

THE FEDERAL ELECTION COMMISSION: A GUIDE FOR CORPORATE COUNSEL

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An understanding of the Federal Election Commission [FEC or Commission] is essential to one who counsels political action committees [PAC's], corporations, or trade associations that undertake political activity. Counsel will discover that the substantive law is often arcane, the activity is politically and publicly controversial, and the FEC is still relatively young and periodically unpredictable. There exists a potential for public embarrassment of a client in addition to the normal legal dangers and consequences of a federal election law violation.

Contact with the agency is virtually inevitable. Reports must be filed, committees are subject to audit, and protective advisory opinions can only be obtained from the FEC. The purpose of this Article is to guide counsel and committee officials on how to approach the FEC and its staff. The dynamics and decisionmaking process of the Commission is not altogether ascertainable from the language of the Federal Election Campaign Act as amended [FECA],¹ or the regulations.² After five years of existence, the FEC, like any other governmental organization, has settled into a mode of operation that is in part a result of practice rather than statutory edict. This Article discusses common agency practice as well as enacted law and promulgated rules of procedure. The discussion below focuses on the Commission and its staff's organization, the processing of reports filed under FECA, and the ad-

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1. 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979) (originally enacted as Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 301, 86 Stat. 11, *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 201, 88 Stat. 1272; Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101, 90 Stat. 475; and Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339).

2. 11 C.F.R. §§ 100-115 (1980).

ministrative procedures relating to audits, investigations, and the issuance of advisory opinions.

THE FEC AND ITS STAFF

Historical Background

A major goal of the "post-Watergate" campaign financing reform movement was the creation of an independent agency with the responsibility and power to enforce and administer federal election laws.³ This goal was realized in the enactment of the Federal Election Campaign Act Amendments of 1974 which established the FEC.⁴ The FEC was heralded as an agency which "will assure judicious expeditious enforcement of the law, while reversing the long history of nonenforcement."⁵ Congress intended to devise a "comprehensive system of civil enforcement"⁶ over which the FEC would have primary jurisdiction.⁷ Although the 1974 Amendments were effective January 1, 1975,⁸ the first commissioners were not selected and confirmed until April. One reason for the delay was the unique and ponderous appointment process by which members were confirmed and which ultimately was found unconstitutional by the Supreme Court in *Buckley v. Valeo*.⁹

Prior to the creation of the FEC, the enforcement of FECA was left to the United States Department of Justice which was assisted by "supervisory officers," meaning the Clerk of the United States House of Representatives, the Secretary of the Senate, and the Comptroller General of the United States.¹⁰ Rather than replacing these institutions, the FEC supplemented their activities with respect to administration of the

3. *Federal Election Campaign Act of 1973: Hearings on S. 372 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 63 (1973) (statement of John W. Gardner, Chairman, Common Cause).

4. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208, 88 Stat. 1279 (current version at 2 U.S.C. § 437c (Supp. III 1979)).

5. 120 CONG. REC. 35135 (1974) (remarks of Rep. Frenzel).

6. *Id.* at 35134 (remarks of Rep. Hays).

7. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 310(b), 88 Stat. 1281 (current version at 2 U.S.C. § 437c(b)(1) (Supp. III 1979)).

8. *Id.* § 410(b), 88 Stat. 1304.

9. 424 U.S. 1, 109, 119-43 (1976). The 1974 Amendments provided that two commissioners were to be appointed by the President, two by the President *pro tempore* of the Senate and two by the Speaker of the House of Representatives. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 310, 88 Stat. 1280-82 (current version at 2 U.S.C. § 437c (Supp. III 1979)). The latter four selections had to be made upon the recommendations of the respective majority and minority leaders. *Id.* All six nominees had to be confirmed by a majority of both houses of Congress. *Id.* In *Buckley*, the Court held that most of the powers of the FEC could be exercised only by "Officers of the United States" who were nominated by the President and confirmed by the Senate in accordance with art. II, § 2, cl. 2, of the Constitution. *Buckley v. Valeo*, 424 U.S. at 140. Since the manner in which the majority of the original commissioners were appointed was not in conformity with the Constitution, the FEC was barred from exercising its powers, subject to a limited stay of the Court's judgment, until properly constituted. *Id.* at 141-43.

10. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §§ 301, 309, 86 Stat. 12, 18 (repealed 1974).

election laws. Although the Commission has exclusive civil jurisdiction,¹¹ the Department of Justice still retains its customary authority to prosecute criminal violations of FECA.¹² Except for the Comptroller General, the supervisory officers are still active in administering FECA. The Clerk and Secretary are *ex officio* nonvoting members of the Commission.¹³ Furthermore, some reports required by FECA must be filed originally with the Clerk and Secretary.¹⁴ Many of the powers granted to the FEC, however, were new. Conspicuous among these powers was the power to issue advisory opinions.¹⁵

Perhaps the most controversial act taken by the FEC during its first year of existence involved the issuance of an advisory opinion relating to PAC activity. Advisory Opinion 1975-23 [*SUNPAC*]¹⁶ is viewed as a watershed in the development of corporate sponsored PAC's.¹⁷ It constitutes the first detailed administrative clarification of the lawful operation of a PAC. The controversial aspect of the opinion was the conclusion that a corporation may solicit all employees, in addition to stockholders, for voluntary contributions.¹⁸ Congressional reaction to this holding led directly to that portion of the 1976 Amendments which altered and expanded on present day section 441b.¹⁹ Furthermore, the advisory opinion process itself became suspect and the FEC was accused of changing substantive law through the

11. 2 U.S.C. § 437c(b)(1) (Supp. III 1979).

12. See text & note 80 *infra*.

13. 2 U.S.C. § 437c(a)(1) (Supp. III 1979). See text & note 39 *infra*.

14. See text & note 57 *infra*.

15. 2 U.S.C. § 437d(a)(7) (Supp. III 1979).

16. Advisory Opinion 1975-23, 40 Fed. Reg. 56,584, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶5151 (Nov. 24, 1975).

17. See Note, *Corporate Political Action Committees: Effect of the Federal Election Campaign Act Amendments of 1976*, 26 CATH. U.L. REV. 756, 762-66 (1977).

18. 40 Fed. Reg. at 56,585, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶5151 (Nov. 24, 1975); see 40 Fed. Reg. at 56,586 (dissenting opinion of Commissioners Harris and Tiernan). In a discussion of former 18 U.S.C. § 610 (Supp. II 1972) (repealed 1976) (current version at 2 U.S.C. § 441b (1976 & Supp. III 1979)), the Court in *Buckley v. Valeo* appears to have repudiated the position of the *SUNPAC* dissenters and ratified the position of the majority. The Court noted that corporate and union treasury funds could be used "to solicit contributions from employees, stockholders, and union members." See *Buckley v. Valeo*, 424 U.S. 1, 28 n.31 (1976). But see H.R. REP. NO. 917, 94th Cong., 2d Sess. 6-7 (1976).

