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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 17, 2012

The Honorable Darrell E. Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Re: April 3, 2012 Inquiry about FEC MUR 6159

Dear Chairman Issa:

I write in response to your letter of April 3, 2012. As you know, Commission staff has discussed our response with staff of the Committee on Oversight and Government Reform, and we plan to respond to questions 3 and 4 shortly. Pursuant to those discussions, this letter responds to your first two questions.

Question 1. The First General Counsel's Report and the Factual and Legal Analysis predicate their conclusions on the de mimimis *amount in question. Please describe any baseline threshold, formal or informal, the Commission references when deciding whether an amount is* de minimis.

Response: The Factual and Legal Analysis ("F&LA") in Matter Under Review ("MUR") 6159, which is the document containing the Commission's official explanation of its actions in the matter, based the dismissal of the complaint giving rise to that MUR on a number of factors, including the small amount at issue. Other factors supporting dismissal described in the F&LA include certain material conflicts between the parties' declarations and affidavits, other gaps in the factual record, and the best use of the Commission's resources relative to other matters. *See* FEC, F&LA in MUR 6159, at 1, 6 (2009).[1]

The factors the Commission identified in the F&LA in support of the dismissal are consistent with the factors identified long ago by the Supreme Court that relate to an agency's discretion not to undertake an enforcement action. *Heckler v. Chaney,* 470 U.S. 821, 831-32 (1985). In *Heckler,* the Supreme Court recognized that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." As the Court noted, "the agency must not only assess whether a violation has occurred, but whether

[1] This FL&A was provided to complainants and respondents at the conclusion of the Commission's consideration of this MUR. Copies of the FL&A are enclosed and available on the FEC's website in the Enforcement Query System under MUR 6159. *See, e.g.,* http://eqs.nictusa.com/eqsdocsMUR/10044260927.pdf.

agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." Thus, the Court further noted, "An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.*

The Commission's reasons as set forth in the F&LA are also consistent with its Policy Statement regarding Commission action at the initial stage in the enforcement process. *See* FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process,* 72 Fed. Reg. 12,545 (Mar. 16, 2007).[2] The Policy Statement provides: "Pursuant to the exercise of its prosecutorial discretion, the Commission will dismiss a matter when the matter does not merit further use of Commission resources, due to factors such as the small amount or significance of the alleged violation, the vagueness or weakness of the evidence, or likely difficulties with an investigation, or when the Commission lacks majority support for proceeding with a matter for other reasons." *Id.* at 12,546.

In general, once a complaint has been filed with the Commission, the Office of General Counsel evaluates the complaint and responses submitted by respondents, if any, using objective criteria approved by the Commission in its Enforcement Priority System ("EPS"). MURs are prioritized to determine which of them are significant enough to be directed to the Enforcement Division for further consideration. MURs identified as having low priority under the Enforcement Priority System are forwarded to the Commission with a recommendation to dismiss the matter. Other MURs can be referred to either the Alternative Dispute Resolution Office or the Administrative Fine Program. Criteria in the EPS include the dollar amount at issue. *See* FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process,* at 11 & 12 (2009).[3] MURs may be dismissed when there is a small dollar amount at issue or when it appears they would result in only the imposition of nominal civil penalties. There are additional criteria, and in all instances the Commission considers each MUR on a case-by-case basis, and it may decide to pursue MURs involving certain violations that it considers Commission priorities regardless of the amount in violation or the perceived low dollar value of a particular violation. *Id.*

The particular MUR that is the subject of your inquiry stemming from Ms. Waites's complaint was *not* dismissed as a low priority matter based on an initial review under EPS, but referred to the Enforcement Division for further consideration, notwithstanding the relatively small dollar value of her contribution. The MUR was fully considered by Enforcement Division attorneys, and the recommended course of action—in this case dismissal—was presented to the Commission in a written report that reviews the complaint, the responses, as well as the recommended course of action. The Commission voted unanimously to adopt the recommendations of the Office of General Counsel to dismiss.

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[2] The Policy Statement is enclosed and available at http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-6.pdf.

[3] The Guidebook is enclosed and available at http://www.fec.gov/em/respondent_guide.pdf.

Question 2. Federal election law violations alleged by an individual member of an organization could reflect endemic, organization-wide violations. Please describe any policy or approach, formal or informal, adopted by the Commission to assess the scope of violations against a particular organization by individual members of that organization.

Response: The Commission has not adopted any formal or informal policy or approach designed specifically to assess the scope of violations that individual members of an organization allege against that organization. Based on a complaint or information ascertained in the normal course of carrying out its supervisory responsibilities, the Commission may determine that there is "reason to believe" that a violation of the law has been or is about to be committed and then investigate the alleged violation. 2 U.S.C. § 437g(a)(2). In 2007, the Commission issued a general policy detailing the standards that it applies in determining the appropriate disposition for each individual MUR. *See* FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process,* 72 Fed. Reg. 12,545 (Mar. 16, 2007). Further, as described above, the Commission may exercise its broad prosecutorial discretion to dismiss a MUR based on a case-by-case determination. The perceived low dollar amount of a particular violation may figure in that case-by-case analysis, but is not alone dispositive.

Question 3. Our staff has had initial discussions about this inquiry with Committee staff, we expect to have further discussions, and will provide the requested information as promptly as possible thereafter.

Question 4. Question 4 requests all documents and communications relating or referring to MUR 6159 or the complainant in that MUR, Ms. Waites. As discussed with Committee staff, our staff has already begun to identify and retrieve responsive documents, and expect to be in a position to discuss producing responsive documents following consideration by the Commission. We will discuss with Committee staff the timing of our response to this document request.

We appreciate the Committee's patience and the courtesies of your staff. The Commission looks forward to continuing to work with the Committee on Oversight and Government Reform to respond to your inquiries. If you have any questions or concerns, please contact me at (202) 694-1045, or Duane Pugh, our Director of Congressional Affairs, at (202) 694-1002.

On behalf of the Commission,

Caroline C. Hunter by EBB

Caroline C. Hunter
Chair

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member
Committee on Oversight and Government Reform

Rules and Regulations

Federal Register
Vol. 72, No. 51
Friday, March 16, 2007

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2007–6]

Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process

AGENCY: Federal Election Commission.

ACTION: Statement of Policy.

SUMMARY: The Federal Election Commission (''Commission'') is issuing a Policy Statement to clarify the various ways that the Commission addresses Matters Under Review (''MURs'') at the initial stage of enforcement proceedings. The Commission may take any of the four following actions at this stage: find ''reason to believe,'' ''dismiss,'' ''dismiss with admonishment,'' and find ''no reason to believe.''

DATES: *Effective Date:* March 16, 2007.

FOR FURTHER INFORMATION CONTACT: Mark Shonkwiler, Assistant General Counsel, or Lynn Tran, Attorney, Enforcement Division, Federal Election Commission, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* (''FECA'' or ''the Act''), grants the Commission ''exclusive jurisdiction with respect to civil enforcement'' of the provisions of the Act and Chapters 95 and 96 of Title 26. 2 U.S.C. 437c(b)(1). Enforcement matters come to the Commission through complaints from the public; information ascertained in the ordinary course of the Commission's supervisory responsibilities, including referrals from the Commission's Reports Analysis and Audit Divisions; referrals from other government agencies; and self-reported submissions.

The FECA provides that ''upon receiving a complaint'' or upon the basis of information ascertained in the course of carrying out its supervisory responsibilities, the Commission ''shall make an investigation of such alleged violation'' of the Act where the Commission, with the vote of four members, determines that there is ''reason to believe that a person has committed, or is about to commit'' a violation of the Act. 2 U.S.C. 437g(a)(2); *see also* 11 CFR 111.10(f). Commission ''reason to believe'' findings have caused confusion in the past because they have been viewed as definitive determinations that a respondent violated the Act. In fact, ''reason to believe'' findings indicate only that the Commission found sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred. Indeed, the Commission has recommended that Congress modify the FECA to clarify this point. *See* Legislative Recommendations in 2003 and 2004 FEC Annual Reports. Other kinds of dispositions at this preliminary stage would also benefit from clarification to ensure consistency and promote understanding of the Commission's reasons for taking action. Thus, the Commission is issuing this policy statement to assist complainants, respondents, and the public in understanding the Commission's findings at this stage of the enforcement process.

Generally speaking, at the initial stage in the enforcement process, the Commission will take one of the following actions with respect to a MUR: (1) Find ''reason to believe'' a respondent has violated the Act; (2) dismiss the matter; (3) dismiss the matter with admonishment; or (4) find ''no reason to believe'' a respondent has violated the Act. This policy statement is intended to clarify the circumstances under which the Commission uses each of these dispositions.

A. ''Reason To Believe''

The Act requires that the Commission find ''reason to believe that a person has committed, or is about to commit, a violation'' of the Act as a predicate to opening an investigation into the alleged violation. 2 U.S.C. 437g(a)(2). The Commission will find ''reason to believe'' in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation. A ''reason to believe'' finding will always be followed by either an investigation or pre-probable cause conciliation. For example:

- A ''reason to believe'' finding followed by an investigation would be appropriate when a complaint credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope.
- A ''reason to believe'' finding followed by conciliation would be appropriate when the Commission is certain that a violation has occurred and the seriousness of the violation warrants conciliation.

