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January 5, 2009

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VIA E-MAIL (AGENCYPRO2008@FEC.GOV)

Stephen Gura, Esq.
Mark Shonkwiler, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments to FEC Notice 2008-13 (Agency Procedures)

Dear Messrs. Gura and Shonkwiler:

On behalf of the Election Law and Government Ethics practice group of Wiley Rein LLP, we welcome this opportunity to respond to the Federal Election Commission's request for comments regarding its policies, practices, and procedures and request an opportunity to testify at the accompanying hearing.

These comments and any accompanying testimony are our own and are based on our experience observing and practicing before the Commission. These comments are based on our collective observations and experiences and do not necessarily reflect the views of any client.

Our comments, which follow, are generally organized to correspond with the topics raised by the Commission in the above-captioned Notice.

1. Enforcement Process

(a) Initial Complaint Processing

The FECA requires that a complaint filed with the Commission be: (1) filed by a person who believes a violation of the FECA has occurred; (2) in writing; (3) signed and sworn to by the person filing the complaint; and (4) notarized. 2 U.S.C. § 437g(a)(1). These requirements are all embodied in the Commission's implementing regulations. 11 C.F.R. § 111.4(a)-(c). The implementing regulations also list the following four additional criteria to which a "complaint should conform":

- (1) It should clearly identify as a respondent each person or entity who is alleged to have committed a violation;



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(2) Statements which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainants belief in the truth of such statements;

(3) It should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction; and

(4) It should be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available to, the complainant.

Id. at § 111.4(d). The Office of General Counsel has explained that it “strongly encourages” compliance with these criteria, but does not require it when initially processing complaints. *See* MUR 4979 First General Counsel’s Report at 11 (Sept. 30, 2003).

The Commission should make compliance with these factors mandatory and should not accept complaints that fail to satisfy them. The FECA, fundamental fairness and respect for respondents’ rights, and preventing abuse of the complaint process are all factors that support this recommendation.

First, the FECA requires that complaints be filed by persons who believe a violation has occurred and the Commission must determine – based on the complaint and, if one is filed, a response by persons named in the complaint – whether there is “reason to believe” a violation was committed. 2 U.S.C. § 437g(a)(1), (2). The FECA puts the onus on the complainant to file a complaint if he or she “believes” a violation has occurred. If that belief is not corroborated with adequate facts and supporting information, the Commission cannot carryout its statutory duty to judge the merits of legal claims contained in the complaint.

Second, fundamental fairness to respondents and respect for their rights seemingly compels complainants to provide sufficient facts and support so that respondents can adequately respond to a complaint. The Federal Rules of Civil Procedure are a useful guide for these concepts. The Supreme Court of the United States has



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recently recited the long accepted requirements that a complaint in federal court include “[f]actual allegations” that “raise a right to relief beyond the speculative level.” *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). Furthermore, a complainant alleging fraud or mistake “must state with particularity the circumstances constituting” the claim. Fed. R. Civ. P. 9(b). By mandating compliance with the factors of 11 C.F.R. § 111.4(d), the Commission will bring its pleading standards in line with those required by other forums.

The Commission should also be mindful of the relevant First Amendment implications when respondents are submitting information to the Commission in response to a complaint. The U.S. Court of Appeals for the D.C. Circuit has explained that information provided to the FEC in the course of an investigation “is of a fundamentally different constitutional character from the commercial or financial data which forms the bread and butter of SEC or FTC investigations, since release of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment.” *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981). Moreover, information is subject to statutory confidentiality requirements both during and after investigation. *See AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003); *In re Sealed Case*, 237 F.3d 657 (D.C. Cir. 2001).

