



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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2006 NOV 28 P 1:01

November 27, 2006

MEMORANDUM

To: The Commission

From: Chairman Michael E. Toner *MT*
Commissioner Ellen L. Weintraub *ELW*

Re: Proposed Policy Statement Establishing a Pilot Program for Probable Cause Hearings

AGENDA ITEM
For Meeting of: 11-30-06

SUBMITTED LATE

Attached please find a proposed policy statement we are offering for publication in the Federal Register. The notice would seek comment on a proposal to establish hearings for respondents prior to the Commission's consideration of the General Counsel's probable cause recommendations.

FEDERAL ELECTION COMMISSION

11 CFR Part 111

2006 NOV 28 P 1: 01

[NOTICE 2006-]

**PROPOSED POLICY STATEMENT ESTABLISHING A PILOT PROGRAM
FOR PROBABLE CAUSE HEARINGS**

AGENCY: Federal Election Commission

ACTION: Draft Statement of Policy with Request for Comments

SUMMARY: The Commission is issuing a proposed policy statement to establish a pilot program offering probable cause hearings to respondents in enforcement actions pending before the Commission. The pilot program would allow respondents to request a hearing directly before the Commission prior to the Commission's consideration of the General Counsel's probable cause recommendation. The program would provide respondents with the opportunity to present directly arguments to the Commission and give the Commission an opportunity to ask relevant questions. The Commission requests comments on this proposed pilot program.

DATE: Comments must be submitted on or before January 5, 2007.

CONTACT: All comments should be addressed to Mark D. Shonkwiler, Assistant General Counsel, Enforcement Division, and must be

1 submitted in either electronic or written form. Electronic mail
2 comments should be sent to *probablecausehearings@fec.gov* and
3 must include the full name, electronic mail address and postal
4 service address of the commenter. Electronic mail comments that
5 do not contain the full name, electronic mail address and postal
6 service address of the commenter will not be considered. If the
7 electronic mail comments include an attachment, the attachment
8 must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc)
9 format. Faxed comments should be sent to (202) 219-3923, with
10 printed copy follow-up to ensure legibility. Written comments and
11 printed copies of faxed comments should be sent to the Federal
12 Election Commission, 999 E Street, N.W., Washington, D.C.
13 20463. Commenters are strongly encouraged to submit comments
14 electronically to ensure timely receipt and consideration. The
15 Commission will make every effort to post public comments on its
16 Web site within ten business days of the close of the comment
17 period.

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19 **FOR FURTHER INFORMATION CONTACT:** Mark D. Shonkwiler, Assistant
20 General Counsel, 999 E Street, N.W., Washington, D.C. 20463,
21 (202) 694-1650 or (800) 424-9530.
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1 **SUPPLEMENTARY**

2 **INFORMATION:** The Federal Election Commission is establishing a pilot program
3 to afford respondents in pending enforcement matters the opportunity to participate in
4 hearings before the Commission. During such a hearing, a respondent (generally
5 through counsel) may present oral arguments directly to the Commissioners, prior to any
6 Commission determination of whether to find probable cause to believe that respondents
7 violated the Federal Election Campaign Act.

8 On June 11, 2003, the Commission held a hearing concerning potential changes to
9 its enforcement procedures. The Commission received comments from those in the
10 regulated community, many of whom argued for increased transparency in Commission
11 procedures and expanded opportunities to contest allegations. The Commission designed
12 this pilot program with those concerns in mind. Proposed procedures for probable cause
13 hearings are outlined below. The Commission seeks comment on all aspects of this
14 proposal.

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17 **Opportunity to Request a Hearing**

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19 A hearing would take place before the Commission considers whether or not to
20 make a finding of “probable cause to believe” that a respondent has violated the Act or
21 Commission regulations.¹ A probable cause hearing may be requested by any respondent
22 who reaches the probable cause determination stage (see 11 CFR 111.16 – 111.17) and
23 submits a probable cause response brief to the Office of General Counsel. A cover letter
24 attached to the probable cause brief will inform the respondent of the opportunity to

¹ The Commission is appending to this statement a general description of its enforcement procedures (“Basic Commission Enforcement Procedure”). These procedures are prescribed by statute and regulation, and the Commission is not requesting comment on them at this time.