19. 2 U.S.C. § 441b (1976 & Supp. III 1979). See 122 CONG. REC. 8570-72 (1976) (remarks of Rep. Brademas); *id.* at 8576 (remarks of Rep. Thompson); *id.* at H3782 (daily ed. Mar. 30, 1976) (remarks of Rep. Brademas). The 1976 Amendments substantially amended former 18 U.S.C. § 610 (current version at 2 U.S.C. § 441b (1976 & Supp. III 1979)) by restricting the manner in which and the number of times that a corporation may solicit nonexecutive employees for voluntary contributions to the corporation's PAC; prohibiting corporations and their PAC's from soliciting the general public; broadening the class subject to § 441b to include trade associations, membership organizations, cooperatives and corporations without capital stock; requiring trade associations to obtain specific written approval from a member corporation prior to soliciting any executive within that corporation; and creating a qualified right for labor organizations to demand from a corporation in which its members are employed the use at cost of the payroll deduction for purposes of collecting member contributions to the union's PAC. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 321, 90 Stat. 490-92 (current version at 2 U.S.C. § 441b (1976 & Supp. III 1979)).

use of these opinions.²⁰

After the FEC was declared unconstitutionally constituted by the Court in *Buckley v. Valeo*, Congress made wholesale changes in the Act and refused to simply reconstitute the Commission as suggested by President Ford.²¹ Many elements of the 1976 Amendments were designed to hold the FEC publicly accountable for exercising "an outrageous abuse of power" in issuing the *SUNPAC* decision.²² Consequently, restrictions were placed on the Commission's ability to issue advisory opinions,²³ informal opinions were prohibited,²⁴ the substantive law of PAC's was enlarged,²⁵ and the congressional veto²⁶ was refined to permit either House to reject any discrete portion of proposed FEC regulations.²⁷ The 1976 Amendments also recodified FECA's criminal provisions and transferred them from Title 18 to Title 2.²⁸ Simultaneously, the FEC's enforcement role was increased, although special emphasis was placed on informal resolution of violations of FECA.²⁹

Congressional interest in the FEC had not dissipated by the time the 1979 Amendments³⁰ were enacted. Congress continued to refine the Commission's powers through the systematic repeal of provisions which granted discretion to the Agency. The FEC's powers to formulate general policy,³¹ grant limited reporting waivers,³² and require data other than that specifically required by FECA on reports³³ and registration statements³⁴ were eliminated. The Commission is now required to submit all its forms to Congress in the same fashion as regu-

20. 122 CONG. REC. 8866, 8882-84 (1976) (remarks of Reps. Gaydos and Maguire). One proposal, subsequently discarded during consideration of the 1976 Amendments, was a requirement that advisory opinions be reduced to regulations within 30 days and submitted to Congress for a potential veto by either chamber. H.R. 12,406, 94th Cong., 2d Sess., 122 CONG. REC. 9112 (1976).

21. See President's Message to Congress Transmitting a Draft of Proposed Legislation to Establish the Offices of Members of the Federal Election Commission (Feb. 16, 1976). In *Buckley*, the Court gave Congress 30 days to pass remedial legislation, in the absence of which the FEC would not be authorized to function. 424 U.S. at 142-43.

22. 122 CONG. REC. 8571 (1976) (remarks of Rep. Brademas).

23. 2 U.S.C. § 437f (1976) (amended 1979) (advisory opinion must concern "the application of a general rule of law" already contained in FECA or in FEC regulations).

24. *Id.*

25. *Id.* § 441b (1976 & Supp. III 1979); see text & note 19 *supra*.

26. 2 U.S.C. § 438(c)(2) (1976) (current version at *id.* § 438(d)(2) (Supp. III 1979)).

27. *Id.* § 438(c)(5) (1976) (new definition of "rule or regulation") (current version at *id.* § 438(d)(4) (Supp. III 1979)).

28. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, §§ 105, 201, 90 Stat. 481, 496.

29. See 2 U.S.C. § 437g(a)(5)(A) (1976) (amended 1979).

30. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339.

31. 2 U.S.C. § 437d(a)(9) (1976) (repealed 1979).

32. *Id.* § 436(b) (repealed 1979).

33. *Id.* § 434(b)(14) (repealed 1979).

34. *Id.* § 433(b)(11) (repealed 1979).

lations, subject to a veto by a majority of either house.³⁵ The Commission must issue advisory opinions within sixty days.³⁶ Finally, the FEC's discretion in conducting audits is considerably curtailed.³⁷

The Commissioners

The Commission is composed of eight members—six voting commissioners and two nonvoting *ex officio* commissioners.³⁸ The latter two members are the Clerk of the House of Representatives and the Secretary of the Senate,³⁹ who fulfill their duties at the FEC through respective deputies. These deputies, like their principals, are employees of Congress, but they maintain offices at the Commission. The *ex officio* members, through their deputies, actively participate in the affairs of the Agency. The deputies attend all formal FEC functions, including hearings and meetings. In particular, they are present at both open and closed Commission meetings and participate in the discussion of all advisory opinions, investigations, and personnel matters.

The voting commissioners are appointed for staggered six year terms.⁴⁰ No more than three of these members may be affiliated with the same political party,⁴¹ and all must be full-time commissioners.⁴² The Chairman and Vice Chairman are elected by the voting members from among themselves. A commissioner may be Chairman only once during his or her term; the tenure for a Chairman is one year.⁴³ The Chairman and the Vice Chairman must be affiliated with different political parties.⁴⁴ Commissioners may not delegate their votes and all decisions must be made by a majority vote of the members.⁴⁵ An absolute majority of four votes is required before the FEC may proceed in a civil suit, issue an advisory opinion, issue a regulation, or conduct an investigation.⁴⁶

The Commission is granted exclusive jurisdiction with respect to civil enforcement of FECA and is charged with the general responsibility of administering and seeking compliance with FECA.⁴⁷ The FEC is vested with investigative powers including the power to issue subpoe-

35. *Id.* § 438(d) (Supp. III 1979).

36. *Id.* § 437f.

37. *See id.* § 438(b).

38. *Id.* § 437c(a)(1).

39. *Id.*

40. *Id.* § 437c(a)(2)(A).

41. *Id.* § 437c(a)(1).

42. *Id.* § 437c(a)(3).

43. *Id.* § 437c(a)(5).

44. *Id.*

45. *Id.* § 437c(c).