When a respondent is presented with a complaint devoid of facts or support, it is left with a dilemma. The respondent could refuse to substantively respond, thereby preserving the First Amendment rights cited by the D.C. Circuit in *Machinists*, but waiving a statutory right to respond to the complaint and risking adverse inferences. Alternatively, the respondent could exercise that statutory right by providing relevant information about its activities, but in so doing, it will be forfeiting its First Amendment rights. For example, if a respondent does not know the facts – or the support for such facts – it must refute, the respondent is left to guess at what information it must provide to adequately respond to the complaint. This will result in disclosing more than what might otherwise be necessary because the respondent has no way of calibrating its response to facts and support provided in the complaint. Mandating that complaints comply with the provisions of 11 C.F.R. § 111.4(d) will significantly reduce this First Amendment damage by providing respondents with the information necessary to appropriately respond to complaints filed against them.



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Third, filtering out complaints that do not contain sufficient facts or support will prevent political abuse of the complaint process.¹ In our observation and experience, there is an inverse relationship between factually complete and supported complaints and political motivation – as opposed to a genuine law enforcement concern – for filing the complaints. In the run-up to an election, complaints are often filed for the sole purpose of issuing an accompanying press release accusing a political opponent of violating the law. Even if the Commission ultimately determines that the complaint is baseless, the complainant’s political goals will have been satisfied because the Commission is not in a position to dismiss the matter until months after the election. As a result, the respondent has the specter of a legal complaint hanging over its head through election day that the complainant often exploits for political purposes.

If the Office of the General Counsel is tasked with screening complaints for compliance with 11 C.F.R. § 111.4(d) and returns deficient complaints pursuant to 11 C.F.R. § 111.5(b), the Commission can remove the political incentives for filing baseless complaints. 11 C.F.R. § 111.5(b) requires that the Office of General Counsel notify both the complainant and any respondents named in the complaint that the complaint failed to comply with the Commission’s pleading standards and that no action will be taken on the complaint. The notification must be sent within five days of receipt of the complaint and must include a copy of the complaint. Faced with the potential political backfiring that could stem from having a complaint immediately rejected, complainants will be less inclined to attempt to co-opt the Commission for their own political purposes by filing baseless complaints.

(b) Motions Before the Commission

The request for comments asks about the Commission’s procedures for consideration to motions to dismiss and motions to reconsider and states that “the Administrative Procedure Act ... does not require that agencies entertain such motions in non-adjudicative proceedings” while at the same time admitting that the Commission has reviewed motions on a case-by-case basis. We urge the Commission to adopt a policy of considering such motions and issue a set of procedures by which the entire

¹ In fact, it is because complaints of fraud and mistake are easy to allege and, therefore, can be abusively filed that the Federal Rules of Civil Procedure include the heightened pleading standard discussed *supra*. See 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1296 (3d ed. 2004).



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regulated community may understand the process for having the Motions considered. Considering such Motions on a case-by-case basis, without guidance may be arbitrary. Further, the Commission should not leave this decision to the General Counsel's Office which generally has a vested interest in the position it has laid out. However, the Factual and Legal Analysis issued by the General Counsel's Office and adopted by the Commission gives respondents the first glimpse into the Commission's analysis and the facts upon which the analysis is based. It is only at this point that the respondent can reply in an educated manner to the facts and analysis put forward. Allowing a Motion to Dismiss or a Motion for Reconsideration at this point in the process can save the respondent time and money in discovery costs and can also save the Commission lost time in pursuing a theory based on inaccurate or simply incorrect facts. This will allow the Commission to reassess the use of its resources.

Further, there is nothing in the Administrative Procedures Act that would preclude an agency from allowing Motions to Reconsider or to Dismiss. Indeed, the fact that the Commission already does this on a case by case basis underscores that it has the ability to do so. Moreover, there have been many occasions in the past when the Commission, after making a reason to believe finding never gets to the probable cause stage, but rather, after further inquiry, determines to take no further action on a case. This is not specified by the Act or Commission regulations, but has become commonplace. Thus, since the Commission has already determined that it can short-circuit the probable cause stage of the procedures, it would make sense to include the ability to file Motions after a "reason to believe" finding.

We recommend that the window for such Motions should be after the reason to believe finding. Requiring such motions within 30 days of notice of such a finding would appear to be reasonable. Further, it would make sense to require that the Motions highlight either an error in the factual presentation found in the Factual and Legal Analysis or give the respondent the ability to respond to legal inquiries raised in the factual and legal analysis.