1 request an oral hearing before the Commission. Hearings are voluntary and no adverse
2 inference will be drawn by the Commission with respect to the request or waiver of such
3 a hearing.

4 The General Counsel must receive the written request for a hearing at the same
5 time that a respondent submits his or her timely response brief. 11 CFR 111.16(c).
6 Absent good cause, to be determined at the sole discretion of the Commission, late
7 requests will not be accepted. Respondents may make their request for a hearing by mail
8 (including private delivery services), hand delivery, facsimile or email. Respondents are
9 responsible for ensuring that their request is timely received.

10 The Commission will grant a request for an oral hearing when it concludes that a
11 hearing would help resolve significant or novel legal issues, or significant questions
12 about the application of the law to the facts. The Commission will grant a request for a
13 probable cause hearing if any two commissioners agree to hold a hearing.

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16 Hearing Procedures

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19 The purpose of the oral hearing is to provide a respondent an opportunity to
20 present his or her arguments in person to the Commissioners *before* the Commission
21 makes a determination that there is “probable cause to believe” that the respondent
22 violated the Act or Commission regulations. Consistent with current Commission
23 regulations, any respondent may be represented by counsel, at the respondent’s own
24 expense, or may appear *pro se* at any probable cause hearing. See 11 CFR 111.23.
25 Respondents will have the opportunity to present their arguments, and Commissioners,
the General Counsel, and the Staff Director will have the opportunity to pose questions.

1 Respondents may discuss any issues presented in the enforcement matter, including
2 potential liability and calculation of a civil penalty.

3 The Commission will determine the format and time allotted for each hearing at
4 its discretion. Among the factors that the Commission may consider are agency time
5 constraints, the complexity of the issues raised, the number of respondents involved, and
6 Commission interest. The Commission will determine the amount of time allocated for
7 each portion of the hearing, and these time limits may vary from hearing to hearing. The
8 Commission anticipates that most hearings will begin with a brief opening statement by
9 counsel, followed by questioning from the Commissioners, General Counsel, and Staff
10 Director. Hearings will normally conclude with the respondent's closing remarks.

11 The Commission will have transcripts made of the hearings. The transcripts will
12 become a part of the record for the enforcement matter and may be relied upon for
13 determinations made by the Commission. The Commission will make the transcripts
14 available to the respondent, who may, at his or her own expense, purchase copies of the
15 transcript. Respondents will have access to the transcripts from their own hearing, but
16 not transcripts of other co-respondents' separate hearings, unless co-respondents in the
17 same matter specifically provide written consent to the Commission granting access to
18 such transcript(s). Transcripts will be made public after the matter is closed in
19 accordance with Commission policies on disclosure.²

20 Third party witnesses or other co-respondents may not be called to testify at a
21 respondent's oral hearing. However, the Commission may request that supplementary
22 information be submitted after the probable cause hearing. The Commission discourages

² *Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files*, 68 FR 70426 (Dec. 18, 2003) is hereby amended to include disclosure of transcripts from probable cause hearings.

1 voluminous submissions. Supplementary information may not be submitted more than
2 ten days after the oral hearing, unless submitted in response to a Commission request that
3 imposes a different, Commission-approved deadline. Materials requested by the
4 Commission, and materials considered by the Commission in making its “probable cause
5 to believe” determination, may be made part of the record pursuant to the Commission’s
6 *Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files*, 68
7 FR 70426 (Dec. 18, 2003). Hearings are confidential and not open to the public.

