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ATTORNEYS AT LAW

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INCLUDING PROFESSIONAL CORPORATIONS

1333 NEW HAMPSHIRE AVENUE, N.W.
SUITE 400
WASHINGTON, DC 20036
(202) 887-4000
FAX (202) 887-4288
www.akingump.com

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RIYADH - IN AFFILIATION WITH
THE LAW OFFICE OF ABDULAZIZ H.
FAHAD

WRITER'S DIRECT DIAL NUMBER 202-887-4343
WRITER'S E-MAIL ADDRESS sross@akingump.com

May 1, 2000

Ms. Rosie Smith, Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Dear Ms. Smith:

The following comments are submitted in response to the Federal Election Commission's Notice of Proposed Rulemaking ("NPRM") regarding "Administrative Fines," published in the Federal Register on March 29, 2000.

We ask that you include this document as part of the administrative record for this rulemaking, and we formally request an opportunity to present oral testimony.

Thank you very much for your assistance in this matter. If you need any further documentation or have any questions, please feel free to contact us.

Sincerely,

Steven R. Ross
Janis M. Crum

Comments to the Federal Election Commission's Notice of Proposed Rulemaking

The Administrative Fines Process

I. Introduction and Background

A. Statutory Amendments to the Federal Election Campaign Act ("FECA")

On September 29, 1999, Congress amended the Federal Election Campaign Act ("FECA") by authorizing the Federal Election Commission ("FEC" or "Commission") to impose civil fines for a certain category of FECA violations. The "administrative fines" provision permits the Commission to "require the person to pay a civil money penalty in an amount determined under a schedule of penalties which is established and published by the Commission." 2 U.S.C. § 437g(a)(4)(C)(i)(II).

In implementing a system of administrative fines, Congress explicitly required the Commission to take into account three factors: (1) the amount of the violation involved, (2) the existence of previous violations by the person, and (3) such other factors as the Commission considers appropriate. The statute also guarantees procedural due process rights to respondents who have allegedly violated the timely reporting and disclosure requirements of 2 U.S.C. § 434(a). Prior to making an adverse finding against a respondent, the Commission must provide "written notice and an opportunity to be heard." 2 U.S.C. § 437g(a)(4)(C)(ii). Respondents also have the right to judicial review in the district courts of the United States. Id. Within 30 days of receiving notice of the Commission's decision, the respondent may submit a written petition requesting the court to determine whether the finding should be modified or set aside. 2 U.S.C. § 437g(a)(4)(C)(iii).

The administrative fines provision is the first major amendment to the FECA in more than two decades. By vesting in the Commission the power to impose monetary civil penalties for reporting violations, Congress has given the agency an administrative tool never before used in the Title 2 context. Unlike the statutory processes to which it has become accustomed, informal adjudication requires the Commission to promulgate rules and implement procedures that protect the due process rights of respondents. The nature of those rights are embodied in the United States Constitution and the Administrative Procedure Act ("APA"). *See*, U.S. *Const. Amend*. V.; 5 U.S.C. §555.

B. Request to Present Oral Testimony

In its effort to comply with Congress' impacted two-year administrative fines program (running January 1, 2000 through December 31, 2001), the Commission published a Notice of Proposed Rulemaking ("NPRM") on March 29, 2000 with a 30-day comment period that foreclosed any opportunity for oral testimony. *See*, FEC Agenda Doc. No. 00-38 (Mar. 17, 2000) at p. 1; 65 Fed. Reg. 16534 (Mar. 29, 2000). Short comment periods without opportunity for testimony are uncommon at the FEC. In most rulemakings, the Commission provides a 60-day comment period with an opportunity for an oral hearing upon request. Rarely are those requests denied.

The Commission should be wary of moving too quickly to establish a procedure that does not comply with constitutional, procedural and statutory rights guaranteed the respondent. Throughout the NPRM, the Commission characterizes the congressional intent behind the new provisions as a way to "expedite and streamline the Commission's enforcement process." 65 Fed. Reg. at 16534. Importantly, however, when Congress authorized the Commission to

impose serious monetary penalties – fines weighty enough to be more than merely "the cost of doing business," as the NPRM states – it also mandated procedural safeguards for respondents. By permitting oral testimony, the Commission will better understand respondents' points of view and provide a meaningful "opportunity to be heard."

Should the Commission determine that a hearing is necessary, we request an opportunity to testify.

C. The Current FEC Enforcement Process for Reporting Violations

Under the Commission's existing process, section 434(a) reporting violations are treated in the same manner as most "internally-generated" violations of the Act or Commission regulations. Generally, the Commission initiates an internally-generated complaint based on evidence that a respondent's report was filed late or not at all. *See*, 11 C.F.R. § 111.8. Once the Office of General Counsel examines the alleged reporting violation, it may recommend that the Commission find "reason to believe" that a violation occurred. 11 C.F.R. § 111.8(a).[1]

Upon a "reason to believe" finding by an affirmative vote of four members of the Commission, the Office of General Counsel must notify the respondent, in writing, and set forth the factual and legal bases for the alleged violation. 2 U.S.C. §437g(a)(2); 11 C.F.R. § 111.9(a). Alternatively, the Commission may find no reason to believe that a violation occurred, and the General Counsel would notify the respondent that no further action will be taken in the matter. 11 C.F.R. § 111.9(b).

[1] This rule applies to most reports, with the exception of pre-election and quarterly reports filed by candidates in the weeks preceding an election. 11 C.F.R. §§111.8(a), (c). With these two types of late filers, the Commission notifies the candidate's committee within four days of the reporting deadline. "If a satisfactory response is not received within four (4) business days," the Commission publishes the name of the candidate's committee on its web site. 11 C.F.R. § 111.8(c); *see also*, <<http//www.fec.gov/news.html>>.

Once the respondent is notified of the reason to believe finding, the General Counsel begins its investigation. 11 C.F.R. § 111.10. At the investigation's conclusion, the General Counsel drafts a "probable cause" brief recommending either that the Commission find probable cause to believe that a violation occurred, or that the Commission vote to find no probable cause. 2 U.S.C. §437g(a)(3). The brief is sent to the respondent, who has fifteen days[2] to file a response that sets forth any legal or factual defenses.[3]

The Commission reviews the respondent's and the General Counsel's probable cause briefs, then votes on the recommendation. If four Commissioners vote affirmatively to find probable cause, the statute imposes a mandatory conciliation period of 30 to 90 days. 2 U.S.C. §437g(4)(A)(i); 11 C.F.R. §111.18(a).[4] If the Commission votes to find no probable cause, the matter is closed.

At the close of the conciliation period, the respondent and General Counsel may settle the case with a civil penalty or otherwise. If this occurs, the Commission votes to accept or reject the proposed settlement. Four affirmative votes to accept the settlement terms will conclude the matter, and the final agreement becomes part of the public record. 2 U.S.C. §437g(4)(A)(ii). The settlement terms may be rejected by the Commission, however, thereby continuing the conciliation process if time permits. If settlement negotiations end without an agreement, the Commission may impose a civil penalty. 2 U.S.C. §437g(6)(A).

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[2] The fifteen days begins to toll upon receipt of the brief, not from the date of the finding. 2 U.S.C. § 437g(a)(3).

