

FEDERAL ELECTION COMMISSION**11 CFR Part 111****[Notice 2006–19]****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.

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

ADDRESSES: All comments should be addressed to Mark D. Shonkwiler, Assistant General Counsel, Enforcement Division, and must be submitted in either electronic or written form. Electronic mail comments should be sent to probablecausehearings@fec.gov and must include the full name, electronic mail address and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address and postal service address of the commenter will not be considered. If the electronic mail comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. The Commission will make every effort to post public comments on its Web site within ten business days of the close of the comment period.

FOR FURTHER INFORMATION CONTACT:

Mark D. Shonkwiler, Assistant General Counsel, 999 E Street, NW.,

Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

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

On June 11, 2003, the Commission held a hearing concerning potential changes to its enforcement procedures. The Commission received comments from those in the regulated community, many of whom argued for increased transparency in Commission procedures and expanded opportunities to contest allegations.¹ The Commission designed this pilot program with those concerns in mind. Proposed procedures for probable cause hearings are outlined below. The Commission seeks comment on all aspects of this proposal.

Opportunity To Request a Hearing

A hearing may take place before the Commission considers whether or not to make a finding of “probable cause to believe” that a respondent has violated the Act or Commission regulations.² A probable cause hearing may be requested by any respondent who reaches the probable cause determination stage (see 11 CFR 111.16–111.17) and submits a probable cause response brief to the Office of General Counsel. A cover letter attached to the probable cause brief will inform the respondent of the opportunity to request an oral hearing before the Commission. Hearings are voluntary and no adverse inference will be drawn by the Commission with respect to the request or waiver of such a hearing.

The General Counsel must receive the written request for a hearing at the same time that a respondent submits his or her timely response brief. 11 CFR 111.16(c). Any request for a hearing must state with specificity why the hearing is being requested and what issues the respondent expects to address. Absent good cause, to be

¹ These comments are available at <http://www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml>.

² 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.

determined at the sole discretion of the Commission, late requests will not be accepted. Respondents may make their request for a hearing by mail (including private delivery services), hand delivery, facsimile or email. Respondents are responsible for ensuring that their request is timely received.

The Commission will grant a request for an oral hearing when it concludes that a hearing would help resolve significant or novel legal issues, or significant questions about the application of the law to the facts. Within 30 days of receiving a request for a hearing, the Commission will grant a request for a probable cause hearing if any two commissioners agree to hold a hearing.

Hearing Procedures

The purpose of the oral hearing is to provide a respondent an opportunity to present his or her arguments in person to the Commissioners *before* the Commission makes a determination that there is “probable cause to believe” that the respondent violated the Act or Commission regulations. Consistent with current Commission regulations, any respondent may be represented by counsel, at the respondent's own expense, or may appear *pro se* at any probable cause hearing. See 11 CFR 111.23. 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. Respondents may discuss any issues presented in the enforcement matter, including potential liability and calculation of a civil penalty.

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

The Commission will have transcripts made of the hearings. The transcripts will become a part of the record for the enforcement matter and may be relied upon for determinations made by the

Commission. Respondent may be bound by any representations made by Respondent or Respondent's counsel at a hearing. The Commission will make the transcripts available to the respondent, who may, at his or her own expense, purchase copies of the transcript. Respondents will have access to the transcripts from their own hearing, but not transcripts of other co-respondents' separate hearings, unless co-respondents in the same matter specifically provide written consent to the Commission granting access to such transcript(s). Transcripts will be made public after the matter is closed in accordance with Commission policies on disclosure.³

Third party witnesses or other co-respondents may not be called to testify at a respondent's oral hearing. However, the Commission may request that supplementary information be submitted after the probable cause hearing. The Commission discourages voluminous submissions. Supplementary information may not be submitted more than ten days after the oral hearing, unless submitted in response to a Commission request that imposes a different, Commission-approved deadline. Materials requested by the Commission, and materials considered by the Commission in making its "probable cause to believe" determination, may be made part of the record pursuant to the Commission's *Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files*, 68 FR 70426 (Dec. 18, 2003). Hearings are confidential and not open to the public; only Respondents and their counsel may attend. Attendance by any other parties must be approved by the Commission in advance.