A ''reason to believe'' finding by itself does not establish that the law has been violated. When the Commission later accepts a conciliation agreement with a respondent, the conciliation agreement speaks to the Commission's ultimate conclusions. When the Commission does not enter into a conciliation agreement with a respondent, and does not file suit, a Statement of Reasons, a Factual and Legal Analysis, or a General Counsel's Report may provide further explanation of the Commission's conclusions.

The Commission has previously used the finding ''reason to believe, but take no further action'' in cases where the Commission finds that there is a basis for investigating the matter or attempting conciliation, but the Commission declines to proceed for prudential reasons. As discussed below, the Commission believes that resolving these matters through dismissal or dismissal with admonishment more clearly conveys the Commission's intentions and avoids possible confusion about the meaning of a reason to believe finding.

B. Dismissal and Dismissal With Admonishment

Under *Heckler* v. *Chaney*, 470 U.S. 821 (1985), the Commission has broad discretion to determine how to proceed with respect to complaints or referrals. The Commission has exercised its prosecutorial discretion under *Heckler* to dismiss matters that do not merit the additional expenditure of Commission

resources.[1] As with other actions taken by the Commission, dismissal of a matter requires the vote of at least four Commissioners.

Pursuant to the exercise of its prosecutorial discretion, the Commission will dismiss a matter when the matter does not merit further use of Commission resources, due to factors such as the small amount or significance of the alleged violation, the vagueness or weakness of the evidence, or likely difficulties with an investigation, or when the Commission lacks majority support for proceeding with a matter for other reasons. For example, a dismissal would be appropriate when:

- The seriousness of the alleged conduct is not sufficient to justify the likely cost and difficulty of an investigation to determine whether a violation in fact occurred; or
- The evidence is sufficient to support a ''reason to believe'' finding, but the violation is minor.

The Commission may also dismiss when, based on the complaint, response, and publicly available information, the Commission concludes that a violation of the Act did or very probably did occur, but the size or significance of the apparent violation is not sufficient to warrant further pursuit by the Commission. In this latter circumstance, the Commission will send a letter admonishing the respondent. For example, a dismissal with admonishment would be appropriate when:

- A respondent admits to a violation, but the amount of the violation is not sufficient to warrant any monetary penalty; or
- A complaint convincingly alleges a violation, but the significance of the violation is not sufficient to warrant further pursuit by the Commission.

C. ''No Reason To Believe''

The Commission will make a determination of ''no reason to believe'' a violation has occurred when the available information does not provide a basis for proceeding with the matter. The Commission finds ''no reason to believe'' when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law. For example, a ''no reason to believe'' finding would be appropriate when:

- A violation has been alleged, but the respondent's response or other evidence convincingly demonstrates that no violation has occurred;
- A complaint alleges a violation but is either not credible or is so vague that an investigation would be effectively impossible; or
- A complaint fails to describe a violation of the Act.

If the Commission, with the vote of at least four Commissioners, finds that there is ''no reason to believe'' a violation has occurred or is about to occur with respect to the allegations in the complaint, the Commission will close the file and respondents and the complainant will be notified.

D. Conclusion

This policy enunciates and describes the Commission's standards for actions at the point of determining whether or not to open an investigation or to enter into conciliation with respondents prior to a finding of probable cause to believe. The policy does not confer any rights on any person and does not in any way limit the right of the Commission to evaluate every case individually on its own facts and circumstances.

This notice represents a general statement of policy announcing the general course of action that the Commission intends to follow. This policy statement does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the Administrative Procedures Act (''APA''). As such, it does not bind the Commission or any member of the general public. 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.

Dated: March 7, 2007.

Robert D. Lenhard,

Chairman, Federal Election Commission.

[FR Doc. E7–4868 Filed 3–15–07; 8:45 am]

BILLING CODE 6715–01–P

[1] The FECA and Commission regulations also recognize the Commission's authority to dismiss enforcement matters. *See* 2 U.S.C. 437g(a)(1); 11 CFR 111.6(b) and 111.7(b).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–26166; Directorate Identifier 2006–CE–58–AD; Amendment 39–14992; AD 2007–06–11]

RIN 2120–AA64

Airworthiness Directives; EADS SOCATA Model TBM 700 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

> Cracks on a vertical stabilizer attachment fitting due to corrosion, have been found on an aircraft in service.

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective April 20, 2007.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of April 20, 2007.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Albert J. Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri, 64106; telephone: (816) 329–4119; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Streamlined Issuance of AD

The FAA is implementing a new process for streamlining the issuance of ADs related to MCAI. The streamlined process will allow us to adopt MCAI safety requirements in a more efficient manner and will reduce safety risks to the public. This process continues to follow all FAA AD issuance processes to meet legal, economic, Administrative Procedure Act, and **Federal Register** requirements. We also continue to meet

Guidebook for Complainants and Respondents on the FEC Enforcement Process

Federal Election Commission
December 2009

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ABBREVIATIONS

ADR	Alternative Dispute Resolution
ADRO	Alternative Dispute Resolution Office
CELA	(Office of) Complaints Examination and Legal Administration
DOJ	Department of Justice
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
OAR	Office of Administrative Review
OGC	Office of General Counsel
PCTB	Probable Cause to Believe
RAD	Reports Analysis Division
RTB	Reason to Believe

I. INTRODUCTION

The purpose of this guidebook is to assist complainants and respondents and educate the public concerning Federal Election Commission ("FEC" or "Commission") enforcement matters. The guidebook summarizes the Commission's general enforcement policies and procedures and provides a step-by-step guide through the Commission's enforcement process.

This publication also provides guidance on certain aspects of federal campaign finance law. It does not replace the law or change its meaning, nor does this publication create or confer any rights for or on any person or bind the Commission or the public. The reader is encouraged also to consult the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), Commission regulations (Title 11 of the Code of Federal Regulations), Commission advisory opinions, and applicable court decisions. All of these materials can be accessed via the Commission's website, www.fec.gov. This Guidebook is a general reference guide, is not intended to be an exhaustive list of procedures, and does not attempt to address all circumstances that may arise in any given enforcement matter.

The FEC is the independent federal regulatory agency that holds the exclusive authority and responsibility for the civil enforcement of the federal campaign finance laws that are found in the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.*; the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 *et seq.*; the Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9031 *et seq.*; and Title 11 of the Code of Federal Regulations. The FEC has jurisdiction over the financing of campaigns for the U.S. House of Representatives, the U.S. Senate, the Presidency and the Vice Presidency.

The Commission has six members, no more than three of whom may be of the same political party. Commissioners are nominated by the President and confirmed by the Senate. The Chairman and Vice Chairman of the Commission, who are not from the same political party, serve terms of one calendar year. The Commissioners serve in these capacities on a rotating basis, with the Chairmanship alternating between the two parties.

The Commission's core functions include administering the public disclosure system for campaign finance activity, providing information and policy guidance on campaign finance laws, encouraging voluntary compliance with campaign finance laws, and enforcing the campaign finance laws through audits, investigations, and civil litigation. This guidebook concerns three aspects of the Commission's enforcement function: the general enforcement process set forth in 2 U.S.C. § 437g, the Commission's Alternative Dispute Resolution program and Administrative Fine program.

As an initial matter, it is important for respondents to be aware that:

- The fact that an entity or person has been designated a "respondent" at the outset of an enforcement matter does not mean that the Commission has made a finding or otherwise believes that a violation has occurred or is about to occur; respondents may admit or deny, in whole or in part, any allegation made against them.
- The FEC's general enforcement process, as carried out through the Commission's Office of General Counsel ("OGC") and as described below, moves in stages during which there are opportunities for respondents to respond to the allegations and present their views to General Counsel staff and to the Commission.
- A vote by at least four of the six Commissioners is needed at every stage, including whether to find reason to believe and initiate an investigation, find probable cause that a violation has occurred or is about to occur, settle a matter, or authorize filing a lawsuit. If there are not four votes at any stage, the Commission will not proceed to the next step of the enforcement process.
- With the limited exception of the Administrative Fine program discussed in Section III.B. below, the Commission does not impose fines for violations of the campaign finance laws. The Commission seeks the payment of civil penalties through voluntary settlements with the respondent. If there is no such settlement, the Commission may file suit in federal district court.

II. GENERAL ENFORCEMENT PROCESS

The enforcement process most often begins in one of the four following ways:

- The filing of a complaint by a person or entity (the "complainant"),
- A referral from another government agency,
- A referral from the Commission's Audit Division or Reports Analysis Division ("RAD"), or
- A voluntary submission made by persons or entities who believe they may have violated campaign finance laws (often referred to as a *sua sponte* submission).

The process ends when the Commission determines to take no action or reaches a settlement with the respondent. If the Commission fails to successfully conciliate differences with a respondent, it may file a civil lawsuit in U.S. District Court. In certain circumstances, the Commission may also refer a matter to the U.S. Department of Justice for criminal prosecution under the Act.

For additional information regarding the rules pertaining to the Commission's enforcement process, *see* 11 CFR Part III, Subpart A, which sets forth the rules governing enforcement procedures. These regulations are on the Commission's website at http://www.fec.gov/law/cfr/ej_citation_part111.shtml. The Commission's website also contains documents from closed enforcement matters, all the policy statements cited herein, and other information about Commission practices and procedures. The links for this material are included throughout this guidebook.

