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May 30, 2003
By e-mail to enfpro@fec.gov

Susan E. Lebeaux, Esquire
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: FEC Notice 2003-9 (Enforcement Procedures)

Dear Ms. Lebeaux:

We are writing on behalf of our client the Free Speech Coalition, Inc., a group of ideologically diverse nonprofit organizations and for-profit organizations that help them raise funds and implement programs, which defends the right of nonprofits as against excessive government regulation, and the Conservative Legal Defense and Education Fund, a legal defense foundation active in combating government abuses of individual rights.

This letter is in response to the FEC's request for comments published in the *Federal Register* on May 1, 2003, at 23311-14 relating to "Enforcement Procedures." Our firm has represented clients with respect to federal election law matters since 1977, including representation before the Commission in enforcement actions. We offer comments on certain of the issues identified in that notice.

We have serious objections to the constitutionality of the entire FEC licensing and regulatory system, but nevertheless, without in any way compromising those objections, file these comments on particularly egregious practices which could be improved.

Lastly, I would ask for the opportunity to testify on these matters before the Commission on June 11, 2003.

COMMENTS ON SELECTED ISSUES

Issue No. 1 -- Designating Respondents in a Complaint

We believe that the FEC has been too willing to designate persons as respondents in Matters Under Review ("MURs"). The FEC should not designate any person a respondent in a MUR simply because they may have information useful to an investigation of another party, or that they have some employment, political, or business affiliation with a respondent. Becoming a respondent is a significant event for an individual or entity, and often requires the expenditure of legal fees in self-defense.

Further, under 2 U.S.C. section 437g, a MUR is to be opened upon the receipt of a notarized complaint, sworn to, and filed under penalty of perjury. This would imply to any reasonable person that the complaint would be based on information evidencing a violation with which he or she has personal familiarity, and the complainant's rendering of those facts would be truthful. We are familiar with MURs which have been opened based on nothing other than a press clipping attached to a letter, and the equivalent of a statement that the complainant has seen the attached newspaper article and believes that it is true. Such a complaint is not a proper complaint under the statute. The facts alleged are based on nothing more than the unspoken and flawed assumption that newspapers print accurate information about political issues. This is a perversion of the statutory requirement for a sworn complaint, and this abuse must stop. A complaint based on nothing more than a press report should never be rewarded by the opening of a MUR, but rather should immediately be determined to be inadequate as a matter of law, and the respondent notified.

Issue No. 4 -- Deposition and Document Production Practices

We have participated in enforcement actions representing respondents whose deposition was taken, and were then refused a copy of that deposition. The FEC Office of General Counsel would not even allow the deposition to be given to respondent's counsel for the purpose of post-deposition review and signing by the deponent. The respondent has been forced to either return to the FEC's office in Washington, D.C., or the office of a court reporter elsewhere, to review and correct his or her deposition there, and sign it.

When asked, the FEC Office of General Counsel explains that the purpose for this rule is to protect the privacy rights of the respondent under 2 U.S.C. section 437g. This position is irrational, constituting nothing less than a manipulation of the purpose underlying legislatively granted privacy rights for the Office of General Counsel's own tactical advantage in making defense of the MUR more difficult and costly for the respondent. This practice must be brought to an end. A respondent must be allowed immediate access to his or her own deposition. Indeed, a respondent should be allowed to tape record his or her own deposition, or even bring his or her

own reporter, and the respondent and his or her counsel must be allowed to take whatever type of notes that the respondent would like to take.

Further, it would be appropriate for the FEC to negotiate a contract with a reporter service under which the FEC would pay the full appearance fee for the reporter and the FEC's copy, and the charge to the respondent would be no more than nominal copying charges for an additional copy. The FEC Office of General Counsel must not be allowed to enter into contracts with reporters which shift the FEC's investigatory costs off onto respondents, or operate to impede respondents in defending against FEC action. A respondent should not be asked to help pay the bills of the agency which is investigating him or her.

