CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

January 5, 2009

Via Electronic Mail
Mr. Stephen Gura
Deputy Associate General Counsel
Mr. Mark Shonkwiler
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Center for Competitive Politics Comments on Notice 2008-13: Agency Procedures

Dear Messrs. Gura and Shonkwiler:

These comments are filed on behalf of the Center for Competitive Politics ("CCP") with respect to the Notice on "Agency Procedures" published by the Federal Election Commission on December 8, 2008. *See* Notice 2008-13: Agency Procedures, 73 Fed. Reg. 74494 (Dec. 8, 2008) (hereinafter, "Notice"). CCP applauds the willingness of the Commission to examine and evaluate its current "policies, practices and procedures," *id.* at 74495, and welcomes the opportunity to provide comments and testimony to aid the Commission in that process. As a result, in addition to the submission of these written comments, CCP respectfully requests the opportunity for a representative to testify at the Commission hearing scheduled for January 14, 2009, on these issues.

Introduction

Since its inception, the Federal Election Commission, and its policies, practices, and procedures, have been the subject of much discussion and debate both in and outside of the regulated community. As a task force of the American Bar Association's Committee on Election Law observed more than twenty-five years ago:

> The Federal Election Commission is unique in many ways, but particularly in two respects. First it is unique by virtue of the conduct that it regulates — political speech. The Supreme Court has noted that regulation of campaign financing

> affects core first amendment freedoms of political expression and association. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). For this reason, the Commission has "the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression." *Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 55 (2d Cir. 1980) (Kaufman, C.J., concurring). The Commission is also singular in its enforcement procedures, which reflect an amalgam of investigative, prosecutorial, and de facto adjudicative phases and functions. In addition to conducting investigations, the Commission "has the sole discretionary power 'to determine' whether or not a civil violation has occurred or is about to occur, and consequently whether or not informal or judicial remedies will be pursued." *Buckley*, 424 U.S. at 112, n153.

American Bar Ass'n, Section of Administrative Law, Comm. on Election Law, Report on Reform of the FEC's Enforcement Procedures, at 2 (available in Annual Reports of Committees, Vol. 19, 1982, at 229).

Supplementing its enforcement powers, the Commission monitors compliance through its Reports Analysis Division, as well as through the exercise of its power to audit members of the regulated community. And, the Commission also possesses the power to prospectively address and determine the application of the law to members of the regulated community through the issuance of advisory opinions.

Through each of these means, the Commission has a profound and direct effect on the meaning and application of federal election law, as well as the exercise of the constitutional rights of political speech and association by members of the regulated community. Indeed, although members of the regulated community are entitled to *de novo* review of the Commission's determinations in a court of law, the realities of the enforcement process, politics, and political campaigns is such that the Commission is usually the first and only place where members of the regulated community have their political rights determined and adjudicated. As then Commission Vice Chairman Bradley Smith noted in Congressional testimony in 2003: "99 percent of all cases before the FEC and over 96 percent of those in which [the FEC] find[s] a violation are adjudicated without going to court." Hearing on Fed. Election Comm'n Enforcement Procedures: Hearing Before the Comm. On House Admin., 108th Cong., at 13 (Statement of Vice Chairman Bradley A. Smith, Fed. Election Comm'n) (Oct. 16, 2003).

Thus, the determination of the Commission is generally the last word as to the just how freely the regulated community may participate in the electoral process. Such a reality makes it

especially important that members of the regulated community enjoy a fair and adequate opportunity to be heard by the Commission as it determines what the Federal Election Campaign Act (hereinafter, the "Act") means and how it applies to those who subject to its requirements. This is why, for more than two-and-a-half decades, members of the public and regulated community have advocated that the Commission become more transparent, give more notice, and provide more process for those who are subject to its jurisdiction.

In fact, such additional transparency, notice, and process can be helpful to all, including the Commission, and would promote, rather than threaten, compliance with and enforcement of the law. In response to the Commission's review of its enforcement proceedings initiated under then Chair Ellen Weintraub in 2003, some commentators argued that respondents already enjoyed too much process in proceedings before the Commission. These commentators also claimed that providing additional transparency, notice, and process, such as that recommended in the American Bar Association's Report, would hinder the Commission's enforcement of the Act. However, the exact opposite has occurred, demonstrating that there is no conflict between enforcement of the law and basic norms of due process. Since the reforms that followed that 2003 hearing, processing and closure times for Matters Under Review have continued to decline, and the Commission has levied record levels of fines. CCP believes that this is both because basic due process norms (whether or not constitutionally required at the Commission level in the unique enforcement process prescribed by the Act) provide a framework best suited to the adjudication of complaints, and because a regulated community that perceives the process is fair is more likely to cooperate in the investigatory process.

The Commission has made many improvements over the years, especially since 2003 when the Commission last invited and acted upon comments about its enforcement procedures. CCP's comments submitted here provide additional suggestions as to how the Commission could further improve its policies, practices, and procedures so that its interpretation and enforcement of the Federal Election Campaign Act is fair and just for those who must abide by the law.

I. Enforcement Process

A. *Motions Before the Commission*

In the Notice, the Commission acknowledges that "attorneys have occasionally submitted motions for the Commission's consideration," and that "the Commission has reviewed these motions on a case-by-case basis." 73 Fed. Reg. 74496. The Commission further states that it has done so despite the fact that "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.*,

does not require that agencies entertain such motions in non-adjudicative proceedings." *Id.* Nevertheless, the Commission's practice of considering motions is useful and valuable both to the parties and to the Commission, and is sound administrative policy.

Indeed, motions can be, and are, useful and valuable to the parties and the Commission with respect to both discovery (*e.g.*, subpoenas and privilege) and quasi-adjudicative findings (*e.g.*, "reason to believe" and "probable cause"). With respect to discovery, motions can help to avoid court action, which would be necessary to enforce or quash a subpoena or to resolve some other discovery dispute, such as whether privilege applies. And, with respect to quasi-adjudicative findings such as "reason to believe" or "probable cause," motions to dismiss or to reconsider can help to ensure the enforcement process is considering all relevant and material information, and is proceeding in a focused manner. For these reasons, and others, motions serve, rather than hinder, the efficiency and effectiveness of the enforcement process. Therefore, not only should the Commission continue to entertain motions, but the Commission should also make public its practice and procedure for such motions so that all counsel know and understand the process.