A. Sources of Allegations

1. Complaint Generated Matters

Any person may file a complaint if he or she believes a violation of the federal election campaign laws or Commission regulations has occurred or is about to occur. The complaint must be made in writing and submitted to the Office of General Counsel, Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463. The original must be submitted, along with three copies, if possible. Upon receipt of the complaint, OGC circulates a copy to each Commissioner. Facsimile or e-mail transmissions are not acceptable. A complaint must comply with certain requirements. 2 U.S.C. § 437g(a)(1); 11 CFR 111.4(a)-(d).

A complaint must:

- Provide the full name and address of the complainant; and
- Be signed, sworn to and notarized. This means that the notary public's certificate must say "...signed and sworn to before me", or words that connote the complaint was affirmed by the complainant (such as "under penalty of perjury").

Furthermore, in order for a complaint to be considered complete and proper, it should:

- Clearly recite the facts that describe a violation of a statute or regulation under the Commission's jurisdiction (citations to the law and regulations are not necessary but helpful);
- Clearly identify each person, committee or group that is alleged to have committed a violation;
- Include any documentation supporting the alleged violations, if available; and
- Differentiate between statements based on the complainant's personal knowledge and those based on information and belief. Statements not based on personal knowledge should identify the source of the information.

Complaints should be as factually specific as possible (e.g., by providing the date or approximate dates that the activities at issue occurred), and sworn affidavits from persons with first-hand knowledge of the facts alleged is encouraged. If the allegations in the complaint are based in whole or in part upon information contained in an advertisement, news article, or website, the complaint should provide a copy of the relevant advertisement, news article, or link to the website, if possible. Complaints should be filed as soon as possible after the alleged violation becomes known to the complainant in order to preserve evidence and the Commission's ability to seek civil penalties in federal district court within the five-year statutes of limitations period (measured from the time of the violation) provided by 28 U.S.C. § 2462 (civil) and 2 U.S.C. § 455 (criminal).

The Office of Complaints Examination and Legal Administration ("CELA") within OGC is the entry point for processing the complaint. CELA reviews the complaint for compliance with the required criteria, as described above. If the complaint does not meet the criteria, CELA notifies the complainant of the deficiencies and that no action can be taken on the basis of the complaint. 11 CFR 111.5(b). If the complaint is deemed sufficient, CELA assigns the complaint a Matter Under Review ("MUR") number, informs the complainant that the complaint has been received and that the Commission will notify him or her once the entire matter has been resolved. *See* 11 CFR 111.5(a)-(b).

Until the matter is closed, the Commission is required by law to keep its actions regarding the MUR confidential. 2 U.S.C. § 437g(a)(12). Confidentiality requirements, however, do not prevent a complainant or respondent from disclosing the basis of the complaint. Information about a Commission notification of findings or about a Commission investigation may not be disclosed before the matter is made public, unless the respondent waives the right to confidentiality in writing.

2. Non-Complaint Generated Matters

The primary types of non-complaint generated matters are: (1) those based on referrals from within the Commission (internally generated from RAD or the Audit Division), (2) those based on referrals from other government agencies, and (3) those based on *sua sponte* submissions (i.e., voluntary submissions made by persons or entities who believe they may have violated the law). Before the Commission votes on OGC's recommendations as to any referral, respondents will have an opportunity to review and respond to the referral. See Section II.B.2 below.

a. Internal Referrals

- Referrals from the Commission's Reports Analysis Division

OGC receives referrals regarding apparent violations of the Act and FEC regulations from RAD and the Audit Division. RAD monitors the filing of disclosure reports filed with the Commission by federal political committees and other reporting entities, reviews their contents for compliance with the federal campaign finance laws, and, when necessary, sends written requests for further information, clarification, and sometimes correction of potential inaccuracies that appear on disclosure reports. Prior to any potential referral, RAD will contact the committee or reporting entity and give it an opportunity to take corrective action, if possible, or provide clarification. Pursuant to internal Commission thresholds, depending upon the nature and extent of the apparent violations, and any corrective actions taken, RAD may refer apparent violations to OGC for possible enforcement action.

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Referrals from the Commission's Audit Division

The Audit Division conducts audits pursuant to (1) 26 U.S.C. §§ 9007, 9008, and 9038 of all presidential candidates and nominating conventions that qualify for public financing, and (2) 2 U.S.C. § 438(b) of committees required to file reports under 2 U.S.C. § 434. During an audit, the committee will have the opportunity to review and respond to any proposed or suggested findings made by the Audit Division. Depending upon the nature and severity of apparent violations identified during an audit, and any corrective actions taken, such findings may be referred to OGC for possible additional action.

The Final Audit Report, upon which the potential referral is based, will be reviewed by the full Commission and must be approved by at least four Commissioners. The committee will receive a copy of the Audit Division's proposed Final Audit Report, after which it may request an oral hearing before the full Commission. Two Commissioners must agree to hold the hearing before the request is granted. The Commission will inform the committee whether the Commission is granting the committee's request within 30 days of receipt of the request. For more information on the audit hearing process, please refer to the Commission's Policy Statement on Procedural Rules for Audit Hearings at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-12.pdf.

b. External Referrals

Enforcement proceedings may also originate from other entities referring potential violations to the Commission. These entities include local and state law enforcement authorities, federal enforcement authorities, and other federal agencies. The majority of external referrals received by the Commission originate with the U.S. Department of Justice (DOJ). The fact that a person is or was the subject of a DOJ investigation or prosecution does not necessarily preclude the Commission from civilly pursuing that person for violations the Act, even when the conduct at issue is the same and similar facts are involved. Also, the FEC may elect to proceed on the civil track at the same time the DOJ is pursuing the criminal case, but will, under appropriate circumstances, hold cases in abeyance during the criminal proceedings.

c. *Sua Sponte* Submissions

Self-reported voluntary submissions (called "*sua sponte*" submissions) should include the following:

- An admission of each violation, with names and contact information as appropriate;
- A complete recitation of the facts along with all relevant documentation that explains how each violation was discovered;
- The actions that were taken in response to the violation, if any (e.g., a report of an internal investigation); and
- What other agencies, if any, are investigating the violation (or facts surrounding the violation).

To encourage self-reporting, the Commission will often negotiate penalties that are between 25 and 75 percent lower than those for comparable matters arising by other means.

In certain circumstances, the Commission may allow persons or entities who voluntarily report their violations and make a complete report of their internal investigation to proceed directly into conciliation before the Commission makes a finding as to whether there is reason to believe the committee violated campaign finance laws or Commission regulations. Generally speaking, the more complete the submission and the greater the cooperation from a person or entity that is self-reporting, the more likely a mutually acceptable "fast track" settlement can be presented to the Commission for its approval.

For more guidance on how to prepare and file a *sua sponte* submission, please refer to the Commission's Statement Regarding Self-Reporting of Campaign Finance Violations (*Sua Sponte* Submissions), which can be found on the Commission's website at http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-8.pdf.

B. Notice to Respondents

A "respondent" is a person or entity who is the subject of a complaint or a referral (or who files a *sua sponte* submission) that alleges that the person or entity may have violated one or more of the federal campaign finance laws within the FEC's jurisdiction.

1. Complaint Generated Matters

Within 5 days after receiving a properly filed complaint, OGC sends each respondent a copy of the complaint, a letter describing the Commission's compliance procedures and a designation of counsel form. 11 CFR 111.5(a). The Commission must provide the respondent at least 15 days from the date of receipt to respond in writing, explaining why no action should be taken. 11 CFR 111.6(a). The letter from OGC notes that respondents have a legal obligation to preserve all documents, records and materials relating to the matter until such time as they are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519 (establishing penalties for knowing destruction, alteration, or falsification of records in federal investigations).

2. Non-Complaint Generated Matters

In RAD referrals and Audit referrals, within five days of OGC's receipt of such referrals, OGC sends notification letters to respondents, attaching the documents from RAD that set forth the basis for the referral or, in the case of Audit referrals, the relevant audit findings. The respondents have at least 15 days to respond to OGC's notification. For more information, please refer to the Commission's Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 Fed. Reg. 38617-618 (Aug. 4, 2009), also available at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-18.pdf.

When OGC receives referrals from other government agencies or *sua sponte* submissions, it notifies the respondents (other than the *sua sponte* submitters) of the allegations by letter containing the same types of information as discussed above. The respondents have at least 15 days to respond in writing.

The notification letters reflect no judgment about the accuracy of the allegations, but are merely a vehicle for (1) informing the respondent that the Commission has received allegations as to possible violations of the federal campaign laws by the respondent, (2) providing a copy of the complaint or referral document, or in limited circumstances, a summary thereof, and (3) giving the respondent an opportunity to respond in writing in a timely manner.

C. The Response

The response is the respondent's opportunity to demonstrate to the Commission why it should not pursue an enforcement action, or to clarify, correct, or supplement the information in the complaint or referral, including possible mitigating circumstances, and if desired, to ask for early settlement consideration. The Commission may not take any action on a complaint or referral other than a vote to dismiss, until 15 days after the date of notification. See, e.g., 2 U.S.C. § 437g(a). Respondents are not required to respond to the allegations.

There is no prescribed format for responses. While not required, documentation, including sworn affidavits from persons with first-hand knowledge of the facts, tends to be helpful. It is also helpful for a respondent to specifically address each allegation in the complaint. Upon receipt of the response, OGC circulates a copy to each Commissioner. All responses are reviewed and considered by OGC and the Commissioners.