46. *Id.*

47. *Id.* § 437c(b)(1).

nas and orders and the power to initiate civil actions.⁴⁸ It also may issue rules and regulations, forms, and advisory opinions.⁴⁹

The Staff

Each Commissioner has a small personal staff comprised of an executive assistant and a secretary. Consequently the Commission relies heavily on its general staff. The FECA provides for two staff positions, the Staff Director and the General Counsel, both of whom are appointed by the Commission.⁵⁰ In recent years the size of the total staff has numbered approximately 250 persons. Technically, the entire general staff reports to the Staff Director who, with the approval of the Commission, hires all personnel.⁵¹ In practice, the General Counsel supervises and manages his own staff which comprises roughly one-third of the general staff. The Office of General Counsel is organized by legal function, including advisory opinions, legislation and regulation, enforcement (administrative), and litigation. Association with members of the legal staff is likely to be limited to formal statutory proceedings such as investigations, rulemaking, and advisory opinions.

Informal contact with nonlegal staff is far more likely. The nonlegal staff is organized by operational divisions—Public Information Division, Reports Analysis Division, Audit Division, Administration Division, Data Services Division, and Public Records Division. An individual subject to FECA, or counsel, conceivably could come into contact with each of these divisions, with the exception of the Data Services and Administration Divisions.

The Public Information Division contains the Press Office and provides services to the general public. Free publications, including forms, copies of the statute and regulations, and the Commission's monthly newsletter, *The FEC Record*, are available. Nonlegal staff is trained to answer basic questions about the law and the Commission over the telephone. This service is provided nationwide through the use of a toll-free "hot-line." Answers obtained by informal means are not binding on the Commission and offer no legal protection.⁵² The service is helpful, however, if used for general informational purposes.

The Reports Analysis Division is responsible for the processing

48. *Id.* § 437d.

49. *Id.*

50. *Id.* § 437c(f).

51. *Id.*

52. See 2 U.S.C. § 437f(b) (Supp. III 1979); text & note 136 *infra*. The Commission has successfully sought a conciliation agreement against a respondent in an enforcement proceeding, see text and notes 102-11 *infra*, notwithstanding that the respondent had acted in reliance upon the written opinion of an FEC attorney. FEC, CAMPAIGN PRACTICES REP., May 29, 1978, at 13 (quoting the General Counsel's Report in MUR 413 (In re Gun Owners of America), the respondents "could rely on Commission advice only if it were delivered in an advisory opinion").

and analysis of all reports and statements filed with the FEC.⁵³ The reports are available to the public both in hard copy and microfilm form at the Public Records Division. Any report can be reproduced at cost. Finally, the Audit Division conducts the FEC's audits.⁵⁴

PROCESSING OF REPORTS

FECA requires various individuals and political committees to file statements⁵⁵ and reports⁵⁶ which must disclose the organization and financial activity of the reporting entity. Reports from PAC's are filed directly with the FEC.⁵⁷ These documents are received and processed by the Commission's Reports Analysis Division [RAD] which is supervised by an Assistant Staff Director. RAD is organized into two branches, the Candidate Branch and the Non-Candidate Branch. Each branch is further subdivided into sections. The name of each branch and section reflects the type of filer whose reports are processed, reviewed, and analyzed by that portion of the staff. Consequently, the Candidate Branch, through the Presidential and Congressional Sections, processes documents from candidates and their authorized committees. The Non-Candidate Branch, through the Party and Non-Party Sections, handles reports and statements from political committees other than candidates and their committees. PAC reports are within the responsibility of the Non-Party Section of the Non-Candidate Branch.

Each section is composed of a Section Chief and several reports analysts. The Non-Party Section contains approximately one-dozen reports analysts who must review the documents of the more than 2,000 political committees that are not affiliated with a political party or candidate. The reports analyst is customarily an individual who is a recent college graduate, not an attorney or an accountant, and the first link in a chain of events which may ultimately result in a formal enforcement proceeding.

The duties of a reports analyst are largely mechanical and clerical. The analyst's first duty is to verify that all required reports have in fact been filed by the committee. When a report is initially received, the reports analyst will undertake a preliminary review of the document to

53. See text & notes 55-60 *infra*.

54. See text & notes 61-73 *infra*.

55. 2 U.S.C. § 433 (Supp. III 1979).

56. *Id.* § 434.

57. *Id.* § 432(g)(4); 11 C.F.R. § 105.4 (1980). Reports by candidates for the House and their principal campaign committees are filed with the Clerk of the House of Representatives. 11 C.F.R. § 105.1 (1980). Reports by candidates for the Senate and their principal campaign committees are filed with the Secretary of the Senate. *Id.* § 105.2. In this respect the Clerk and the Secretary act as custodians for the FEC, and are required to forward to the Commission copies of all statements and reports within 48 hours.

ascertain its technical sufficiency. He will check for any mathematical errors or omitted information. The report is then coded for subsequent data entry into the FEC's computer. Virtually all aggregate totals from the summary pages of the report (FEC Form 3x) will be entered as will most data relating to large individual contributors. All contributions made by PAC's to candidates and committees are coded and entered into the computer. The staff utilizes this data to monitor compliance with statutory limits on contributions and to prepare statistical studies on campaign financing. Computer printouts are also used by the press and the public and may be obtained from the Public Records Division.

The reports analyst has one very significant enforcement responsibility: to send written inquiries to a reporting committee regarding any perceived inaccuracies, deficiencies, or statutory violations that appear on a report. The majority of these inquiries are entitled Requests for Additional Information [RFAI's]. RFAI's are form letters signed by the Staff Director that expressly refer to the individual reports analysts who initiated the inquiry. An RFAI is not a formal Commission investigation, and is not prompted by a Commission vote. It does request a response from the committee, either an explanation or an amendment to a report. RFAI's may be resolved informally and a treasurer who receives such a letter should contact the named reports analyst directly.⁵⁸

If a committee is able and willing to provide the requested information, the matter should be immediately resolved. The reports analyst will not confirm in writing that the committee's response satisfactorily answers the inquiry, but he will provide such assurances orally. The overwhelming majority of RFAI's are concluded in this manner.⁵⁹ If the committee ignores or refuses to respond to the RFAI, or if the committee's response is deemed either inadequate or a confirmation of the presence of a violation, the entire matter may be referred to the Office of the General Counsel for possible enforcement action.⁶⁰ The potential for such a referral makes it imperative that a committee's treasurer and counsel promptly and fully respond to an RFAI, if doing so does not otherwise incur additional risk.

