This Federal Register notice provides detailed information concerning the FEC's request for comments and public hearing on agency policies and procedures.

**FEDERAL ELECTION COMMISSION**

**[Notice 2008–13]**

**Agency Procedures**

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of public hearing and request for public comments.

**SUMMARY:** The Federal Election Commission is announcing a public hearing on the policies and procedures of the Federal Election Commission including but not limited to, policy statements, advisory opinions, and public information, as well as various elements of the compliance and enforcement processes such as audits, matters under review, report analysis, administrative fines, and alternative dispute resolution. The Commission also seeks comment from the public on the procedures contained in the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et. seq.* (''FECA'' or ''the Act''), as well as the Commission's implementing regulations.

**DATES:** Comments must be received on or before January 5, 2009. A public hearing will be held on Wednesday, January 14, 2009, from 10 a.m. to 5 p.m. at the Federal Election Commission, 999 E Street, NW., 9th floor Hearing Room, Washington, DC 20463. Anyone seeking to testify at the hearing must file written comments by the due date and must include in the written comments a request to testify.

**ADDRESSES:** All comments must be in writing, must be addressed to Stephen Gura, Deputy Associate General Counsel, or Mark Shonkwiler, Assistant General Counsel, and must be submitted in either e-mail, facsimile, or paper copy form. Commenters are strongly encouraged to submit comments by e-mail to ensure timely receipt and consideration. E-mail comments must be sent to *agencypro2008@fec.gov*. If e-mail comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219–3923, with paper copy follow-up. Paper comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its Web site after the comment period ends.

**FOR FURTHER INFORMATION CONTACT:** Stephen Gura, Deputy Associate General Counsel, or Mark Shonkwiler, Assistant General Counsel, Office of General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:**

**Background and Hearing Goals**

The Commission is currently reviewing, and seeks public comment on, its policies, practices and procedures. The Commission will use the comments received to determine whether its policies, practices or procedures should be adjusted, and/or whether rulemaking in this area is advised. The Commission has made no decisions in this area, and may choose to take no action.

The Commission conducted a similar review of its enforcement procedures in 2003. *See Enforcement Procedures*, 68 FR 23311 (May 1, 2003). Comments filed in the 2003 review, as well as a transcript of the 2003 public hearing, are available on the Commission's Web site at *http://www.fec.gov/law/policy.shtml* (see bottom of page). Subsequent to that review, the Commission formally adopted several new policies, including a policy on deposition transcripts, a ''fast track'' policy for *sua sponte* matters, a policy clarifying treasurer liability, and an interim disclosure policy for closed enforcement and related files. *See Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations*, 68 FR 50688 (Aug. 22, 2003); *Statement of Policy Regarding Self Reporting of Campaign Finance Violations (Sua Sponte Submissions)*, 72 FR 16695 (April 5, 2007); Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 FR 3 (January 3, 2005); and *Statement of Policy Regarding the Disclosure of Closed Enforcement and Related Files*, 68 FR 70426 (Dec. 18, 2003). These policy statements and supporting documents are available on the Commission's Web site at *http://www.fec.gov/law/policy.shtml*. Additionally, in 2007 the Commission created a new procedure within the enforcement process that affords respondents the opportunity for an oral hearing before the Commission at the probable cause stage of a matter under review. *See Enforcement Procedural Rules for Probable Cause Hearings*, 72 FR 64919 (Nov. 19, 2007), available on the Commission's Web site at *http://www.fec.gov/law/cfr/eLcompilation/2007/notice_2007-21.pdf*. The Commission has also adopted several internal procedural changes, which are mentioned in this notice.

The FECA grants to 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, referrals from the Reports Analysis and Audit Divisions, referrals from other agencies, and *sua sponte* submissions. Enforcement matters are generally handled by the Office of General Counsel pursuant to the procedures set forth in 2 U.S.C. 437g.

During the administrative enforcement process, the Office of General Counsel reviews and investigates enforcement matters, and makes recommendations to the Commission regarding the disposition of matters. Stages of the enforcement process include Reason to Believe (RTB), probable cause, and conciliation. A full description of the Commission's administrative enforcement process is available on the Commission's Web site at *http://www.fec.gov/pages/brochures/complain.shtml*.

