



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTIO...
COMMISSION
SECRETARIAT

2009 JUL 15 P 5:34

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther
Chairman *Stew*

DATE: July 15, 2009

RE: Agency Procedure for Notice to Named Respondents of Additional Material Facts
or Additional Potential Violations

AGENDA ITEM
For Meeting of: 07-16-09

SUBMITTED LATE

Attached is a proposed agency procedure for notice to named respondents of additional material facts or additional potential violations.

I have asked to place this draft on the agenda for July 16, 2009.

Attachment

FEDERAL ELECTION COMMISSION

[NOTICE 2009-XX]

**Agency Procedure for Notice to Named Respondents of Additional
Material Facts or Additional Potential Violations**

AGENCY: Federal Election Commission

ACTION: Notice of Agency Procedure

SUMMARY: The Federal Election Commission (“Commission”) is establishing a new agency procedure that will provide respondents in certain complaint-generated enforcement matters brought under the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”) with (1) notice of additional material facts and/or additional potential violations not contained in the complaint and (2) an opportunity to respond thereto, prior to the Commission’s consideration of whether it has reason to believe (“RTB”) that a violation of the Act has been or is about to be committed by such respondents. This policy will provide respondents who have been named in a complaint with notice and an additional opportunity to respond when the Commission’s Office of General Counsel (“OGC”) otherwise intends to recommend an RTB finding based on information that was not included in the complaint.

DATES: Effective [15 days from the date of publication in the Federal Register].

**FOR FURTHER
INFORMATION
CONTACT:**

_____, Assistant General Counsel, or _____,
Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-
1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

I. Background

On December 8, 2008, the Commission issued a notice of public hearing and request for public comment on the compliance and enforcement aspects of its agency procedures. Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74495 (Dec. 8, 2008). On January 14-15, 2009, the Commission received comment and testimony. The comments received by the Commission, as well as the transcript of the hearing are available at: <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>. Comments and testimony received in this proceeding urged the Commission to provide further transparency, fairness and efficiency in Commission procedures and additional opportunities to contest allegations.

This new agency procedure, along with a new procedure for notice to potential respondents in enforcement matters, are among the most recent in a series of new agency procedures that have been recently adopted by the Commission in response to the received comments and testimony. See Advisory Opinion Procedures, 74 FR 32160 (July 7, 2009); Procedural Rules for Audit Hearings, 74 FR 33140 (July 10, 2009); Procedural Rule for Notice to Respondents in Non-Complaint Generated Matters, 74 FR ____ (July X, 2009). This new agency procedure differs from the new procedure for notice to potential respondents in enforcement matters in that this procedure applies to persons who are, and have already been notified as, respondents in a complaint-generated enforcement matter pursuant to section 437g of FECA, whereas the new procedure for notice to potential respondents in enforcement matters applies to persons who are not yet respondents in a complaint-generated matter.

Under section 437g of FECA, 2 U.S.C. 437g, and part 111 of the Commission's regulations, 11 CFR part 111, any person who believes that a violation of any statute or regulation over which the Commission has jurisdiction has occurred, or is about to occur, may file a complaint with the Commission. 2 U.S.C. 437g(a)(1); 11 CFR 111.4. Upon receipt of the complaint, the OGC reviews the complaint and notifies each respondent named in the complaint that the complaint has been filed. 2 U.S.C. 437g(a)(1); 11 CFR 111.5. The OGC notification also provides the respondent with a copy of the complaint. 11 CFR 111.5(b). The respondent is then provided with 15 days from receipt of the complaint to demonstrate why the Commission should not take action based on the complaint. 2 U.S.C. 437g(a)(1); 11 CFR 111.6. Only after the expiration of this 15 day period, or receipt of a response from the respondent, whichever occurs first, may the OGC make a recommendation to the Commission that it should find RTB that the respondent has committed or is about to commit a violation. 2 U.S.C. 437g(a)(1); 11 CFR 111.6(b).

In the course of developing its RTB recommendation to the Commission, the OGC will on occasion determine (1) that additional material facts, not presented in the complaint or addressed in the response to the complaint, exist that support the allegations contained in a complaint or (2) that additional potential violations of a statute or regulation over which the Commission has jurisdiction may have occurred even though the violations, or the legal basis for such violations, have not been specifically stated in the complaint. Similarly, in the course of an investigation after the Commission has made an RTB finding based on a complaint, the OGC will on occasion determine (1) that one or more additional violations may have occurred or (2) that the violation or violations alleged in the complaint may have involved knowing and willful illegal activities on the part of the respondent. The Commission's current procedure do not formally include a procedures by which the Commission would notify respondents of additional material facts, or of additional potential violations, to provide them with an opportunity to respond prior to the OGC making an RTB recommendation to the Commission.

II. Agency Procedure for Notice to Respondents of Additional Material Facts or Potential Violations

As stated above, after a complaint has been filed with the Commission, in the course of developing its recommendations to the Commission, the OGC will on occasion (1) acquire information regarding additional material facts that support or dispute the allegations contained in a complaint or (2) determine that one or more additional potential violations may have occurred even though the violation or violations have not been specifically identified in the complaint. The OGC may also, in the course of a formal investigation commenced after the Commission has found RTB based on the allegations contained in the complaint, determine that one or more additional potential violations may have occurred or that the violations alleged in the complaint may have involved knowing and willful illegal activities on the part of the respondent.

The Commission is issuing a new agency procedure to provide respondents with written notification and an opportunity to respond to additional material facts and additional potential violations of law. Accordingly, this agency procedure will provide respondents in complaint-generated matters with essentially the same notice and opportunity to respond to all additional material facts, and all additional potential violations, as that provided to respondents with regard to material facts and allegations that are specifically included in a complaint.

This new agency procedure provides as follows:

- A. A respondent shall be notified by the OGC in the event that the OGC intends to include in its RTB recommendation to the Commission (1) any material facts that were not contained in a complaint or (2) any potential violation or violations that have not been alleged in a complaint.
- B. The notice from the OGC will be in writing and shall contain the following:
 - 1. If the OGC intends to include in its RTB recommendation to the Commission additional material facts that were not contained in a complaint, the notice shall include a recitation of the additional material facts available to the OGC and the source or sources of those facts, unless the Commission determines that good cause exists for withholding such source or sources; and
 - 2. If the OGC intends to include, in its RTB recommendation to the Commission, one or more additional potential violations that were not alleged in a complaint, the notice shall include a description of such additional violation or violations that the respondent may have committed, along with a recitation of the material facts available to the OGC upon which the OGC intends to rely in making its RTB recommendation to the Commission, and the source or sources of those facts, unless the Commission determines that good cause exists for withholding such source or sources.
- C. Within 15 days from receipt of the OGC notice, the respondent may submit a written explanation of why the Commission should take no action based on the additional material facts or with regard to the additional potential violation or violations.
- D. The Commission shall not make any RTB finding against a respondent based on the additional material facts or with regard to the additional potential violation or violations unless it has considered the response or unless no such response has been received by the Commission within 15 days.

III. Conclusion

This notice establishes an agency practice or procedure. This notice 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 Procedure Act (“APA”). 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.

Steven T. Walther
Chairman
Federal Election Commission

DATED _____
BILLING CODE: 6715-01-P