Finally, we see no need for tolling the statute of limitations since such motions would be entertained early in the process when the statute of limitations should presumably not be an issue.



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(c) Appearances Before the Commission

The Commission notes that it recently began permitting respondents in enforcement proceedings to personally appear before the Commission prior to its vote on whether there is probable cause to believe a violation has occurred. We suspect that this development has been a positive one and recommend that the Commission formalize a process by which it may exercise its discretion to permit personal appearances before the Commission in other situations as well.

The vast majority of the Commission's enforcement matters are resolved by the Commission and only rarely result in judicial proceedings to enforce violations of the Act. Accordingly, the Commission is almost always acting as both prosecutor and judge. In this latter role, it seems only fitting that the Commission adopt procedures like that of a court, the most basic of which would be to hold hearings on matters that respondents and the Office of General Counsel dispute. The power of the Commission to do so should be discretionary so that it may consider, on a case-by-case basis, whether a hearing would be productive. We can certainly think of a number of situations where it would. For example, if during pre-probable cause conciliation a respondent and the Office of General Counsel reach a stalemate, a hearing could certainly accelerate resolution of the matter which would, ultimately, save both the respondent's and the Commission's resources.

In addition, hearings need not be limited to the enforcement context. Advisory opinion requests present another opportunity for the Commission to hear directly from an interested party. We have observed numerous Commission meetings where the Commission raises questions that we could easily answer during the meeting if given the opportunity to do so. Permitting requestors or their counsel to personally appear during consideration of an advisory opinion will seemingly only increase the efficiency of the process.

(d) Deposition and Document Practice

We recall when counsel did not have the right to obtain the depositions of its clients prior to responding to the General Counsel's Probable Cause Briefs. We are appreciative that we no longer need to make the case to obtain these documents in order to file a response to probable cause briefs. We believe that the Commission should take the next step and make all documents upon which the General Counsel's Brief relies available to respondents in order to enable the respondent to

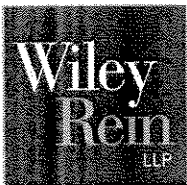


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fully respond to the brief. Without the full documentation, the Commission is asking a respondent to reply to a brief with one hand tied behind her back. There are many occasions when the counsel's office interprets something said by a deponent a certain way when there could easily be an alternative fashion of interpreting the same material. We do not fault the Office of General Counsel for the interpretation, but want the opportunity to explain the materials in another fashion. Without being given access to the materials, there is no way to address these issues without going directly to the deponent, a process which could be more time consuming than simply being given the deposition.

While we understand the Commission's concern that this could delay the process, we believe this can be dealt with by simply providing the documentation contemporaneously with the General Counsel's Brief. Full access to the transcripts of others would not increase the likelihood of public disclosure in violation of 2 U.S.C. 437(g)(a)(12). Indeed, for years the Commission has concluded cases against respondents in the same enforcement action at different times, and there is no evidence that this has led to the premature disclosure of Commission notices or materials. Rather, the Commission simply notifies respondents that the matter has not been closed as to all respondents and that there is a continuing requirement of confidentiality. The same procedure could be put in place when materials are provided to respondents in connection with the probable cause stage of the proceeding.

In addition, we recommend that respondent's counsel be allowed to attend depositions of other respondents or witnesses. If the role of the Commission is to discover actual facts, respondent's counsel can help facilitate that role by being allowed to develop the facts as they know them. Here again, our experience has been that the counsel's office typically ask questions based on its theory of the case and attempts to discover the facts that will enable them to make the case. By enabling respondent's counsel to participate in the proceedings, other pertinent facts can be discovered giving the General Counsel's office a more complete look at the case.



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2. Other Programs

(a) Reports Analysis

The Commission's notice requesting comments asks: "Some RFAI's seek information which is not required [to be] report[ed]. Is this practice consistent with the law?" In our experience, these types of RFAs have grown in recent years which is a troubling development.