The Commission brings *de novo* enforcement suits in U.S. District Courts when matters are not satisfactorily resolved through the administrative enforcement process; it also initiates legal actions to enforce administrative subpoenas during the investigative process.

The Commission also enforces the FECA through its Alternative Dispute Resolution (ADR) and Administrative Fine programs. The ADR program was established at the Commission in 2000 to promote compliance with the law by encouraging settlements outside the traditional enforcement and litigation processes. ADR results in an expeditious resolution that allows participants in the program to have an active role in shaping the settlement, and, as a result, reducing costs for respondents and the Commission. The Interest-based negotiations focus the process on respondents' future compliance with the FECA. A full description of the Commission's ADR program is available on the Commission's Web site at *http://www.fec.gov/pages/brochures/adr.shtml*.

The Administrative Fine Program was established by Congress with the intent of streamlining the enforcement process for violations involving late and non-filing of reports. The Commission believed that the addition of this authority (to assess fines for these violations subject to a reasonable appeal process) would introduce greater certainty to the regulated community about the consequences of noncompliance with the Act's filing requirements, lessen costs, and lead to efficiencies for all parties while maintaining an emphasis on the Act's disclosure requirements. Since its inception in 2000, the Commission has made adjustments to its fine schedules

and the list of acceptable defenses. A full description of the Commission's Administrative Fine program is available on the Commission's Web site at *http://www.fec.gov/pages/brochures/admin_fines.shtml*.

Additionally, the Commission administers the Act through a review of all disclosure reports that are filed with the FEC. These reports are reviewed by the Commission's Reports Analysis Division (RAD) for compliance with the Act and to ensure that the information reported is both accurate and complete. When review of a political committee's disclosure reports reveals that the reports appear not to have met the threshold requirements for substantial compliance with the requirements of the Act, the Commission will conduct an audit of the committee to determine whether the committee complied with the Act's limitations, prohibitions and disclosure requirements. 2 U.S.C. 438(b). In addition, the Commission is required by law to audit presidential campaigns and convention committees that accept public funds.

Finally, the Commission issues additional guidance through advisory opinions, policy statements and other guidelines.

In the course of addressing its administrative responsibilities, the Commission periodically reviews its programs. The purpose of this Notice of Public Hearing is to reexamine the Commission's practices and procedures, some of which have been in place since the Commission was founded, and to give the regulated community and representatives of the public an opportunity to bring before the Commission general comments and concerns about the agency's policies and procedures regarding compliance, enforcement, public disclosure, advisory opinions and any other matter.

The Commission requests those who submit comments to be cognizant of the fact that statutory requirements, such as confidentiality and privacy mandates, may be implicated by certain proposals. Thus, the Commission would appreciate if participants would specify in their written remarks whether their proposals are compatible with applicable statutes or would require legislative action.

The Commission specifically seeks comment on issues confronting counsel who practice before the Commission, complainants and respondents who directly interact with the FEC, treasurers, witnesses, other third parties, and the general public. The Commission seeks general comments on how the FEC's enforcement and other procedures have facilitated or hindered productive interaction with the agency. The Commission is not interested in complaints or compliments about individual FEC employees or matters, but it seeks input on structural, procedural and policy issues. The Commission also seeks comment about practices and procedures used by other civil law enforcement agencies when acting in an enforcement (*i.e.*, non-adjudicative) capacity. For example, do such agencies provide greater or lesser transparency? What opportunities exist for presenting or addressing issues, evidence, or potential claims that might be the basis of a subsequent adjudicative proceeding? The Commission is also interested in any studies, surveys, research or other empirical data that might support changes in its enforcement procedures.

**General Topics for Specific Comments**

The Commission welcomes input on any aspect of its policies and procedures. Among the topics on which the Commission will accept comment are those below. However, the list is not exhaustive and comments are encouraged on other issues as well.

