

April 19, 2013

By **Electronic Mail** (process@fec.gov)

Mr. Stephen A. Gura
Deputy Associate General Counsel for Enforcement
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Notice 2013-01: Request for Comment on Enforcement Process

Dear Mr. Gura:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Commission's Notice 2013-01, requesting comment on the Commission's enforcement process, published at 78 Fed. Reg. 4081 (January 18, 2013). The Campaign Legal Center and Democracy 21 regularly file complaints with the Commission and we offer the following comments based on our experience with the enforcement process.

"The Commission seeks general comments on whether the agency is effectively enforcing" the Federal Election Campaign Act (the "Act") and Commission regulations. *Id.* at 4083. In a word, no, the Commission is not effectively enforcing the Act and Commission regulations. The Campaign Legal Center and Democracy 21, together with five other organizations, sent a letter to the Commission on February 12, 2009 in response to Notice 2008-13 (Rulemaking on Agency Procedures), detailing our general dissatisfaction with the Commission's ineffective enforcement of federal campaign finance laws. Our concerns with the Commission's ineffective enforcement remain largely unchanged today, so we will rely on our 2009 submission to express those general concerns instead of repeating them here. We confine our comments here to specific questions and requests for comment posed in Notice 2013-01.

I. In Complaint-Generated Matters, the Commission Should Continue to Rely on Publicly Available Information and Legal Theories Not Contained In the Complaint.

The Commission seeks comment on two current practices of the Office of General Counsel related to the pre-RTB stage of the enforcement process in complaint-generated matters. 78 Fed. Reg. at 4084. First, the Commission asks whether it should continue its practice of basing RTB findings on, or taking into account, publicly available information not referenced or included in the complaint and response. Or "[d]o the statute and regulations require the Commission to ignore publicly available information that may be material to the issue of RTB?" *Id.* Second, the Commission asks whether it should continue its practice of basing RTB findings

in appropriate circumstances on legal theories not alleged in the complaint. Or “[d]o the statute and regulations require the Commission to ignore additional potential violations that are supported by the facts but not specifically alleged in the complaint?” *Id.*

The Campaign Legal Center and Democracy 21 strongly urge the Commission to continue its commonsense, perfectly lawful practices of taking into account, and basing RTB findings on, publicly available information and legal theories not included in complaints. Doing so is not only desirable agency practice, it is required by law.

In *In Re FECA Litigation*, the U.S. District Court for the District of Columbia explicitly considered and answered the question of “what information must the Commission . . . take into account in deciding whether or not to investigate” allegations made in a complaint. 474 F. Supp. 1044, 1046 (D.D.C. 1979) (emphasis added). The court explained:

[T]he Commission must take into consideration all available information concerning the alleged wrongdoing. In other words, the Commission may not rely solely on the facts presented by the sworn complaint when deciding whether to investigate. Although the facts provided in a sworn complaint may be insufficient, when coupled with other information available to the Commission gathered either through similar sworn complaints or through its own work the facts may merit a complete investigation. By the same turn, a persuasive and strong complaint may not merit an investigation because the Commission possesses reliable evidence indicating that no violation has occurred. . . . [S]ection 437g(a)(2) envisions this broad examination of all evidence available to the Commission. Its language provides that the Commission must investigate a sworn complaint “if it has reason to believe that any person has committed a violation” of the election laws; the statute’s reference to the Commission’s “belief” calls for the Commission to exercise its informed discretion. This discretion must be based on all the information which the FEC possesses, including the individual sworn complaint, other sworn complaints, and facts which the FEC has ascertained in the normal course of carrying out its supervisory responsibilities.

Id. (emphasis added).

In *Antosh v FEC*, 599 F. Supp. 850 (D.D.C. 1984), the U.S. District Court for the District of Columbia cited its earlier decision in *In Re FECA Litigation*, reiterating that the Commission must take into consideration all available information, not only a complaint and related administrative record materials, when considering the allegations made in a complaint. *Id.* at 855. The court concluded that the Commission’s dismissal of a complaint was arbitrary, capricious and contrary to law because the Commission “ignored persuasive evidence”—public documents in the form of disclosure reports filed with the Commission itself—that had not been filed along with the complaint, but that established a significant violation of the law. *Id.*

The Commission’s consideration of publicly available information is not only required by law, as made clear in *In Re FECA Litigation* and *Antosh*, it is also good policy. Ignoring

publicly available information would be a highly inefficient practice that would fundamentally undermine the Commission’s principal responsibilities of administering and seeking to obtain compliance with FECA. *See* 2 U.S.C. § 437c(b)(1). Ignoring publicly available information would result in the squandering of precious government resources to pursue complaints proven meritless by publicly available information. Ignoring publicly available information would also permit serious violations of federal campaign finance laws that are known to the Commission to go unpunished, even not investigated, simply because all elements of the violations might not be set forth within the four corners of a complaint.

Notice 2013-01 further asks whether the Commission should continue its practice of basing RTB findings on legal theories not alleged in a complaint or, by contrast, whether the Commission should “ignore additional potential violations that are supported by the facts but not specifically alleged in the complaint?” 78 Fed. Reg. at 4084.