RFAI's and any responses are always part of the public record. This reinforces the overall view that such inquiries relate to nonsubstantive reporting irregularities and deficiencies. A different procedure

58. A treasurer should confer with counsel before responding to an RFAI in order to determine whether the inquiry may relate to an apparent violation of the Act. Any response may be used subsequently by FEC lawyers as an admission of a violation. Counsel normally should not deal with the reports analyst, however, in order to avoid creating the impression that a serious substantive violation has been uncovered.

59. See generally [1978] FEC ANN. REP. 17.

60. 2 U.S.C. § 437g (Supp. III 1979); see text & notes 74-122 *infra*.

is used by RAD for what may be characterized as substantive violations of FECA. For example, corporate or union contributions, and contributions in excess of the applicable limits are viewed as substantive violations. If such a receipt is disclosed in a report, the reports analyst will initiate a Surface Violation Letter [SVL]. An SVL is not part of the public record, because there is a high probability that the inquiry will lead directly to a formal investigation. If the committee can provide an explanation for the apparent violation, the matter may not be referred to the Office of General Counsel. The committee also may be able to take remedial steps to rectify the problem. For example, the committee may refund any improper contribution. In either event, the FEC still could commence formal proceedings upon the recommendation of the General Counsel to whom the matter may be referred by the reports analyst. Remedial action will not guarantee that no further action will be taken, but formal proceedings are much less likely. If circumstances reflect a knowing and willful violation of the FECA, the Commission may institute enforcement proceedings regardless of the committee's remedial efforts.

In general, RFAI's and SVL's can be resolved informally, but must be approached with the understanding that they may be a harbinger of subsequent enforcement proceedings.

AUDITS

The FEC may conduct audits of any political committee.⁶¹ The Commission must give priority to audits of committees that receive federal funds pursuant to the public financing provisions of FECA.⁶² Prior to the 1979 Amendments, the Commission utilized its general auditing powers to conduct audits of committees which were selected at random,⁶³ and of committees, including PAC's, whose financial activity exceeded certain arbitrary dollar amounts.⁶⁴ The legal basis for these types of random and arbitrary audits, however, has been eliminated.⁶⁵ Presently, audits may be conducted after the Commission establishes thresholds for substantial compliance with FECA, and thereafter specifically finds, by a vote of at least four commissioners, that a particular committee has failed to meet the threshold requirements.⁶⁶ The

61. 2 U.S.C. § 438(b) (Supp. III 1979).

62. *Id.*; see I.R.C. §§ 9007, 9008(g), 9038.

63. FEC RECORD, Sept. 1977, at 6.

64. FEC RECORD, Feb. 1979, at 5. Historically the FEC has not had the time or resources necessary to audit substantial numbers of nonparty political committees. In 1977, only 10 of 1,389 registered nonparty committees were audited. [1977] FEC ANN. REP. 68, 71. In 1978 the Commission audited 53 of 1,903 registered nonparty committees. [1978] FEC ANN. REP. 89, 101.

65. See 2 U.S.C. § 438(a)(8) (Supp. III 1979).

66. *Id.* § 438(b). The FEC may also authorize and conduct audits and field investigations in the course of enforcement proceedings. *Id.* § 437g(a)(2); 11 C.F.R. § 104.16(c) (1980).

ensuing audit must commence within thirty days of the vote.⁶⁷

The audit process⁶⁸ begins with written notification to the treasurer of the committee to be audited. A time and place for the audit will be proposed in the notice. The FEC has been flexible in granting extensions of time, particularly if a delay is necessary in order to assemble all of the committee's records. The audit is normally conducted at the committee's offices. The FEC will use facilities at a local federal office building, however, if the audit would cause a physical inconvenience or dislocation to the committee. At the appointed time and place for the start of the audit, the FEC auditors will conduct an entrance conference with the committee's treasurer and any other committee personnel whom the treasurer may wish to be present, such as counsel. At the conference, the lead auditor will explain the basis for the audit and the general procedures that will be used. The treasurer will be requested to certify the location and existence of all depositories that have been used by the committee during the period subject to audit. The lead auditor will also request that the treasurer or other knowledgeable person explain the committee's bookkeeping system.

The actual audit is conducted in a manner designed to verify the accuracy of the committee's reports and to determine the committee's compliance with FECA. Therefore, in addition to verifying and reconciling the committee's bank statements, the auditors will attempt to substantiate the committee's reports with the committee's records. This is done on a sampling basis whenever possible. Sample itemized expenditures will be traced back to invoices, cancelled checks, and any other records.⁶⁹ The auditors will also request samples of solicitation materials used by the committee. In the case of PAC's, the auditors

67. 2 U.S.C. § 438(b) (Supp. III 1979).

68. There are no published rules of procedure regarding audits. In 1977 the FEC announced "procedures for conducting audits." FEC RECORD, May 1977, at 3. But the announcement merely described the following "seven-step auditing process" which had been approved by the Commission on April 7, 1977:

1. A detailed pre-audit review at the FEC of all reports and statements filed by the party.
2. An "Entrance Conference" between the auditors and the candidate or committee to explain the purpose of the audit, outline its procedures, obtain necessary documents, records and statements and answer any questions about the audit process.
3. A field review to verify the candidate or committee's records.
4. An "Exit Conference" between auditors and the candidate or committee to discuss the results of the audit, subsequent audit procedures, and possible suggestions for improved recordkeeping and reporting.
5. A staff report to the Commission on the audit results.
6. Commission review of the report to decide what action, if any, to take with respect to these results.
7. Publication of all completed audits.

Id.

69. Reported itemized contributions will be verified by using bank deposit slips and any documentation provided to the committee by the contributor such as payroll deduction authorization cards, or direct mail cards.

will check for the presence of statutorily required notices.⁷⁰ If the PAC is connected to a trade association, the auditors will review and verify the mandatory prior approval statements from corporate members.⁷¹

At the conclusion of the field work, the auditors will hold an exit conference with the treasurer. The treasurer will be informed of the preliminary audit findings. In the event that inaccuracies or discrepancies are discovered, the treasurer will be told of any remedial action that can be taken, such as filing amendments to reports or registration statements. The findings are presented orally and there is no mechanism that affords the committee an opportunity to contest the auditors' findings before a written audit report is presented by the staff to the Commission. The auditors may refer apparent violations of FECA to the General Counsel who may recommend to the FEC that a formal investigation be conducted pursuant to FECA's enforcement provisions.⁷²

After the auditors have completed their field work and the committee has taken any suggested remedial action, the auditors will prepare an audit report. The report will include one of three basic auditor statements. If the reports accurately reflect the committee's activity and if the committee is in compliance with FECA in all material respects, the auditors will state an unqualified opinion to that effect. If the audit reveals certain discrepancies, a qualified opinion will be included in the audit report and the reporting discrepancies and deficiencies will be noted in detail. The third type of auditor's statement concludes that the audit has revealed that the committee's reports do not reflect the committee's financial activity and/or the committee has not complied with FECA. The auditor's report is circulated to the commissioners for their review. A copy is not provided to the committee. If all commissioners agree to the findings in the report, the report is deemed final and released to the committee and the public. If any commissioner objects to the audit findings, the report will be placed on the next Commission meeting agenda for discussion. Unless the Commission votes to consider the report in closed executive session, the report will be considered in open session, at which time it will be made a public document.⁷³ The report is not considered final until approved by at least four commissioners.