[3] The Office of General Counsel commonly grants extensions of time for probable cause briefs to be filed pursuant to this provision.

[4] The statute and regulations permit the General Counsel to begin conciliation prior to a finding of probable cause, but at the pre-probable cause stage, conciliation is not mandatory. *See*, 11 C.F.R. §111.18(d).

D. The Commission's Notice of Proposed Rulemaking ("NPRM")

As discussed in detail in Section II, *infra*, the Commission has proposed an administrative fines process that fails to satisfy the requirements of Section 555 of the APA and the constitutional safeguards guaranteed to respondents under the Due Process Clause. This section provides an overview of the Commission's proposed procedures. The following section includes suggested amendments to the proposed rules.

1. The "Reason to Believe Finding" and the Respondent's "Opportunity to Be Heard."

The administrative fines provision authorizes the Commission to find "reason to believe" that political committees and their treasurers are in violation of the reporting requirements of 2 U.S.C. § 434(a). Monetary fines will be imposed on "late filers" and "non-filers" who fail to timely file monthly, quarterly, pre-election, post-general election, mid-year and year-end reports, and 48-hour notices of contributions received after the 20th day but more than 48 hours prior to an election. 65 Fed. Reg. at 16534. "Late-filers" include committees who file a report as soon as one day after the reporting deadline, and "non-filers" include those who fail to file a report more than 30 days after its due date, with the exception of pre-election reports. Id. at 16537. Any committee that fails to file a pre-election report four days after the deadline will be considered a "non-filer." Id. Non-filers are subject to greater monetary penalties.

Respondents will be notified by mail that the Commission has found "reason to believe" that a reporting violation has occurred. The allegation would include a factual and legal statement of the claim and the amount of the civil penalty according to a schedule of penalties. Id. at 16535. Respondents may either pay the fine within forty days of the reason to believe

finding, or they may contest the allegation. Id. The proposed rules would require the respondent to file a "written notice of intent to challenge" the fine within twenty days of the reason to believe finding. Failure to file an "intent to challenge" within twenty days from the adverse finding constitutes a full and complete waiver of the respondent's right to administrative appeal. Thus, on the 20th day after the reason to believe finding, the Commission has the authority to make a final determination and impose a civil penalty. Id.

Within twenty days of the filing of the "intent to challenge," respondents would be required to file a second appeal that sets forth the substantive basis for the defense. Id. The proposed rules circumscribe the number and types of defenses that a respondent is permitted to raise, and the appeal must be supported by written documentation. Id. The list of appropriate responses is limited to: (1) "alleged factual or legal errors," (2) a miscalculation of the civil penalty, or (3) "extraordinary circumstances that were for a duration of at least 48 hours and that prevented the respondent from filing the report in a timely manner." Id. The rules explicitly prohibit defenses based on "negligence, computer failures, problems with contractors and vendors and other similar occurrences." Id. No mitigating factors will be permitted as part of the defense, and the proposed rules do not offer an opportunity for an oral hearing. Id. at 16536.

2. Administrative Appeals by an FEC Reviewing Officer

Appeals that meet the Commission's restrictive list of defenses are submitted to a "reviewing officer." The only factor "ensuring" the reviewing officer's impartiality is that this individual will "not be someone who was involved in developing the reason to believe finding." Id. at 16535. When the respondent's appeal reaches the reviewing officer, he or she may ask for additional information or supporting documentation from the respondent and Commission staff.

Id. The reviewing officer also has the discretion to make a recommendation to the Commission regarding the case's outcome. Id. Like the General Counsel in an enforcement matter, the reviewing officer would take the case to the Commission. The final determination requires a vote of at least four Commissioners. Id. at 16536.

If the Commission rejects the respondent's appeal, the respondent has 30 days from receipt of the final determination either to submit payment or seek judicial review in a U.S. district court where the respondent resides or conducts business. Id.

If a respondent fails to pay the civil penalty, the Commission will transfer debt collection responsibilities to the Department of Treasury pursuant to the Debt Collection Improvement Act ("DCIA"), or file suit in federal district court to collect the civil penalty. *See*, 2 U.S.C. § 437g(a)(6); 65 Fed. Reg. 16537.

3. The Administrative Fines Schedule

The NPRM proposes a complex, 3-tiered graduated schedule of fines. In a single reporting period, a respondent could be subject to one of 3 different fines depending on the report in question, the committee's level of activity and prior violations. The new rules impose the lowest penalties for non-election year reports; greater penalties for pre-election, and October monthly and quarterly reports; and additional penalties for non-filers of "48-hour" contribution notices pursuant to 2 U.S.C. § 434(a)(6).

In addition to these factors, the fine depends on four additional components. First, the Commission has developed a "base amount" calculated by adding all receipts plus all disbursements in the respondent's late report. Id. at 16536. For non-election sensitive reports, the base amount ranges from $100 (for committees with between $1 and $24,999 of activity) to

$5,000 (for committees with activity over $950,000). Id. The base amount is higher for committees that file election-sensitive reports, ranging from $150 to $7500.

The second element included in the fine calculation is the number of days the report is filed late, up to 30 days. The daily late fee ranges from $25 per day to a maximum of $200 per day, regardless of the type of report. Id. at 16537.

Third, non-filers pay a premium for failing to file any report (except a 48-hour notice or pre-election report) after 30 days from the due date. Committees are also considered non-filers if they fail to file election-sensitive reports four days prior to an election. This set amount ranges from $1,600 to $17,000 for all reports except election sensitive reports, and from $1,650 to $19,500 for election sensitive reports. Id.

Finally, prior violations are also taken into consideration with an additional premium of 25% of the fines paid for each violation in the current and previous two-year election cycle. For non-filers who fail to file a report, the Commission would add the total receipts and total disbursements reported in the current election cycle and then divide by the number of reports received in the current election cycle. If no reports were filed during an election cycle, the Commission would look to the previous election cycles. Id.

Yet another schedule exists for non-filers of 48-hour notices for contributions of $1000 or more that are received after the 20th day but more than 48 hours before an election. Id. In this case, the schedule of penalties does not distinguish between late and non-filers – any committee that files this notice late is considered a non-filer. Id. Nor does it distinguish between large and small committees. The penalty is $100 plus 15% of the amount of the contributions that were

not reported ($100 + (.15 x amount of contribution(s)). For committees with prior 48-hour notice violations, the resulting fine is increased by an additional 25%. Id. at 16541.

II. The Commission's Proposed Rules Fail to Satisfy Section 555 of the APA and Violate the Due Process Clause of the Fifth Amendment.

Federal agencies have the authority to implement a range of adjudicative procedures. This "does not mean, however, that an administrative agency may adjudicate using any procedures that it sees fit." Jacob Stein, Glenn A. Mitchell and Basil J. Mezines, ADMINISTRATIVE LAW, Vol. 4, Ch.33.01 (May, 1998). The Constitution's procedural due process requirements must be followed, as well as Congress' statutory mandate under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et. seq.*

The proposed rules fail to satisfy these statutory and constitutional requirements. First, the final rules must incorporate the procedural safeguards set forth at 5 U.S.C. § 555 of the Administrative Procedure Act, which include the right to counsel, the right to appear before the agency to present a defense, and the right to procure any documents or evidence used by the agency to make a final determination. Further, the Fifth Amendment's Due Process Clause also requires that the agency carefully balance, through a "cost-benefit" analysis, the respondent's right to a full and fair opportunity to be heard with the agency's resource concerns, in light of the proposed procedures. Mathews v. Eldridge, 424 U.S. 319 (1976).