It is our understanding that the FEC's current "deposition policy" is not set forth in any regulation, policy statement, or other writing, but is simply an unwritten policy established by the FEC Office of General Counsel many years before. We have asked for a copy of the policy on several occasions, and have been advised that no written policy exists, although that it may be alluded to in confidential internal memoranda within the Office of General Counsel. To our knowledge, this "deposition policy" has never been the subject of any administrative or court decision (either upholding the policy or refusing to apply it). The policy would appear, therefore, to be nothing more than one of the Office of General Counsel, and as far as we can tell it is not even based on any express action by the Commission. The fact that it has always been this way is no reason for it to continue to be this way.

Beyond the issue of a respondent's own deposition, a general rule should be adopted, as follows. To the extent that the FEC acts in enforcement actions based upon input from both the Office of General Counsel and counsel for respondent, the Office of General Counsel should have no greater access to documentary evidence than respondent's counsel. Any lower level of access to depositions or other documents rigs the system, drives up the cost of defense, and deprives the Commission of a meaningful adversarial process which can lead it to a just outcome.

Issue No. 6 – Appearance Before the Commission

The FEC has fashioned its procedural rules so that respondents are not permitted to present their case directly to Commissioners. Rather, respondents can only file their papers with the Office of General Counsel, which then has the responsibility of presenting those documents to the Commission, interpreting them for the Commission, and answering questions about them for the Commission. In this way, the FEC Commissioners and make important enforcement decisions without ever hearing from the respondents or their counsel.

Using the current parlance, the FEC's procedures could be seen as giving rise to "corruption or the appearance of corruption," where the system is designed so that the well-funded Office of General Counsel, which is a partisan in a dispute (enforcement action) with a private party, becomes more influential with the decision makers, because it has regular access to

those decision makers, while those who do not have substantial resources will not even be heard in person under any circumstances.

If the FEC Office of General Counsel is part of the enforcement arm of the FEC – and it is – it is profoundly unfair for the FEC to rely on that office to pretend to represent the respondent as well. In fact, it would appear that undertaking such a responsibility may raise ethical issues for FEC attorneys, although we are unfamiliar with any such concerns having been raised by these attorneys thus far. At a minimum, in practice, the Office of General Counsel attorneys could not be expected to be as familiar with a respondent's defenses as the respondent's counsel, and certainly would not be as motivated to communicate the respondent's defense to the Commission, if it would result in the dismissal of the charges they are prosecuting.

In short, the FEC should permit respondents the same opportunity to present their case to the Commission as enjoyed by the Office of General Counsel. If the Office of General Counsel is heard in person, then respondents should be able to be heard either *pro se* or through counsel, irrespective of the stage of the proceeding.

Although arguments could be constructed against allowing respondents to be heard at the reason to believe ("RTB") stage, certainly, a respondent in an enforcement matter should be entitled to appear before the Commission, either *pro se* or through counsel: (i) at the probable cause stage; (ii) on motions to quash subpoenas; (iii) at any time where respondent has criticism to offer regarding the Office of General Counsel; and (iv) whenever respondent believes there has been an abuse of process.

The resulting delays would be minor in comparison with the benefit derived from the additional due process safeguards that this practice will provide to respondents.

Issue No. 8 -- Public Release of Directives and Guidelines

The Commission should make available to the public additional information regarding its enforcement process. Only the most basic information regarding Commission's enforcement practices and procedures, such as a brief overview on how to file a complaint, is available on the Commission's web site. Also, as late as 1997, the Federal Election Commission conferences on campaign finance law included a section on "Enforcing the Federal Election Campaign Act," although in recent years, this section has been omitted, reportedly due to lack of interest by conference attendees. This rationale for ending these sessions is highly questionable, as avoiding FEC enforcement actions is the number one priority of any candidate, campaign manager, campaign accountant, campaign attorney, and particularly, any campaign treasurer.

The FEC has taken the position that campaign treasurers are personally liable for fines associated with violations of the Federal Election Campaign Act of 1971, as amended (FECA). When asked, the Office of General Counsel has no document which explains the complete basis

for this view. The Commission should revisit this issue, and explain its conclusions fully. We would ask that this reconsideration of this issue lead to a conclusion that service as a campaign treasurer does not carry with it any personal liability whatsoever. Only the assets of political committees, not the individuals who work with them, should be vulnerable to FEC attack for FECA violations by those committees.

Sincerely yours,

William J. Olson

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