Although an audit may result in an enforcement proceeding or an audit report adverse to the committee, neither FECA nor FEC proce-

70. See 2 U.S.C. §§ 441b(a)(3)(B), (C), 441d (1976 & Supp. III 1979); 11 C.F.R. § 110.11 (1980).

71. See 2 U.S.C. § 441b(a)(4)(D) (1976 & Supp. III 1979); 11 C.F.R. § 114.8(d) (1980).

72. 2 U.S.C. § 437g (Supp. III 1979).

73. FEC RECORD, Sept. 1979, at 5.

dures afford the committee an opportunity to contest an auditor's findings during the audit process. Therefore, it is important that counsel monitor the audit and be present at both the entrance and exit conferences. The auditor's preliminary findings as articulated during the exit conference should be closely scrutinized and discussed with the auditors. If counsel disputes a specific finding, there is limited recourse in preventing such a finding from appearing in the audit report. The most direct and immediate action is to resolve the matter informally with the auditors. If such discussions are unsuccessful, however, the only remaining recourse available to counsel is to appeal in writing directly to the Commission.

INVESTIGATIONS

In General

The FEC, through its General Counsel, investigates possible violations of FECA.⁷⁴ The agency is charged with seeking compliance through informal methods of conference, conciliation, and persuasion.⁷⁵ The Commission maintains that the investigative process is nonadjudicative in that the FEC does not make specific findings of fact or conclusions of law.⁷⁶ In the event that the FEC and a respondent are unable to resolve a matter through conciliation, the FEC may seek judicial enforcement in federal district court where the matter will be adjudicated as a civil case.⁷⁷

Despite FECA's emphasis on informal resolution of violations, liability for criminal prosecution, including imprisonment of up to one year, is provided.⁷⁸ The FEC may refer a knowing and willful violation to the Attorney General of the United States.⁷⁹ The Attorney General, independent of the Commission, may initiate a criminal prosecution.⁸⁰

The fact that an FEC civil enforcement proceeding may evolve into or be conducted concurrently with a criminal prosecution for the

74. 2 U.S.C. § 437g (Supp. III 1979); 11 C.F.R. § 111 (1980).

75. 2 U.S.C. § 437g(a)(4)(A)(i) (Supp. III 1979).

76. Commission attorneys have argued in federal district court that the FEC "does not adjudicate, hold trials, determine civil or criminal liability, issue orders, indict or impose any legal sanctions on its own." Memorandum of Points and Authorities in Support of Motion to Dismiss at 15, National Right to Work Comm. v. FEC, No. 77-786-A (E.D. Va., filed Oct. 20, 1977).

77. 2 U.S.C. § 437g(a)(6) (Supp. III 1979).

78. *Id.* § 437g(d).

79. *Id.* § 437g(a)(5)(C).

80. See, e.g., *United States v. Operating Engineers Local 701*, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶9095 (9th Cir. Oct. 1, 1979), *cert. denied*, 48 U.S.L.W. 3536 (Feb. 9, 1980); *United States v. Tonry*, 433 F. Supp. 620, 623 (E.D. La. 1977); *United States v. Jackson*, 433 F. Supp. 239, 241 (W.D.N.Y. 1977), *aff'd*, 586 F.2d 832 (2d Cir.), *cert. denied*, 440 U.S. 913 (1978). The FEC and the Department of Justice have signed and publicly issued a Memorandum of Understanding regarding their respective jurisdiction over enforcement of FECA. 43 Fed. Reg. 5,441 (1978).

identical violation will profoundly affect the manner in which counsel represents a respondent at the Commission. In some aspects counsel will be faced with a Hobson's choice. On the one hand, FECA encourages informal resolution of disputed violations between the FEC and a respondent. Often times a formal conciliation agreement will be highly desirable and advantageous to a respondent. Such an agreement constitutes a complete bar to any further civil action on the matter⁸¹ and, perhaps more importantly, must be taken into account by a court in any criminal proceeding in weighing the seriousness of the violation and the appropriateness of any penalty.⁸² Therefore, a conciliation agreement in which the FEC specifically notes the absence of any knowing and willful violation⁸³ would seriously undermine any criminal proceeding in which intent must be proved in order to establish a criminal violation.

On the other hand, FECA's emphasis on informal settlement of a violation can subject a respondent to great risks. A conciliation agreement is not guaranteed under FECA. Any statements submitted by respondent to the FEC during administrative proceedings may constitute admissions which either the FEC or the Department of Justice may attempt to introduce as evidence in either a civil or criminal proceeding. Although statements may be barred on the grounds that they constitute offers of settlement in the course of conciliation negotiations,⁸⁴ such an exclusionary rule has not been explicitly established in any court to date. In light of these tactical considerations, counsel for a respondent must initially evaluate his client's total potential liability, and on a case-by-case basis determine which approach would be most advantageous to the client. There are substantial risks inherent in either refusing to conciliate with the FEC or in being too forthcoming.

Commencement Of Enforcement Proceedings

The FEC designates its section 437g investigations as Matters Under Review [MUR's]. Each MUR is assigned a number by the Office of General Counsel at the time a file is opened on the matter. MUR's are initiated in one of two ways. Most commonly, a division of the FEC, such as the Reports Analysis Division or the Audit Division, will refer an apparent violation to the Office of General Counsel.⁸⁵ The General Counsel will make a determination as to whether the matter should be brought before the Commission with a recommendation that

81. 2 U.S.C. § 437g(a)(4)(A)(i) (Supp. III 1979).

82. *Id.* § 437g(d)(3).

83. See text & notes 110-11 *infra*.

84. See FED. R. EVID. 404.

85. See text & notes 58-60, 72 *supra*.

it find reason to believe that a violation of FECA has occurred.⁸⁶ The Commission may accept or reject the recommendation, but in either event the respondent is not notified that proceedings have commenced until after a Commission finding.