Specifically, CCP suggests that the Commission should examine the range of motions it has considered in the past, as well as the range of motions available in adjudicative proceedings, to determine which motions would serve the parties' and the Commission's interest in fair, efficient, and effective enforcement proceedings. With respect to the specifics of practice and procedure, there is no reason that motions need to threaten to significantly lengthen the enforcement process. Indeed, the fact that the Commission has accepted and considered motions in the past has demonstrated that motions can be submitted by the parties and be resolved by the Commission effectively and efficiently as a part of the enforcement process.

While CCP does not express opinions on exactly which motions should be provided for, at a minimum a process should be provided for motions to quash subpoenas. The Commission, to speed the enforcement process, often provides the Office of General Counsel with blanket or discretionary subpoena and discovery authority. While CCP believes that this is a worthwhile approach to expedite case handling, it makes it more important that a method be in place for respondents to raise objections to specific requests or subpoenas before the Commission, rather than being forced to court in the first instance to fight discovery.

The Commission should not, as a general or routine matter, condition the consideration of motions on a respondent's tolling of the statute of limitations. Instead, the Commission should request that a respondent toll the statute of limitations only in the unusual event that a motion would seriously prejudice the Commission's interest in enforcing the Act. The five-year statute

of limitations provided for in the Act provides sufficient time for the Commission to fully investigate and prosecute an enforcement matter, even when the proceeding necessitates the filing of motions. Depending upon the complexity and sensitivity of each matter, the Commission, as well as its Office of General Counsel, should contemplate and account for the possibility of motions being filed when budgeting the amount of time necessary for the completion of the investigation and enforcement proceedings. In other words, respondents seeking to protect their rights through motions should not be forced into the Hobson's choice of either having to toll the already adequate five-year statute of limitations or having to forego filing a necessary motion.

Finally, in considering motions, the Commission should seriously consider allowing an appearance by the party or counsel for the party if the Office of General Counsel is also going to present its position in person. Such an appearance should not create timeliness issues since the hearing could occur at the meeting at which the Commission is going consider the motion.

The permanent policy adopted by the Commission with respect to hearings before the Commission at the "probable cause" stage would provide a good model for when a hearing would be appropriate for a submitted motion. As the Commission knows, under that policy, a respondent must make a request for a hearing — which is "voluntary and no adverse inference will be drawn ... based on ... [the] request ... or waiver" — and "[t]he Commission will grant [the] request ... if any two Commissioners agree that a hearing would help resolve significant or novel legal issues, or significant questions about the application of the law to the facts." Notice 2007-21, Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007). Additionally, such hearings are not conducted as "mini-trials" or evidentiary hearings, rather they are more akin to oral arguments on motions in courts of law. Such a procedure would seem to be particularly well-suited to hearing motions at the Commission, and CCP recommends that the Commission consider adopting — or at least experimenting with — such a policy and procedure for hearing motions that are submitted.

B. *Deposition and Document Production Practices*

When the Commission last sought comments on its enforcement procedures, *see* Notice 2003-9: Enforcement Procedures, 68 Fed. Reg. 23311 (May 1, 2003), this issue generated some of the most numerous and vigorous responses from the regulated community. *See generally* Comments on Notice 2003-9: Enforcement Procedures (available at http://www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml). Not only did the regulated community comment that the Commission should change its policy so that deponents could obtain a copy of their deposition transcripts, but also that the Commission should provide respondents with access to

the depositions taken and documents produced during the investigation of their enforcement matters. The regulated community commented that access to such evidence was essential in mounting a fair and adequate defense, specifically at the "probable cause" stage of the enforcement proceedings.

In response to those comments, the Commission "published its new deposition policy," *see* Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations, 68 Fed. Reg. 50688 (Aug. 22, 2003), under which "the Commission allows deponents in enforcement matters to obtain ... a copy of the transcript of their own deposition unless ... the General Counsel concludes and informs the Commission that it is necessary ... to withhold the transcript until the completion of the investigation." 73 Fed. Reg. 74496. However, the Commission did not issue a policy regarding respondents' access to other depositions taken and documents produced during the enforcement process. Rather, the Commission has maintained its practice of "generally provid[ing]" respondents, "upon request, ... the documents and depositions of other respondents and third party witnesses that are referred to in the General Counsel's ['probable cause'] brief." *Id.* The Commission should now take this opportunity to make it clear that respondents should be routinely granted access to all depositions taken and documents produced in their enforcement matters when the investigation is complete.

Specifically, CCP recommends that the Commission adopt a policy that, absent objection by the General Counsel submitted to the Commission, respondents should be granted access, at their own expense, to all depositions taken and documents produced at the point when the investigation is complete, and before the General Counsel submits its "probable cause" brief. Access to documents should only be denied when the General Counsel demonstrates that access to full records would prejudice ongoing investigations, or that the information in the documents would be protected from disclosure under the Federal Rules of Civil Procedure in the event that the MUR should proceed to suit.

In order to ensure a transparent and formal timeline for such access, CCP further suggests that the policy instruct the Office of General Counsel to notify the respondent of such available access no later than 10 days prior to submitting its "probable cause" brief pursuant to 2 U.S.C. § 437g(a)(3). Such a policy will not only provide respondents and their counsel with the information they need to fairly and adequately defend at the "probable cause" stage of the enforcement proceedings, but it will also assist the Commission by ensuring that all issues of fact and law are raised so that the Commission can make a fully informed decision about whether to proceed with enforcement, including understanding the strengths and weaknesses of filing suit if that is necessary.

Indeed, at the point at which the investigation is complete, there is no longer any investigatory reason to prevent respondents and their counsel from having access to these materials. Confidentiality really should not be a major concern since the confidentiality provision in the Act is intended to protect respondents, *see* 2 U.S.C. § 437g(a)(12), and since, in most cases, the respondents already are aware of each other and who else has been accused. But if confidentiality is a concern, the Commission should consider whether it could deal with that concern through other means, such as through an agreement by respondents to keep such information confidential unless and until it is made public by the Commission, or through a voluntary waiver of confidentiality.

Moreover, by providing access to these materials at the point at which the investigation is complete, but before the General Counsel commences "probable cause" briefing, any timeliness concerns are reduced since respondents and their counsel will have time to access and familiarize themselves with the depositions and documents while the General Counsel is preparing its "probable cause" brief — before the statutory 15-day period for the response brief begins to run.