The Act requires that, before taking any action on a complaint (except to dismiss it), the Commission must provide a respondent at least 15 days to file a response demonstrating that no action should be taken But extensions to this 15-day period may be available. To request an extension of time to respond to a complaint before the Commission considers the complaint, the respondent should submit a letter to the Commission as soon as possible after receiving notice of the complaint explaining why the respondent needs more time. If an extension is granted, the Commission will take no action on the complaint until after the new deadline.

Respondents may contact OGC at any time to ask questions they may have about a matter, such as the current status of the case. A contact person within OGC (typically a paralegal or attorney) and phone number is identified in the first notification to the respondent.

D. Representation by Counsel

Respondents, if they so choose, have a right to be represented by counsel during all or any portion of the enforcement process, and may designate or change counsel at any point. A respondent who decides to be represented by counsel must inform the Commission by sending a "statement of designation of counsel," a copy of which is included with the notification letter. Where the respondent is a political committee, the designation of counsel also covers the treasurer in his or her official capacity unless the respondent specifies otherwise. Once the Commission receives the "statement of designation of counsel," the Agency will communicate only with the counsel unless otherwise authorized by the respondent.

E. Processing Enforcement Matters

After the 15-day response period (and any extension of time, if granted) has elapsed, OGC evaluates the complaint and response, if any, using objective criteria approved by the Commission under its Enforcement Priority System. Matters are prioritized and in some instances are referred to either the Alternative Dispute Resolution Office or the Administrative Fine Program (discussed below). In general, matters that are deemed high priority (generally those reflecting such factors as a substantial amount of activity involved, high legal complexity, the presence of possible knowing and willful intent, and potential violations in areas that the Commission has set as priorities) are preliminarily assigned to the Enforcement Division. Matters not warranting the further use of Commission resources are recommended for dismissal.

F. Initial Vote to Proceed (Reason to Believe)

With regard to each matter assigned to an attorney in the Enforcement Division, the General Counsel recommends to the Commission whether or not there is "reason to believe" the respondent has committed or is about to commit a violation of the law. This report, called the First General Counsel's Report, is circulated to the Commissioners for a vote on whether to approve the General Counsel's recommendation or to seek an alternate disposition of the matter. In casting their votes, the Commissioners consider the complaint, the respondent's reply, relevant committee reports on the public record, and the General Counsel's analyses and recommendations. If the Report receives less than four approvals, it is scheduled for a closed Executive Session, during which the full Commission considers the recommendations and votes on the disposition of the matter.

In the initial stages of the process, the Commission will take one of the three following courses of action:

- Find Reason to Believe

The Act requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a precondition to opening an investigation into the alleged violation. 2 U.S.C. § 437g(a)(2). A "reason to believe" finding is not a finding that the respondent violated the Act, but instead simply means that the Commission believes a violation may have occurred.

A reason to believe finding is generally followed by either an investigation or pre-probable cause conciliation. For example, a reason to believe finding followed by an investigation would be appropriate when there is reason to believe a violation may have occurred, but an investigation is required to determine whether a violation in fact occurred and, if so, the exact scope of the violation. However, if it appears the Commission has all of the necessary information regarding the alleged violations, the Commission may immediately authorize OGC to enter into conciliation with the respondent(s) prior to a finding of probable cause (called "pre-probable cause conciliation") and approve a proposed conciliation agreement attached to the First General Counsel's Report. *See* 11 CFR 111.18.

- Dismiss the Matter

Pursuant to the exercise of its prosecutorial discretion, the Commission may dismiss a matter when, in the opinion of at least four Commissioners, the matter does not merit further use of Commission resources. The Commission may take into account factors such as the small dollar amount at issue, the insignificance of the alleged violation, the vagueness or weakness of the evidence, or the merits of the response. For example, a dismissal would be appropriate when the seriousness of the alleged conduct is not sufficient to justify the likely cost and difficulty of an investigation to determine whether there is probable cause to believe a violation in fact occurred, or the evidence is sufficient to support a reason to believe finding but the violation is minor and not likely to be repeated. In this latter circumstance, the Commission may send a letter cautioning or reminding the respondent regarding their legal obligations under the relevant statutory and regulatory provisions.

- Find No Reason to Believe

The Commission will make a determination of "no reason to believe" a violation has occurred when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law. For example, a no reason to believe finding would be appropriate when a violation has been alleged, but the respondent's response or other evidence demonstrates that no violation has occurred, a complaint alleges a violation but is either

not credible or is so vague that an investigation would be unwarranted, or a complaint fails to describe a violation of the Act.

G. Notification of Reason to Believe Findings

When the Commission approves a recommendation by OGC that it find reason to believe, the respondent will receive written notification (generally through a letter signed by the Chairman) of the Commission's determination shortly thereafter. In matters involving registered committees, the current treasurer is usually included as a respondent in his or her official capacity. In rare instances, however, the Commission has made findings against a treasurer in his or her personal capacity. For example, the Commission may make a determination that the treasurer acted in a personal capacity when information indicates that the treasurer knowingly and willfully violated the Act, recklessly failed to fulfill duties specifically imposed by the Act or intentionally deprived himself or herself of facts giving rise to the violation. For further information regarding the Commission's practice with respect to committee treasurers, please refer to the Commission's Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (January 3, 2005), at http://www.fec.gov/law/policy/2004/notice2004-20.pdf.

If the respondent has not already filed a designation of counsel with the Commission, the notification letter will again advise the respondent of the right to be represented by counsel. Enclosed with the notification letter is a copy of the Factual & Legal Analysis approved by the Commission that provides the basis for the Commission's decision.

A letter notifying a respondent of a reason to believe finding will apprise the respondent of the ability to submit any factual or legal materials that the respondent believes are relevant for the Commission's consideration or resolution of the matter. Respondents should not hesitate to provide the Commission with relevant new information or present the Commission with any errors in the Commission's recitation of the facts or law. The Commission receives all responses and considers them when determining whether and how to proceed with an investigation or conciliation. Any documents or letters that are sent directly to the Commissioners should also be sent to the Office of General Counsel to ensure that the materials are properly documented and included in the files related to the matter.

Respondents or their counsel may also contact the Enforcement Division attorney handling the matter by telephone, or request a meeting to discuss any issues relating to the reason to believe findings or other developments in the matter.

Depending on whether further information is required, the Commission may follow a reason to believe finding with an investigation or proceed to attempt to settle the matter prior to a finding of probable cause to believe.

H. Investigation

Upon finding reason to believe that a violation has occurred or is about to occur, the Commission may authorize an investigation.

Enforcement Division staff may conduct an investigation through informal and formal methods. Informal methods may include such activities as in-person or telephone interviews with persons, including respondents or third-party witnesses, and informal requests for information and documents. Staff may also examine relevant information from publicly available sources.

Formal methods (also called "compulsory process") may include subpoenas and orders for information, documents, or depositions. See 2 U.S.C. § 437d. All subpoenas are reviewed and approved by the Commission before they are served.

Responses to subpoenas are generally due within 30 days of receipt of such subpoenas, but extensions may be granted as appropriate. Persons subpoenaed may file motions to quash with the Commission within five days of receipt of the subpoenas. If a person fails to respond to a subpoena or order for documents and information, or provides insufficient grounds for declining to respond or provides an incomplete submission, the Commission may file a subpoena enforcement action in federal district court. *See* 11 CFR 111.13(b), 111.15.

A deposition in the enforcement process is subject to special rules. See 11 CFR 111.12, 111.14. A respondent or other witness deponent may have counsel present during the deposition and shall be paid the same fees and mileage as witnesses in federal courts. If the deponent lives and works a long distance from Washington, D.C., and the deposition is scheduled at the FEC's headquarters, the Commission may also pay for the deponent's air, bus, or train fare and if, necessary, overnight lodging, within certain government-approved parameters. A deponent is responsible for paying all costs for his or her attorney.

At the deposition itself, the deponent will be placed under oath by the court reporter (who is a notary public), and is required to respond to questions by the Commission's staff unless the information requested is protected from disclosure by law. Respondent's counsel may be present, take notes, consult with the deponent, object to or seek to clarify certain questions, and, generally at the end, ask questions of the deponent. The court reporter, paid for by the Commission, will make a verbatim transcript of the deposition.

A deponent has the right to review the deposition transcript, consistent with Federal Rule of Civil Procedure 30(e). 11 CFR 111.12(c). If there are any changes in form or substance to the testimony, the deponent may sign a statement listing the changes and the reasons for making them. Furthermore, the deponent may purchase a copy of the transcript of his or her own deposition from the court reporter. For further information, please refer to the Commission's Statement of Policy Regarding Deposition

Transcriptions in Nonpublic Investigations, 68 Fed. Reg. 50688-589 (Aug. 22, 2003) at http://www.fec.gov/agenda/agendas2003/notice2003-15/fr68n163p50688.pdf.

I. Early Resolution of MUR (Pre-Probable Cause Conciliation)

Although the Act only requires the Commission to attempt to conciliate matters after a finding of probable cause, 2 U.S.C. § 437g(a)(4), the Commission has promulgated regulations for pre-probable cause conciliation to allow for early disposition of appropriate matters. *See* 11 CFR 111.18(d). Pre-probable cause conciliation is strictly voluntary; both the Commission and the respondent must be willing to participate.