*I. Enforcement Process*

A. Motions Before the Commission

Both complainants' and respondents' attorneys have occasionally submitted motions for the Commission's consideration, including motions to dismiss and reconsider. Although neither the FECA nor the Commission's regulations provide for consideration of such motions, and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* (''APA''), does not require that agencies entertain such motions in non-adjudicative proceedings, the Commission has reviewed these motions on a case-by-case basis. The Commission requests comments on whether its procedures for consideration of motions should be modified. Should the Commission entertain motions? If yes, what types of motions should be considered? What should be the time frame for consideration of motions generally? Should the motions be served on the Commission Secretary or the General Counsel? Should the movant be granted an oral hearing before the Commission? Should there be substantive or procedural requirements that must be met in order to trigger the Commission's review? Should the motions be considered even though this would extend the time that a MUR remains active? Should parties be required to toll the statute of limitations for periods in which motions are under consideration by the Commission?

B. Deposition and Document Production Practices

When Commission attorneys take a deponent's sworn testimony at an enforcement deposition authorized by section 437d(a)(4), only the deponent and his or her counsel may attend. Under historical practice, the deponent had the right to review and sign the transcript, but normally a deponent was not allowed to obtain a copy of, or take notes on, his or her own transcript until the investigation was complete, *i.e.,* after all depositions had been taken. On August 22, 2003, the Commission published its new deposition policy. *See Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations,* 68 FR 50688 (August 22, 2003), available on the Commission's Web site at *http://www.fec.gov/agendaJagendas2003/notice2003–15/fr68nl63p50688.pdf.* Under this policy, the Commission allows deponents in enforcement matters to obtain, upon request to the Office of General Counsel, a copy of the transcript of their own deposition unless, on a case-by-case basis, the General Counsel concludes and informs the Commission that it is necessary to the successful completion of the investigation to withhold the transcript until completion of the investigation.

If the General Counsel decides to recommend that the Commission find probable cause to believe a respondent has violated the Act, the Act requires that the General Counsel so notify the respondent, and provide a brief on the legal and factual issues in the case. The Act entitles respondents to submit, within 15 days, a brief stating their position on the factual and legal issues of the case. 2 U.S.C. 437g(a)(3). Although nothing in the FECA requires that documents or deposition transcripts be provided to respondents at this stage, respondents are generally provided, upon request, with the documents and depositions of other respondents and third party witnesses that are referred to in the General Counsel's brief. Respondents, however, may deem other information that the Commission does not disclose as valuable to the respondents' defense. Note that this practice can cause delay because, upon receiving these documents and depositions, respondents' counsel often seek an extension of time since counsel must submit the reply brief within 15 days of receiving the General Counsel's probable cause brief.

The Commission's practice in providing depositions and documents to respondents contrasts with the practice of some other civil law enforcement

agencies during the investigative stage of their proceedings, in which the only deposition transcript supplied to the respondent is the respondent's own deposition. Further, during the pendency of an investigation, section 6b of the APA, 5 U.S.C. 555(c), grants investigative agencies the right to deny the request of a witness for copies of transcripts of his or her own testimony based on ''good cause,'' in light of concerns that witnesses still to be examined might be coached. *Commercial Capital Corp.* v. *SEC,* 360 F.2d 856, 858 (7th Cir. 1966). On the other hand, it has been suggested the Commission's practice contrasts with procedural rights afforded in litigation matters under the Federal Rules of Civil Procedure, which give litigants the right to attend the depositions of all persons deposed in their case and obtain copies of all deposition transcripts.

The Commission seeks comment on whether counsel should have access to all documents prior to having to respond to a recommendation by the Office of General Counsel. Should deposition transcripts of the respondent, other respondents, and witnesses be released, and if so, when and to whom should they be released? Should respondents be allowed full access to the depositions of all other respondents, including those with the same and those with competing interests? At what point in the enforcement process should this occur? Would full access to the deposition transcripts of all other respondents increase the likelihood of a public disclosure in violation of 2 U.S.C. 437g(a)(12)? Would such release itself violate 2 U.S.C. 437g(a)(12)? If full access were to be granted prior to the probable cause stage, would it compromise the effectiveness of the Commission's investigations? Should respondents or respondent's counsel be allowed to attend depositions of other respondents or witnesses, including those with the same and those with competing interests? If so, under what circumstances? Again, would such access be consistent with 2 U.S.C. 437g(a)(12)?