It is important the Commission recognize the necessity of granting respondents and their counsel access to all of the depositions taken and documents produced during the investigation — rather than just the depositions and documents relied upon by the General Counsel. The point here is that, by the "probable cause" stage, both respondents and the Commission should want a complete airing of the enforcement matter. The respondents desire such a complete airing — including a fully informed defense — because, for most, this will be the only adjudication they will ever receive. Again, as then Vice Chairman Smith advised Congress in the 2003 oversight hearing, "99 percent of all cases before the FEC and over 96 percent of those in which [the FEC] find[s] a violation are adjudicated without going to court." Smith, *supra*, at 2. And, while the Commission should want such a complete airing for this same reason of basic fairness, providing respondents with access to all possible information for their defense is also helpful to the Commission because it ensures that the Commission proceeds with further enforcement, and possible suit, with its eyes wide open.

In other words, it is not enough to grant access only to the materials relied upon by the General Counsel in its "probable cause" brief, or even the materials identified by the General Counsel as exculpatory, because respondents and their counsel might find other information relevant and material to their defense. By the "probable cause" stage, the Office of General Counsel is clearly in an adversarial position vis-à-vis respondents, and only respondents and their counsel truly know and understand the theory of their defense. Since the investigation is complete by this stage of the enforcement proceedings, respondents and their counsel should be permitted to make their best defense with all of the information available.

C. *Extensions of Time*

The 15-day statutory period respondents have to respond to the Office of General Counsel's "probable cause" brief is inadequate. *See* 2 U.S.C. § 437g(a)(3). Indeed, the Commission and the Office of General Counsel seem to recognize this fact since, as the Notice explains, "the Office of General Counsel typically will grant an extension upon a showing of good cause." 73 Fed. Reg. 74497. Of course, the propriety and length of any extension will depend upon the enforcement matter involved, but 15-day extensions should be granted to respondents as a matter of course.

The Office of General Counsel should, at the outset of an investigation, budget for such a 15-day extension in the enforcement schedule so that the statute of limitations does not become an issue. Except in rare cases where respondents' own dilatory behavior raises statute of limitations issues, respondents should never be asked to toll the statute of limitations to obtain a 15-day extension for responsive "probable cause" briefing. After all, by the time an enforcement matter reaches the "probable cause" stage, the Office of General Counsel will have already had months, if not years, to investigate the mater and draft its "probable cause" brief, so it is entirely reasonable for respondents to have the benefit of a month to respond. Indeed, the Commission and its Office of General Counsel can be proactive in reducing the length of necessary extensions by notifying respondents when an investigation is complete and by providing access to all depositions taken and documents produced before the Office of General Counsel submits its "probable cause" brief. *See* Section I.B. *supra.* By doing so, respondents and their counsel will be able to familiarize themselves with the facts and law at issue and begin the process of developing their "probable cause" response before their statutory time period begins to run, thus having the effect of reducing any extension that would be necessary if respondents could only begin that process after the Office of General Counsel filed its "probable cause" brief.

In short, the Commission and its Office of General Counsel should be cognizant and permissive of the fact that extensions will be routinely required, and that such a fact is entirely reasonable and should not operate to the detriment of respondents.

D. *Appearance Before the Commission*

Appearances before the Commission have been valuable if for no other reason than that they have provided respondents the opportunity to see and perceive that they actually have been heard — an opportunity that, in practice, they receive at no other time. Indeed, appearances before the Commission are helpful to both respondents and the Commission, and accomplish far more than providing just the simple appearance of fairness.

Appearances before the Commission give both respondents and the Commission the opportunity to address issues that may not have been perfectly clear in the written submissions, and also provide the opportunity for a back-and-forth dialogue so that all sides can explore their theories and understandings of the matter. In fact, appearances before the Commission may be most helpful to the Commissioners, themselves, because such appearances may provide the only opportunity for the Commissioners to probe and inquire about the strengths and weaknesses of an enforcement matter so that the Commission can make a fully informed decision as to the proper and best way to proceed. Moreover, there is no reason that appearances before the Commission need to lengthen the time that enforcement matters will be under review. The Commission can schedule such appearances at the time of the meeting at which the matter will be considered. For these reasons, CCP suggests that the Commission should expand the opportunities for respondents to appear before the Commission.

The Commission's policy providing for appearances before the Commission at the "probable cause" stage of the enforcement process has been a success, and predictions that it would drain Commission resources and slow case processing have been proven wrong. Therefore, CCP commends the Commission on making that policy permanent, and suggests that the Commission consider ways to increase use of the procedure at the "probable cause" stage, thus providing more respondents with the opportunity to appear and be heard in their Matters Under Review. *See* Notice 2007-21: Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007).

Moreover, CCP recommends that the Commission experiment with expanding the possibility of appearing before the Commission to both the "reason to believe" stage and in connection with motions submitted. Such a change would be relatively easy since the Commission has already developed a policy and procedure providing for appearances before the Commission at the "probable cause" stage, *see id.*, and similar practices could be adopted for the "reason to believe" stage and for motions. It is not clear how often parties would request to appear before the Commission at either the "reason to believe" stage or in connection with motions. However, if the Commission were to experiment with such a possibility through the adoption of a pilot program similar to that used for the "probable cause" stage, then the Commission would not only be able to gauge interest in and usefulness of such appearances, but would also retain discretion as to whether to provide such hearings on a case-by-case basis. *See id.*; *see also* Notice 2007-04: Policy Statement Establishing a Pilot Program for Probable Cause Hearings, 72 Fed. Reg. 7551, 7552 (Feb. 16, 2007). As with "probable cause" hearings, no adverse inference should be drawn from the fact that a respondent does not wish to appear in-person before the Commission or cannot answer a question during the appearance. And, as

stated above, these appearances could be scheduled for the meeting at which the Commission is considering the matter, thus not lengthening the process for a Matter Under Review.

Additionally, CCP recommends that the Commission provide for appearances in both the audit and advisory opinion processes for similar reasons. These recommendations are discussed further below. *See* Sections II.D. and III.A., *infra*.

E. *Releasing Documents or Filing Suit Before an Election*

While CCP applauds the fact that the Commission is cognizant and concerned that its release of documents or reports related to closed enforcement Matters Under Review could have the effect of influencing an impending election, CCP believes that the Commission's current policy of doing so in the normal course of business is correct. Not only is the Commission on firm ground in observing that it could not prevent such information from becoming public pursuant to a Freedom of Information Act request, *see* 73 Fed. Reg. 74497, but there is also the problem that there are always two sides to any such release.