If OGC believes that an investigation is not necessary before attempting conciliation, it may recommend pre-probable cause conciliation before the Commission approves an investigation. Additionally, respondents can request pre-probable cause conciliation at any time, even in matters in which the Commission has authorized an investigation. If the respondent is interested in pursuing a settlement, the respondent should so request in writing to OGC. Upon receipt of a request for settlement, OGC will make recommendations to the Commission whether pre-probable cause conciliation is appropriate at that juncture.

At the time the Commission decides to enter into pre-probable cause conciliation, it approves a proposed conciliation agreement that serves as the opening settlement offer. Among other things, the proposed agreement will generally:

- Recite the Commission's reason to believe finding(s),
- Set forth relevant facts and law,
- Contain the respondent's admission of violating specific provisions of the Act and the Commission's regulations,
- Include an agreement that the respondent will cease and desist from violating those provisions in the future, and
- Include an agreement to pay a civil penalty and/or possibly take corrective actions, such as refunding impermissible contributions, amending reports, hiring compliance specialists, or attending FEC educational seminars.

With respect to the civil penalty, the Act provides that a conciliation agreement entered into by the Commission may require that the respondent pay a civil penalty "which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved." 2 U.S.C. § 437g(a)(5)(A). In 2009, the statutory penalty was adjusted for inflation to $7,500. *See* 11 CFR 111.24(a)(1) (2009). If a respondent knowingly and willfully violates the Act, the Act provides for a civil penalty "which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved." 2 U.S.C. § 437g(a)(5)(B). The statutory penalty of $10,000 was adjusted for inflation in 2009 to $16,000. *See* 11 CFR 111.24(a)(2)(i) (2009). Finally, for knowing and willful violations of 2 U.S.C. § 441f— contributions made in the name of another— the Act provides for a civil penalty "which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1000 percent of

the amount involved in the violation." 2 U.S.C. § 437g(a)(5)(B). The statutory penalty of $50,000 was adjusted for inflation to $60,000 in 2009. 11 CFR 111.24(a)(2)(ii). When determining the amount of a civil penalty to be included in a conciliation agreement, the Commission uses the statutory guidelines described above and considers the particular facts involved in a specific matter, including all potential mitigating and aggravating circumstances.

OGC transmits the proposed conciliation agreement to a respondent and invites the respondent to engage in negotiation concerning the proposed agreement. The respondent should reply to OGC's invitation to enter into such negotiations within seven days of the receipt of the offer.

Upon agreeing to enter into conciliation, the respondent may sign the conciliation agreement and return it to OGC, or the respondent may make a counter-offer. Negotiations may take place in writing, by telephone, in person, or any combination of these approaches. A respondent may ask OGC to present a specific counter-offer to the Commission. Respondents who claim an inability to pay an appropriate civil penalty may be asked to provide documentation as to their financial condition.

Neither the Act nor the Commission's regulations specify a time frame for pre-probable cause conciliation, but OGC attempts to limit it to no more than 60 days. Because the Commission's ability to seek civil penalties in federal district court is subject to a five-year statute of limitation, *see* 28 U.S.C. § 2462, OGC may request at any stage in the enforcement process that the respondent agree to toll the statute of limitations, including during the pendency of the pre-probable cause conciliation process.

Conciliation agreements in closed matters are available on the Commission's website for review and comparison. *See* http://www.fec.gov/em/em.shtml.

J. General Counsel's Brief

After the investigation is completed and/or no pre-probable cause conciliation agreement is reached, if the General Counsel intends to recommend that the Commission find probable cause to believe a violation has occurred or is about to occur, OGC notifies the respondent of the intent to make such a recommendation and includes with the notification a brief stating the General Counsel's position on the factual and legal issues of the matter. The respondent is sent a copy of the brief and has at least 15 days to file a reply brief explaining the respondent's position.

K. Probable Cause Hearing

Respondents are also entitled to request a hearing to present oral arguments directly to the Commission prior to any decision on whether there is probable cause to believe that a violation of the Act or the Commission's regulations has or is about to occur. Such a hearing may be requested by the respondent in his or her reply brief. The request for a

hearing is optional, and the respondent's decision on whether to request one will not influence the Commission's decision regarding a probable cause finding.

The respondent must include a written request for a hearing as a part of the respondent's brief filed with the Commission Secretary under 11 CFR 111.16(c). Each request for a hearing must state with specificity why the hearing is being requested and what issues the respondent expects to address.

The Commission will grant a request for an oral hearing if any two Commissioners approve the request. If the request is granted, a respondent who appears before the Commission may discuss any issues presented in its brief, including potential liability and the amount of any civil penalty.

Hearings are not open to the public. Respondents and their counsel are the only people from outside the Commission who may attend. Commissioners, the General Counsel and the Staff Director may ask questions relevant to the matter of the respondent or respondent's counsel, if respondent is represented, and may request that the respondent supplement the record within a set time. The Commissioners may also ask questions designed to elicit clarification from the General Counsel and the Staff Director.

A court reporter will transcribe the proceedings, and the respondent may purchase a copy of the transcript from the court reporter. The transcript of the hearings, with possible appropriate redactions, will be made public as part of the public record when a case is closed. The Commission determines the format and time allotted for each hearing at its discretion.

For more detailed information regarding the Commission's probable cause hearings, please refer to:

- Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007), at http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-21.pdf; and
- Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55443 (October 28, 2009), at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-24.pdf.

L. Vote on Alleged Violations (Probable Cause to Believe)

After reviewing the briefs of both the General Counsel and the respondent, the Commission votes on whether there is "probable cause to believe" that a violation has occurred or is about to occur. Four affirmative votes are required to make a finding of probable cause to believe. If the Commission does not find "probable cause to believe," the case is closed and the parties are notified. In complaint-generated matters where the Commission does not approve OGC's recommendation to find probable cause, the objecting Commissioners are required to issue a Statement of Reasons setting forth the basis for their rejection, which will appear on the public record and be provided to the complainant and the respondent(s).

If the Commission determines that there is "probable cause to believe" the law has been violated, it must attempt to conciliate with the respondent for at least 30 days, but not more than 90 days. If the Commission makes a probable cause finding in the 45-day period immediately preceding any election, then the Commission must attempt to conciliate a matter for a period of at least 15 days. See 2 U.S.C. § 437g(a)(4)(A).

In order to facilitate these discussions, a Commission-approved proposed conciliation agreement is sent to the respondent, forming the basis for settlement negotiations. The provisions included in a pre-probable cause conciliation agreement, described above, are generally also included in post-probable cause conciliation agreements.

If the Commission determines that there is probable cause to believe that knowing and willful violations occurred, it may refer such violations to the DOJ for possible criminal prosecution. 2 U.S.C. § 437g(a)(5)(C).

M. Resolution of MUR (Conciliation Agreement)

If the General Counsel and the respondent enter into a conciliation agreement, the written agreement becomes effective once it is approved by the affirmative vote of four Commissioners and signed by the respondent and the General Counsel. When the Commission approves a signed conciliation agreement, the Commission closes the matter, sends a copy of the signed agreement to the complainant and respondent, and puts documents on the public record. Civil penalty payment checks, which are made payable to the United States Treasury, are transferred from the Commission to the Treasury for deposit once the Commission approves a conciliation agreement.

Unless a respondent violates the conciliation agreement, the agreement is a complete bar to any further action by the Commission based on the same facts. If the respondent violates the conciliation agreement, however, the Commission can sue to enforce the terms of the conciliation agreement in federal district court.

N. Litigation

If post-probable cause conciliation does not result in an agreement, OGC may recommend to the Commission that it authorize a civil action in federal court. The Commission may only authorize the filing of a civil action by an affirmative vote of at least four members.

If the Commission provides such authorization, the matter is transferred from OGC's Enforcement Division to its Litigation Division, which represents the Commission in all litigation. Contact information for relevant staff in the Litigation Division is provided in the letter informing respondents that suit has been authorized.

If the Commission gives such authorization, the Commission will file suit in the District Court of the United States for the district in which the person against whom such action is

being brought is found, resides, or transacts business. 2 U.S.C. § 437g(a)(6)(A). The proceedings are then governed by the Federal Rules of Civil Procedure and the local rules of the district court.

The Commission may seek a variety of remedies, including a civil penalty that meets the appropriate statutory guidelines as set forth in 2 U.S.C. § 437g(a)(6). The federal district court will review the facts of the matter *de novo*, which means that the court will not rely exclusively on the administrative record but also on fresh fact discovery by the parties, and will review the facts anew. *See, e.g.*, American Fed'n of Labor & Congress of Indus. Orgs. v. F.E.C., 177 F. Supp.2d 48, 63 (D.D.C. 2001).

O. Complainant's Recourse

If a complainant disagrees with the Commission's dismissal of a complaint, or any allegations contain therein, he or she may file a petition in the U.S. District Court for the District of Columbia. This petition must be filed within 60 days after the date of the dismissal. 2 U.S.C. § 437g(a)(8).

In addition, if 120 days have passed since the filing of a complaint, and the Commission has not yet acted on the complaint, the complainant may file suit in district court. 2 U.S.C. § 437g(a)(8)(A). As discussed above, however, the Commission may be taking action on the allegations (e.g., finding reason to believe and conducting an investigation) that it may not disclose to the public (including the complainant) until the conclusion of the matter under 2 U.S.C. § 437g(a)(12).