The Commission should incorporate the APA's section 555 provisions. We also recommend that the Commission permit an opportunity for an oral hearing, however informal.

A. The Process and Proposed Rules Ignore the Minimal Procedures Required by Section 555 of the APA

The Commission correctly interprets the administrative fines provision to require *informal*, rather than formal, adjudication. 65 Fed. Reg. at 16534. Absent the statutory requirement that a hearing be held "on the record" (or some other clear congressional intent to impose a trial-like procedure), the APA's formal adjudication provisions do not apply. *See*, Kenneth C. Davis & Richard J. Pierce, ADMINISTRATIVE LAW TREATISE, 3d. Ed., Vol. I at §8.2 (1999 supp.).[5]

However, even under a process of informal adjudication, the Commission's new rules and procedures implemented pursuant to 2 U.S.C. § 437g(a)(4)(C) must provide specific safeguards to protect the procedural due process rights of respondents. The source of those rights are found in Section 555 of the APA, and the 3-prong balancing test compelled by the U.S. Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976).

The Commission's NPRM states that "the APA is silent on what type of procedure agencies must follow in informal adjudication." 65 Fed. Reg. at 16535. This statement is incorrect. Section 555, titled "Ancillary Matters," sets forth the minimal procedures required in any "agency proceeding" except as otherwise provided by the APA under its formal adjudication provisions, or those applicable to formal and informal rulemaking. 5 U.S.C. §555(a); Davis & Pierce, *supra*, at § 8.2 at 379 (Vol. I, 1994). The United States Supreme Court has specifically held that the "minimal requirements" for a federal agency's informal adjudicative proceedings

[5] For example, the statutory language at issue in Chemical Waste Management, Inc. v. U.S. E.P.A. required the agency to hold a "public hearing" as opposed to a hearing "on the record." Although the regulations permitted an oral hearing, the D.C. Circuit held that the formal adjudication provisions of the APA did not apply. Chemical Waste Management, Inc. v. U.S. E.P.A, 873 F.2d 1477, 1478-79 (D.C. Cir. 1989).

"are set forth in the APA, 5 U.S.C. § 555." Pension Guaranty Corp. v. LTV Corp., 496 U.S. 633, 655, 110 S.Ct. 2668, 2681, 110 L.Ed. 2d 579 (1990).

Section 555 requires the Commission to guarantee a series of procedural safeguards to respondents who face a monetary fine. First, Section 555(b) permits a respondent accused of a FECA violation to appear in person and to be represented by counsel. The pertinent section states:

> "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel, or, if permitted by the agency, by other qualified representative. *A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.* So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function" (emphasis added).

The Commission's proposed rules do not include any reference to an "appearance" before the agency or the agency's employee. Nor do they allow a specific right to be represented by counsel.[6] The Commission should amend its rules to include these provisions by allowing respondents and their attorneys to meet with the "reviewing officer" to discuss the facts of the case. Without such procedural rights, the Commission would not be in compliance with the statutory requirements of the APA.

Second, the Commission must permit the respondent to review any evidence or other information used by the agency to make a final determination. Section 555(c) requires the Commission to furnish copies of any documents related to the case. Specifically, respondents

[6] The courts have similarly imposed a right to counsel in administrative proceedings. *See*, Kelly v. Railroad Retirement Board, 625 F.2d 486 (3d Cir. 1980).

who are "compelled to submit data or evidence" are entitled to "procure a copy or transcript" of the records of the proceeding. 5 U.S.C. § 555(c). The proposed rules do not include a provision that would enable the respondent to review any allegations made by agency staff during the administrative appeal. Because proposed 11 CFR § 111.35(c) "compels" the respondent to file a written intent to challenge the finding, along with supplemental documentation for the actual appeal, the respondent is entitled to receive a copy of any information used by the reviewing officer to make a recommendation to the Commission.

B. The Proposed Rules Fail to Satisfy Constitutional Due Process Requirements Under the *Mathews v. Eldridge* Balancing Test.

In addition to implementing procedures that comply with Section 555 of the APA, Federal agencies must adhere to the Due Process Clause of the Fifth Amendment. Even where a statute does not call for a hearing on the record, courts will ascertain whether a particular hearing procedure "meets the minimum protections of procedural due process as a matter of constitutional law." Harrison v. USPS, 840 F.2d 1149, 1153 (4th Cir. 1988). "Once it is determined that due process applies, the question remains what process is due." Morrisey v. Brewer, 408 U.S. 471 at 481, 92 S.Ct. 2593, 33 L.Ed. 2d. 484 (1972).

1. The Commission Fails to Recognize the Nature of the Respondent's Rights Under the First Prong of the *Mathews v. Eldridge* Balancing Test

In Mathews v. Eldridge, *supra*, the Court established the appropriate constitutional analysis to determine the scope of procedural rights compelled by informal adjudication. The three-prong balancing test considers three subjective elements, weighing each against the other in an effort to ensure that agency process achieves a steady constitutional "balance" in cases

where the government threatens to deprive an individual of "life, liberty or property." Mathews v. Eldridge, *supra* at 334; U.S. *Const. Amend* V.

Under the first prong of the Mathews analysis, the agency must closely scrutinize the respondent's interests. This requires an inquiry into the *nature* of the interest affected, including money, property, physical freedom, or even reputation. *See*, Erickson v. United States, 67 F.3d. 858 (9th Cir. 1995). However, the analysis must also consider the nature of the loss at stake *relative to other factors*. For example, the Court has held that "a public school's decision to suspend a student for 10 days for disciplinary reasons deprived the student of property. . . Hence, the school was compelled to provide some limited procedural rights." Davis & Pierce, *supra*, § 9.4 at 26, *citing*, Goss v. Lopez, 419 U.S. 565 (1975).

The Commission's analysis under the first prong of the Mathews test concludes (without contemplation) that "the private interests in this rulemaking are protected." 65 Fed. Reg. at 16535. This statement hardly qualifies as an "analysis" of the private interests affected by a system that imposes severe monetary penalties. In the context of the Commission's proposed schedule of fines, the nature of the interest is the monetary penalty imposed on a respondent, and the size of the penalty relative to the respondent's receipts and disbursements, prior violations, and the type of report in question. For example, a committee with $100 in receipts and disbursements faces the same penalty as a committee with $24,999 in receipts and disbursements. The $100 committee was unlikely to have participated in the political process during that reporting period, while the $24,999 committee could have made multiple $5000 contributions to Federal candidates. Nonetheless, if both committees' reports were ten days late and neither had a prior violation, the fine would be $350. The "private interest" of the $100

committee is immediately and seriously impacted by a fine 35 times the level of its activity, while payment of the fine by the $24,999 committee may simply be "the cost of doing business."[7]

Without a complete understanding of the risk of loss a respondent may suffer – not only the infringement on an individual's "property" right that occurs as a result of the government's imposition of a monetary penalty, but the potential infringement on first amendment rights attributable to a political committee's loss of funds for campaign-related advocacy -- the Commission's analysis places undue importance on the factors that relate to its own expeditious enforcement of the law, favoring agency expediency over legal and constitutional mandates intended to safeguard the procedural due process rights of respondents.