In other words, if the Commission adopted a blanket policy that it would not release any documents or reports for some period preceding an election, that policy would have the effect of not only protecting those candidates or committees who would be tainted by such release, but it would also have the effect of preventing the vindication of those candidates and committees who would be cleared by such release. For this reason, CCP believes the best policy is the one already followed by the Commission, which is to release information from closed enforcement Matters Under Review in the normal course of business. In doing so, the Commission should neither attempt to speed up nor slow down that process, but should simply release the information in the time and manner it would regardless of the proximity of an upcoming election.

However, an exception to this policy should be when the Commission is going to file suit in order to prosecute an enforcement matter. In that case, the Commission should seriously consider whether it should wait to file suit until after the election occurs. Indeed, this is consistent with the careful guidelines adhered to by the U.S. Department of Justice in election-related matters, and CCP suggests that the Commission should consider those guidelines in framing its own policy with respect to filing suit close to an election.

F. *Timeliness*

The Commission and its Office of General Counsel should be commended in the strides they have made over the past five years, and certainly over the past decade, in resolving

enforcement Matters Under Review in a more timely manner. That said, however, timeliness remains a problem with the enforcement process. The resolution of enforcement matters continues to take months, if not years, which is a particular problem for all involved, including the respondent candidates and committees, the necessary witnesses, and the Commission and its Office of General Counsel.

As everyone understands, campaigns and elections come and go. This means that pursuing an enforcement matter, from either a prosecutorial or defense standpoint, gets more and more difficult as time passes. Not only may the candidate and committee no longer continue to operate, but the people who were involved move on, as well. Additionally, memory and recollection of what occurred diminishes with the passage of time. In other words, it is to everyone's advantage that enforcement matters be pursued in a timely and efficient manner.

It is true, of course, that anyone and everyone can always say that more could be accomplished with greater resources, but limited resources are simply a fact of life. Thus, in the end, the Commission and its Office of General Counsel must continue to seek to expedite the timely resolution of enforcement matters within current budgetary and resource constraints. Unfortunately, there are no easy recommendations or quick fixes in this area.

However, one mechanism that can, and should, be used by the Commission, as well as its Office of General Counsel, to ensure timeliness is to prevent investigations from becoming unfocused and running amok, thus threatening all those involved with unnecessary and unfounded fishing expeditions. There remains a perception among the regulated community — one that is all too often a reality — that the Commission, and/or its Office of General Counsel, uses a narrowly focused complaint as an excuse for a full-scale and wide-ranging investigation into the actions and practices of designated respondents. This obviously increases the resources required and time needed to conclude the investigation, and unnecessarily and inappropriately so. Thus, if both the Commission and its Office of General Counsel were to ensure investigations remain properly focused and circumscribed, that vigilance and oversight would go a long way toward improving timeliness. We ultimately believe, however, that this is a matter of internal management not susceptible to a quick fix simply through announcement of some rule.

Beyond that, the more general answer when it comes to timeliness continues to be that both the Commission and its Office of General Counsel need to concentrate their efforts and use all available resources in pursuing that goal. We believe that the suggestions here, by shedding light on the process, increasing the amount of information available to the public and to the Commission, and helping to weed out flimsy cases at an early stage, or prevent them from being filed, contribute toward that goal.

G. *Prioritization*

Through the Enforcement Priority System, the Commission seems to have a reasonably well-established sense of its enforcement priorities. CCP recommends that the Commission maintain its focus on rapid adjudication of matters raising settled issues of law, rather than expend substantial resources to test novel enforcement theories or stretch the boundaries of the Act. Such expeditions use up tremendous resources that are better spent elsewhere, and often create a climate of uncertainty that chills speech and association that is clearly protected by the Constitution.

H. *Memorandum of Understanding With the Department of Justice*

The Memorandum of Understanding with the Department of Justice, which is now more than three decades old, continues to serve its purpose well and needs to be neither revisited nor revised. Nothing in the Bipartisan Campaign Finance Reform Act of 2002 altered or amended the balance of responsibilities for enforcement of the Act between the Commission, which is vested with "exclusive jurisdiction" for "civil enforcement," 2 U.S.C. § 437c(b)(1), and the Department of Justice, which is, and has been, the executive agency charged with criminal enforcement of federal law. Indeed, in just the past year, two U.S. Courts of Appeals have carefully examined and favorably cited the Memorandum of Understanding as support for dismissing claims that the Department of Justice could not pursue criminal investigations or prosecutions of federal campaign finance violations without referrals from the Commission. *See generally Fieger v. U.S. Attorney General*, 542 F.3d 1111 (6th Cir. 2008); *Bialek v. Mukasey*, 529 F.3d 1267 (10th Cir. 2008).

Not only should such judicial approval of the Memorandum of Understanding send a strong signal that revisiting or revising that document is unnecessary, but also the fact that there has been little conflict or confusion concerning the Memorandum more than suggests that no change should be made. The *Fieger* and *Bialek* courts — as well as the Ninth Circuit in *United States v. Int'l Union of Operating Eng'rs, Local 701*, 638 F.2d 1161 (9th Cir. 1979) — harmonized the statutory language of the Act, its legislative history, interpretative cases, as well as the Memorandum of Understanding, providing a clear (although not entirely separate) demarcation of the enforcement responsibilities of the Commission and the Department of Justice. Given the continuing validity of the Memorandum implied by these decisions, along with the state of relative clarity and stability as to the enforcement responsibilities of the two agencies, both at present and historically, the Commission should simply maintain the Memorandum of Understanding as it has since 1977.

I. *Settlements and Penalties*

For many years portions of the regulated community have urged the Commission to make public a schedule of penalties, similar to that done in the realm of the Administrative Fines program. While this holds superficial attraction, CCP believes that ultimately the public and the intent of the Act is best served by the Commission's current practice. Therefore, CCP recommends that the Commission not publish its settlement and penalty schedule.