In any case brought against the Commission for dismissing or failing to act on a complaint, a court may declare that the Commission acted contrary to law and direct the Commission to conform to that declaration. If the Commission fails to act on the court's order within 30 days, complainants may bring a civil action under their own name to remedy the alleged violation. 2 U.S.C. § 437g(a)(8)(C).

P. Confidentiality

To protect the interests of those involved in a complaint, the law requires that any Commission action on a MUR be kept strictly confidential until the case is resolved. These provisions do not, however, prevent a complainant or respondent from disclosing the substance of the complaint itself or the response to that complaint or from engaging in conduct that leads to the publication of information contained in the complaint.

Q. Public Disclosure Upon Termination of an Enforcement Matter

Because the public has the right to know the outcome of any enforcement proceeding, a redacted file is made available to the public in the Press Office and the Office of Public Records within 30 days after the parties involved have been notified that the entire matter has been closed. Complaints and responses are placed on the public record, though in some cases, sensitive or privileged information such as personal phone numbers or

financial information is redacted. Closed enforcement files are also available for review at the Enforcement Query System found on the Commission's web site at http://eqs.nictusa.com/eqs/searcheqs**Error! Hyperlink reference not valid.**.

R. Overview of Stages and Applicable Timeframes

Stage	Number of Days
Complaint Received	n/a
Complaint Notification	5 Days
Response to Complaint	15 Days
Reason to Believe Finding	n/a
Investigation	n/a
Pre-Probable Cause Conciliation	60 Days*
General Counsel's Brief	n/a
Response to General Counsel's Brief	15 Days
Probable Cause to Believe	n/a
Probable Cause to Believe Conciliation	30-90 Days
Disposition	n/a
Public Release of closed case file	30 Days
* Not set by statute or regulation.	

III. ALTERNATIVE DISPUTE RESOLUTION ("ADR")

The Commission established the Alternative Dispute Resolution Office ("ADRO") to promote compliance with the federal election laws by encouraging settlements outside of the general enforcement process. In most enforcement matters where a settlement is involved, the Commission has already voted to find reason to believe a violation has occurred or is about to occur. In ADR, however, a settlement is generally reached prior to any finding by the Commission. ADR tends to place greater emphasis on remedial measures, such as hiring compliance specialists or having persons responsible for FEC disclosure attending Commission educational conferences.

ADR is an option extended only in appropriate matters based on criteria approved by the Commission. Once a matter is deemed suitable for ADR, the respondent will receive a letter from the ADRO asking for a commitment, in writing, to the terms for participation in ADR, which include (1) engaging in the ADR process; (2) setting aside the statute of limitations while the complaint or referral is pending in ADRO; and (3) participating in bilateral negotiations. The respondent should respond to the letter within 15 business days of receipt; otherwise, the matter may be dropped from further consideration for ADR and sent to OGC for further processing. After the respondent provides this information (which involves completing a form enclosed with ADRO's notification letter) and any additional information relevant to the matter, ADRO will contact the respondent or respondent's counsel to discuss mutually acceptable dates and times for engaging in bilateral negotiations.

If the respondent and ADRO are able to reach a mutually acceptable settlement agreement, ADRO presents a signed agreement to Commission for approval. All ADR settlements are placed on the public record. They do not serve as precedents for subsequent enforcement actions. If the respondent and ADRO are unable to reach a settlement during bilateral negotiations, the case may be sent to OGC for enforcement processing.

For more information regarding ADR, please see http://www.fec.gov/pages/brochures/adr.shtml.

IV. ADMINISTRATIVE FINE PROCESS

Civil fines for violations by registered political committees involving (1) failure to file reports on time, (2) failure to file reports at all, and (3) failure to file 48-hour notices of contributions are assessed through the Administrative Fine process. 2 U.S.C. § 437g(a)(4)(C); 11 CFR 111.30 – 111.46.

Under the administrative fine regulations, if the Commission finds reason to believe that a committee violated the law, the Commission sends a letter to the committee containing the factual and legal basis of its finding and the amount of the proposed fine. Fine schedules are published in the administrative fine regulations and all fines are calculated using the formulas in these schedules. 11 CFR 111.43, 111.44. The committee has 40 days from the date of the reason to believe finding to (1) pay the proposed fine or (2) challenge the RTB finding and/or fine.

Unlike enforcement matters that are handled through OGC or ADRO, the penalties assessed through the Administrative Fine Program are not subject to settlement negotiations. So there are no settlement agreements approved by the Commission as typically occurs when a respondent is on the OGC or ADR enforcement track.

If the committee pays the proposed fine, it sends the payment and remittance form (provided in the Commission's RTB letter) to the FEC following the instructions in the letter. Upon receipt of payment, the Commission makes a final determination, assesses the appropriate fine, and sends the committee a final determination letter.

If the committee does not pay the proposed fine or submit a challenge, the Commission makes a final determination, assesses the appropriate fine, and sends the committee a final determination letter.

If the committee challenges the RTB finding and/or the fine, it must submit a written response to the Office of Administrative Review ("OAR"). The challenge must include the reason why the committee is challenging the RTB finding and/or fine, along with supporting documentation. The FEC only considers challenges that are based on the following:

- A factual or legal error in the RTB finding;

- A miscalculation of the RTB fine by the FEC; or
- A demonstrated use of best efforts to file in a timely manner but being prevented from filing by reasonably unforeseen circumstances that were beyond the committee's control.

The RTB letter includes examples of circumstances that are considered reasonably unforeseen and beyond the committee's control, as well as examples that are not considered reasonably unforeseen and beyond the committee's control.

The committee's challenge is reviewed by a reviewing officer who was not involved in the original RTB finding. After review of the challenge and any information provided by staff, the reviewing officer makes a recommendation to the Commission and sends a copy of the recommendation to the committee. The committee has 10 days to respond in writing to the recommendation. The Commission then either (1) makes a final determination that a violation occurred and upholds the RTB fine; (2) determines that no violation occurred because the RTB finding was based on a factual error or the committee used best efforts to file on time; (3) terminates its proceedings; or (4) makes a final determination that a violation occurred and modifies the fine.

OAR will notify the committee in writing of the Commission's decision. If the letter notifies the committee that the Commission has made a final determination that a violation occurred, the committee has 30 days from its receipt of such "final determination letter" to (1) pay the assessed fine or (2) file suit in the U.S. District Court where the committee or treasurer resides or transacts business.

If the committee pays the fine, it sends the payment and remittance form (provided in the notification letter) to the FEC following the instructions in the letter. If the committee chooses to appeal the final determination, it should file suit within the 30-day timeframe in the U.S. District Court in which it or the treasurer reside or transact business. The failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of the committee's right to present that argument in the court petition.

If the committee fails to pay the fine or seek judicial review, the unpaid fine is treated as a debt under the Debt Collection Improvement Act. The Commission will transfer the unpaid fine to the Department of the Treasury for collection.

For more information about the Administrative Fine Program, including a fine calculator and examples of how to calculate a fine, please see http://www.fec.gov/af/af.shtml.

Approved by the Commission 12/17/09

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 1 8 2009

Mr. Michael B. Trister, Esq.
Lichtman, Trister & Rose
1666 Connecticut Ave, NW
Suite 500
Washington, DC 20009

RE: MUR 6159
Alabama Education Association,
National Education Association, and
The NEA Fund for Children and
Public Education

Dear Mr. Trister:

On January 23, 2009, the Federal Election Commission notified your clients, Alabama Education Association, National Education Association, and The NEA Fund for Children and Public Education, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on December 3, 2009, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

If you have any questions, please contact April J. Sands, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Sidney Roeke

Sidney Roeke
Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR 6159

RESPONDENTS: Baldwin County Education Association
Saadia Hunter, BCEA President
Alabama Education Association
National Education Association
National Education Association Fund for Children and Public Education

I. INTRODUCTION

The complaint in MUR 6159 makes four basic allegations: first, three affiliated labor organizations solicited involuntary contributions for their separated segregated fund during the 2008 election cycle. Second, an agent of the labor organizations failed to inform the two individual complainants of the political purposes of the fund and of their right to refuse to contribute without reprisal at the time of solicitation. Third, one of the labor organizations used its treasury funds to make contributions. Fourth, three respondents made, and one respondent accepted, contributions in the name of others. Because of the material conflicts between the parties' declarations and affidavits, the small amount at issue, and the gaps in the factual record, the Commission dismisses the allegations and closes the file.

II. FACTUAL SUMMARY

The National Education Association ("NEA") is a nationwide labor organization with more than 3.2 million members, the majority of whom are employed by public school districts, colleges, and universities. AEA/NEA/NEA Fund Response at 1. The National Education Association Fund for Children and Public Education ("NEA

Fund") is its federally registered SSF. *Id.* The Alabama Education Association ("AEA") is the NEA's state affiliate in Alabama. *Id.* The Baldwin County Education Association ("BCEA") is a local union that represents teachers employed by the Baldwin County (Alabama) Public Schools, and it is an NEA county affiliate in Alabama. BCEA Response at 1. *Id.* Local, state, or national chapters of unions are affiliated with each other and may serve as collecting agents for the national organization's SSF. 11 C.F.R. §§ 100.5(g)(3)(ii) and (iii), 110.3(a)(2)(iii), 102.6(b)(1)(ii) and (iii). Therefore, BCEA, AEA, and NEA could all serve as collecting agents for NEA Fund. Saadia Hunter was the President of BCEA at the time the events relevant to the complaint occurred. AEA/NEA/NEA Fund Response at 1. As its president, Ms. Hunter was an agent for BCEA; therefore, she could solicit on its behalf for contributions to the NEA Fund.

