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Congressman Gregg Harper
Chairman Subcommittee on Elections
Committee on House Administration
1309 Longworth House Office Building
Washington, D.C. 20515

Re: Federal Election Commission Oversight

Dear Chairman Harper:

I greatly appreciate the opportunity to comment in connection with the upcoming oversight hearing of the Federal Election Commission ("FEC") by the Committee on House Administration, Subcommittee on Elections. The FEC regulates "the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981). Vigilant oversight of an administrative agency with a charge that so closely impacts our political freedoms is critical and I am pleased to assist by offering these comments.

By way of background, I am a partner in the Election Law and Government Ethics group at Wiley Rein LLP. I have over a decade of experience counseling clients and representing them before the FEC in rulemaking, advisory opinion, and enforcement proceedings. The focus of my comments will be on the lack of transparency afforded to participants attempting to settle enforcement proceedings. The views expressed in these comments are mine alone and do not reflect the views of Wiley Rein LLP or any of its clients.

1. FEC Enforcement Process

The FEC may initiate enforcement proceedings based on a complaint alleging a violation of the campaign finance laws or on the basis of other information the FEC obtains in the course of carrying out its regulatory duties. 2 U.S.C. § 437g(a)(1)-(2). The FEC must determine by a vote of at least four of its commissioners that there is "reason to believe" that a violation of the campaign finance laws was, or will be, committed before proceeding with an investigation. *Id.* § 437g(a)(2).

At any time during an investigation, the FEC and the respondents to the enforcement proceeding may attempt to settle the matter. 11 C.F.R. § 111.18(d). If after the investigation the FEC determines by a vote of at least four of its

commissioners that there is "probable cause" to believe a violation was, or will be, committed, the FEC and the respondents to the proceeding are required by statute to enter into settlement discussions. 2 U.S.C. § 437g(a)(4)(A).[1] If the discussions are unsuccessful and do not result in a signed conciliation agreement memorializing a settlement, the FEC may vote to initiate a lawsuit against the respondents for a civil penalty and injunctive relief. *Id.* § 437g(a)(6)(A).

2. The Need for Greater Transparency

The vast majority of FEC enforcement proceedings conclude prior to litigation, either in dismissal or a conciliation agreement. Accordingly, the negotiation of the civil penalty in a conciliation agreement is often the de facto penalty phase of any enforcement proceeding. This negotiation can be frustrated by the FEC's lack of transparency.

When proposing an initial draft conciliation agreement, the FEC almost always includes a civil penalty that is seemingly tethered to the upper limit of what the statutory penalty scheme permits. *See* note 1. Prior to responding, I research the conciliation agreements in closed enforcement proceedings – publicly available pursuant to 2 U.S.C. § 437g(a)(4)(B)(ii) – to find past conciliation agreements that describe facts similar to those I am addressing. These conciliation agreements often include penalties that are far smaller than what the FEC has initially proposed. Whenever possible, I make a counter-offer that is tied to what the FEC has accepted in these past conciliation agreements and justify the counter-offer on that basis. On more than one occasion, I have been told by FEC staff that the conciliation agreements upon which I was relying are distinguishable, the FEC has an internal process to ensure consistency in civil penalties, and that process was used to

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[1] The FEC can pursue civil penalties in a settlement of up to $5,000 per violation or an amount equal to the contributions or expenditures that resulted in the violation. 2 U.S.C. § 437g(a)(5)(A)-(B) (these amounts can increase to $10,000 and $50,000 per violation or 200% and 1,000% of the contributions or expenditures depending on the nature of the violation). This statutory penalty scheme vests the FEC with wide discretion to determine the civil penalties it pursues. For example, if a campaign did not follow the proper procedures to redesignate and report one hundred campaign contributions of $100, the FEC could demand a penalty of up to $500,000 ($5,000 x 100 violations) instead of $10,000 ($100 x 100 contributions). Alternatively, if a campaign did not include proper notices on a $100,000 advertisement, the FEC could insist on a penalty of up to $100,000 ($100,000 x 1 expenditure) instead of $5,000 ($5,000 x 1 violation).

determine the FEC's proposed civil penalty. When I have asked for more information about that process to better assess the FEC's claim for the proposed civil penalty, I have been denied.

The FEC's failure to provide information about its penalty calculation process creates numerous problems. First, it hampers settlement negotiations because the FEC does not provide the basis for its proposed civil penalty. With that information, a respondent might be able to agree that the FEC's proposal is fair or attempt to explain to the FEC why it is not. Without that information, a respondent is left to negotiate against something that is a complete unknown which makes meaningful settlement discussion very difficult.

Second, the civil penalty negotiations often belie the FEC's claim that the civil penalty is the result of a consistently applied process. The civil penalty is almost always negotiated down from the FEC's original proposal. If, in fact, the FEC has a consistently applied process that dictates the appropriate civil penalty, there would not be much need for negotiation. Yet, I have never participated in settlement negotiations where the final civil penalty did not change – significantly in many cases – from the FEC's original proposal.

Third, the FEC's failure to provide information about its civil penalty process erodes confidence that the FEC is enforcing the campaign finance laws fairly. The area in which the FEC regulates invariably arouses suspicion regarding political motivations.[2] The campaign finance laws attempt to address this issue by ensuring that no more than three FEC commissioners are from the same political party. 2 U.S.C. § 437c(a)(1). No similarly strong statutory safeguard applies to the FEC staff negotiating conciliation agreements. When the FEC staff insists on a civil penalty unlike that in any similar publicly available conciliation agreement, the FEC is inviting challenges to its impartiality and motivations.

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[2] *See, e.g., In re: Sealed Case*, 237 F.3d 657, 668 (D.C. Cir. 2001) ("We would hope that [the FEC's] strident opposition is not politically motivated nor compelled by some vindictive desire… [T]he weakness of the FEC's position in this case invites the suspicion that its actions are externally motivated.").

When discussing the FEC's failure to publicly explain its civil penalty process, the most frequent defense given is a general claim that this information will compromise the FEC's negotiating position and, as a result, the enforcement process. I have never understood that argument. Federal criminal defendants negotiate plea agreements by reference to the Federal Sentencing Guidelines which are not only publicly known, but are developed with input from the public. 28 U.S.C. § 994(a), (x). Far from undermining the criminal justice system, the Federal Sentencing Guidelines have provided a framework to increase efficiency and to provide certainty and fairness in criminal penalty proceedings. These same goals can be achieved in FEC enforcement proceedings if information regarding the FEC's civil penalty process were public.

* * *

In recent years, the FEC has taken significant steps to increase the transparency in its enforcement proceedings and to respect the due process rights of respondents participating in those proceedings.[3] By making its civil penalty process publicly known, the FEC can continue to advance these important goals.

Sincerely,

Caleb P. Burns

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[3] *See, e.g.,* Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel, 76 Fed. Reg. 63570 (Oct. 13, 2011); Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34986 (June 15, 2011); Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 Fed. Reg. 38617 (Aug. 4, 2009).