2. The Commission Underestimates the Likelihood of Agency Error and the Value of Holding an Oral Hearing Under *Mathews'* Second Prong.

Under the second prong of the Mathews test, the agency must consider the risk of an erroneous result and the probable value of additional procedural safeguards. Mathews, *supra*, at 334-335. The Commission has determined that the risk of erroneous result is minimal. "Reporting violations are relatively straightforward. There are basically only three issues – whether the respondent was required to submit a report, whether the report was timely filed, and whether the civil money penalty was calculated correctly. The opportunity for the respondent to submit a written response and to have the enforcement matter reviewed by an independent

[7] As discussed in detail in Section II.F., this part of the test should be carefully analyzed with respect to the graduated fine schedule. As the proposed schedule is currently designed, the broad categories of "base amounts" will likely discriminate against small committees. *See* discussion, *infra*, at 27-32.

reviewing officer will protect the respondent from an erroneous result as will the opportunity for the respondents to appeal to federal district court." 65 Fed. Reg. at 16535.

Again, the Commission focuses on an incomplete set of factors under Mathews' second prong, limiting the analysis to a list of procedures posed in a factual vacuum. The appropriate Mathews analysis considers the risk of erroneous result due to the process implemented by the agency. For example, the calculation of the civil penalty poses a potentially large risk of error because it relies on at least three factors, including the calculation of a committee's receipts plus disbursements, the number of days late and the number of prior violations. In addition, the proposed system incorporates a completely different standard for 48-hour notice violations. *See*, 65 Fed. Reg. at 16541 (proposed 11 C.F.R. § 111.44).

Another factor that must be considered is the Commission's upcoming rulemaking to mandate electronic filing for most political committees. *See*, 65 Fed. Reg. 15339 (April 11, 2000). The mandatory electronic filing program, once implemented, will dramatically raise the likelihood of agency error, and have a direct impact on the administrative fines process. Potentially thousands of committees will be required to electronically file, increasing the risk of agency error upon the first "flood" of electronically-filed reports. For example, if a respondent's software confirms that a report was filed on time, but Commission software has not detected receipt of the report, the proposed rules actually deprive the respondent of the right to proffer these facts in its appeal. "Computer failure" is not considered a valid defense. *See*, 65 Fed. Reg. at 16536.

Errors are also more likely to occur because the Commission currently faces several new reporting amendments to the FECA, including electronic filing and election cycle reporting. *See*,

145 Cong. Rec. E 1896, 106th Cong., Sept. 17, 1999 (House Conf. Rep. on H.R. 2490). Three new reporting-related initiatives implemented at around the same time inevitably increases the likelihood of agency error as the Commission and staff confront new and unique issues.

Under the same prong, the Commission must also consider the "probable value of additional procedural safeguards." Mathews, *supra* at 334-335. The Commission seems to believe that "the opportunity for the respondent to submit a written response and to have the . . . matter reviewed by an independent reviewing officer" are *extra* procedural rights not required by the Constitution or the APA. 65 Fed. Reg. at 16535. This is simply incorrect. In fact, as noted s*upra*, the Commission's proposed rules do not comply with the minimal procedural guarantees of Section 555 of the APA, including the right to counsel, the right to appear in person before the reviewing officer, and the right to examine any information or documents used to make a recommendation to the Commission. In light of the Commission's thin procedural safeguards, the final rules should explicitly incorporate the Section 555 requirements.

3. The Commission Should Provide An Opportunity for An Oral Hearing.

An oral hearing should be provided in cases with legitimate factual disputes. Oral hearings need not be full-blown trials, but could include an opportunity for the respondent, his or her counsel, the reviewing officer and a Commission representative to meet and discuss disputed facts. *See, e.g.*, Connecticut Bankers Ass'n v. Board of Governors of FRS, 627 F.2d 245, 251 (D.C. Cir. 1980); Smithkline Corp. v. FDA, 587 F.2d 1107 (D.C. Cir. 1978). An oral hearing may also include an evidentiary hearing, informal conference or other oral representations. *See*, e.g., Vermont Dept. Of Public Service v. FERC, 817 F.2d 127, 140 (D.C. Cir. 1987).

The value of an oral hearing provision is threefold. First, the respondent would have the opportunity to present factual evidence and a detailed explanation to support a legitimate claim, which gives greater meaning to the individual's "opportunity to be heard." Second, by settling factual disputes at the oral hearing stage rather than in federal court, the Commission will save public funds and agency resources and fulfill congressional intent. *See*, statement of Chairman Bill Thomas, 145 Cong. Rec. E 1896 (House), Conf. Rep. on H.R. 2490, Vol. 145, No. 122 (106th Cong., Sep. 17, 1999). In addition, for cases that proceed to trial, the Commission will have developed a full administrative record for the purpose of judicial review. Third, an oral hearing provision would bring the Commission in compliance with Section 555(b) which requires the agency to permit the respondent to appear in person with counsel.

4. The Commission Has Placed Inordinate Weight on the Interest of Procedural Expediency.

Finally, the third prong of the Mathews test considers "the government's interest in avoiding administrative burdens." Mathews, *supra* at 334-335. The purpose of the administrative fines process, as stated by Chairman Bill Thomas, is "a simplified administrative penalty process" to "free critical FEC resources for more important disclosure and enforcement efforts." 145 Cong. Rec. E 1896 (House), Conf. Rep. on H.R. 2490, Vol. 145, No. 122 (106th Cong., Sep. 17, 1999). While it is true that procedural expediency is important, it is only one part of the three-part balancing test.

As the Commission considers these and other comments supporting additional procedures to safeguard respondent's rights, it is important to recognize that the concept of due process is flexible. The Commission should consider the Mathews balancing test as a mode of analysis

informed by the agency's past and current history, the type of respondent that will likely appear before the agency, respondents' patterns of behavior, their level of sophistication and knowledge of the law, and any other relevant factors. "[The] flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." Morrisey v. Brewer, *supra,* at 481. Indeed, most agencies that engage in informal adjudication grant procedural rights *in excess* of those required by procedural due process or statutory mandate.[8] In promulgating final rules for the administrative fines provisions, the Commission should follow suit.

C. The Constitution Compels the Commission to Guarantee Respondents a Full and Fair Opportunity to Be Heard.

In addition to consideration of agency procedure necessitated by the Mathews v. Eldridge balancing test, the Court has clearly held that "notice and an opportunity to be heard" encompasses the right to reasonable notice and a fair hearing. *See,* Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978). Some of the procedures proposed by the Commission may not survive such constitutional scrutiny.

For example, the proposed "notice of intent to challenge" rule imposes an unnecessary burden on the respondent, is clearly contrary to the statute, and offers an unreasonably short twenty-day response period. This rule should be eliminated. At the very least, the twenty-day

[8] For example, although the EPA is not required to comply with the formal adjudication procedures under its authorizing statute (42 U.S.C. §§ 3008(h)(1) and 6928(h)(1)), the agency nonetheless promulgated regulations that permit individuals adversely affected by informal adjudicatory decisions to submit written information and make an oral presentation. Chemical Waste Management, Inc., *supra*, n.1, at 1479 (citing 40 C.F.R. §§ 24.10(b), 24.24(a)(1), 24.11 and 24.15(a).

response period should be extended to thirty days, and should not begin to toll until the respondent receives actual notice of the reason to believe finding. More importantly, the Commission should avoid promulgating a final rule that limits the entire range of substantive defenses. Such a restrictive list unfairly curbs a respondent's right to be heard and violates the procedural due process guarantee.