The complainants are National Right to Work Legal Defense and Education Foundation, Inc., and Claire Waites and Jeanne Fox, two members of all three affiliated labor organizations. Complaint at Paragraphs 1-3. Ms. Hunter, Dr. Fox, and Ms. Waites provided declarations or affidavits, as did Tiffeny Howard and Kim Williams, two members of the BCEA who also attended the NEA convention as delegates and claim to have witnessed some of the events in question. The complaint's allegations relate to events at the NEA's June 30 – July 2, 2008, national convention in Washington D.C., which Fox, Waites, Hunter, Williams, and Howard attended as delegates. The NEA refers to this convention as its Representative Assembly ("RA"). Complaint at Paragraph 9. Prior to the RA, the BCEA approved a budget that included funds to pay costs for their delegates to attend the NEA RA, including travel, hotel, meals, and incidentals.

BCEA Response at 1-2. Ms. Hunter was responsible for bringing with her to the convention a portion of the per person travel allocation balance for the delegates.

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III. ANALYSIS

Based on their allegation that "BCEA included in the expense reimbursements for its delegates to the NEA RA an amount to cover the delegates' contributions" to the NEA Fund, the complainants contend that Ms. Hunter used union money to submit the contributions on behalf of Ms. Fox and Ms. Waites, in purported violation of 2 U.S.C. § 441b(a), which prohibits labor unions from making a contribution or an expenditure in connection with any election for federal office. Complaint at Paragraph 23. All parties agree that Ms. Hunter physically submitted the contributions of Jeanne Fox and Claire Waites to the NEA Fund using the money Ms. Hunter was holding on behalf of these two BCEA delegates, although there is significant disagreement among the parties over whether Dr. Fox gave Ms. Hunter authority to do so.

The Act provides that no person shall make a contribution in the name of another person or knowingly permit his or her name to be used to effect such a contribution, and that no person shall knowingly accept a contribution made by one person in the name of another person. *See* 2 U.S.C. § 441f. The Commission's regulations seek to prevent deception or the attempt to disguise the true source of money contributed and provide some guidance as to the types of activities the Commission regards as violations. *See* 11 C.F.R. § 110.4(b)(2)(i)-(ii). That type of activity does not appear to be at issue here.

There is no dispute that the Alabama State Captain, when receiving the contributions from Ms. Hunter, knew that the contributions were, in fact, for Ms. Waites, Dr. Fox, Ms. Howard, and Ms. Hunter. There is also no dispute that an AEA representative was aware that Ms. Waites wanted her contribution returned and that it

was not returned by the AEA. Waites Affidavit at Paragraph 13; Hunter Declaration at Paragraph 20. The total amount of the contribution submitted on behalf of Ms. Waites and not refunded is $100. There is no information that Dr. Fox requested a refund of her contribution.

In order to ensure that contributions solicited for a separate segregated fund are voluntary, AEA, as an affiliate and potential collecting agent for the NEA Fund, had a responsibility to inform its members of the political purposes of the fund, that contributions were voluntary, that making a contribution was not a condition of employment nor membership in the Association, that members had the right to refuse to make any contribution, and that the labor organization would not favor or disadvantage anyone by reason of the amount of the contribution or the failure to contribute. *See* 2 U.S.C. §§ 441b(b)(3)(B) and (C) and 11 C.F.R. §§114.5(a)(3) and (4).

According to the complaint, Ms. Hunter had already submitted the contributions to the NEA Fund by the time Ms. Waites arrived. Complaint at Paragraph 11. Therefore, it is not apparent how or when any alleged solicitation to Ms. Waites by Ms. Hunter or the AEA, as potential collecting agents of the NEA Fund, could have taken place, or when the requirements of 2 U.S.C. §§ 441b(b)(3)(B) and (C) and 11 C.F.R. §§ 114.5(a)(3) and (4) could have been met. With respect to Dr. Fox's contribution, it is unclear whether the AEA State Captain, when making the solicitation on behalf of the NEA Fund, informed the delegates present of the political purposes of the fund at the time of the solicitation pursuant to 2 U.S.C. § 441b(b)(3)(B) and adhered to the requirements of 2 U.S.C. § 441b(b)(3)(C) and 11 C.F.R. §§ 114.5(a)(3) and (4). Also, it

is unclear whether Ms. Hunter solicited Dr. Fox but, if she did, it appears that Ms. Hunter did not inform Dr. Fox of her right to refuse to contribute without reprisal.

In light of the small amount at issue, the inconsistencies and gaps in the factual record, and in furtherance of the Commission's resources relative to other matters, the Commission exercises its prosecutorial discretion and dismisses the allegations that: 1) BCEA violated 2 U.S.C. § 441b(a); 2) Saadia Hunter, BCEA, AEA or the NEA Fund violated 2 U.S.C. § 441b(b)(3)(B) by failing to inform Dr. Fox and Ms. Waites of the political purposes of the NEA Fund at the time of the solicitation; 3) Saadia Hunter, BCEA, or the NEA Fund violated 2 U.S.C. § 441b(b)(3)(C) by failing to inform Dr. Fox and Ms. Waites at the time of the solicitation of their right to refuse to contribute without any reprisal; 4) BCEA, Saadia Hunter or the NEA Fund violated 2 U.S.C. § 441f; and 5) AEA violated 2 U.S.C. § 441f. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 18 2009

Mr. James Lamb, Esq.
Sandler, Reiff & Young, P.C.
300 M Street, S.E.
Suite 1102
Washington, DC 20463

RE: MUR 6159
Baldwin County Education
Association, Saadia Hunter as
President

Dear Mr. Lamb:

On January 23, 2009 the Federal Election Commission notified your clients, the Baldwin County Education Association ("BCEA") and Saadia Hunter, as president, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on December 3, 2009, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

If you have any questions, please contact April J. Sands, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Sidney Rocke
Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR 6159

RESPONDENTS: Baldwin County Education Association
Saadia Hunter, BCEA President
Alabama Education Association
National Education Association
National Education Association Fund for Children and Public Education

I. INTRODUCTION

The complaint in MUR 6159 makes four basic allegations: first, three affiliated labor organizations solicited involuntary contributions for their separated segregated fund during the 2008 election cycle. Second, an agent of the labor organizations failed to inform the two individual complainants of the political purposes of the fund and of their right to refuse to contribute without reprisal at the time of solicitation. Third, one of the labor organizations used its treasury funds to make contributions. Fourth, three respondents made, and one respondent accepted, contributions in the name of others. Because of the material conflicts between the parties' declarations and affidavits, the small amount at issue, and the gaps in the factual record, the Commission dismisses the allegations and closes the file.

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 1 8 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Bruce N. Cameron
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road
Springfield, VA 22160

RE: MUR 6159

Dear Mr. Cameron:

This is in reference to the complaint you filed with the Federal Election Commission on January 13, 2009, on behalf of Claire Waites, Jeanne Fox, and Stefan H. Gleason concerning Baldwin County Education Association, Alabama Education Association, National Education Association, and The NEA Fund for Children and Public Education. Based on that complaint, on December 3, 2009, the Commission determined to dismiss this matter and closed the file. The Factual and Legal Analysis explaining the Commission's decision is enclosed.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

Thomasenia P. Duncan
General Counsel

BY: Sidney Rocke
Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR 6159

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Saadia Hunter, BCEA President
Alabama Education Association
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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 5, 2013

The Honorable Candace S. Miller
Chairman
Committee on House Administration
U.S. House of Representatives
1309 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Miller:

Thank you for your letter of January 22, 2013, which requests the current status and expected completion date of the Federal Election Commission's revised Enforcement Manual.

The Office of General Counsel recently completed a revised Enforcement Manual, which was circulated to the Commission on January 29. After its review, the Commission will consider the form and timing of a public release, consistent with the Commission's press statement of May 23, 2012, referenced in your letter.

We appreciate your interest in the Commission's enforcement process and hope this information is useful to you. We look forward to continued cooperation with you and Committee staff on this and other matters within our jurisdiction. Should you or your staff wish to communicate further, please do not hesitate to contact me directly at (202) 694-1035, our General Counsel Anthony Herman at (202) 694-1510, or our Staff Director D. Alec Palmer at (202) 694-1007.

On behalf of the Commission,

Ellen L. Weintraub

Ellen L. Weintraub
Chair

Cc: The Honorable Robert A. Brady
Ranking Member
Committee on House Administration

Hon. Caroline C. Hunter
Hon. Donald E. McGahn II
Hon. Matthew S. Petersen
Hon. Steven T. Walther
Mr. Anthony Herman, General Counsel
Mr. D. Alec Palmer, Staff Director

FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 31, 2012

Hon. Gregg Harper
Chairman, Subcommittee on Elections
Committee on House Administration
1309 Longworth House Office Building
Washington, DC 20515-6157

Re: *Carey v. FEC*, No. 11-259 (RMC) (D.D.C.)

Dear Chairman Harper:

This responds, on behalf of Commissioner Bauerly and myself, to your August 17, 2012 letter regarding the recent award of attorneys' fees in the *Carey* litigation.