First, we note that there is already much greater transparency with respect to settlements and penalties since the Commission began indexing closed enforcement matters and making them available to the regulated community, as well as the public, via the Enforcement Query System on the Commission's website. Nevertheless, many factors go into the settlement process that are not susceptible to a hard and fast schedule of penalties or even penalty guidelines. Here it should be noted that while settlement amounts are routinely referred to as "penalties" and in reality function as such, the Act does not anticipate a rigid system of penalties. Rather, the Act specifically requires the Commission to attempt to, "correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to attempt to enter into a conciliation agreement with the person involved," for a period of at least 30 days. 2 U.S.C. § 437g(a)(4)(A)(i). As with any settlement discussions in litigation, arbitration, or other proceedings, numerous factors must go into the Commission's decision on what is a proper conciliation penalty, including the financial status of the respondent, the Commission's own resource allocation and the probable cost of proceeding to trial, the Commission's assessment of the likelihood of prevailing at trial given the available evidence, the perceived level of negligence or culpability of the respondent, whether or not the respondent is a repeat violator, and many, many more. This is not the same as, for example, sentencing guidelines that exist in some court settings, because there has been no judicial finding of liability. Rather, both the Commission and respondent must factor into the conciliation process the cost of litigation and their perception of the odds of winning. In summary, a published set of penalty guidelines would not be able to capture all the different factors that should — that the law anticipates will — go into conciliation discussions. The end result is not only contrary to statutory intent, but likely to be perceived as more arbitrary than the present system.

The statute provides for a range of specific monetary penalties available to the Commission in conciliation, *see* 2 U.S.C. § 437g(a)(5), and within this framework the Commission should have, and is expected to have, maximum flexibility to reach conciliation agreements with respondents.

The bigger problem when it comes to settlements and penalties is how the Commission calculates the amount involved. The Commission frequently fixes its sights not on the actual amount expended, but instead on the expected or realized value of the expenditure to a campaign. For example, if an individual spends just $100 but raises $5,000 for the campaign based on that $100 expenditure, the Commission often concludes the matter is a $5,000 case when it comes to enforcement.

The purpose of the Act, however, is to regulate money, not political influence *per se*. Thus, with the exception discussed below, the fine should not be based on some subjective (expected) value to the campaign, or even objective (realized) value to the campaign, but on the actual expenditure of money by the respondent. This proposition is in harmony with the general rules for allowable activity. For example, if an individual donates a used computer to a campaign with a value of $400, the campaign does not have to report an in-kind contribution of $1,200 just because that is what the campaign would have had to spend to buy another computer if the individual had not made the donation. Nor should the campaign have to report the value of the contribution as $30,000 (obviously in excess of the legal limits) because that is the amount the campaign was able to raise using the donated computer. In other words, "value" or amount of a violation is, and should be, based on actual amount spent, not value expected or realized by the campaign. That is how legal behavior is determined, and that is how illegal behavior should be determined when it comes to enforcement matters.

The exception to this rule would come only where the Commission finds a "knowing and willful" violation. The reason for an exception in these cases is to prevent dishonest actors from engaging in a cost-benefit analysis that leads them to intentionally violate the law. This consideration is absent in the vast majority of enforcement actions that are based on errors, negligence, or honest misunderstanding of the law.

The Notice also inquires as to whether "admonishments [are] allowed by the statute," and whether such "admonishments" would constitute "a civil penalty." 73 Fed. Reg. 74498. Nothing in the Act suggests that the Commission cannot admonish respondents, but such admonishments could be deemed a civil penalty, which means that the Commission must be especially careful and sparing in using admonishments pursuant to its enforcement powers. Many in the regulated community already believe that the Commission essentially does use the enforcement process to attempt to discourage respondents from engaging in future activities without having to demonstrate that the activities are in fact illegal. Specifically, there are times when the Commission finds "reason to believe" a respondent has violated the Act, but then votes to "take no further action." In doing so, the Commission appears to the regulated community and the public to be "admonishing" such a respondent for violating the Act, while not pursuing

any additional civil remedy or punishment. It is important to note that to the average citizen engaging in political activity, a finding that a government agency has "reason to believe" that the citizen violated the law is a very big deal, indeed. It is not within the general knowledge of citizens, or newspapers that may report the release, that the "reason to believe" finding is a low threshold merely intended to suggest that an investigation could be opened.

It would be preferable and more straightforward for the Commission to actually admonish a respondent if that is the intent of the Commission, but only if such admonishment is warranted by the established facts, circumstances, and law for the enforcement matter. Thus, the Commission would be justified in finding "reason to believe," as well as issuing an admonishment letter, when the facts stated in the complaint and not denied in the response are sufficient to carry the "probable cause" burden, but the Commission decides per *Heckler v. Chaney*, 470 U.S. 821 (1985), not to pursue further enforcement action. On the other hand, where the Commission believes that the complaint and the response justify an investigation but are insufficient themselves to find "probable cause," and that resources suggest that dismissal per *Heckler* is the better course, then the Commission should only issue a "cautionary" letter at most (*e.g.*, "The Commission found 'reason to believe' that this conduct may have violated FECA, but has chosen not to open an investigation per *Heckler v. Chaney*, 470 U.S. 821 (1985). In finding 'reason to believe,' the Commission has made no determination that the allegations in the Complaint are true or that you have violated the Act. The Commission cautions you that [describe alleged misconduct in statutory terms] may be illegal pursuant to 2 U.S.C. § ___.").

Of course, if the complaint and the response, as well as any other considered facts, are insufficient for the Commission to find "reason to believe," then the Commission should dismiss the complaint and take no further action whatsoever. Nothing requires a "reason to believe" finding (or any other finding) before dismissing a case. However, CCP also believes that the Commission should be dismissing more complaints with a finding of "no reason to believe" both before and after receiving responses pursuant to 2 U.S.C. §437g(a)(1), either because the complaint itself fails to state or adequately support a claim or because the response demonstrates that there is no claim to pursue. *See* Section I.J., *infra.* In such cases, the respondent should be vindicated by the Commission through a dismissal as soon as possible, and the Commission should be sure not to take any action that could be interpreted as impugning the respondent.

J. *Designating Respondents in a Complaint and other pre-RTB Actions*

This is yet another issue that has appeared to improve since the Commission received comments and held a hearing on its enforcement procedures in 2003. However, there remains some room for more improvement.

For a person or entity to be designated as a respondent, the facts alleged in the complaint should, either on their face or through clear implication, allege a violation of the Act as well as provide sufficiently detailed facts to support the allegation that such a violation has occurred. If the complaint either does not state such an allegation or does not include sufficient detail to support the allegation, then the Commission should not name other persons as respondents

More generally, in determining whether or not a complaint is sufficient to find "reason to believe" and to open an investigation, the Commission should use a standard similar to that used to determine whether a plaintiff has met his burden to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). However, the standard should be somewhat more rigorous because the complaint should be required to allege enough facts and circumstances to support moving forward with an investigation.[1]

Additionally, the Office of General Counsel should not engage in any preliminary investigation — including searching the Internet or news stories — before the Commission finds "reason to believe." Indeed, 2 U.S.C. § 437g(a)(2) precludes such investigations (regardless of whether they are preliminary or informal) unless and until a majority of the Commission has voted in favor initiating an investigation.