1. The proposed rule's twenty-day "intent to challenge" provision is contrary to the plain language of the statute and violates reasonable notice and an opportunity for a fair hearing under the Due Process Clause.

The proposed rules require the respondent to submit a written "notice of intent to challenge" within twenty days from the date of the Commission's "reason to believe" finding. 65 Fed. Reg. at 16539 (proposed rule 11 C.F.R. § 111.35(a)). This requirement should be eliminated for several reasons. First, the provision is contrary to the plain language of the statute, which forbids the Commission from making an adverse determination "until the person has been given written notice and an opportunity to be heard before the Commission." 2 U.S.C. § 437g(a)(4)(c)(ii). Second, the provision's twenty-day response period undermines the respondent's guarantee of reasonable notice under the Due Process Clause of the Fifth Amendment.

As described, *supra*, the proposed rules require respondents to submit a written "notice of intent to challenge" within twenty days from the Commission's finding. 65 Fed. Reg. at 16539 (proposed rule 11 C.F.R. § 111.35(a)). This notice does not constitute the respondent's substantive appeal; no factual or legal defenses are required at this stage. Should a respondent fail to file this notice, however, the Commission "issue[s] a final determination with a civil money penalty." 65 Fed. Reg. at 16536, 16540.

This provision is contrary to the express language of the statute. The amendment clearly states that "[t]he Commission may not make any determination adverse to a person . . . *until the person has been given written notice and an opportunity to be heard before the Commission*." 2 U.S.C. § 437g(a)(4)(C)(ii) (emphasis added). The "intent to challenge" appears to be merely a reservation of the respondent's right to appeal rather than an "opportunity" to present a substantive defense. *See*, 65 Fed. Reg. at 16536, 16540. The Commission may not make a final adverse determination based on a respondent's failure to file a "notice of intent to challenge" because the "intent to challenge" does not constitute an "opportunity to be heard" under the proposed rules. The written hearing actually occurs upon the respondent's appeal, pursuant to proposed rule 11 CFR § 111.35(c), which occurs twenty days later and requires the respondent to submit "reasons why the respondent is challenging the reason to believe finding." 65 Fed. Reg. at 16539. Thus, pursuant to the statutory guarantee of the respondent's "opportunity to be heard," the Commission's may not dismiss the case due to a respondent's failure to file an "intent to challenge," nor may it make a final determination until completion of the "hearing" process described in proposed section 111.35(c).[9]

This "notice of intent to challenge" provision also defies the constitutional guarantee of reasonable notice under the Due Process Clause of the Fifth Amendment. "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing." Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978). The concept of reasonable notice necessarily implicates the issue of response time. In

[9] In cases where Congress and the Constitution impose a hearing requirement, an agency cannot "construe as a waiver" the individual's involuntary or unknowing failure to "demand a hearing." Ostlund v. Bobb, 825 F.2d 1371, 1373 (1987).

the informal adjudication context, for example, twenty-day response periods have been invalidated by the courts.[10] Loui v. Merit Systems Protection Bd., 25 F.3d 1011, 1013 (Fed. Cir. 1994). This is especially true in cases where the time period begins to toll on the date of the agency's adverse finding rather than upon receipt of the notice by the respondent. Id. Thus, the twenty-day period provides an insufficient and unreasonable time frame for an individual to submit a response.

The imposition of the "notice of intent to challenge" creates an unfair and unnecessary obstacle for respondents, and there appears to be no rationale for the rule. In order to streamline the process, the Commission should eliminate the "notice of intent to challenge" provision of 11 C.F.R. § 111.35(a). At the very least, the Commission should re-draft the rule to extend the period to 30 days. Additionally, the effective date that triggers the tolling of the response period should be the date the respondent actually receives the Commission's notice, rather than the date of the Commission's finding.[11] Respondents should not be held responsible for agency delay in issuing the notice, and the Commission has a statutory and constitutional obligation to provide reasonable, adequate notice and a full and fair opportunity to be heard.

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[10] In Loui v. Merit Systems Protection Bd., 25 F.3d 1011, 1013 (Fed. Cir. 1994), the U.S. Postal Service regulations included a twenty-day response time for an employee to appeal the agency's decision to terminate him. The twenty-day period began tolling upon the agency's termination decision. Id. at 1012. However, the letter was not delivered to the employee until eight days after the Postal Service's decision. Id. The court held that the *delivery date* of the termination notice begins the tolling of the twenty-day window for an appeal, rather than the date of the final action by the agency. Id. at 1014. "The agency's action in attempting to enforce an effective date before delivery of notice . . . deprived the employee of part of the appeal time. . . Eight days out of the twenty-day time period, or forty percent of [the employee's] appeal time, had expired by the time notice of removal was delivered to him." Id. at 1013.

[11] The Act's and regulation's enforcement and reporting provisions generally toll the response time from the date of receipt by the respondent, rather than from the date of the Commission's decision. *See, e.g.*, 2 U.S.C. § 437g(a)(3). In fact, 11 C.F.R. § 111.2(c) adds an additional three days to deadlines where documents are served by mail to the respondent or to the Commission.

2. The limitation on the nature and type of substantive defenses cannot withstand constitutional scrutiny under the *Mathews* test.

Importantly, the heart of a respondent's "opportunity to be heard," and the full protection of due process should be embodied in the provisions related to administrative appeal; however, proposed 11 C.F.R. § 111.35(c)(1) severely restricts the range of substantive defenses.

The proposed rules would permit the respondent to argue agency error based on "factual errors" or miscalculation of the monetary penalty. 65 Fed. Reg. at 16539. Even for defenses based on Commission mistakes, however, the proposed rules unfairly place the full burden of proof on the respondent, who is required to provide supporting documentation to show agency error. Id. Because the Due Process Clause serves to protect a respondent's full and fair "opportunity to be heard," the burden to prove the factual allegations must rest completely with the Commission.

The only other possible defense is so restricted that it a respondent's success is unlikely. Upon a showing of "extraordinary circumstances that were out of the control of the respondent" and that lasted for a duration of at least 48 hours, the Commission will consider this a legitimate defense, with the exception of the following: (1) "negligence," (2) "problems with vendors or contractors," (3) "illness of staff," (4) "computer failures," or (5) "other similar circumstances." Id.

The Commission offers no rationale for the "48-hour extraordinary circumstances" rule,[12] but it appears that the rule seeks to eliminate the most common defenses for late reports, leaving

[12] The underlying reason for the 48-hour time frame is not clear from the NPRM. Further, the proposed rule lacks specificity. It states that the respondent must show that the "extraordinary circumstances" lasted "for a duration of at least 48-hours." 65 Fed. Reg. at 16539. The requisite quantum of evidence to prove this defense is unclear, but if

only agency error as a valid defense. Rather than assuming that "computer failure" or treasurer illness are good faith defenses, the Commission has instead eliminated them. Under the Mathews analysis, the Commission's prohibition on what may be a legitimate defense suggests that the administrative fines process was designed with the primary goal of administrative expediency, rather than in the interest of striking a fair constitutional balance with respondents' rights.

