



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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October 23, 2007

**AGENDA ITEM**

For Meeting of: 10-25-07

MEMORANDUM:

To: The Commission

From: Commissioner Ellen L. Weintraub

ELW

**SUBMITTED LATE**

Re: Procedural Rules For Probable Cause Hearings

Attached please find procedural rules for probable cause hearings that I am offering for publication in the Federal Register. The procedural rules would make permanent a 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]**

**Procedural Rules For Probable Cause Hearings**

**AGENCY:** Federal Election Commission.

**ACTION:** Rule of Agency Procedure.

**SUMMARY:** The Federal Election Commission (“Commission”) is making permanent a program that allows respondents in enforcement proceedings under the Federal Election Campaign Act, as amended (“FECA”), to have a 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 program is provided in the supplementary information that follows.

**EFFECTIVE DATE:** [insert date of publication in Federal Register]

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

4 **CONTACT:** Mark D. Shonkwiler, Assistant General Counsel, 999 E Street,  
5 N.W., Washington, D.C. 20463, (202) 694-1650 or (800) 424-  
6 9530.

7  
8 **SUPPLEMENTARY**

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

14 **I. Background**

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

<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 treasurer liability for violations of the FECA, See Statement of Policy Regarding  
2 Treasurers Subject to Enforcement Proceedings, 70 FR 3 (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 On February 8, 2007, the Commission decided by a vote of 6-0 to institute the  
12 pilot program. The program went into effect on February 16, 2007. The pilot program  
13 was designed to remain in effect for at least eight months, after which time a vote would  
14 be scheduled on whether the program should continue. The Commission finds that the  
15 pilot program has been successful and hence, is issuing this notice to announce that the  
16 Commission has determined to make the program permanent.

17 **II. Procedures for Probable Cause Hearings**

18 A. Opportunity to Request a Hearing

19 A respondent may request a probable cause hearing when the enforcement  
20 process reaches the probable cause determination stage (see 11 CFR 111.16 – 111.17)  
21 and the respondent submits a probable cause response brief to the Office of General  
22 Counsel. The General Counsel will attach a cover letter to its probable cause brief to  
23 inform the respondent of the opportunity to request an oral hearing before the

1 Commission. See 11 CFR 111.16(b). Hearings are voluntary and no adverse inference  
2 will be drawn by the Commission based on a respondent’s request for, or waiver of, such  
3 a hearing. The respondent must include a written request for a hearing as a part of the  
4 respondent’s filed reply brief under 11 CFR 111.16(c). Each request for a hearing must  
5 state with specificity why the hearing is being requested and what issues the respondent  
6 expects to address. Absent good cause, to be determined at the sole discretion of the  
7 Commission, late requests will not be accepted. Respondents are responsible for  
8 ensuring that their requests are timely received. All requests for hearings, scheduling and  
9 format inquiries, document submissions, and any other inquiries related to the probable  
10 cause hearings should be directed to the Office of General Counsel.

11 The Commission will grant a request for an oral hearing if any two  
12 Commissioners agree that a hearing would help resolve significant or novel legal issues,  
13 or significant questions about the application of the law to the facts. The Commission  
14 will inform the respondent whether the Commission is granting the respondent’s request  
15 within 30 days of receiving the respondent’s brief.

16 B. Hearing Procedures

17 The purpose of the oral hearing is to provide a respondent an opportunity to  
18 present the respondent’s arguments in person to the Commissioners before the  
19 Commission makes a determination as to whether there is “probable cause to believe”  
20 that the respondent violated the Act or Commission regulations. Consistent with current  
21 Commission regulations, a respondent may be represented by counsel, at the respondent’s  
22 own expense, or may appear pro se at a probable cause hearing. See 11 CFR 111.23.  
23 Respondents (or their counsel) will have the opportunity to present their arguments, and

1 Commissioners, the General Counsel, and the Staff Director will have the opportunity to  
2 pose questions to the respondent, or respondent's counsel, if represented.

3 At the hearing, respondents are expected to raise only issues that were identified  
4 in the respondent's hearing request. Such issues must have been previously presented  
5 during the enforcement process, either in the response, during the investigation or pre-  
6 probable cause conciliation, or in the reply brief. Respondents may discuss any issues  
7 presented in the enforcement matter, including potential liability and calculation of a civil  
8 penalty, and should be prepared to address questions related to the complaint, their initial  
9 response, and any other material they have submitted to the Commission. The reply brief  
10 should include specific citations to any authorities (including prior Commission actions)  
11 on which the respondent is replying or intends to cite at the hearing. If respondents  
12 discover new information after submission of the reply brief, or need to raise new  
13 arguments for similarly extenuating circumstances, they should notify the Commission as  
14 soon as possible prior to the hearing. Commissioners may ask questions on any matter  
15 related to the enforcement proceedings and respondents are free to raise new issues  
16 germane to any response.

17 Hearings are confidential and not open to the public; generally only respondents  
18 and their counsel may attend. Attendance by any other parties must be approved by the  
19 Commission in advance.

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

1 allocated for each portion of the hearing, and each time limit may vary from hearing to  
2 hearing. The Commission anticipates that most hearings will begin with a brief opening  
3 statement by respondent or respondent's counsel, followed by questioning from the  
4 Commissioners, General Counsel, and Staff Director. Hearings will normally conclude  
5 with the respondent or respondent's counsel's closing remarks.

6 Third party witnesses or other co-respondents may not be called to testify at a  
7 respondent's oral hearing, nor may a respondent's counsel call the respondent to testify.  
8 However, the Commission may request that the respondent submit supplementary  
9 information or briefing after the probable cause hearing. The Commission discourages  
10 voluminous submissions. Supplementary information may be submitted only upon  
11 Commission request and no more than ten days after such a request from the  
12 Commission, unless the Commission's request for information imposes a different,  
13 Commission-approved deadline. Materials requested by the Commission, and materials  
14 considered by the Commission in making its "probable cause to believe" determination,  
15 may be made part of the public record pursuant to the Commission's Statement of Policy  
16 Regarding Disclosure of Closed Enforcement and Related Files, 68 FR 70426 (Dec. 18,  
17 2003).

18 The Commission will have transcripts made of the hearings. The transcripts will  
19 become a part of the record of the enforcement matter and may be relied upon for  
20 determinations made by the Commission. Respondent may be bound by any  
21 representations made by respondent or respondent's counsel at a hearing. The  
22 Commission will make the transcripts available to the respondent as soon as practicable  
23 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 hearings 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 the hearing of that  
11 respondent, but transcripts of other co-respondents' hearings will not be made available  
12 unless co-respondents specifically provide written consent to the Commission granting  
13 access to such transcripts.

14 D. Scheduling of Hearings

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

2 Probable cause hearings are optional and no negative inference will be drawn if  
3 respondents do not request a hearing. Currently, the majority of the Commission's cases  
4 are settled through pre-probable cause conciliation. Proceeding to probable cause  
5 briefing requires a substantial investment of the Commission's limited resources.  
6 Consistent with the goal of expeditious resolution of enforcement matters, the  
7 Commission encourages pre-probable cause conciliation. The Commission has a practice  
8 in many cases of reducing the civil penalty it seeks through its opening settlement offer in  
9 pre-probable cause conciliation. However, once pre-probable cause conciliation has been  
10 terminated, this reduction (normally 25%) is no longer available and the civil penalty will  
11 generally increase.

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

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22 Robert D. Lenhard  
23 Chairman  
24 Federal Election Commission  
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27 DATED: \_\_\_\_\_  
28 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 or 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).