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January 5, 2009

Stephen Gura, Esq.
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Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Agency Procedures

Dear Mr. Gura:

On behalf of the Perkins Coie LLP Political Law Group, we write in response to the Commission's December 8, 2008, notice of public hearing and request for public comments. Our comments reflect our experience as practitioners over many years; we are not expressing the views of particular clients. We appreciate the opportunity to make our views known on the subject of the agency's procedures.

INTRODUCTION

We are pleased that the Commission has chosen to undertake a critical review of its current practices. Like other agencies, it has always been obliged to follow basic norms of reasoned decision-making in accordance with the law. *See, e.g., Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), *reh'g at* 76 F.3d 1234 (1996). But it also routinely – even necessarily – acts in matters of “constitutional significance”, *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), and it must be particularly attentive to the challenge presented by the growing complexity of the law for effective, cost-efficient compliance by candidates, political committees, and others engaged in political speech and association.

Because the Commission regulates core First Amendment activity – and not merely “fair dealings in commerce ... adequate corporate disclosures, or ... fair labor standards,”

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Machinists, 655 F.2d at 387 – those whom it regulates should enjoy robust procedural safeguards. They should be able to make reasonable decisions about compliance now, without fear of penalties and litigation costs later.

DISCUSSION

A. The Enforcement Process

The Federal Election Campaign Act implies, and the Commission has always assumed, that the civil enforcement process is an impartial exercise in reasoned agency decision-making. As an expert, independent agency, the Commission is supposed to reach decisions on the dispassionate advice of its general counsel, while affording respondents the opportunity to present facts and arguments at various stages of the process.

In our experience, however – and there are sometimes exceptions – the process is functionally adversarial. More often than not, on a close, controversial question, the respondent will vigorously assert its innocence; the general counsel will vigorously assert its culpability; and the Commission will have to sort the matter out.

The adversarial nature of the process lends itself poorly to a scheme in which respondents are expected to funnel their arguments to the Commission through the general counsel, as is now the case. At no point – even under the recently adopted procedures for oral hearing at the probable cause stage – is the Commission presented with an equal, direct exchange of opposing viewpoints, as a court sees in litigation. One need not discredit the professionalism and integrity of the Commission’s career lawyers to see how such a process might be deficient for the resolution of charged, complex questions, often with First Amendment implications.

We would respectfully submit that –

- Respondents should have the opportunity to communicate directly, formally and transparently with the Commission at all stages of the enforcement process. While limits on private or individual *ex parte* communication remain appropriate, there is simply no reason why a respondent should not be able to file a brief or memorandum in a matter, knowing that it will be read and reviewed by the trier of fact.
- At both the reason-to-believe and probable cause stages, respondents should have the opportunity to review and respond to any adverse course of action that the general counsel would urge upon the Commission.

- Respondents should have the opportunity to review and respond to the information on which the general counsel relies in making adverse recommendations. This includes, but is not limited to, being able to review deposition transcripts and documents produced through discovery.
- The general counsel should be expected to address and respond to legal arguments made by respondents at the reason-to-believe and probable cause stages. If the office disagrees with the respondents' arguments, then it should be expected to say so clearly, and to say why.
- The Commission should take pains to avoid "short-circuited" outcomes, which can occur from time to time under current processes. It should never find reason to believe that a violation occurred, without first giving the respondent the opportunity to respond to the underlying complaint. Nor should it admonish a respondent for a supposed violation, without first giving the respondent the opportunity to review and oppose the basis for admonishment.
- The Commission should be leery of using the enforcement process to "make law." Its efforts to propound and enforce an "electioneering message" standard in the 1990s were unsuccessful, with great resulting cost to the respondents who were burdened with opposing it in administrative and court litigation. *See, e.g., Colorado Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 613 (1996); *Clifton v. FEC*, 114 F.3d 1309, 1316 (1st Cir. 1997). Its more recent efforts to use a disclaimer case, *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995), as the basis to impose political committee status on unregistered nonprofit organizations, seems similarly flawed.