It is true that the law also allows the Commission to open investigations based on information "ascertained in the normal course of carrying out its supervisory responsibilities," 2 U.S.C. § 437g(a)(2), but the Commission has internal directives for opening complaints on this basis, and those directives do not, to CCP's knowledge, allow the Commission to open investigations based on staff attorneys rummaging through news accounts and online sources. Allowing a complaint to trigger even a "preliminary" or "informal" review of news reports or other items to support a "reason to believe" is to obliterate the distinction between the two.

Furthermore, the statute requires, in pertinent part, that, "before the Commission conducts any vote on the complaint, ... any person ... shall have the opportunity to demonstrate ... that no action should be taken ... on the basis of the complaint." 2 U.S.C. § 437g(a)(1). Respondents attempting to address a complaint cannot respond to allegations or information that are not included in the complaint and that they do not know is being considered by the

[1] This is because, unlike a civil proceeding in which the plaintiff must bear his or her own costs of litigation, including frivolous or weak cases, at the Commission the complainant may file a complaint known to be weak or even frivolous, but the government will then assume all costs of investigating the complaint. Meanwhile, the respondent, almost always a political adversary of the complainant, is saddled with considerable costs in defending against the weak or frivolous complaint.

Commission. The purpose of the mandatory response to a submitted complaint is to allow Commission to hear from respondents before opening an investigation. But if Office of General Counsel gathers, and the Commission reviews, material beyond the submitted complaint, then, contrary to the statute, the respondent has no chance to respond to those allegations and information. Therefore, the complaint, and the clear implications derived from it, should be able to stand on their own with sufficient detail in order for the Commission to make the determination that the enforcement process should proceed.

Putting an end to these pre-RTB investigations would also, CCP believes, speed up the enforcement process.

The Notice also inquires about the Office of General Counsel's practice of sending "pre-RTB letters" to respondents identified at a later stage of the enforcement process. 73 Fed. Reg. 74498. Providing such "pre-RTB letters" is good practice, ensuring that additional respondents have the opportunity to respond before the Commission finds "reason to believe" that they violated the Act, thus triggering an investigation aimed at them. Indeed, whenever a respondent is not specifically identified in a complaint, it would be good practice to provide such persons or entities with the factual basis for why the Office of General Counsel intends to recommend that the Commission find "reason to believe" a violation occurred. However, regardless of when and how a respondent is identified as a potential respondent by the Office of General Counsel, that potential respondent should receive a copy of the complaint that led the Office of General Counsel to such a conclusion. Confidentiality should not be a concern here, as it is no different than when multiple respondents are provided with copies of a complaint after it is first filed.

K. *Confidentiality of the Complaint Process*

At the time of the Commission's 2003 hearings on enforcement, several commentators noted that the Commission had traditionally used the mandatory confidentiality of the Act as a sword, rather than for its intended purpose as a shield for respondents, using it to intimidate respondents and hinder them in their efforts to speak to witnesses or other respondents. In response, the Commission changed the language in its confidentiality notice and has become more sensitive to the proper use of confidentiality. Nevertheless, the Commission has still failed to protect the confidentiality of respondents in the most obvious way.

Pursuant to 2 U.S.C. § 437g(a)(12), no person may make public "any notification or investigation" without the written consent of the person receiving the notification or to whom such an investigation is made. Unfortunately, for 30 years the Commission has failed to enforce this provision against complainants themselves. The Commission should make it clear to those

filing complaints that they should not make such filings public and instead should keep that information confidential. The point of the confidentiality provision is to protect respondents, and 2 U.S.C. § 437g(a)(12) prohibits making public any notification or investigation made under the section. When a complaint is filed, 2 U.S.C. § 437g(a)(1) *mandates* that the Commission "notify, in writing," the person alleged to have committed the violation. Given this legal mandate, for a complainant to state publicly that he or she has filed a complaint with the Commission is to state that the Commission has notified the respondent of the complaint. They are one and the same. As such, complainants that publicly tout the complaints they have filed with the Commission appear to be doing precisely what the confidentiality provision found at 2 U.S.C. § 437g(a)(12) was designed to protect against.

Under the Commission's longstanding practice of not enforcing Subsection 437g(a)(12) against complainants, the entire confidentiality regime makes little sense. Complainants can publicly announce that a complaint has been filed with the Commission, and the Commission cannot publicly address the ensuing press speculation. The respondent is often made worse off than if no confidentiality provision existed at all. The purpose of confidentiality is to prevent the public besmirching of a candidate or committee and to prevent the use of the Commission's enforcement process for political gain. The Commission's failure to enforce 2 U.S.C. § 437g(a)(12) against complainants defeats this purpose and encourages frivolous complaints, as the complainant gets the story in the news knowing that the accused is unlikely to be vindicated until after the election, no matter how frivolous the complaint. This also then works against the Commission by producing a greater workload and causing a slower processing time for legitimate complaints. In other words, it would be best for both the Commission and the regulated community if the Commission would seriously consider cautioning complainants that the Act prohibits them from making their complaints public.

We note that enforcing Subsection 437g(a)(12) against complainants no more violates their free speech rights than does the existing interpretation of 437g(a)(12). As it now stands, complainants are not free to comment on ongoing investigations except to note their initial filing of the complaint. Applying the statute to prohibit their commenting on the original complaint violates no First Amendment principle not already at issue. In other words, either Subsection 437g(a)(12) can and should be constitutionally extended to complainants' publication of their own complaints, or the Subsection is not constitutional in its entirety. Note that under this proper reading a complainant would still be free to claim that his opponent (or any respondent) was engaged in illegal conduct. What he could not do is comment on his complaint to the Commission or publish the complaint (though, of course, the respondent could choose to make the complaint public). CCP believes this simple step would go a long way to fulfilling

Congress's original goal that the Act not be used for political witch hunts and vendettas, but rather to police serious violations of the law free from political hoopla.