Similarly, the Commission seeks comment on whether all relevant documents required to be disclosed in civil litigation pursuant to Federal Rule of Civil Procedure 26(a) should be provided with the probable cause brief. Is the Rule 26(a) model appropriate for a proceeding that is investigative, rather than adversarial? Would it be practical (or, in cases with multiple respondents, legal) to do so in cases involving voluminous records and multiple respondents? Who should bear the costs of copying documents and ordering deposition transcripts from court reporters? Would providing all such materials and allowing time for their review further delay the submission of responsive briefs? Would doing so compromise investigations? Would doing so compromise the Commission's ability to obtain and share information with other governmental agencies? Should this be done on a case-by-case basis? Would some standard other than Rule 26(a) of the Federal Rules of Civil Procedure provide a more workable standard?

The Commission seeks comment on these or other approaches to balancing its need to conduct effective investigations with the interests of respondents seeking to support their positions before the Commission.

C. Extensions of Time

Respondents have 15 days to respond to the General Counsel's probable cause brief. 2 U.S.C. 437g(a)(3). Although the Commission does not have any regulations addressing whether and under what circumstances an extension of this 15 day deadline is warranted, the Office of the General Counsel typically will grant an extension upon a showing of good cause. Should the Commission provide more explicit guidance regarding when an extension is warranted? If so, under what circumstances, if any, should extensions of time be granted to respondents to respond to the probable cause brief? Are there particular situations in which extensions of time should be denied? If extensions were granted, should they be contingent on respondents' agreements to toll the statute of limitations for the extension period?

D. Appearance Before the Commission

Under FECA, respondents are currently permitted to present their position through written submissions in response to the complaint and the General Counsel's probable cause brief, and generally they may do so at the RTB stage pursuant to Commission practice. The Commission also allows oral presentations prior to voting on a recommendation by the General Counsel to find probable cause. *See Enforcement Procedural Rules for Probable Cause Hearings,* 72 FR 64919 (Nov. 19, 2007), available on the Commission's Web site at *http://www.fec.gov/law/cfr/eLcompilation/2007/notice_2007-21.pdf.* Has the opportunity for oral presentation been helpful? Can the process be improved and, if so, how? Has the opportunity to appear in person before the Commission at the probable cause stage changed respondents' interest in conciliating at an earlier stage, and if so, how?

The Commission also seeks comment on whether respondents should be entitled to appear before the Commission, either *pro se* or through counsel, at other times such as when the Commission is considering motions (*see* I–A, above), audit reports that state violations of law, or prior to finding RTB. If so, should appearances be limited to certain types of hearings and cases? If so, what should be the limiting criteria? What should be the scope and form of the personal appearance? Should the Commission be permitted to draw an adverse inference if respondents decline to answer certain questions or do not fully answer them? Allowing counsel to appear would add an additional procedural right, but could also lengthen the enforcement process. How would this additional step be balanced with the timeliness of completing a MUR? Is the Commission justified in prolonging the process? Would this complicate the process or add unnecessary time constraints? Would it place respondents with limited resources, or those located far from Washington, at a comparative disadvantage, and if so, is this a valid reason to restrict personal appearances for all respondents? In cases involving multiple respondents, how would the Commission protect the confidentiality of other respondents also wishing to appear? The Commission would also benefit from hearing about whether other civil law enforcement agencies provide for personal appearances before agency decision-makers.

