

enforcement practices and procedures, many 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 general enforcement policy concerns before the Commission.

In inviting a constructive dialogue concerning its enforcement procedures, the Commission asks 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 would like to see addressed the issues that face counsel who practice before the Commission, complainants and respondents who directly interact with the FEC, witnesses, other third parties, and the general public. The Commission seeks general comments on how the FEC's enforcement procedures have been helpful or unhelpful in working through enforcement cases. The Commission is *not* interested in complaints or compliments about individual FEC employees, but seeks input on structural and policy issues. The Commission would also benefit from hearing about practices and procedures used by other civil law enforcement agencies when acting in a prosecutorial (*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 would also be 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 enforcement procedures. Among the topics on which the Commission will accept comment are those below. However, the list is not seen as exhaustive and comments are encouraged on other issues as well.

1. Designating Respondents in a Complaint

In addition to respondents named in the complaint, the Commission may designate additional respondents from information ascertained in the normal course of carrying out its supervisory responsibilities. 2 U.S.C. 437(a)(2); 11 CFR 111.8(a). As a simple example, a

complaint may allege that a campaign accepted an illegal contribution from Corporation X, but name only the campaign as a respondent. The Commission may add the alleged donor as a respondent. This has been done on a case-by-case basis. In some cases, the Commission has been criticized for designating too many additional respondents who may only have tangential interaction with the allegations in the complaint. At other times, the Commission has been criticized for failing to give early notice and an opportunity to address allegations that give rise to potential liability to persons who may be generated as respondents at the reason to believe stage or after the investigation is underway. The Commission seeks comments as to how the Commission designates respondents. In what circumstances and at what time is it appropriate to designate additional respondents? What criteria should the Commission apply?

2. Confidentiality Advisement

Under 2 U.S.C. 437g(a)(12), an investigation shall not be made public without the consent of the respondents. To ensure the confidentiality of investigations, including the protection of respondents from premature disclosure, Commission staff advises witnesses (usually orally, but sometimes in writing) of this statutory requirement. The Commission has received comments in the past from respondents that this advisement has been interpreted by some third party witnesses (such as vendors) as preventing them from speaking to respondents and thus interfering with the respondent's own investigation of the events in question. *See generally* MUR 4624 Coalition; Carol F. Lee, *The Federal Election Commission, The First Amendment, and Due Process*, 89 Yale L.J. 1199, 1209–1210 (1980). Should the Commission clarify its confidentiality advisement to address this issue? If so, how? What, if any, language should be included in an oral or written advisement to explicitly exclude communications with third party witnesses that are initiated by respondents? Is the Commission obliged to inform witnesses that they can speak to respondents? Is the Commission permitted to identify the respondents so as to convey such permission? Is there a better way in which to ensure confidentiality?

3. Motions Before the Commission

Both complainants' and respondents' attorneys have occasionally put forward motions for the Commission to consider,

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 nonadjudicative proceedings,¹ the Commission has reviewed these motions on a case-by-case basis. The Commission requests comments on whether procedures for consideration of these motions should be formalized in a rulemaking. If yes, what motions should be considered and what should the time frame be for consideration? Should there be a requirement that in order to trigger the Commission's review, the motion must contain genuinely new material that respondents had no opportunity to present previous to the subject findings? 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?

4. Deposition and Document Production Practices

When Commission attorneys take a respondent's sworn testimony at an enforcement deposition authorized by section 437d(a)(4), only the deponent and his or her counsel may attend. The respondent has the right to review and sign the transcript, but normally a respondent is not allowed to obtain a copy of, or take notes on, his or her own transcript until the investigation is complete, *i.e.* after all depositions have been taken.

If the General Counsel decides to recommend that the Commission find probable cause to believe that 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.

¹ Note, however, that unless otherwise prohibited by law, it is always within the agency's discretion to afford more procedure than that required by the APA. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).