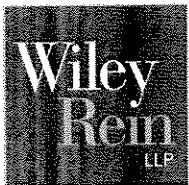
Initially, these RFAs could be counted on once every two years stating:

Clarification regarding administrative expenses should be disclosed during each two-year election cycle beginning with the first report filed in the non-election year. Please verify that all expenses referenced above (i.e., rent, salaries, utilities, etc.) have been adequately disclosed. If volunteers have provided these services, please confirm this in writing.

Though we were never aware of the authority for this requirement, compliance with it was never terribly onerous. In our experience, the FEC's Reports Analysis Division (RAD) has recently begun issuing RFAs with remarkably increased frequency that request confirmation of the accuracy of other information previously reported to the FEC. Three examples follow:

Please clarify all expenditures made for "Event Catering," "Fundraiser Invitations," and "Fundraising Consulting Expenses" on Schedule B. If a portion or all of these expenditures were made on behalf of specifically identified federal candidates, this amount should be disclosed on Schedules B or E supporting Lines 23 or 24 and include the amount, name, address and office sought by each candidate. 11 CFR §§104.3(b) and 106.1.

11 CFR §100.24 defines as Federal Election Activity, services provided by an employee of a State, district



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or local party committee who spends more than 25 percent of their time during that month on activities in connection with a Federal election. You are advised that payments for salaries and wages for employees who spend more than 25 percent of their compensated time in a given month on Federal Election Activity or activities in connection with a Federal election must be made with Federal funds only. Please provide clarification regarding the lack of payments for salary and wages disclosed by your committee.

Please clarify all expenditures made for [Beverages, Event Beverages, Event Food, Event Invitations, Event Music, Event Tents/Chair, and Event Venue] on Schedule B. If a portion or all of these expenditures were made on behalf of specifically identified federal candidates, this amount should be disclosed on Schedules B, E or F supporting Lines 23, 24 or 25 and include the amount, name, address and office sought by each candidate. 11 CFR §§104.3(b) and 106.1.

Notably, none of these RFAIs state that the disclosures were incomplete or improperly made. Rather, they all seek "clarification" that the manner in which they were originally disclosed was what was intended. On its face, this does not appear to be terribly burdensome. But the RFAIs all include language that a failure to respond or an inadequate response could result in audit or enforcement action. This threat almost always compels a response which, like any filing with the federal government, could expose the respondent to liability for making a false or incomplete statement. For these reasons, it has been our experience that RFAIs generate a fair amount of concern with the recipients and are taken very seriously. Furthermore, they remain a matter of public record and give the incorrect impression that the recipients may have violated the law or improperly reported.

Accordingly, RAD should refrain from sending RFAIs that, without a basis for apparent inaccurate or incomplete disclosure, seek nothing more than confirmation that information originally reported was accurate. At the very least, RAD should



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cease making them a matter of public record. The reporting form already requires a signature after the statement: "I certify that I have examined this Report and to the best of my knowledge and belief it is true, correct and complete." *See also* 11 C.F.R. § 104.14(d) (imposing personal responsibility "for the timely and complete filing of the report or statement and for the accuracy of any information or statement contained in it.") These RFAIs are redundant and impose significant burdens on the recipients.

Furthermore, several times this past election cycle letters from RAD did not reflect changes to election dates or electoral developments. For instance, RAD issued letters related to several elections stating the following:

Schedule B supporting Line 23 of your report discloses one or more contributions to a candidate(s) for the 2008 Primary election; however, the funds were disbursed after the election date(s) (see attached). Please note that contributions may not be designated for an election which has already occurred unless the funds are to be used to reduce a candidate committee's debts incurred during that election campaign.

If any apparently impermissible contribution in question was incompletely or incorrectly disclosed, you should amend your original report with clarifying information. If the contribution(s) in question should have been designated for debt retirement, you should amend your report to indicate "debt retirement," along with the year of election.