Proceedings may also be initiated on the basis of a complaint.⁸⁷ The complaint may be filed by any person and must be in writing, signed, sworn, and notarized.⁸⁸ The FEC also requests that a complaint contain a clear and concise recitation of the facts that the complainant believes constitute a violation of the FECA, copies of any relevant supporting documentation, and/or suggested sources who may substantiate or provide the pertinent facts.⁸⁹ If a complaint satisfies the technical statutory requirements, the FEC is required to notify and send a copy of the complaint to the respondent within five days.⁹⁰ Unlike a respondent in an internally generated matter, a respondent subject to a complaint is provided an opportunity to challenge the investigation before the FEC considers whether a violation has occurred. Such a respondent may submit, within fifteen days from receipt of a copy of the complaint, a letter or memorandum setting forth factual and legal reasons why the Commission should take no action and dismiss the complaint.⁹¹ The Commission may dismiss the complaint at any time, but it may not find reason to believe that respondent has violated FECA until the fifteen day period has expired or until it has considered a timely filed submission.⁹²

A respondent may retain counsel to make the submission on his behalf and otherwise to represent him during an investigation. The respondent must advise the Commission in writing that he will be represented by counsel⁹³ and must authorize counsel to receive all notifications and pleadings, including subpoenas and orders.⁹⁴ The respondent retains control over the confidentiality of the investigation. Without the respondent's written consent, no aspect of the Commission's investigation may be made public by any person, including Com-

86. 2 U.S.C. § 437g(a)(2) (Supp. III 1979); 11 C.F.R. §§ 111.3, 111.8 (1980). Investigations may also be commenced after a matter has been referred to the FEC by an agency of the United States or by a state. 11 C.F.R. § 111.8 (1980).

87. 2 U.S.C. § 437g(a)(1) (Supp. III 1979); 11 C.F.R. § 111.3 (1980).

88. 2 U.S.C. § 437g(a)(1) (Supp. III 1979); 11 C.F.R. § 111.4 (1980). Statements made in a complaint are subject to statutes governing perjury. 11 C.F.R. § 111.4 (1980).

89. 11 C.F.R. § 111.4 (1980).

90. 2 U.S.C. § 437g(a)(1) (Supp. III 1979); 11 C.F.R. § 111.5(a) (1980). A technically deficient complaint is returned to the complainant without further action. A copy of the faulty complaint is also sent to any person identified therein as a respondent. 11 C.F.R. § 111.5(b) (1980).

91. 2 U.S.C. § 437g(a)(1) (Supp. III 1979); 11 C.F.R. § 111.6(a) (1980). The computation of time is based on the Federal Rules of Civil Procedure. 11 C.F.R. § 111.2 (1980).

92. 2 U.S.C. § 437g(a)(1) (Supp. III 1979); 11 C.F.R. § 111.6(b) (1980).

93. 11 C.F.R. § 111.23 (1980). The respondent must provide the Commission with the attorney's name, address, and telephone number. *Id.*

94. *Id.* § 111.13(b).

mission members and employees.⁹⁵

Reason To Believe Finding

The first decision by the Commission regarding a MUR is whether to dismiss the matter or whether to find there is reason to believe that a violation by respondent has occurred. In arriving at a decision, the Commission must consider any submission of the respondent in reply to a complaint.⁹⁶ In all cases the FEC will consider the General Counsel's report and his recommendations. The report, which is not available to the respondent,⁹⁷ will contain a description of the facts and a legal argument in support of the General Counsel's recommendation. The Commission will consider and discuss the report, which will have been circulated to them, at an executive meeting. The meeting is closed to the public. The General Counsel and the staff attorney who is assigned the MUR will present the case to the commissioners. Neither the respondent nor respondent's counsel may be present or make an oral presentation to the Commission at any time. The Commission has never conducted a hearing in conjunction with an investigation.

A vote of four commissioners is required to find reason to believe that respondent violated FECA.⁹⁸ Thereafter, respondent or counsel will be notified by a letter, signed by either the Chairman or Vice Chairman, that sets forth the specific violation and the factual basis for the FEC's finding.⁹⁹ The Commission will then proceed to gather information concerning the MUR.¹⁰⁰ The FEC may issue written interrogatories, orders and subpoenas, and conduct depositions.¹⁰¹

Probable Cause To Believe Finding And Conciliation

At such time as the FEC concludes that it has sufficient facts relating to the MUR, it must next make its second major determination. As in the reason-to-believe stage the process is initiated by the General Counsel. On the basis of the investigation that has been conducted, the

95. 2 U.S.C. § 437g(a)(12) (Supp. III 1979); 11 C.F.R. § 111.21 (1980). No person may make public any FEC notification or investigation. 11 C.F.R. § 111.21 (1980). Violators may be prosecuted and penalized up to \$2000, or up to \$5000 in the case of a knowing and willful violation. *Id.* A complainant may be barred from publicly disseminating copies of a complaint that he has filed with the FEC. 2 U.S.C. § 437g(a)(12) (Supp. III 1979); see 11 C.F.R. § 111.21 (1980); see also *Common Cause v. FEC*, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶9089 (D.D.C. Aug. 10, 1979).

96. 2 U.S.C. § 437g(a)(1) (Supp. III 1979); 11 C.F.R. § 111.6(b) (1980).

97. At the conclusion of an investigation, all reports by the General Counsel are made public along with most other documents relating to a specific MUR. Closed MUR files are not indexed or reported, but they are available from the Public Records Division. See 11 C.F.R. § 111.20 (1980).

98. 2 U.S.C. § 437g(a)(2) (Supp. III 1979); 11 C.F.R. § 111.9 (1980).

99. 2 U.S.C. § 437g(a)(2) (Supp. III 1979); 11 C.F.R. § 111.9 (1980).

100. 11 C.F.R. § 111.10 (1980).

101. *Id.* § 111.11-15.

General Counsel must prepare a brief that will include an exposition of the factual and legal issues of the case and a recommendation as to whether the Commission should find probable cause to believe that respondent has violated FECA.¹⁰² The General Counsel must send a copy of his brief to the respondent or his counsel.¹⁰³ Within fifteen days of receipt, respondent's brief may be filed with the Commission Secretary.¹⁰⁴ The General Counsel may then review respondent's brief and advise the Commission as to whether he intends to proceed with the recommendation.¹⁰⁵ FECA requires the affirmative vote of four commissioners for a finding of probable cause to believe.¹⁰⁶ The respondent is notified of such a finding by the General Counsel, and the Commission is thereafter bound to attempt to correct or prevent the violation through conciliation efforts for a period of at least thirty days, but no more than ninety days.¹⁰⁷

The statutory time limitations for conciliation have prompted the FEC to encourage respondents to initiate negotiations prior to a finding of probable cause to believe. If respondent indicates in writing his desire to commence negotiations toward a conciliation agreement, such negotiations may be commenced, and any subsequent agreement may be ratified by the Commission when it finds probable cause to believe.¹⁰⁸ A conciliation agreement is not final until it is approved by four commissioners and signed by the respondent and the General Counsel.¹⁰⁹

FECA does not specify the form or content of a conciliation agreement. The FEC, however, usually requires two provisions. First, the FEC through its legal staff normally insists on a penalty, the amount of which is negotiable.¹¹⁰ Second, the FEC ordinarily demands a clause in which the respondent acknowledges that his acts have contravened a

102. 2 U.S.C. § 437g(a)(3) (Supp. III 1979); 11 C.F.R. § 111.16 (1980).

