



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of 11-17-11

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther
Commissioner

DATE: November 10, 2011

SUBJECT: Agency Procedure for Notice to Named Respondents
in Enforcement Matters of Additional material Facts and/or
Additional Potential Violations

I request that the attached draft Agency Procedure for Notice to Named Respondents in Enforcement Matters of Additional material Facts and/or Additional Potential Violations be placed on the agenda for the November 17, 2011 Open Session.

Attachment

FEDERAL ELECTION COMMISSION

[NOTICE 2011-XX]

**Agency Procedure for Notice to
Named Respondents in Enforcement Matters of
Additional Material Facts and/or Additional Potential Violations**

AGENCY: Federal Election Commission.

ACTION: Agency Procedure.

SUMMARY: The Federal Election Commission (“Commission” or “FEC”) is establishing an agency procedure that will provide a respondent in certain complaint-generated and non-complaint generated enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”) with (1) notice of additional material facts and/or additional potential violations not contained in the complaint or referral notification and (2) an opportunity to respond thereto, prior to the Commission’s consideration of whether it has reason to believe (“RTB”) that a violation of the Act and/or the Commission’s regulations (the “Regulations”) has been or is about to be committed by the respondent.

DATES: Effective upon publication in the FEDERAL REGISTER.

**FOR FURTHER
INFORMATION**

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

SUPPLEMENTARY INFORMATION:

I. Background

On December 8, 2008, the Commission issued a notice of public hearing and request for public comment on all aspects of its agency procedures. Agency Procedures, 73 FR 74495 (Dec. 8, 2008). The purpose for the notice and ensuing proceeding was to obtain from all sources information on how the Commission might improve its efficiency, fairness and transparency in all aspects of its procedures. These procedures include the formal enforcement process, the referral of potential enforcement matters internally within the Commission or from a law enforcement or governmental agency, and the issuance of advisory opinions. The Commission received written comments and on January 14-15, 2009, the Commission conducted open hearings and received oral testimony.¹

Since the January 2009 public hearing, the Commission has formally adopted twelve agency procedures, policies, directives and guidance designed to improve the Commission's efficiency, fairness and transparency as follows:²

- Advisory Opinion Procedures, 74 FR 32160 (July 7, 2009)
- Procedural Rules for Audit Hearings, 74 FR 33140 (July 10, 2009);
- Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 FR 38617 (Aug. 4, 2009)
- Amendment of Agency Procedures for Probable Cause Hearings, 74 FR 55443 (Oct. 28, 2009)
- Statement of Policy Regarding Placing First General Counsel Reports on the Public Record, 74 FR 66132 (Dec. 14, 2009)
- Guidebook for Complainants and Respondents on the FEC Enforcement Process (Dec. 17, 2009) (available at www.fec.gov/em/respondent_guide.pdf)
- FEC Directive 68, Enforcement Procedures (Dec. 31, 2009) (available at www.fec.gov/directives/directive_68.pdf)
- FEC Directive 69, FEC Directive on Legal Guidance to the Office of Compliance (July 1, 2010) (available at www.fec.gov/directives/directive_69.pdf)
- FEC Directive 70, FEC Directive on Processing Audit Reports (Apr. 26, 2011) (available at www.fec.gov/directives/directive_70.pdf)
- Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 FR 34986 (June 15, 2011)

¹ The comments received by the Commission, as well as the transcript of the hearing are available at: <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>.

² Unless noted otherwise, these agency procedures and policies are available on the Commission's website at www.fec.gov/law/policy.shtml.

- Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 FR 45798 (Aug. 1, 2011)
- Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel, 76 FR 63570 (Oct. 13, 2011).

This agency procedure is the most recent addition to the series of agency procedures, policies, directives and guidance mentioned above.