E. Releasing Documents or Filing Suit Before an Election

While an enforcement matter is pending, the matter remains confidential pursuant to 2 U.S.C. 437g(a)(4)(B). The Commission's regulation at 11 CFR 5.4 mandates that files be publicly released within 30 days of notification to the respondents that the matter is closed. Once an enforcement matter is closed, the Commission's practice is to publicly release documents related to the matter in the normal course of business, even if this occurs immediately prior to, or following, an election that may involve one of the respondents in the matter. Upon resolution of an enforcement matter, the Commission could not deny a Freedom of Information Act, 5 U.S.C. 552 *et. seq.,* request for disclosure of conciliation agreements or other dispositions simply because of the proximity of an upcoming election. Furthermore, the FECA provides for expedited conciliation immediately

prior to an election, which allows voters to consider a Commission determination that a campaign has not violated the FECA as alleged in a complaint, or alternatively, that a campaign has accepted responsibility for an election law violation. 2 U.S.C. 437g(a)(4)(A)(ii).

On the other hand, the Commission is sensitive to the fact that releasing documents, reports, or filing suit before an election, even when it occurs in the normal course of business, may influence election results. The Commission seeks comment on whether consideration of an upcoming election should or should not be considered when releasing documents. In particular, should the Commission adopt a policy of not releasing outcomes of cases for a specific period immediately preceding an election? If so, should that policy apply only to violations from a previous cycle? Would such a policy invite respondents to employ dilatory tactics for the apparent purpose of keeping information confidential until the election is over? Should the same considerations apply when the Commission has completed the administrative process and is prepared to file an enforcement action in federal court? What if the statute of limitations is due to run before or shortly after the election? Would the policy expose the Commission to criticism that it was withholding from voters information that it would normally make public precisely when that information is arguably of greatest interest to the electorate?

F. Timeliness

From the end of fiscal year 2003 to the end of fiscal year 2007 the Commission improved the overall processing time for Enforcement matters by 64%, while at the same time doubling the number of matters it closes on a yearly basis. Nonetheless, it has still been criticized in some quarters for lack of timeliness. Are there specific practices or procedures that the Commission could implement, consistent with the FECA and the APA, which could reduce the time it takes to process MURs? Does the agency have too few staff assigned to handle its workload? Can the Commission afford respondents with more procedural rights without sacrificing its goal of conducting timely investigations? Should respondents be afforded more process than is required by the FECA or the APA when the likely result will be longer proceedings? How should a respondent's timeliness in responding to discovery requests and subpoenas and orders, or the lack thereof, be weighed in the balance? Has any particular stage of the enforcement procedure been a source of timeliness problems?

G. Prioritization

The Commission has adopted an Enforcement Priority System to focus resources on cases that most warrant enforcement action. Should the Commission give lesser or greater priority to cases that require complex investigations and/or raise issues where there is little consensus about the application of the law—such as coordination, qualified non-profit corporation status, and express advocacy/issue ad analysis? Since cases involving these issues often involve large amounts of spending, and hence large potential violations, should these be the cases given high priority? If not, what cases should be given high priority?

H. Memorandum of Understanding With the Department of Justice

The Commission for years has divided responsibility for the enforcement of FECA with the Department of Justice. A 1977 Memorandum of Understanding contemplates that the Department of Justice should handle ''significant and substantial knowing and willful'' violations, and that where the Commission learns of a probable, significant and substantial violation, it will endeavor to expeditiously investigate the matter and refer it promptly to the Department upon a finding of probable cause. Is this still a valid demarcation of responsibility? Does anything in BCRA suggest a different approach would be appropriate?

I. Settlements and Penalties

Settlements and penalties are a sensitive and difficult area for both the Commission and the public. It is vitally important that settlements and penalties are equitable and appropriate. The Commission seeks comment on any systematic settlement or penalty issues that have arisen in the Commission's enforcement of the FECA. How can these issues be resolved? The Commission seeks comment on several issues in particular. Has the Commission's practice of approving proposed conciliation agreements as opening settlement offers been helpful in facilitating discussions? Have the civil penalties accurately reflected the underlying issues? Are admonishments allowed by the statute? Are admonishments a civil penalty? Is it appropriate to base penalties and disgorgements on extrapolations of violations in a sample to the entire universe of funds in question? Is the public aware of how the FEC calculates fines and other penalties? Should the Commission provide this information to the public? Specifically, do other agencies make public their methodology for determining the agency's opening offer in settlement negotiations, which is the purpose for which the Commission's guidelines are used? If the Commission were to publish those guidelines, would they be applicable without exception or with only a few specified exceptions? Should the Commission retain its discretion and flexibility to depart from its guidelines in instances when it feels that fairness or public policy requires another result? Would such guidelines minimize or even eliminate negotiations over what constitutes an appropriate penalty? Have fines and other penalties been consistent? How much consistency is required under the APA, equal protection and due process? Are there other directives or guidelines that should be publicly available, pertaining to enforcement procedures?