Thus, defenses based on Commission error should remain, but the rules should clarify that the burden to prove the factual allegation rests with the Commission. In addition, the Commission should eliminate proposed 11 C.F.R. §§ 111.35(c)(1)(iii) and 111.35(c)(4). Until it has a better understanding of the types of problems that Committees face and the number and range of appeals, the Commission should not altogether eliminate the good faith responses of late- and non-filers. After some experience, the Commission will be in a better position to engage in the cost-benefit assessment required by the Court in Mathews.

3. The placement of the reviewing officer within the agency and the description of his or her duties do not guarantee impartiality.

There are fundamental problems with the Commission's description of the role of the reviewing officer. Specifically, the role and placement of the reviewing officer within the agency is unclear. The NPRM states that "[t]o ensure impartiality, the reviewing officer would not be someone who was involved in developing the reason to believe finding. . . [He or she]

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a respondent is required to provide documentary evidence that reflects a 48 hour period of activity, this provision is unduly burdensome. The application of the proposed rule to the 48-hour late contribution reporting provision is also unclear. *See*, 2 U.S.C. § 434(a)(6); 65 Fed. Reg. at 16539. Is the respondent required to show that the 48-hour duration occurred precisely 48-hours prior to the reporting deadline? If so, the proposed rule would be especially unfair to candidates who would be required to show that the "extraordinary circumstances" began at the moment a late contribution was received.

would be allowed to request that other Commission staff and the respondent submit supplemental information. The officer would draft a written recommended decision and forward it to the Commission along with the RTB finding with the supporting documentation, the respondent's written response with the supporting documentation, and supplemental information, if any." 65 Fed. Reg. at 16535 - 16536

The reviewing officer's independence and impartiality is likely to be called into question if this individual is a staff member who is supervised by the General Counsel or the General Counsel's enforcement staff. The same questions arise with respect to supervision by the Reports Analysis Division. An effective way to ensure impartiality and prevent bias is to create an independent position for the reviewing officer so that this person can protect his or her objectivity and be shielded from the supervisory influence of the agency "investigator" and the prosecutor.

Finally, the reviewing officer should be subject to the Commission's Code of Ethical Conduct, like all Commission employees. *See, e.g.*, 11 C.F.R. § Part 7. Moreover, the application of the Code with respect to conflicts of interest and the appearance of impropriety should be scrupulous. For example, a reviewing officer should not be a member of the enforcement staff who previously served as counsel in a matter where the current respondent was either a witness or a respondent.

4. The Reviewing Officer Should Be Authorized to Reduce the Civil Penalty.

As discussed, supra, the proposed rules so severely restrict the possible range of defenses that they likely violate respondents' due process rights. In addition to amending 11 C.F.R. § 111.35(c), the Commission should grant the receiving officer regulatory authority to reduce the

monetary penalty, and the fines described in the graduated schedule should be maximum penalty amounts, rather than absolute base amounts.

By granting the reviewing officer with "downward departure" authority to reduce a civil monetary penalty, the Commission will have more flexibility in applying the new rules. Unlike the individual Commissioners, the reviewing officer has first-hand knowledge of the nature of the violation and any legitimate mitigating factors that may be present. This individual will be in the best position to determine the reasonableness of reducing the monetary penalty based on the totality of the circumstances.

D. The "Graduated" Fine Schedule Does Not Further the Purposes of the Act and Lacks a Rational Basis.

The Commission should redesign the fine schedule to further the purposes of the Act and reflect the practical realities of political activities among FEC filers.

Specifically, the Commission should reject a graduated schedule of fines that measures base amounts by receipts plus disbursements. Instead, the Commission should base monetary penalties on the amount of contributions and expenditures and the number of days that a committee submits a report after the deadline. Late-filer committees that make no contributions during a reporting period should be subject to a lesser fine, or no fine at all. If a committee can prove that it made no contributions or expenditures, the rules should acknowledge this as a complete defense.

Assuming the Commission will not eliminate the graduated fine schedule, it should re-adjust the categories for the base amounts to accurately reflect FEC PAC statistics. Specifically,

the $1-24,999 and $25,000 - $49,999 categories should be subdivided into smaller sub-categories to accurately reflect the actual size of FEC filers.

The Commission should also explicitly state in the final rules that committees with no activity during a reporting period will not be subject to the administrative fines system. In lieu of a report, the treasurers of these committees should be permitted to provide an affidavit confirming that no receipts were accepted and no disbursements were made during that period.

Finally, the final rules should clarify the date and time when a report is considered "filed." Although Commission regulations currently include postmark deadlines for reports sent by U.S. mail (*see*,11 C.F.R. § 104.5; *C.f.*, 11 C.F.R. § 111.2), the Commission should address the appropriate standard for a report to be considered "filed" by electronic submission.

1. The Commission Should Eliminate the "Receipts Plus Disbursements" Base Amount Calculation.

The Commission constructed its fine schedule as a "graduated" or "progressive" system of monetary penalties. The implicit rationale underlying the schedule is that the more funds received and spent by a committee, the greater need for public disclosure. Thus, "small" committees that file late reports receive smaller fines than "large" committees. Because the base amount increases according to the amount of a committee's receipts plus disbursements, the proposed premium for prior reporting violations would impose greater fines for large committees than those imposed on small committees with the same number of prior violations.

In application, the Commission's graduated fine schedule presents several practical difficulties. Specifically, the "receipts plus disbursements" base amount categories should be replaced with measures that are reasonably related to the goals and purposes of the Act. The fine

schedule should count only a committee's contributions received and expenditures made, excluding overhead and administrative costs that are not considered "political" costs under the Act's definitions.

By categorizing the "base amounts" according to a committee's receipts and disbursements, the proposed fine schedule does not further the purposes of the FECA. The reporting provisions of 2 U.S.C. § 434 were intended to further the goals of curbing corruption and the appearance of corruption of elected officials by requiring public disclosure of *contributions* and *expenditures* made for the purpose of influencing Federal elections. *See*, Buckley v. Valeo, 424 U.S. 1 (1976). In fact, an organization must register and report as a "political committee" when it "receives *contributions* aggregating in excess of $1,000 during a calendar year or . . . makes *expenditures* aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A)(emphasis added). The calculation of receipts and disbursements, however, is made up of all funds accepted and expended, including contributions, expenditures and overhead and administrative payments and costs.

Further, the "receipts plus disbursements" calculation discriminates against PACs with high overhead and administrative costs. Such discrimination is readily apparent in cases where two committees have engaged in the same amount of political activity (i.e., contributions received and expenditures made), but one has higher staff, rent and overhead costs. The latter may be subject to a larger fine because the base amount would be larger. However, the factors that "bumped" the committee into a higher base amount category would have had nothing to do with actual political activity. Similarly, a newly organized PAC initially will have high overhead and administrative costs prior to making or receiving its first contribution.

We therefore suggest that the Commission consider the purpose of the Act in determining base amount categories. While the cost of overhead and administration will vary widely depending on the type of committee (*e.g.*, non-connected, Separate Segregated Fund, Principal Campaign Committee), the Commission can reliably measure a PAC's political activity by considering the contributions it receives and the expenditures it makes. By including contributions and expenditures as the "base amount" calculation, the Commission will also further the purposes of the Act.