In its request for public comments, the Commission sought discussion of a number of particular aspects of the enforcement process:

With regard to **motions**, we have found these desirable, and often necessary, and favor expanded opportunities for their consideration. This is especially true when it comes to motions to vacate or reconsider. Thus, for example, when a court invalidates a Commission rule – as recently happened with the "Millionaire's Amendment" – or when the Commission later rejects the legal reasoning that led initially to an adverse finding, it would be appropriate for the Commission to vacate a finding that was based on the invalidated interpretation.

On depositions and document production practices, as indicated above, we favor granting respondents the opportunity to review and respond to evidence relied upon by the general counsel in propounding an adverse finding. In one recent case, for example, a respondent client sought a copy of a document for which it had allegedly paid. We were told no, although we were given the opportunity to inspect the document in the Commission's offices.

On extensions of time, our experience is that the Commission grants them generously at the initial complaint processing stage, somewhat less so at the reason-to-believe stage, and least of all at the probable cause stage. We have found that the process benefits from reciprocal comity between respondents' counsel and the general counsel on such matters. Especially at the probable cause stage, where matters are most highly charged and the issues most complex, the process benefits from the fullest possible presentation of information, and it is rare in our experience that the extensions requested, undoubtedly helpful to the presentation, would in any way inconvenience the agency or create untenable delays of consequence to the agency's fulfillment of its mission.

On appearances before the Commission, we have found probable cause hearings to be useful; they are now the only available means of direct dialogue with the Commission itself in the enforcement process. Similar opportunities at the reason-to-believe stage, or in the consideration of motions, would be useful, especially when complex legal issues are involved.

On pre-election sensitivity, the Commission should be guided to the greatest extent possible by the need to avoid distorting electoral outcomes. The Justice Department describes its own role as "prosecution, not intervention." See Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 9-10 (7th ed. 2007). The Commission, too, should continue to enforce and adhere to a policy whereby it "minimizes the likelihood that the investigation itself may become a factor in the election." *Id.* at 9.

On the Memorandum of Understanding with the Justice Department, the Bipartisan Campaign Reform Act of 2002 expanded the possibilities for criminal enforcement of the FECA. The Commission should consider that this expansion is apt to affect how respondents and witnesses will react to the administrative process, and especially to subpoenas for testimony. Also, there have been some recent instances where the simultaneous consideration of matters through the criminal and civil processes have

created confusion and affected respondent rights. A clear, renewed MOU would be helpful to bring clarity to the enforcement process.

On **settlements and penalties**, the manner by which the Commission reaches proposed civil penalties is impossible for outsiders to discern, and seems tethered to no fixed principle. When negotiating penalties in conciliation, respondents are repeatedly told that they are being given discounts, or that the Commission “cannot go lower.” And yet these assertions can never be verified, and indeed are occasionally contradicted by the resolution of other, similar matters.

There is actual law, outside the FECA, that exists to guide the calculation of penalties. *See FEC v. Furgatch*, 869 F.2d 1256 (9th Cir. 1989). When imposing penalties under the FECA, courts are supposed to consider: (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendants’ ability to pay; and (4) the necessity of vindicating the Commission’s authority. *See id.* at 1258. The Commission should consider including in each proposed conciliation agreement – or in a separate submission to the respondent for discussion – a clear indication of how the penalty proposed fits with these standards. This would serve the objective of efficiency, and it would be fairer than the opaque procedure now followed.

On **designation of respondents**, while the Commission’s recent, more careful review of this process has been effective, respondents still do not always enjoy so-called “pre-RTB” opportunities to respond to basic allegations, especially when the proposed finding is initiated internally by the Commission. As discussed above, a respondent should never face a reason-to-believe finding without having first had the opportunity to answer the allegations in question.

B. Other Programs

The Commission sought comment on its alternative dispute resolution, administrative fine, reports analysis and audit programs. Each program relates to the enforcement process to some degree, and thus implicates the same concerns discussed above. In no case should any program operate to curtail respondent rights in the enforcement process. One example is confidentiality. A respondent defending itself privately in a MUR should not see the same allegations surfaced publicly through the audit and reports analysis processes, which happens from time to time.

1. Audit

The audit and enforcement processes have become closely interconnected in practice. In recent years, the Commission has come to use audit findings as the basis for a reason-to-believe finding, and to adopt the final audit report as the factual and legal analysis while advancing a proposed conciliation agreement. There is no reason for the respondent to think that the audit findings have received any real, subsequent review. The Commission's past action provides the sole, apparent basis for its new one.