Cases Involving Multiple Respondents

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

Scheduling of Hearings

The Commission will seek to hold the hearing in a timely manner after

receiving Respondents' request for a hearing. The Commission will attempt to schedule the hearings on a mutually acceptable date and time. However, if a respondent is unable to accommodate the Commission's schedule, the Commission may decline to hold a hearing. The Commission reserves the right to reschedule any hearing. Where necessary, the Commission reserves the right to request from a respondent an agreement tolling any upcoming deadline, including any statutory deadline or other deadline found in 11 CFR part 111.

Pilot Program

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

Conclusion

The Commission urges Respondents to consider carefully the costs and benefits of proceeding to probable cause briefings and/or hearings. The hearings are optional and no negative inference will be drawn if Respondents do not request a hearing. The majority of the agency's cases are settled through pre-probable cause conciliation. Proceeding to probable cause briefing requires a substantial investment of the Commission's limited resources. Consistent with the goal of expeditious resolution of 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 penalty it seeks through its opening settlement offer. However, once the Office of General Counsel has terminated pre-probable cause conciliation negotiations, this reduction (normally 25%) is no longer available and the civil penalty will generally increase.

All requests for hearings, scheduling and format inquiries, document submissions, and anything else related to the probable cause hearings should be

directed to the Office of General Counsel.

This notice represents a general statement of policy announcing the general course of action that the Commission intends to follow. This policy statement 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 Procedures Act ("APA"). As such, it does not bind the Commission or any member of the general public. 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.

Dated: December 1, 2006.

Michael E. Toner,

Chairman, Federal Election Commission.

Appendix

Basic Commission Enforcement Procedure⁴

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

Following receipt of such letter or memorandum, or expiration of the 15-day period, the Office of General Counsel may recommend to the Commission whether or not it should find "reason to believe" that a respondent has committed or is about to commit a violation of the Act or Commission regulations. 11 CFR 111.7(a).⁵ With respect to internally-generated matters (e.g., referrals from the Commission's Audit or Reports Analysis Divisions), the Office of General Counsel may recommend that the Commission find "reason to believe" that a respondent has committed or is about to commit a violation of the Act or Commission

⁴ The Commission provides this overview of enforcement procedures for informational purposes only. The Commission is not seeking comment on this section.

⁵ 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).

³ *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.

regulations on the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities, or on the basis of a referral from an agency of the United States or any State. If the Commission determines by an affirmative vote of four members that it has "reason to believe" that a respondent violated the Act or Commission regulations, the respondent must be notified by letter of the Commission's finding(s). 11 CFR 111.9(a).⁶ The Office of General Counsel will also provide the respondent with a Factual and Legal Analysis, which will set forth the bases for the Commission's finding of reason to believe.

After the Commission makes a "reason to believe" finding, an investigation is conducted by the Office of General Counsel, in which the Commission may undertake field investigations, audits, and other methods of information-gathering. 11 CFR 111.10. Additionally, the Commission may issue subpoenas to order any person to submit sworn written answers to written questions, to provide documents, or to appear for a deposition. 11 CFR 111.11–111.12. Any person who is subpoenaed may motion the Commission for it to be quashed or modified. 11 CFR 111.15.

Following a "reason to believe" finding, the Commission may attempt to reach a conciliation agreement with the respondent(s) prior to reaching the "probable cause" stage of enforcement (*i.e.*, a pre-probable cause conciliation agreement). See 11 CFR 111.18(d). If the Commission is unable to reach a pre-probable cause conciliation agreement with the respondent, or determines that such a conciliation agreement would not be appropriate, upon completion of the investigation referenced in the preceding paragraph, the Office of General Counsel prepares a brief setting forth its position on the factual and legal issues of the matter and containing a recommendation on whether or not the Commission should find "probable cause to believe" that a violation has occurred or is about to occur. 11 CFR 111.16(a).