If you have made an impermissible contribution, you must request a refund or provide a written authorization for a redesignation of the contribution pursuant to 11 CFR §110.2(b) within 60 days of the treasurer's receipt.



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If the foregoing conditions for redesignations were not met within 60 days of the treasurer's receipt, your committee must obtain a refund.

Please inform the Commission of your corrective action immediately in writing and provide a photocopy of the refund or redesignation request sent to the recipient committee(s). In addition, any refunds should be disclosed on Schedule A supporting Line 16 of the report covering the period during which they are received. Any redesignations should be disclosed as memo entries on Schedule B supporting Line 23 of the report covering the period during which the redesignation is made. 11 CFR § 110.1(b)

Although the Commission may take further legal action regarding this impermissible activity, your prompt action in obtaining a refund and/or redesignating the contribution(s) will be taken into consideration.²

In issuing these letters, RAD should first confirm that the information in the letters is accurate and up-to-date, and second, should agree to remove the letters from the public record when an obvious mistake has been brought to its attention. Filers should not be told to amend a report while the Commission is making a determination as to whether the RAD letter was correct. This muddies the public record and potentially makes filers report inaccurate information. Further, filers are very sensitive to the appearance on the public record that they have made a mistake when, in fact, no mistake was made and the record has not been cleared. A series of

² These RFAIs were issued in clear error but remain part of the public record. Louisiana moved its 2008 congressional primary date due to a hurricane. The FEC website reflected the change in date of the primary election to October 4, 2008. *See* http://www.fec.gov/pages/report_notices/State_Notices/laprim2.shtml. Notwithstanding that fact, RAD sent RFAIs to numerous committees that had contributed to candidates after the original primary election date, but before the new October 4 primary date. The letter accused the committees of making impermissible primary election contributions because the primary election had already passed. Even after RAD was apprised of its error and directed to the FEC webpage indicating that the primary election had not passed, the RFAIs remain part of the public record.



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letters like the ones identified above make it appear as though the filer has made repeated mistakes, when in fact, not a single mistake has been made and RAD is seeking information either not required or which is inaccurate.

(b) Administrative Fines

As a technical matter, the Commission's administrative fines program only applies to violations of the 2 U.S.C. § 434(a) reporting requirements. *See* 11 C.F.R. § 111.31(b). However, reporting requirements for independent expenditures, electioneering communications, and other types of activities exist in sections of the FECA other than that codified at 2 U.S.C. § 434(a). *See, e.g.*, 2 U.S.C. § 434(c) (independent expenditures by persons), (f) (electioneering communications), (g) (independent expenditures by political committees); 2 U.S.C. § 431(9)(B)(iii) (internal communications containing express advocacy). We are not aware of any policy reason that would justify not including all reports filed with the Commission within the administrative fines program and believe that the benefits that have accrued in connection with 2 U.S.C. § 434(a) reporting would also accrue if all other reports are also subject to the administrative fines program.

3. Advisory Opinions

As noted in the Commission's request for comments of the agencies policies and procedures, the Commission's policy has been to post one or more draft opinions on the Commission website for comment. Further, Requesters are sent a copy of the draft opinions for comment as well. While this is an excellent policy in theory, unfortunately in practice there have been many occasions when the drafts are issued so late as to give the requestors only one or two days to respond. It can be difficult to draft a response and have a client consider and approve the response within the time frame allotted. The requestor can often shed light on the issue at hand once a draft opinion is issued. Thus, we recommend that the Commission adopt a policy of providing at least five business days notice to Requesters (and the public at large) in order to file responses to the Commission's drafts. This would enable the Commission to review all of the facts and circumstances surrounding an Advisory Opinion request and consider the input provided after a draft opinion has been issued. Given that the Commission has a staff of professionals dedicated to the drafting of Advisory Opinions, it should be the rare occasion that the Commission uses all 60 days to respond to an Advisory Opinion request.



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We look forward to discussing these and any other comments submitted to the Commission during the January 14, 2009, hearing.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jan Baran".

Jan Witold Baran

On behalf of the Wiley Rein LLP Election Law and Government Ethics group