This might be appropriate, if the audit process involved the same safeguards as the enforcement process. But often, it does not. Our experience is that the audit process all too often results in faulting committees for having failed to comply with norms not clearly understood at the time; and it features, also too frequently, radical changes in findings and theories between the interim and final stages of the process.

The audit process offers only three opportunities for respondents to affect the outcome: fieldwork, the exit conference, and the interim report. We have seen some instances where the principal finding is developed even after the interim report has been provided for comment. In this case, the respondents' only chance to avert a hostile finding and later enforcement is to try and intervene before the final report is adopted. This is a poor process for a number of reasons. The Commission may not be closely engaged with the audit at that time. The respondents may not, in fact, have the opportunity to engage before the final report is adopted. And audits can involve a large number of complex issues, making the process burdensome for all involved.

The Commission should understand that the audit process is functionally a part of the enforcement process. And it should add the same sorts of safeguards to that process as it should to enforcement. An audited committee should be able to make arguments directly to the Commission. It should be able to have its representatives appear before the Commission before adoption of the final report. It should not be presented with new or radically different findings after presentation of the interim report, at least without a renewed opportunity to respond. And the audit process should not serve as the opportunity to "make new law." Committees that acted reasonably at the time should not face the possibility of paying penalties because their decisions are later second-guessed by the auditors.

2. ADR

With respect to the alternative dispute resolution program, we have found it to be an efficient way to resolve low-level matters, with an eye toward future committee compliance. In recent years, the Commission has seemed more inclined to view ADR in relation to the conventional enforcement process, especially in terms of penalties. The Commission should resist that temptation. If ADR is expected to impose the same sorts of penalties as in the regular enforcement process, or to seek penalties in all instances, then it will cease to be an efficient forum for resolving matters.

3. RAD

The purpose of the Reports Analysis Division should be to assist filers with accurate, complete disclosure. Yet, RAD has served with some frequency as an unreviewed forum to impose new and functionally binding norms on reporting committees. Committees will receive requests for additional information that fault reporting practices in which they have engaged for years, with no intervening change in the statute or rules. (Some recent examples include the specificity to be used in describing payments for consulting services, and the practice of reporting reimbursements made to individuals.) Moreover, in our experience, there is not always consistency in the advice RAD provides, even on the same particular question.

Such instances can be gravely consequential for reporting committees. Requests for additional information can trigger audit and enforcement, and can invite political attack and press scrutiny. The Commission should take steps toward greater standardization and transparency in the requirements asserted by RAD. For example, if RAD wishes to change substantive reporting requirements, then there ought to be a process for public review and comment.

C. Advisory Opinions and Policy Statements

The essential condition of the advisory opinion and policy statement processes is that they should not serve as vehicles to enforce new, binding norms on the regulated community. It remains true that rulemaking is not the preferred means of imposing new norms; it is the only means.

Often, the Commission sees requestors who use the AO process as an offensive weapon against political adversaries. They have no genuine intention of engaging in proposed

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conduct, but rather seek to advance the enforcement process against a political competitor. Still, from time to time, the Commission will consider and adopt opinions in response to such requests. The Commission should take special care to avoid prejudging pending enforcement actions through the AO process.

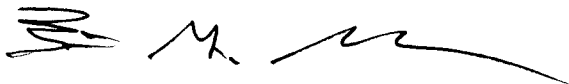
On the other hand, we also see instances from time to time where the Commission will initially decline to take up a valid advisory opinion request, on the pretext that it has not presented "a complete written request" under 2 U.S.C. 437f(a)(1). These decisions seem affected principally by the seeming difficulty of the request. The Commission and the regulated community would benefit from the publication of transparent criteria for the completeness of a request.

Finally, the most serious deliberations in the advisory opinion process often occur at the meeting itself, on drafts that have not been available for public comment. The Commission should give requestors and their counsel the opportunity to answer questions at the meetings at which requests are considered, to ensure that their views are fully known and available to the Commissioners.

We appreciate the opportunity to discuss these matters, and would like the opportunity for Bob Bauer, Marc Elias and Brian Svoboda to testify in open hearing.

Very truly yours,

PERKINS COIE LLP



Robert F. Bauer
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