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

If the Commission determines by an affirmative vote of four members that there is "probable cause to believe" that a respondent has violated the Act or Commission regulations, the Commission authorizes the Office of General Counsel to notify the respondent by letter of this determination. 11 CFR 111.17(a). Upon a Commission finding

of "probable cause to believe," the Commission must attempt to reach a conciliation agreement with the respondent. 11 CFR 111.18(a). If no conciliation agreement is finalized within the time period specified in 11 CFR 111.18(c), the Office of General Counsel may recommend to the Commission that it authorize a civil action for relief in the appropriate court. 11 CFR 111.19(a). Commencement of such civil action requires an affirmative vote of four members of the Commission. 11 CFR 111.19(b). The Commission may enter into a conciliation agreement with respondent after authorizing a civil action. 11 CFR 111.19(c).

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FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2006–20]

Proposed Policy Regarding Self-Reporting of Campaign Finance Violations; (*Sua Sponte* Submissions)

AGENCY: Federal Election Commission.

ACTION: Draft statement of policy with request for comments.

SUMMARY: The Commission is seeking comments on a proposed policy statement to clarify and memorialize its approach to enforcement actions arising from self-reported violations (also known as *sua sponte* submissions). In order to encourage the self-reporting of violations about which the Commission would not otherwise have learned, the Commission proposes, in appropriate cases warranting such mitigation, to offer significantly lower penalties than the Commission would otherwise have sought in complaint-generated matters involving similar circumstances. The Commission is also outlining a new expedited procedure that it intends to use in a limited number of situations through which the Commission may allow individuals and organizations that self-report violations and that make a complete report of their internal investigation to proceed directly into conciliation prior to the Commission determining whether their conduct may have violated statutes or regulations within its jurisdiction. The proposed policy also addresses various issues that can arise in connection with parallel criminal, administrative or civil proceedings. The Commission requests comments on this proposed policy.

DATES: All comments must be submitted on or before January 29, 2007.

ADDRESSES: All comments should be addressed to Mark Shonkwiler, Assistant General Counsel, or April Sands, Attorney, and must be submitted

in either electronic or written form. Electronic mail comments should be sent to selfreportpolicy@fec.gov and must include the full name, electronic mail address and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address and postal service address of the commenter will not be considered. If the electronic mail comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. The Commission will make every effort to post public comments on its Web site within ten business days of the close of the comment period.

FOR FURTHER INFORMATION CONTACT:

Mark D. Shonkwiler, Assistant General Counsel, or April J. Sands, Attorney, Enforcement Division, Federal Election Commission, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

I. Goals and Scope of the Policy

The Commission periodically receives submissions from persons who self-report statutory or regulatory violations of which the Commission had no prior knowledge. The Commission considers such self-reports (which also are referred to as *sua sponte* submissions) as information ascertained in the normal course of carrying out its supervisory responsibilities pursuant to 2 U.S.C. 437g(a)(2), and may investigate if it determines there is reason to believe a violation has occurred. The Commission also investigates complaints reporting the potentially illegal conduct of another, submitted pursuant to 2 U.S.C. 437g(a)(1), but which also, by implication, provide a basis for investigating the complainant itself.¹ As a general proposition, self-reported

⁶ 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 If a person who self-reports a violation of the FECA also makes specific allegations as to other persons not joining in the submission, and particularly where the person making the submission seeks to assign primary responsibility for the violations to another person (including an organization's former officers or employees), the Commission, acting through its Office of General Counsel, may advise the self-reporting person that a portion of the relevant materials should be re-submitted as a complaint to which other persons would be allowed to respond prior to any findings by the Commission.