J. Designating Respondents in a Complaint

When the Commission last conducted a public review of its enforcement procedures in 2003, one of the topics that generated the most comments was with regard to designating respondents in a complaint. As a result of those comments, the Commission established two new practices. First, the Office of General Counsel modified how it identified respondents upon the initial review of an external complaint. Specifically, the Office of General Counsel used to notify any party mentioned in a complaint, or attachment to a complaint, where they could be inferred to have violated a provision of the FECA. Following the 2003 public review, the Office of General Counsel curtailed its notification practice to include only those parties that were either specifically identified by the complaint to have violated the FECA or were shown to have a clear nexus to the alleged violation in a complaint. Second, in instances where the Office of General Counsel identifies additional respondents at a later stage in the enforcement process, OGC now sends the potential respondent a ''pre-RTB letter'' notifying them of OGC's intention to recommend that the Commission find reason to believe a violation occurred, setting forth the factual basis for the recommendation, and inviting the potential respondent to respond to OGC prior to making its recommendation to the Commission. Have these two procedural changes

effectively addressed the due process issues raised in 2003 about designating respondents in a complaint? Are pre-RTB letters useful to the enforcement process? Are they consistent with the statute? Should OGC provide potential respondents with a copy of the complaint or, in *sua sponte* matters, a copy of the *sua sponte* submission? Would the provision of these documents to someone who has not yet been named as a respondent violate 2 U.S.C. 437g(a)(12)?

*II. Other Programs*

A. Alternative Dispute Resolution

Has the ADR program been helpful? If so, in what ways has the program been helpful? Should it be expanded? Should the referral policies the Commission currently uses be modified so that the ADR program can handle more cases? If so, what cases are most appropriate for ADR? Should a respondent be able to request participation in the ADR program?

What are the perceived advantages or disadvantages of the ADR process compared to the regular enforcement process? What can be done to ensure uniformity of treatment of respondents between the ADR program and the traditional enforcement process? Is the Commission doing an adequate job of ensuring that civil penalties agreed to in ADR are actually paid by respondents and that other agreed upon remedial actions (such as annual internal audits or attendance at an FEC conference) are completed?

Currently, in most instances penalties and other remedial actions are negotiated independently of the Office of General Counsel. What are the perceived advantages or disadvantages of the ADR negotiations being independent of the Office of General Counsel? If the ADR program were to negotiate in coordination with the Office of General Counsel, would that provide a disincentive for respondents to disclose confidential information for fear that the information would be available to the Office of General Counsel in the event that ADR does not result in a successful resolution of the matter?

What else can the Commission do to improve the ADR process?

B. Administrative Fines

Has the Administrative Fine program improved consistency of civil penalty amounts? Are the schedules of the administrative fines published in the Commission's regulations (11 CFR 111.43 and 111.44) useful?

What else can the Commission do to improve the Administrative Fine process?

C. Reports Analysis

All persons and entities who file disclosure reports with the Commission must interact with the RAD. All reports filed with the Commission are reviewed by RAD. The RAD will attempt to acquire information through a Request for Additional Information (RFAI) if an error, omission, need for additional clarification, or prohibited activity is discovered in the course of reviewing a report. Are the RFAI's clear and understandable? Do RFAI's provide sufficient time to respond? Should the times vary based on the nature of the request? Are RFAI's consistent in the information they seek? Some RFAI's seek information which is not required by the report. Is this practice consistent with the law?