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9 Cases Involving Multiple Respondents

10 In cases involving multiple respondents, the Commission will decide on a case-
11 by-case basis how to structure any hearing(s). Respondents are encouraged to advise the
12 Commission of their preferences. Such respondents may request joint hearings if each
13 participating respondent provides an unconditional waiver of confidentiality with respect
14 to other participating co-respondents and their counsel and a nondisclosure agreement.

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16 Scheduling of Hearings

17 The Commission will seek to hold the hearing in a timely manner after receiving
18 Respondents’ request for a hearing. The Commission will attempt to schedule the
19 hearings on a mutually acceptable date and time. However, if a respondent is unable to
20 accommodate the Commission’s schedule, the Commission may decline to hold a
21 hearing. The Commission reserves the right to reschedule any hearing. Where
22 necessary, the Commission reserves the right to request from a respondent an agreement

1 tolling any upcoming deadline, including any statutory deadline or other deadline found
2 in 11 CFR part 111.

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5 Pilot Program

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8 The pilot program will last eight months from the time that this policy is
9 approved. After eight months, a vote will be scheduled on whether the program should
10 continue. The program will remain in effect until that vote is taken. Four votes will be
11 required to extend or make permanent the program. The program will be terminated after
12 that vote if there are not four affirmative votes to make the program permanent or to
13 extend it for some time period. The Commission may terminate this pilot program prior
14 to the eighth month of the program if there are four affirmative votes for early
15 termination. If the pilot program is terminated, any previously requested hearings will
16 still be held.

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17 Conclusion

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20 The Commission urges Respondents to consider carefully the costs and benefits
21 of proceeding to probable cause briefings and/or hearings. The hearings are optional and
22 no negative inference will be drawn if Respondents do not request a hearing. The
23 majority of the agency's cases are settled through pre-probable cause conciliation.
24 Proceeding to probable cause briefing requires a substantial investment of the
25 Commission's limited resources. Consistent with the goal of expeditious resolution of
26 enforcement matters, the Commission seeks to promote pre-probable cause conciliation.
To encourage this, the Commission has a practice in many cases of reducing the civil

1 penalty it seeks through its opening settlement offer. However, once the Office of
2 General Counsel has terminated pre-probable cause conciliation negotiations, this
3 reduction (normally 25%) is no longer available and the civil penalty will generally
4 increase.

5 All requests for hearings, scheduling and format inquiries, document submissions,
6 and anything else related to the probable cause hearings should be directed to the Office
7 of General Counsel.

8 This notice represents a general statement of policy announcing the general
9 course of action that the Commission intends to follow. This policy statement does not
10 constitute an agency regulation requiring notice of proposed rulemaking, opportunities
11 for public participation, prior publication, and delay effective under 5 U.S.C. 553 of the
12 Administrative Procedures Act ("APA"). As such, it does not bind the Commission or
13 any member of the general public. The provisions of the Regulatory Flexibility Act,
14 which apply when notice and comment are required by the APA or another statute, are
15 not applicable.

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Michael E. Toner
Chairman
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U

1 Appendix:
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3 Basic Commission Enforcement Procedure³

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5 The Commission’s enforcement procedures are set forth at 11 CFR part 111. An
6 enforcement matter may be initiated by a complaint or on the basis of information
7 ascertained by the Commission in the normal course of carrying out its supervisory
8 responsibilities. 11 CFR 111.3. If a complaint substantially complies with certain
9 requirements set forth in 11 CFR 111.4, the Office of General Counsel notifies each
10 respondent that a complaint has been filed, provides a copy of the complaint, and advises
11 each respondent of Commission compliance procedures. 11 CFR 111.5. A respondent
12 then has 15 days to submit a letter or memorandum to the Commission setting forth
13 reasons why the Commission should take no action on the basis of the complaint. 11
14 CFR 111.6.

