern with extensions of time to respondents is, in my view, misplaced. A greater emphasis on assuring equivalent timeframes to respondents as those enjoyed by the OGC and attention to expeditious action and disposition of MURs by the OGC are of greater importance to the regulated community and should be of greater concern to the Commission.

The Commission has made progress in terms of its statistics related to processing and better prioritization of complaints – and deserves credit for efforts in that regard. Nonetheless, there are still areas in need of attention as outlined above.

Memorandum of Understanding with DOJ. Has one been adopted since BCRA was enacted? Is it published? If not, why not? This is important.

Settlements and Penalties. The secrecy surrounding the OGC's negotiating parameters makes it difficult to know what the amounts relate to. Having negotiated several, I can honestly say I have no idea how the OGC arrives at the amounts it demands and receives. Some seemingly large penalties paid by certain respondents in the past few years nonetheless constitute a tiny fraction of the amount at issue in the MUR – but it is impossible to know how the number

was conceived or arrived at by the OGC or whether it is based on a formula that would be applicable to other similarly situated respondents. Perhaps that is contained in the secret procedures manual – something to which I am not privy.

Conclusion. The Commission has listed numerous other questions and topics which are deserving of attention. I will be prepared to answer questions about some of the topics at the public hearing and may supplement these comments at a later date.

Thank you for the opportunity to submit these comments. I can be reached at (202) 295-4081 should you have questions regarding this submission or with respect to the hearing schedule.

Sincerely,

/s/Cleta Mitchell

Cleta Mitchell, Esq.