103. 2 U.S.C. § 437g(a)(3) (Supp. III 1979); 11 C.F.R. § 111.16 (1980).

104. 2 U.S.C. § 437g(a)(3) (Supp. III 1979); 11 C.F.R. § 111.16 (1980).

105. 11 C.F.R. § 111.16(d) (1980). FEC regulations do not prescribe any procedures in the event that the General Counsel decides not to proceed with his original recommendation. The spirit of the statute, however, appears to require that he submit to respondent any revised brief or recommendations in order to preserve the respondent's right to submit a brief on respondent's behalf.

106. 2 U.S.C. § 437g(a)(4)(A)(i) (Supp. III 1979); 11 C.F.R. § 111.17 (1980). The Commission is not required to adopt the General Counsel's recommendation, whether he proposes a finding of probable cause or no probable cause. Furthermore, the Commission may fail to attain a four-vote majority for either course of action. A majority may agree simply to take no further action. 11 C.F.R. § 111.17(b) (1980).

107. 2 U.S.C. § 437g(a)(4)(A)(i) (Supp. III 1979). The conciliation period is shorter if the probable cause to believe finding occurs during the 45-day period immediately preceding any election. *Id.* § 437g(a)(4)(A)(ii).

108. 11 C.F.R. § 111.18(d) (1980). The use of this conciliation procedure not only insulates the parties from FECA's time limitations, it also obviates the need for the filing of briefs.

109. *Id.* § 111.18(b).

110. See 2 U.S.C. §§ 437g(a)(5)(A), (B) (Supp. III 1979) (penalty provisions applicable to conciliation agreements). The Commission will often commence negotiations by suggesting a penalty

provision of FECA. In return for this admission, the FEC will often agree to a provision stating that the violation was not knowing or willful. The remainder of the agreement will incorporate statements of fact, general conditions of the agreement and respondent's acknowledgement of Commission jurisdiction over him and the subject matter of the MUR. The agreement, once approved by four commissioners, bars the Commission from proceeding further against the respondent with respect to the matters that are the subject of the agreement.¹¹¹

Civil Actions

If the respondent and the FEC fail to agree upon a conciliation agreement during the statutory conciliation period, the Commission may institute civil action against the respondent in a United States district court in a district in which the respondent is found, resides, or transacts business.¹¹² Such action must be approved by a vote of four commissioners.¹¹³ The FEC may seek and the court may grant injunctive relief and/or civil penalties.¹¹⁴ Either party may appeal the judgment of the district court to the appropriate court of appeals, and, thereafter, to the United States Supreme Court upon a writ of certiorari.¹¹⁵ FECA requires each court to advance the action on the docket ahead of all other matters, except similar suits, and suits challenging the constitutionality of the Act pursuant to section 310¹¹⁶ of FECA.¹¹⁷

Complainant's Rights

After a complainant has filed a complaint, he may not participate in the investigation. He will not be apprised of any FEC action except termination or dismissal of the MUR.¹¹⁸ FECA, however, does provide a complainant with the right to institute a private cause of action against the FEC, if the Commission has failed to act upon the complaint within 120 days after it is filed, or if the Commission has dismissed the complaint.¹¹⁹ In the case of a dismissed complaint,

equal to the dollar amount of the contribution or expenditure involved in the violation. The amount will be higher for knowing and willful violations.

111. *Id.* § 437g(a)(4)(A)(i). The FEC may seek judicial enforcement of a conciliation agreement if respondent violates any of its terms. *Id.* § 437g(a)(5)(D).

112. *Id.* § 437g(a)(6)(A). FEC regulations permit a respondent to enter into a conciliation agreement even after civil suit has been filed. 11 C.F.R. § 111.19(c) (1980).

113. 2 U.S.C. § 437g(a)(6)(A) (Supp. III 1979); 11 C.F.R. § 111.19(b) (1980).

114. 2 U.S.C. § 437g(a)(6)(A)-(C) (Supp. III 1979); *see* AFL-CIO v. FEC, No. 78-1937 (D.C. Cir. April 1, 1979).

115. 2 U.S.C. § 437g(a)(9) (Supp. III 1979).

116. *Id.* § 437h (1976) (amended 1979).

117. *Id.* § 437g(a)(10) (Supp. III 1979); *id.* § 437h (1976 & Supp. III 1979).

118. 11 C.F.R. §§ 111.9(b), 111.17(b), 111.18(e) (1980).

119. 2 U.S.C. § 437g(a)(8)(A) (Supp. III 1979). The FEC and not the respondent is the proper defendant initially in a complainant's suit. *See* Common Cause v. FEC, 82 F.R.D. 59, 60 (D.D.C.

complainant must file suit within sixty days after dismissal.¹²⁰ If the court declares that the FEC's inaction or dismissal was contrary to law, the court may direct the Commission to take action specified by the court within thirty days.¹²¹ If the Commission fails to conform with the court's declaration within the designated time, the complainant may institute a private civil action against the respondent and seek judicial enforcement of FECA for the violation involved in the original complaint.¹²²

ADVISORY OPINIONS

The FEC may render advisory opinions regarding the application of any provision of FECA or FEC regulations to a specific fact situation.¹²³ Any person may obtain an advisory opinion by filing a written request setting forth the specific transactions or activity regarding which the person is seeking an opinion.¹²⁴ Requests that seek a Commission ruling concerning the activities of third parties do not qualify for advisory opinions.¹²⁵ The activity described in the request must be activity that the requesting party plans to undertake or is presently undertaking and intends to undertake in the future.¹²⁶ Upon receipt of the request, the General Counsel will make an initial determination as to whether the request qualifies as an advisory opinion request and whether sufficient facts have been provided regarding the specific activity or transaction.¹²⁷ If the request is deemed incomplete, the General Counsel will notify the requestor within ten days of receipt and specify

1979); text & note 122 *infra*. No other private cause of action may be asserted on the basis of a violation of the Act. *See* *Cort v. Ash*, 422 U.S. 66, 74-77 (1975).