15 Following receipt of such letter or memorandum, or expiration of the 15-day
16 period, the Office of General Counsel may recommend to the Commission whether or not
17 it should find “reason to believe” that a respondent has committed or is about to commit a
18 violation of the Act or Commission regulations. 11 CFR 111.7(a).⁴ With respect to
19 internally-generated matters, the Office of General Counsel may recommend that the
20 Commission find “reason to believe” that a respondent has committed or is about to
21 commit a violation of the Act or Commission regulations on the basis of information
22 ascertained by the Commission in the normal course of carrying out its supervisory

³ The Commission provides this overview of enforcement procedures for informational purposes only. The Commission is not seeking comment on this section.

⁴ The Office of General Counsel may also recommend that the Commission find no “reason to believe” that a violation has been committed to is about to be committed, or that the Commission otherwise dismiss a complaint without regard to the provisions of 11 CFR 111.6(a). 11 CFR 111.7(b).

1 responsibilities, or on the basis of a referral from an agency of the United States or any
2 state. If the Commission determines by an affirmative vote of four members that it has
3 “reason to believe” that a respondent violated the Act or Commission regulations, the
4 respondent must be notified by letter of the Commission’s finding(s). 11 CFR 111.9(a).⁵
5 The Office of General Counsel will also provide the respondent with a Factual and Legal
6 Analysis, which will set forth the bases for the Commission’s finding of reason to
7 believe.

8 After the Commission makes a “reason to believe” finding, an investigation shall
9 be conducted, in which the Commission may undertake field investigations, audits, and
10 other methods of information-gathering. 11 CFR 111.10. Additionally, the Commission
11 may order any person to submit sworn written answers to written questions, issue
12 subpoenas and subpoenas *duces tecum*, or take depositions. 11 CFR 111.11 – 111.12.
13 Any person who is subpoenaed may motion the Commission for it to be quashed or
14 modified. 11 CFR 111.15.

15 Following a “reason to believe” finding, the Commission may attempt to reach a
16 conciliation agreement with the respondent(s) prior to reaching the “probable cause”
17 stage of enforcement (*i.e.*, a pre-probable cause conciliation agreement). See 11 CFR
18 111.18(d). If the Commission is unable to reach a pre-probable cause conciliation
19 agreement with the respondent, or determines that such a conciliation agreement would
20 not be appropriate, upon completion of the investigation referenced in the preceding
21 paragraph, the Office of General Counsel prepares a brief setting forth its position on the
22 factual and legal issues of the matter and containing a recommendation on whether or not

⁵ If the Commission finds no “reason to believe,” or otherwise terminates its proceedings, the Office of General Counsel shall advise the complainant and respondent(s) by letter. 11 CFR 111.9(b).

1 the Commission should find “probable cause to believe” that a violation has occurred or
2 is about to occur. 11 CFR 111.16(a).

3 The Office of General Counsel notifies the respondent(s) of this recommendation
4 and provides a copy of the probable cause brief. 11 CFR 111.16(b). The respondent(s)
5 may file a written response to the probable cause brief within fifteen days of receiving
6 said brief. 11 CFR 111.16(c). After reviewing this response, the Office of General
7 Counsel shall advise the Commission in writing whether it intends to proceed with the
8 recommendation or to withdraw the recommendation from Commission consideration.
9 11 CFR 111.16(d).

10 If the Commission determines by an affirmative vote of four members that there
11 is “probable cause to believe” that a respondent has violated the Act or Commission
12 regulations, the Commission authorizes the Office of General Counsel to notify the
13 respondent by letter of this determination. 11 CFR 111.17(a). Upon a Commission
14 finding of “probable cause to believe,” the Commission must attempt to reach a
15 conciliation agreement with the respondent. 11 CFR 111.18(a). If no conciliation
16 agreement is finalized within the time period specified in 11 CFR 111.18(c), the Office of
17 General Counsel may recommend to the Commission that it authorize a civil action for
18 relief in the appropriate court. 11 CFR 111.19(a). Commencement of such civil action
19 requires an affirmative vote of four members of the Commission. 11 CFR 111.19(b).
20 The Commission may enter into a conciliation agreement with respondent after
21 authorizing a civil action. 11 CFR 111.19(c).

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