If a potential violation is discovered and the committee fails to take corrective action or provide clarifying information to adequately address the issue, the committee may be referred for enforcement or audit. Has the Commission appeared to have been consistent in its approach to RAD referrals? What steps could the Commission take to increase transparency and improve the RAD referral procedure?

What else can the Commission do to improve the RAD's processes?

D. Audits

While presidential campaigns that accept matching funds are audited automatically, other committees are only audited based on Commission procedures that set audit priorities. The committee has the opportunity to respond confidentially to the Interim Audit Report/Preliminary Audit Report, and changes from the IAR/PAR in the Final Audit Report can result from information provided by the audited committee in that response. These final audit reports are made public. This process raises several questions upon which the Commission seeks comment. Is it sufficiently clear to the general public how the Commission decides to audit a particular committee? If not, should more information be made public? If it should, what information should be made public? Is it possible to release the specified information without providing committees a road map on how to violate the law just enough to avoid being audited? Does the selection of committees for audit have the appearance of being done in a neutral manner? What can be done to improve public confidence in the neutrality, fairness and relevancy of the audit selection process? What is the significance of an audit finding that a violation of law has occurred? Does such a finding in an audit report constitute ''enforcement?'' What is the public perception of such a finding? Does such a finding have immediate punitive and other adverse consequences for the committee, including candidate committees?

Are committees being given sufficient opportunity to be heard by the Commission, particularly prior to the release of audit reports reaching legal conclusions that the committee violated the law? If not, what is the best way to ensure that committees have appropriate and full due process before the Commission? Should audited committees be allowed to file a written brief in response to the audit report? Should audited committees be allowed to have a hearing before the Commission? Should this hearing be at the time of the interim audit report, the final audit report, or both? Please note as well that many of the questions raised in Part I.D., pertaining to appearances before the Commission in the enforcement process, apply as well to the question of appearances in audits.

What else can the Commission do to improve the audit process?

*III. Advisory Opinions and Policy Statements*

A. Advisory Opinions

Currently, advisory opinion requests are submitted in writing and posted on the Commission Web site for comment. Typically, one or more draft opinions are proposed and posted on the Web site for comment and the Commission adopts one of the draft opinions or an amended version of one of the drafts. As part of this process, should the requestor be permitted to appear before the Commission before or at the time the Commission considers a request? Should commenters get a similar opportunity? How would allowing requestors or commenters to appear before the Commission affect the statutory requirement that the Commission render an opinion within sixty days of a complete written request? If the Commission were to allow requestors to appear, should they be required to waive the sixty day time period? Given the statutory reference to ''written comments,'' would a legislative change be required to permit requestors or commenters to appear before the Commission?

Furthermore, have advisory opinion requests generally been resolved in a timely manner? Have requesters

experienced a time lag between the time they file a request with the Commission and when the request is deemed submitted for the purpose of beginning the 60-day clock? How can the Commission improve on rendering advisory opinions promptly?

What else can the Commission do to improve the advisory opinion process?

B. Policy Statements and Other Guidelines

In recent years the Commission has issued a number of policy statements, which are available on the Commission's Web site at *http://www.fec.gov/law/policy.shtml.* Have these statements helped increase the transparency of the Commission's practices and procedures? How can the transparency of the Commission's practices and procedures be improved? Are there substantive or procedural flaws in any of these policy statements that the Commission should address or revise? Should any of these policy statements be embodied in regulations to provide better clarity and access to the public? Are there additional policy statements that the Commission should consider issuing? If so, what Commission practices and procedures should be addressed in the policy statements? Should policy statements, directives and guidelines be placed on the Web site?

What other policy statements could the Commission issue that would be helpful to the public?

*IV. Other Issues*

As noted above, the Commission welcomes comments on other issues relevant to these enforcement policies and procedures, including any comments concerning how the FEC might increase the fairness, substantive and procedural due process, efficiency and effectiveness of the Commission.

On behalf of the Commission.

Dated: December 2, 2008.

**Donald F. McGahn II,**

*Chairman, Federal Election Commission.*

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