2. The Commission Should Not Impose Fines on Committees That Engaged in No Political Activity During a Reporting Period.

Second, basing civil monetary penalties on a "receipts plus disbursements" calculation will result in the imposition of fines on committees that accepted no contributions and made no expenditures during a given reporting period.

The Commission's own statistics suggest that a large number of PACs engage in no activity or no *political* activity throughout an entire election cycle. During the 1997-98 election cycle, almost 20% of all committees made no *disbursements*. *See*, "PACs Grouped by Total Spent – 1997-98" at <<http://www.fec.gov/press/pacbyc98.html>> (FEC Press Release). In short, these committees engaged in absolutely no activity. Similarly, approximately 35% of all political committees made no *contributions* to Federal candidates. *See*, FEC Press Release, June 8, 1999, "PACs Grouped by Total Contributions to Candidates – 1997-98" at <<http://www.fec.gov/press/pacbyc98.htm>>. Under the proposed fine schedule, these committees could be fined regardless of their inactive status. Such a system would not further the purposes of the Act.

3. The Graduated Fine Schedule Is Not Based On An Identifiable or Legitimate Rationale

Regardless of whether the Commission opts for an alternative base amount measure, it must reconsider the overly broad base amount categories. Especially if it adopts the "receipts plus disbursements" measure, we recommend that the Commission break down the base amount divisions into $5,000 increments to more reasonably reflect graduated differences among FEC filers.

Although the Commission did not include a factual basis or rationale for the graduated schedule's subdivisions, Commission statistics with respect to the political activities of FEC filers undermines the rationale for a graduated fine schedule. Rather than being evenly distributed along a continuum of receipts and disbursements ranging from $1 to more than $950,000, the bulk of FEC filers are small committees. FEC PAC statistics show that almost 40% (38.24%) of political committees had *less than $5,000 in total disbursements for the entire 1997-1998 election cycle. See,* FEC Press Release, June 8, 1999, "PACs Grouped by Total Spent – 1997-98" at <<http://www.fec.gov/press/pacbyc98.html>>. On the opposite end of the spectrum, just 4% of committees had disbursements that totaled more than $500,000. Id.

These figures implicate two important trends. First, it is clear that the bulk of FEC filers are clustered among the first two tiers of the proposed "base amount" categories. Although the NPRM does not cite the relevant "receipts plus disbursement" PAC statistics, it is reasonable to assume that more than half of all committees will fall into one of the first two "base amount" categories of $1-$24,999 or $25,000-$49,999 for receipts plus disbursements in a single report. Such broad categories discriminate against the smallest committees, which will receive the same monetary penalty as a much larger committee. At the very least, the Commission should create

smaller categorical subdivisions with lower base amounts to accurately reflect the level of political activity among FEC filers.

Moreover, with almost 20% of PACs reporting no disbursements during a full election cycle, the proposed rule should include a safe harbor for committees with no activity during a single reporting period.

III. Conclusion

We appreciate that the Commission is seeking to implement an administrative fines system within the brief statutory time frame imposed by Congress. To best accomplish these goals, the Commission should amend the final rules to incorporate the procedures required by Section 555 of the APA, omit the "intent to challenge" requirement, provide an opportunity for an oral hearing, define the fine amounts as a "maximum" penalty, authorize the reviewing officer to grant downward departures from the maximum penalty amount, revise the fine schedule to comport with the purposes of the Act and the practical realities of the regulated community by eliminating the "receipts plus disbursements" base amount measure, or further subdivide the base amounts into $5,000 subdivisions.

We appreciate the opportunity to submit our views on this matter.

Respectfully submitted,

Steven R. Ross
Janis M. Crum

May 28, 2002

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Dear Ms. Smith:

FEC Watch, a project of the Center for Responsive Politics, submits these comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) on Administrative Fines. 67 Fed. Reg. 20461 (April 25, 2002).

For the reasons set forth below, FEC Watch urges the Commission to delay implementation of final rules until the proposed rules can be more fully considered and an adequate administrative record can be established, or in the alternative, to reject the proposed rules.

Procedural comments

1. Timing of the NPRM

FEC Watch urges the Commission to delay any reductions in the administrative fines schedules until a time when the reductions can be more fully considered.

The Commission published the NPRM on April 25, 2002 and set the comment deadline for May 28, 2002. This comment deadline is one day before comments are due in the rulemaking to implement the soft money provisions of Bipartisan Campaign Reform Act of 2002, the most significant campaign finance law revision since 1976. This schedule has forced interested parties to divide their efforts between two very important rulemakings, and will negatively impact the quality and quantity of comments on this rulemaking.

The Commission's decision to proceed with a reduction in the administrative

fines schedules at this time, and over the staff's objections, suggests that the Commission believes that the reductions are of little concern to the public. However, this rulemaking should not be seen solely as an effort to reduce the impact of the fine schedule on late and nonfiling committees. It should also be seen as reducing the incentive for committees to satisfy their obligation to disclose their campaign finance activity in a timely manner. The likely result is that less campaign finance information will be placed on the public record at a time when it might be meaningful to potential voters. This is ironic, since both supporters and opponents of campaign finance regulations generally view complete and timely disclosure as a worthwhile goal. No rules that are likely to bring about this result should be lightly considered.

For these reasons, we strongly urge the Commission to defer this rulemaking until a time when all interested parties can give it the attention it deserves.

2. Inadequate Administrative Record

We also believe a delay is needed so that the Commission can establish an administrative record upon which a reasoned determination can be made. In the NPRM, the Commission states that

> [b]ased on its experience with the administrative fines program to date, the Commission is concerned that fines for committees with lower levels of activity, generally below $50,000 in a reporting program, may be too high. . . The fines may create a hardship for some committees and their treasurers, since many losing candidates lack fundraising ability and their treasurers, who are sometimes volunteers, are legally liable for the fines. Given the current level of civil money penalties, it may be possible to lower the fines at the lower levels of activity without significantly reducing the incentive to file reports.

Id. at 20462. Later, the NPRM states that

> [m]ore generally, the Commission is concerned that the overall civil money penalty schedules may result in fines that are substantial compared with civil penalties for other types of FECA violations approved in enforcement conciliation agreements.

Id.

The desire to ensure that the fine schedules are properly adjusted is a laudable goal. However, the Commission has credited the Administrative Fines program with reducing the percentage of committees filing late reports from 24% to 11% between 1998 and 2000. Commission seeks comments on proposal to reduce administrative fines, FEC Press Release, April 25, 2002. These are significant gains in the disclosure process. The Commission should not take steps that might undermine these gains without providing substantial justification.

As the Commission is no doubt aware, FEC Watch has submitted a Freedom of Information Act (FOIA) request seeking information showing whether the FEC has established a record upon which reductions in the fine schedule could be based. We urge the Commission to delay final action on these rules until it has responded to this FOIA request. We also urge the Commission to provide the public with an additional opportunity to comment on the NPRM in light of any materials provided.

As stated above, the purpose of the fine schedule is to promote complete and timely disclosure of campaign finance data. The Commission should not reduce fines unless it can be assured that the reduced fines will serve as an adequate incentive to committees to file timely reports.