As we consider our votes on Advisory Opinion Requests and our position in litigation matters involving the FEC, we are mindful of our core responsibility: to enforce the provisions of law that Congress has enacted and given the Commission authority to administer. At the same time, and as part of that responsibility, we also take very seriously our obligation to the taxpayers to take legal positions that will minimize the risk of attorneys' fees awards. In our view, the *Carey* case involved an attempt to strike down an application of the Federal Election Campaign Act ("FECA" or "the Act") that had not been invalidated by the courts. We thus believed at the time – and continue to believe – that we acted reasonably and that the Office of General Counsel was required to present the strongest possible case in defense of the statute. Nevertheless, once we received a contrary decision from the district court, we agreed that the agency's lawyers should move quickly to end the litigation and thereby minimize the Commission's exposure to an award of attorneys' fees.

By way of background, this case involved the National Defense Political Action Committee ("NDPAC"), a political committee that makes both contributions and independent expenditures. It sought an advisory opinion that would have allowed it to set up and control two separate bank accounts: one to fund independent expenditures with unlimited contributions (so-called "soft" money) and another that would be used to fund direct contributions to candidates with funds subject to the limits in the FECA (so-called "hard" money). Commissioner Bauerly and I voted to deny that advisory opinion request in large part based on the Supreme Court's

decision in *California Medical Association v. FEC*, 453 U.S. 182 (1981) ("*Cal. Med.*"), which upheld the Act's limits on contributions to political committees that make both contributions and expenditures. (Commissioner Walther was absent and did not vote.) In our view, the decisions in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), and *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), did not compel a contrary result.

We respectfully disagree with our three colleagues that there was binding precedent on the issue presented by NDPAC's request. *SpeechNow* – unlike NDPAC – involved a group that made only independent expenditures. *EMILY's List* primarily involved a challenge to a set of Commission *regulations* – not to any provision of the Act – governing the allocation of funds for various purposes. In contrast, NDPAC's request raised the question of whether the *statute's* contribution limits were constitutional as applied to NDPAC. In our view, NDPAC's proposal to allow a single political committee both to make contributions with hard money and to use soft money to engage in unlimited independent spending expressly advocating the election or defeat of federal candidates – possibly the same candidates for or against whom the group was simultaneously making direct contributions – appeared to directly undermine and permit circumvention of the Act's contribution limits. In *Cal. Med.*, the Supreme Court upheld those same contribution limits as applied to CALPAC, a political committee that, like NDPAC, made both contributions and expenditures. Given our statutory duty to enforce the Act, in the absence of action by Congress or a definitive decision by a court, we believed (and continue to believe) that it was not our prerogative to disregard a provision of the law that had not been explicitly struck down.

After the Commission deadlocked on NDPAC's advisory opinion request, NDPAC and other plaintiffs sued the Commission. Because the possibility of this kind of deadlock is inherent in the Congressionally-designed structure of the Commission, if litigation is brought against the agency in such circumstances, the General Counsel is required to defend the position of the controlling group of Commissioners who denied the request. *Cf. FEC v. Nat'l Republican Senatorial Comm.*, 966 F.3d 1471, 1476 (D.C. Cir. 1992) (explaining that when the Commission deadlocks and a case is then brought under 2 U.S.C. § 437g(a)(8), the decision of the controlling group of Commissioners becomes the subject of judicial review).

When NDPAC sought a preliminary injunction, the district court disagreed with our analysis. On June 14, 2011, the court issued an order preliminarily enjoining the Commission from "enforc[ing] 2 U.S.C. §§ 441a(a)(1)(C) & 441a(a)(3) against Plaintiffs with regard to independent expenditures, as long as the National Defense Political Action Committee maintains separate bank accounts for its 'hard money' and 'soft money,' proportionally pays related administrative costs, and complies with the applicable monetary limits of 'hard money' contributions." Slip op. at 20-21. The opinion found that plaintiffs were likely to succeed on the merits of their First Amendment claims in light of recent precedent, including the D.C. Circuit's opinion in *EMILY's List*. The opinion did not, however, mention or discuss the Supreme Court's decision in *Cal. Med.*, on which our analysis relied.

Shortly after receiving this opinion from the court, the Commission (with our support) directed the General Counsel to try to reach a settlement with NDPAC. The Commission soon thereafter stipulated to a final judgment on the merits and declined to pursue further proceedings in the trial court or an appeal. In addition, the Commission also announced that it would adhere

to the terms of the stipulated judgment with respect to other similarly situated committees until such time as a final rulemaking is completed.

The plaintiffs then sought attorneys' fees, under the Equal Access to Justice Act, 28 U.S.C. § 2412, which are to be awarded unless the government can show that its position was "substantially justified." The court held, wrongly in our view, that our position was not. The district court essentially reiterated its reasoning from its preliminary injunction decision: that *EMILY's List* had held that political committees like NDPAC have a right to raise unlimited funds in a separate bank account to pay for independent expenditures. Like the ruling on the preliminary injunction, the court's opinion on the fee petition did not mention or discuss the Supreme Court's decision in *Cal. Med.* We respectfully disagree with the district court's decision, although we accept it.

In sum, we reached our decision because the underlying advisory opinion request had asked for relief from a statutory contribution limit that had been upheld by the Supreme Court and not directly struck down by any lower court. Even if we were mistaken in declining to grant NDPAC's request, we believe that our position was substantially justified and should not have given rise to an award of attorneys' fees. Mindful of the Commission's fee exposure, however, once the Commission received the district court's opinion on plaintiffs' request for a preliminary injunction, we joined with our colleagues to authorize counsel quickly to bring the case to a final conclusion on the merits. (We note that the vast majority of the fees incurred were for time plaintiffs' counsel billed *before* the final dispute over the fee award.) In taking all of these actions, we sought, as always, to carry out our statutory duties delegated by Congress in a manner consistent with our obligation to act as careful stewards of taxpayer dollars.

As we move forward, we will continue to do our best to vigorously and effectively enforce the statute Congress enacted and entrusted to our administration, consistent with Supreme Court and lower court precedents, and to protect the public fisc.

We would be happy to respond to any additional questions.

Very truly yours,

Ellen L. Weintraub

Ellen L. Weintraub
Vice Chair
Federal Election Commission

Cc: Hon. Charles A. Gonzalez
Ranking Member, Subcommittee on Elections
Committee on House Administration

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIR

August 30, 2012

The Honorable Gregg Harper
Chairman, Subcommittee on Elections
Committee on House Administration
1309 Longworth House Office Building
Washington, D.C. 20515-6157

Re: August 17, 2012 Inquiry about *Carey v. FEC*

Dear Chairman Harper,

I write to respond to your letter of August 17, 2012 regarding the Commission's litigation strategy in *Carey v. FEC*. In particular, you asked why the Commission took and pursued positions in that case, which resulted in the Commission's payment of nearly $124,000 in taxpayer funds to reimburse plaintiffs' attorneys' fees, and what steps the Commission is taking to ensure that future cases are not similarly litigated.

As you are aware, the genesis of the *Carey* litigation was an advisory opinion request filed by the National Defense PAC ("NDPAC") (Advisory Opinion 2010-20). The Commission considered two draft responses to that request, but was not able to obtain four affirmative votes to approve either one. My colleagues, Commissioners Donald McGahn and Matthew Petersen, and I supported a draft (Draft B), which concluded that, pursuant to the D.C. Circuit Court's decision in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), the requestor's proposed activity was lawful. Vice Chair Ellen Weintraub and Commissioner Cynthia Bauerly supported a draft (Revised Draft A), which concluded that the requestor's proposed activity was prohibited by the Federal Election Campaign Act (the "Act") and Commission regulations.[1]

Following the Commission's deadlock, NDPAC, along with Rear Adm. (Ret.) James J. Carey and Kelly S. Eustis, sued the Commission, seeking declaratory and injunctive relief regarding the Act's contribution limitations, as applied to fundraising for NDPAC's independent spending activities. Our Litigation Division defended the suit "consistent with the 'controlling group' of Commissioners who declined to vote for Draft B, which would have provided NDPAC the relief it [sought] in the lawsuit." Federal Election Commission's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 19, *Carey v. FEC*, Civ. No. 11-259-RMC (D. D.C. 2011); *cf. FEC v. National Republican Senatorial Comm.*, 966 F.3d 1471, 1476 (D.C. Cir. 1992) (explaining that when the Commission deadlocks and a case is then brought under

[1] Commissioner Steven Walther did not participate in the voting on this matter.

2 U.S.C. § 437g(a)(8), the decision of the controlling group of Commissioners becomes the subject of judicial review).

I was not in the "controlling group" of Commissioners, so I believe the person best suited to respond to the concerns outlined in your letter is my colleague, Vice Chair Weintraub, who was in that group. She will be more effective at explaining her opposition to Draft B, which informed the Commission's litigation strategy and positions in *Carey*.

I assure you, though, that my colleagues, Commissioners McGahn and Petersen, and I share your concerns about the Commission's experience in *Carey*. In my view, the best way to prevent this from happening again is for Commissioners to be mindful of and deferential to binding court decisions when considering advisory opinion requests. If this simple guiding principle is followed, advisory opinion requestors should not again have to unnecessarily file suit in Federal court to vindicate their First Amendment rights.

Upon Vice Chair Weintraub's response to your inquiry, I would be happy to write further on this issue to the extent it is necessary. Thank you for your consideration of these important issues.

Regards,

Caroline C. Hunter

Caroline C. Hunter
Chair, Federal Election Commission