II. Other Programs

A. *Alternative Dispute Resolution*

The Alternative Dispute Resolution program has been a positive step made by the Commission in enforcing the Act. Not only has the Alternative Dispute Resolution program been a benefit by lessening the burden on the enforcement process, but it has also been a benefit by helping the Commission pursue one of its core goals, which is to ensure future compliance with the Act. In light of the success of the program, as well as the fact that the Commission should continue to prioritize proactive compliance with the Act, CCP recommends that the Commission explore ways in which the Alternative Dispute Resolution program could be expanded. Specifically, CCP suggests that respondents should be able to request participation in the Alternative Dispute Resolution program, and that those requests should be considered seriously and favorably. In such cases, respondents are showing a desire and willingness not only to resolve their matters through a less complex process but also to commit themselves to future compliance. As such, resolving their matters through a less burdensome and more collegial process is not only appropriate but achieves the goals of all parties involved. Indeed, even when a respondent has not specifically requested participation in the Alternative Dispute Resolution program, the Commission should always consider that process when future compliance, rather than punishment for past action, is the predominant interest to be pursued. The Alternative Dispute Resolution program is also an attractive option for matters where the time and cost of pursuing the traditional and formal enforcement process would be unreasonably high given the potential violation and possible punishment at issue.

Given the success of the ADR program, the Commission may wish to consider ways to utilize the Office of Alternative Dispute Resolution in other settings, most notably the audit process.

Finally, it is important that the Commission understand that the success of the Alternative Dispute Resolution program is dependent, at least in part, upon its independence from the traditional enforcement process and the Office of General Counsel. Only with such independence — through which respondents can feel comfortable enough to be candid in negotiations — can the program succeed. Indeed, if there is always a lurking fear on the part of respondents that information learned through the Alternative Dispute Resolution program could be used against them by the Office of General Counsel in the enforcement process, then the

program will not foster the collegial atmosphere required to ensure the matters are completely resolved and the shared goal of future compliance is fully realized.

B. *Administrative Fines*

CCP has no substantive comments on the Administrative Fines program.

C. *Reports Analysis*

The major concern with the Reports Analysis Division is that far too often the Division acts in an investigative and enforcement capacity that is unnecessary and even inappropriate. With few exceptions, those filing reports with the Commission are attempting to comply with their obligations under the Act, not trying to disguise violations. Given this, as well as the fact that the reports are often confusing and burdensome, the role of the RAD should not be adversarial, but instead should be to ensure that those filing reports have done so correctly and completely. (CCP understands that a specialized section of the RAD staff is tasked with enforcement, and that this enforcement arm is to find and address reporting violations. While this is necessary and appropriate to ensure enforcement of the Act, both the Commission and the RAD should be careful that the adversarial nature of the enforcement arm does not become the standard operating procedure for the RAD as a whole.)

In other words, the RAD should not only ensure compliance with the reporting process but also should aid and assist those filing reports in complying with the requirements. Indeed, one aspect of the RAD that should be commended is that experienced candidate and committee treasurers often know their assigned RAD analysts, and have called them to receive help in the reporting process. Such assistance is helpful both to the regulated community and the Commission in proactively ensuring complete and accurate reporting consistent with the Act, and the Commission should do its best to foster this collegial relationship between the RAD and the regulated community.

Unfortunately, to the regulated community, in recent years it has sometimes appeared that the RAD sees its role as to catch filers in some mistake in reporting, or worse in some attempt to violate the Act. Such a "gotcha" mentality makes the already confusing and burdensome reporting requirements perilous for the regulated community, especially for many candidates and committees that are relatively unsophisticated when it comes to the numerous requirements under the Act.

The RAD has sometimes propounded Requests for Additional Information that reach beyond the information and explanation required by the statute and regulations. This is not only unnecessary, but it is also inappropriate. In ensuring compliance with the reporting requirements, the RAD should be limited to examining the reports submitted for substantial compliance, including in the information and explanation provided. The RAD can, of course, request additional information if that information and explanation is, on its face, required by the reports. But the RAD should, and must, be careful not to take on an adversarial investigative and enforcement mentality that would only provide disincentive for the regulated community to cooperate in the reporting process. In fact, it would help the reporting process for all involved if the RAD concentrated its efforts on assisting the regulated community in complying with the reporting requirements, rather than focusing on uncovering possible avenues for pursuing investigation and enforcement.

D. *Audits*

The problem with the Audit process is that it operates as enforcement of the Act through other means. The Final Audit Reports are, of course, approved by the Commission and made public, and it is not at all unusual for those Final Audit Reports to state that the audited candidate or committee had violated one or more provisions of the Act. Thus, in approving these Final Audit Reports and making them public, the Commission is, in essence, finding and even "admonishing" the audited candidates and committees for violating the Act. At least this is the appearance created by the Commission's approval and publication of the Final Audit Reports. However, it is important to keep in mind that the Audit process is separate and different from the enforcement process. Indeed, the Audit Division is not staffed by lawyers, and audits can be used by the Office of General Counsel to trigger further investigation and enforcement proceedings. Thus, the Commission should consider whether and when it is appropriate to approve and make public a Final Audit Report that alleges a violation of the Act.

Specifically, CCP recommends that the Commission consider all audits in closed session until such time as the Commission makes a final determination on whether to launch any enforcement action based on the audit. Indeed, nothing in the statute requires the Commission to consider the audits in public session before then. *See* 2 U.S.C. § 438(b). The Commission already makes many audit decisions in closed session, including at the Interim Audit Report/Preliminary Audit Report stage. Quite simply, an audit report should not be considered "final" until the Commission has made any decisions on whether to launch an enforcement action based on the audit, and concluded any such enforcement actions so begun. To make the audit process public before such enforcement decisions are made, especially when the audit report alleges a violation of the Act, blurs and obscures the line between the enforcement and

audit processes, and the Commission needs to more clearly separate and mark the line between its exercise of those two different powers, especially given the confidentiality required by 2 U.S.C. § 437g(a)(12). After all, when the Commission makes public its approval of a Final Audit Report that states a purported violation of the Act, the appearance is that the Commission has found and concluded that the candidate or committee has violated the Act. Such an appearance puts both the Commission and the audited in a bad position, especially when the Commission does not pursue further enforcement action. The audited party suffers from the taint of such legal conclusions, and the Commission suffers from the possibility of being accused that it did not pursue further enforcement with respect to the violations explicitly found and approved in such Final Audit Reports.