Substantive comments

FEC watch has several comments on the substantive issues raised in the NPRM.

1. Impact of administrative fines relative to other civil penalties

In the NPRM, the Commission states its concern that the fines under the current schedule may be substantial when compared with civil penalties for other types of FECA violations approved in conciliation agreements.

However, the NPRM offers no explanation as to why this proves that the administrative fines are too high. This could just as easily be interpreted as an indication that the civil penalties assessed in conciliation agreements are too low.

The standard that should be applied in adjusting the fine schedule is whether the fines are higher than they need to be to serve as an incentive to file timely reports. Even at the now reduced 11%, the percentage of committees that file their reports late is still too high. Thus, a further reduction in the fine schedule is not warranted at this time.

2. Selective versus across-the-board reductions

Initially, NPRM expresses the view that the fines at lower end may be too high. Later it seeks comments on across-the-board reductions. If Commission decides to reduce the fines, we urge the Commission to limit this reduction to the fines at the lower end of the schedule, and leave the fines at the higher end of the schedule as they are now. Selective reductions targeted at the portion of the schedule which has produced the most undesirable results would be preferable to an across the board reduction, and would also be easier to justify. Furthermore, by leaving the fines at the higher end of the schedule as they are now, the Commission increases the chances that the downward trend in late filings will continue.

3. Impact of the recidivist factor

The NPRM states that the Commission's concern about excessive fines is exacerbated by the 25% recidivist factor that is now taking effect for repeat violations. However, the NPRM does not explain why this should be seen as an inappropriate result.

The purpose of the recidivist factor is to serve as an incentive for committees that have already filed late reports to get their houses in order and file subsequent reports in a timely fashion. By design, the factor should be "painful" for committees to which it applies. If the factor were not painful, it would not have the desired effect.

If the Commission has concluded that the factor is too harsh, perhaps it should consider reducing the multiplier. However, some form of recidivist factor is needed, and it should be severe enough to serve as a significant disincentive to repeated late filing or nonfiling.

4. Changes in the method of calculating levels of activity

The NPRM proposes to exclude nonfederal receipts and disbursements from the levels of activity used to calculate the amount of a late filing or nonfiling violation. Under this proposal, amounts that are not federal receipts or disbursements, such as amounts transferred to a federal account in payment of the nonfederal portion of an allocable expense, would be subtracted from the level of activity on a late filed or nonfiled report before the amount of the violation is calculated. The NPRM asserts that including these amounts in the calculation unfairly impacts certain types of committees.

However, in the Explanation and Justification (E & J) for the administrative fines rules, issued in May of 2000, the Commission explicitly rejected this exact argument. 65 Fed. Reg. 31787 (May 19, 2000). At that time, the Commission noted that section 434 of the FECA requires committees to report all receipts and disbursements, and concluded "that the 'amount of the violation involved' is equal to receipts and disbursements." *Id.* at 31792.

The Commission's April 2002 NPRM contains no explanation of why it has now decided that its previous conclusion is incorrect. The Commission's reporting requirements include the obligation to report nonfederal disbursements when those disbursements are transferred to a federal account to pay the nonfederal portion of an allocable expense. Thus, this information is part of a committee's reporting obligation. Excluding these amounts would effectively treat the disclosure of some types of receipts and disbursements as less important than other types of receipts and disbursements. The Commission specifically rejected this approach in the E & J.

Conclusion

For these reasons, FEC Watch urges the Commission to delay implementation of final rules until the proposed rules can be more fully considered and an adequate administrative record can be established, or in the alternative, to reject the proposed rules.

Sincerely,

Lawrence M. Noble
Executive Director

Center for Responsive Politics

Paul Sanford
Director
FEC Watch

SANDLER, REIFF & YOUNG, P.C.

50 E STREET, S.E., SUITE 300
WASHINGTON, DC 20003

TELEPHONE: (202) 4[illegible]-1111
FACSIMILE: (202) 4[illegible]-1115

JOSEPH E. SANDLER
sandler@sandlerreiff.com
NEIL P. REIFF
reiff@sandlerreiff.com

COUNSEL:
JOHN HARDIN YOUNG
young@sandlerreiff.com

May 28, 2002

Via Facsimile and First Class Mail

Rosemary C. Smith, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking: Administrative Fines

Dear Ms. Smith:

This comment is submitted in response to the Commission's above-referenced Notice of Proposed Rulemaking, 67 Fed. Reg. 20461 (April 25, 2002), proposing amendments to the Commission's regulations regarding its recently enacted administrative fine program for late filings.

In general, I believe the Commission is taking the right step to ensure that committee's with minimal activity be granted more lenient treatment under the propose. schedule. As the Commission's notice notes, these committees are often defunct, moribund or winding down, and are usually staffed by volunteer treasurers who are not able to deal with the complex federal election laws and regulations.

Although, prior to the administrative fine program, the Commission would likely not have pursued many late filings with low levels of activity, the Commission's progr[illegible] has significantly reduced late filings in general and is an important tool in ensuring compliance with the reporting deadlines.

Specifically, I would like to implore the Commission to amend 11 C.F.R. § 111.43 to limit its scope solely to federal activity. The current regulation unfairly punishes state and local party committees, a large proportion of whose activities, are generally in connection with state and local elections. Indeed, in a non-presidential cycle some local party committees currently pay their administrative and generic get-out-the-vote expenses on a ballot composition ratio which may be as low as 11% federal. Under the current regulation, if such a committee files an untimely report, the Commission's administrative fine calculation not only counts the federal portion of such activity, but also the non-federal portion of the activity, as well as the transfer of the non-federal portion of the activity. This result occurs because the Commission's regulations, at 11 C.F.R. §§ 106.5 & 106.6, require party committees and other committees who allocate their expenses to pay such expenses from a federal account and then reimburse the federal account for the non-federal portion of such expenditures.

Thus, for example, if a local party committee, that has an 11% allocation ratio makes a $1,000 disbursement for a generic get-out-the-vote activity, only $110 of that activity is considered federal activity. However, since federal regulations require that th activity be paid for solely from the federal account, and then ultimately be reimbursed b the non-federal account, this same expenditure ultimately counts as $1,890 of activity fo purposes of calculating the administrative fine level for such a disbursement (The $1,00 disbursement + $890 transfer of the non-federal portion). This formulation results in a 1,618% inflation in the committee's level of receipts and disbursements for purposes of making calculations under section 111.43.

In examining the original record in connection with the promulgation of section 111.43, I have been unable to locate any discussion by the Commission or commenters that addresses the distinction between committees that allocate expenses and those who do not. Therefore, it is likely that the Commission did not recognize the unfair disparit that its own allocation regulations create for purposes of calculations made under secti 111.43.

Thus, the allocation process unfairly penalizes committees who allocate expenses when compared to committees who do not make such allocations by counting the entire portion of an allocable expense, as well as the transfer of the non-federal portion to reimburse the federal account for purposes of calculating the level of activity under section 111.43. Ultimately, the Commission must either create a separate, more lenient schedule for committees that allocate expenses, or exclude non-federal activity and allocation transfers from its method of calculating the level of financial activity under section 111.43 of its regulations.

Respectfully submitted,

Neil P. Reiff