Where the facts establish violations of law under any valid legal theory—including legal theories not alleged in a complaint—the Commission should find reason to believe the law was violated and vigorously pursue an enforcement action. FECA provides that “[a]ny person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission.” 2 U.S.C. § 437g(a)(1). Such a complaint need only be in writing, signed and sworn by the complainant under penalty of perjury, and notarized. *Id.*

FECA does not require that a complaint exhaust all possible legal theories, nor does FECA require that a complaint contain evidence of all relevant facts. FECA’s complaint process is accessible to the average person—as it should be. It is the Commission’s duty, supported by its expert staff, to consider the contents of a complaint, information and arguments submitted to the Commission by respondents, all relevant publicly available information and all valid legal theories when determining whether there is reason to believe the law has been violated.

For all of these reasons, the Commission should continue its practice of basing RTB findings on, or taking into account, publicly available information and legal theories not referenced or included in the complaint and response.

II. The Commission Should More Fully Exercise Its Broad Enforcement Authority By Internally-Generating Enforcement Matters and Should Consider All Publicly Available Information In Such Internally-Generated Enforcement Actions.

As explained in Notice 2013-01, FECA not only authorizes the Commission to pursue enforcement actions on the basis of complaints received from individuals, but also authorizes the Commission to find reason to believe the law has been violated “on the basis of information ascertained in the normal course of carrying out [the Commission’s] supervisory responsibilities.” 78 Fed. Reg. at 4084 (citing 2 U.S.C. §437g(a)(2)).

Central to the Commission’s supervisory responsibilities is administering and seeking to obtain compliance with FECA. *See* 2 U.S.C. § 437c(b)(1). Yet the Commission concedes that “[m]ost of the Commission’s enforcement matters are externally generated based on complaints

submitted by individuals . . .” 78 Fed. Reg. at 4083. Put differently, to the extent federal campaign finance law enforcement actions are being initiated, the public is doing the bulk of the Commission’s job. The Campaign Legal Center and Democracy 21 urge the Commission to dedicate more resources to internally-generating enforcement matters.

The Commission’s regulations provide that, “[o]n 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 of any state, the General Counsel may recommend in writing that the Commission find [RTB] that a person or entity has committed or is about to commit a violation’ of the Act or regulations.” 78 Fed. Reg. at 4084-85 (citing 11 CFR § 111.8(a)).

Notice 2013-01 lists the “primary types of internally generated matters,” including referrals from within the Commission (*e.g.*, RAD and Audit Division) and referrals from other government agencies. The Campaign Legal Center and Democracy 21 urge the Commission to more fully exercise its broad enforcement authority by internally generating enforcement matters with regard to any potential violations of law that come to the Commission’s attention via media reports or other publicly available information.

FECA and “Commission regulations do not restrict what information the Commission may consider in its supervisory responsibilities.” 78 Fed. Reg. at 4085. Notice 2013-01 asks whether “the current practice of bringing to the Commission’s attention media reports and publicly available information filed with the Commission or other governmental entities comport with Directive 6 with respect to the permissible sources of information the Commission may consider in its RTB determination?” *Id.* Notice 2013-01 further asks: “Are there other sources of information that the Commission needs or should consider in its normal course during the pre-RTB stage, beyond those in Directive 6?” *Id.*

For the reasons explained above with respect to complaint-generated matters, the Commission should consider all publicly available information from any sources in the context of internally-generated enforcement actions.

Finally, the Commission requests comment regarding the relationship between internally-generated matters and complaint-generated matters. For example, Notice 2013-01 asks whether the Commission’s reliance on publicly available information in an internally-generated matter should “inform OGC’s recommendations in complaint-generated matters?” *Id.* The Commission asks “[w]hat benefits and drawbacks would result from generating an additional enforcement matter beyond the complaint-generated matter compared with relying on such information in assessing the complaint?” *Id.*

The Campaign Legal Center and Democracy 21 urge the Commission to consider all relevant publicly available information and legal theories in all enforcement matters, regardless of whether the matters are generated internally or by complaints. For the sake of general efficiency and prompt resolution of enforcement matters, the Commission should avoid generation of additional, duplicative enforcement matters whenever possible.

III. Conclusion

The willful ignorance contemplated in Notice 2013-01—*e.g.*, ignoring publicly available information and valid legal theories—would make the Commission’s currently ineffective enforcement process even worse. The Campaign Legal Center and Democracy 21 urge the Commission to continue its practices of basing RTB findings on, and taking into account, all publicly available information and valid legal theories in all enforcement matters, regardless of whether the matter was complaint-generated or internally-generated. We further urge the Commission to more fully and efficiently exercise its broad enforcement authority—and to recognize that doing so is the Commission’s principal responsibility.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ J. Gerald Hebert

/s/ Fred Wertheimer

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

Fred Wertheimer
Democracy 21

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street, NW – Suite 600
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
215 E Street, NE
Washington, DC 20002

Counsel to the Campaign Legal Center