Most of the Commission's enforcement matters begin with the filing of a complaint. Under section 437g of FECA, 2 U.S.C. 437g, and part 111 of the Regulations, 11 CFR part 111, any person who believes that a violation of any statute or regulation over which the Commission has jurisdiction has occurred, or is about to occur, may file a complaint with the Commission. 2 U.S.C. 437g(a)(1); 11 CFR 111.4. Upon receipt of the complaint, the Office of General Counsel ("OGC") reviews the complaint and notifies each respondent named in the complaint that the complaint has been filed, and concurrently provides each respondent with a copy of the complaint. 2 U.S.C. 437g(a)(1); 11 CFR 111.5. Each respondent may within 15 days from receipt of the complaint to demonstrate why the Commission should not take action based on the complaint. 2 U.S.C. 437g(a)(1); 11 CFR 111.6. After the expiration of the 15 day period, or receipt of a response from the respondent, whichever occurs first, the OGC makes a recommendation to the Commission as to whether the Commission should find RTB that the respondent has committed or is about to commit a violation. 2 U.S.C. 437g(a)(1); 11 CFR 111.6(b). Any supplement to a complaint is subject to the same procedures as those applicable to the original complaint.

Respondents in non-complaint generated matters – typically matters arising out of a referral to the OGC from the Commission's Reports Analysis Division, the Commission's Audit Division, or from a law enforcement or governmental agency – are provided procedures similar to those provided to respondents in complaint-generated matters.³ Respondents in non-complaint generated matters are (a) notified in writing by the OGC of the referral to it ("referral notification"), (b) provided with a copy of the referral document (e.g., the referral to the OGC from the Commission's Reports Analysis Division or Audit Division), and (c) informed of the basis of the referral and potential violations of the Act and/or the Regulations. Each respondent may within 15 days from receipt of the referral notification file a response with the Commission demonstrating why the Commission should not take any action based on the referral. After the expiration of the 15 day period, or receipt of a response from the respondent, whichever occurs first, the OGC makes a recommendation to the Commission as to whether the Commission should find RTB that the respondent has committed or is about to commit a violation of the Act and/or the Regulations.

³ See Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 FR 38617 (August 4, 2009).

In both complaint-generated and non-complaint generated matters, called within the FEC Matters Under Review (“MURs”), and prior to the OGC recommendation as to whether to find or not find RTB, the OGC may come into possession of facts that may be material to the issue of RTB; likewise, during that period, the OGC may determine to make a recommendation to the Commission, based on the facts before it, that a violation may have occurred that was not mentioned specifically in the complaint or in the referral notification. Under such circumstances, under the policy stated herein, the respondent is afforded an opportunity to address such issues before any RTB recommendation is made.

II. Agency Procedure for Notice to Respondents of Additional Material Facts or Potential Violations

This new agency procedure is as follows:

- A. A respondent will be given written notice by the OGC in the event that the OGC intends to include in its RTB recommendation to the Commission (1) any additional facts or information known to OGC and not created or controlled by the respondent, which are deemed material to the RTB recommendation, and (2) any potential violation of the Act and/or the Regulations that may not have been specifically alleged in the complaint/referral notification, and the facts and arguments supporting the potential RTB recommendation on the additional potential violation.
- B. The written notice from the OGC will contain the following:
 - 1. If the OGC intends to include in its RTB recommendation additional facts arising out of an existing MUR that were not contained in the complaint/referral notification or in the response to the complaint/referral notification, and not created by or controlled by the respondent, the notice will include a recitation of such additional material facts and the source or sources of those facts, unless the Commission determines that good cause exists for withholding such source or sources, including, without limitation, that disclosure would violate a provision of the Act; and
 - 2. If the OGC intends to include in its RTB recommendation one or more additional potential violations of the Act and/or the Regulations that were not specifically alleged in the complaint/referral notification, the notice will identify each such potential additional violation that the respondent may have committed, along with a recitation of the material facts upon which the OGC intends to rely in making its RTB

recommendation to the Commission, and the source or sources of those facts, unless the Commission determines that good cause exists for withholding such source or sources including, without limitation, that disclosure would violate a provision of the Act.