In other words, if the Commission approves an audit report that suggests violations of the Act, the Commission is making the equivalent of a "reason to believe" finding. That is because what the public sees reported is a staff recommendation of violations, the Commission's acceptance of the report, and a referral to the Office of General Counsel. Not only does that sound like, but it also appears to be, a finding of "reason to believe" and an investigation. *See* 2 U.S.C. § 437g(a)(2). And, pursuant to 2 U.S.C. § 437g(a)(12), such enforcement actions should be confidential and not be public. Moreover, there is no reason the Commission cannot protect the confidentiality of the audited party until the enforcement decisions are resolved because there is no requirement that the auditor's report be received in open session any more than that the Interim Audit Report/Preliminary Audit Report be received in open session. Indeed, the Commission already has a policy not to consider the audit process publicly until the Final Audit Report is considered. Thus, CCP suggests that an audit should not be viewed as completed until these final enforcement decisions are made, any more than the Commission should opine publicly, on the basis of news reports or other information, that political actors have violated the law. At the true conclusion of the audit and enforcement process, then the Final Audit Report could be made public.

In addition, CCP recommends that the Commission should allow those being audited the possibility of having a hearing before the Commission in advance of the Final Audit Report being made public. Indeed, given the possibility of enforcement emerging from the audit process, it would seem most logical for the hearing to occur after the audited party has responded to the Interim Audit Report/Preliminary Audit Report so that both the Audit Division and the Commission can consider the hearing before having to produce and accept the Final Audit Report, as well as before proceeding with the enforcement process. Such a hearing would go a long way toward providing transparency, as well as an opportunity to be heard, by those being audited. It would also assist the Commission to understand the perspective of the audited party, as well as address any lack of clarity present in the written papers submitted by the Audit

Division and the audited party. And, since the Commission has already crafted a policy and procedure for hearings at the "probable cause" stage of its enforcement proceedings, the Commission could use or borrow from those practices. The main point here is that, because the audit process can taint an audited party in the same way the enforcement process can, the audited party has no lesser interest in having the opportunity to appear before the Commission than that present in the enforcement process. Thus, the Commission should not only provide such a meaningful opportunity to be heard, but should use that process frequently so that all involved ensure the audit matter is completely and fully aired before final decisions are made by the Commission.

Finally, CCP suggests that the Commission should consider making public the guidelines, standards, and methodology used to determine which candidates and committees will be audited. Insiders understand that there is a point system used to determine which candidates and committees will be subject to audit, but beyond those who have worked for or extensively with the Commission there is little understanding of how that process works. Thus, it would shed useful light on the process to make it public so that everyone can understand why certain candidates and committees are audited and others are not. Indeed, by releasing this information, the Commission will help to dispel any belief that the audit process is haphazard or inconsistent. Moreover, the Commission should not be concerned that releasing the methodology would "provid[e] committees a road map on how to violate the law just enough to avoid being audited." 73 Fed. Reg. 74499. After all, if committees intentionally take advantage of such information to skirt the Act, they would face far bigger enforcement problems — including the probability that they would have committed a knowing and willful violation.

III. Advisory Opinions and Policy Statements

A. *Advisory Opinions*

In general, the Commission's Advisory Opinion process works quite well and efficiently. One improvement that could be made is allowing the requestor to have an appearance before the Commission. Specifically, CCP recommends that the Commission adopt — or at least experiment with — a policy of allowing the requestor to appear before the Commission at the time when the Commission considers the advisory opinion request. Such timing for the appearance would benefit both the requestor and the Commission without threatening to significantly lengthen the time the request is under consideration. The requestor would gain the benefit of having the opportunity to respond to the various draft advisory opinions being considered by the Commission, and the Commission would gain the benefit of being able to hear

and question the requestor about those drafts, as well as clear up any facts or issues that may not have been considered or addressed in the written submissions.

Indeed, since the Office of General Counsel appears before the Commission in the advisory opinion process, it really seems strange that the person requesting the advice, and who has the most knowledge about the facts raised by the request, is excluded from participating in the meeting at which the Commission considers the request. It has not been unusual, during discussion of an advisory opinion, for questions to arise to which requestor's counsel, often sitting in the audience, could provide an answer but instead must simply sit silent and frustrated as the Commission proceeds, sometimes on an incorrect or incomplete understanding. To allow an appearance could help prevent such problems while promoting the efficiency and effectiveness of the advisory opinion process.

The Act does not appear to bar an appearance by the requestor, but merely requires that the request must be "complete" and "written." 2 U.S.C. § 437f(a)(1). Thus, the Commission should establish its own supplementary policy allowing, but not compelling, a requester to appear before the Commission. Indeed, even a practice of permitting the questioning of requestor's counsel, with or without the possibility of opening or closing argument as to the action the Commission should take, would be an improvement. Of course, since the Commission has already crafted a policy and procedure allowing for appearances before the Commission at the "probable cause" stage of the enforcement process, the Commission could reference or borrow from that policy in providing for appearances in connection with considering advisory opinions.

B. *Policy Statements and Other Guidelines*

In general, CCP believes it best for the Commission to keep the number of policy statements and other guidelines to a minimum because they often can add only further complexity and confusion — not to mention further material that must be referenced. However, this is not to say that the Commission has not been correct and helpful in issuing the policy statements and guidelines that it has in the past. The issues dealt with in the Commission's policy statements have been those that required additional clarity, and that further clarity and transparency is appreciated. What CCP would suggest is that any policy statements or guidelines issued by the Commission should be readily available to the public and the regulated community, and that the Commission should do its best to ensure that the materials are consolidated to the extent possible so that the public and regulated community does not have to worry that they are missing some significant piece of information about practicing before the Commission or interpreting the Act and its regulations.

Indeed, perhaps the most helpful information the Commission could, and often does, issue are comprehensive manuals that provide "one stop shopping" for information. Thus, it may again be time for the Commission to at least consider whether it would be in the interest of both the Commission and the regulated community to issue an enforcement procedures manual that provides detailed and explicit information about the enforcement process. Of course, many in the regulated community are aware that the Commission has such a manual available internally, and it would go a long way to providing transparency for the enforcement process if such a manual was publicly available to all those who practice in this area.

Again, the Center for Competitive Politics applauds the Commission for providing this opportunity to comment on its policies, practices, and procedures. And, CCP looks forward to the opportunity for its representative to testify before the Commission on these issues at the hearing scheduled for January 14, 2009.

Sincerely,

/s/ Reid Alan Cox

Reid Alan Cox
Legal Director