- C. Within 10 days from receipt of the OGC notice, the respondent may submit a written statement demonstrating why the Commission should take no action based on the additional material facts or with regard to any additional potential violation. Additionally, with respect to any additional potential violation, the respondent may address whether it believes the Commission should consider the additional potential violation as part of the existing MUR or whether the Commission should sever the additional potential violation and consider it in the context of a new and separate MUR.
- D. Written statements should be directed to the Office of General Counsel, Federal Election Commission, 999 E Street, NW, Washington, DC 20463. Written statements may be made part of the public record. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 FR 70426 (Dec. 18, 2003).
- E. The Commission will not make any RTB finding against a respondent based on the additional material facts, or with regard to any additional potential violation, until the Commission has considered the response or unless no such response has been received by the Commission within 10 days of the respondent having received the OGC notice.
- F. In the event that any material facts, or any potential violation of the Act and/or the Regulations, was not disclosed to a respondent, and the respondent was not given the opportunity to respond to such facts or potential violation, prior to the Commission making an RTB finding, the respondent may, within 10 days from receipt of notice that the Commission has made an RTB finding, file a request for reconsideration of the RTB finding. Where necessary, the Commission reserves the right to request from a respondent an agreement tolling any deadline, including any statutory or other deadline in 11 CFR part 111, as a condition of granting a request for reconsideration.
- G. Requests for reconsideration should be directed to the Commission Secretary, Federal Election Commission, 999 E Street, NW, Washington, DC 20463. Requests for reconsideration may be made part of the public record. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 FR 70426 (Dec. 18, 2003).

- H. A request for reconsideration should, with as much specificity as possible, identify, describe, and discuss or respond to:
1. Each material fact not contained in the complaint/referral notification, or in the response to the complaint/referral notification, and not created by or controlled by the respondent, but which was before the Commission for consideration in making its RTB finding; and/or
 2. Each potential violation of the Act or the Regulations not specifically identified in the complaint/referral notification, but which was included in the RTB finding.
- I. Reconsideration of an RTB finding may be granted upon approval by four or more Commissioners of a determination that the original RTB finding was based on (a) material facts or (b) potential violations that were not presented or alleged in the complaint/referral notification, and to which the respondent did not have notice and an opportunity to respond. Grant of a request for reconsideration is within the sole discretion of the Commission.
- J. The Commission will, within 10 days of receiving the respondent's request for reconsideration, notify the respondent in writing as to whether the Commission has granted a respondent's request for reconsideration. If the Commission has not granted reconsideration within 10 days of receiving a request for reconsideration, the request shall be deemed automatically denied and the Commission's finding of RTB shall stand.
- K. If the Commission grants reconsideration, the respondent shall be provided 10 days from receipt of written notification from the Commission of the grant of reconsideration to respond to each material fact or potential violation that was not presented or alleged in the complaint/the referral notification. After the expiration of the 10 day period, or receipt of a response from the respondent, whichever occurs first, the OGC shall, within 10 days, make a recommendation to the Commission as to whether the Commission should revise its RTB finding.
- L. The Commission's prior vote adopting the RTB finding shall stand unless, within 10 days from receipt of the OGC recommendation, four or more Commissioners vote to modify, amend, or set aside the RTB finding.

III. Conclusion

Failure to adhere to this procedure does not create a jurisdictional bar for the Commission to pursue all remedies to correct or prevent a violation of the Act or the Regulations.

This notice establishes agency practices or procedures. This procedure sets forth the Commission's intentions concerning the exercise of its discretion in its enforcement program. However, the Commission retains that sole discretion and may or may not, as appropriate, exercise it with respect to the facts and circumstances of each enforcement matter it considers, with or without notice. Consequently, this procedure does not bind the Commission or any member of the general public, nor does it create any rights for respondents or third parties. As such, this notice does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay of effective date under 5 U.S.C. 553 of the Administrative Procedure Act ("APA"). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.

On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission

DATED _____
BILLING CODE: 6715-01-P