120. 2 U.S.C. § 437g(a)(8)(B) (Supp. III 1979).

121. *Id.* § 437g(a)(8)(C).

122. *Id.*; *see* *National Right to Work Comm. v. Thomson*, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶9042 (D.D.C. Aug. 31, 1977). *See generally* *Hampton v. FEC*, No. 77-1546 (D.C. Cir. July 21, 1978); *Walther v. FEC*, 47 U.S.L.W. 2698 (D.D.C. Apr. 17, 1979); *Walther v. Baucus*, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶9077 (D. Mont. Mar. 16, 1979).

123. 2 U.S.C. § 437d(a)(7) (Supp. III 1979).

124. *Id.* § 437f(a)(1); 11 C.F.R. § 112.1(b) (1980). FECA includes within the definition of "person" an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons. 2 U.S.C. § 431(11) (Supp. III 1979); 11 C.F.R. § 100.10 (1980). Therefore, either a corporation or a PAC may request an advisory opinion. Prior to the enactment of the 1979 Amendments, corporations did not have standing to request an advisory opinion. 2 U.S.C. § 437f (1976) (amended 1979); *see* *FEC Response to Advisory Opinion Request 1978-62*, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶6085 (July 19, 1979).

125. 11 C.F.R. § 112.1(b) (1980). Questions regarding the conduct of third parties may be the subject of an administrative complaint. 2 U.S.C. § 437g(a)(1) (Supp. III 1979). *See* text & notes 87-90, 118-22 *supra*.

126. 11 C.F.R. § 112.1(b) (1980). A hypothetical question does not qualify as an advisory opinion request. *Id.* The Commission has yet to distinguish a hypothetical question from a question relating to activity that the requesting party intends to undertake in the future. A requestor must clearly assert his intention to undertake specific activity in order to avoid having the question characterized as hypothetical. There are no sanctions if the requestor fails to undertake the activity after an advisory opinion is rendered.

127. *Id.* § 112.1(d).

the deficiencies in the request.¹²⁸

The Commission must issue an advisory opinion within sixty days after it has received a complete written request.¹²⁹ The request must be made public by the FEC and interested parties may submit written comments within ten days thereafter.¹³⁰ A vote of four commissioners is required for approval of any advisory opinion.¹³¹ If four commissioners fail to agree on an advisory opinion within the sixty-day time limit, a letter to that effect will be sent to the requestor.¹³² Any person who receives an unsatisfactory or unfavorable advisory opinion may within thirty days submit a written request for reconsideration.¹³³ The FEC will consider the request only upon the motion of a member who voted with the majority that originally approved the advisory opinion.¹³⁴ If four commissioners vote for such a motion, the original advisory opinion is vacated.¹³⁵

An advisory opinion issued pursuant to these procedures is the only opinion of an advisory nature that may be issued by the Commission or its staff.¹³⁶ An advisory opinion affords a requesting party and others similarly situated broad protection from subsequent enforcement or prosecution. The requesting party may rely upon the opinion, as may any other person involved in any activity which is materially indistinguishable from the activity with respect to which an advisory opinion is rendered.¹³⁷ Furthermore, any such person who acts in good faith in accordance with the term of the advisory opinion may not be subjected to any of FECA's sanctions as a result of such reliance.¹³⁸

128. *Id.*

129. 2 U.S.C. § 437f(a)(1) (Supp. III 1979). The period is shortened to 20 days if the request is made on behalf of a candidate or his authorized committee within 60 days preceeding an election. *Id.* § 437f(a)(2); 11 C.F.R. § 112.4(b) (1980).

130. 2 U.S.C. § 437f(d) (Supp. III 1979); 11 C.F.R. §§ 112.2, .3 (1980); see *National Conservative Political Action Comm. v. FEC*, No. 78-1543 (D.C. Cir. March 11, 1980); text & note 135 *infra*.

131. 2 U.S.C. § 437c(e) (Supp. III 1979); 11 C.F.R. § 112.4(a) (1980).

132. 11 C.F.R. § 112.4(a) (1980).

133. *Id.* § 112.6(a).

134. *Id.*

135. *Id.* § 112.6(d). FECA does not provide for judicial review of FEC advisory opinions. A court of appeals has concluded, however, that a plaintiff has standing to challenge an advisory opinion granted to a third party on the basis that the defendant FEC failed to follow statutory and promulgated administrative procedures in issuing the opinion. *National Conservative Political Action Comm. v. FEC*, No. 78-1543, slip op. at 7 (D.C. Cir. March 11, 1980). The court further held that the plaintiff must exhaust administrative remedies provided in 2 U.S.C. § 437g before a court may assert jurisdiction over a suit against the recipient of the advisory opinion. *Id.* at 5-6, n.8; *National Conservative Political Action Comm. v. FEC*, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶9057 (D.D.C. Apr. 28, 1978); see text & notes 118-22 *supra*. The court did not address the circumstances under which the recipient of an advisory opinion could obtain standing, and a court could assert jurisdiction, with respect to a substantive challenge to an advisory opinion.

136. 2 U.S.C. § 437f(b) (Supp. III 1979); 11 C.F.R. § 112.4(f) (1980).

137. 2 U.S.C. § 437f(c)(1) (Supp. III 1979); 11 C.F.R. § 112.5(a) (1980).

138. 2 U.S.C. § 437f(c)(2) (Supp. III 1979); 11 C.F.R. § 112.5(b) (1980).

CONCLUSION

Congress has been accused of intentionally establishing a weak FEC.¹³⁹ Critics point out that no one is in charge; there is no permanent chairman and no administrative leadership.¹⁴⁰ In order to achieve partisan balance, Congress has produced an agency that must make decisions by committee, if at all. Consequently, policy direction often is not clearly perceived or understood by the staff.¹⁴¹ Counsel who practice before the FEC must be prepared to cope with this institutional problem. Direct access to the Commission is limited. Counsel will not always know when staff may be acting without clear policy direction. This danger exists in the investigative process, particularly during conciliation negotiations. At all times counsel must bear in mind that final approval rests with at least four commissioners and not with the legal staff. Therefore, it is important to ascertain the precise mandate under which the staff is negotiating. If FEC policy is uncertain, it should be clarified through the staff. In the case of advisory opinions, which often flesh out FEC policy, counsel should be prepared for the possibility that difficult questions may not receive a consensus response. With an even number of commissioners, tie votes will occur, occasionally along partisan lines.

Counsel must at times represent a client's interest at the FEC without the benefit of public rules of procedure. This is true with respect to audits and reports analysis. In both cases a staff decision may result in enforcement proceedings. The FEC, however, has not to date set forth audit or reports analysis procedures for use by counsel and the public. Until such procedures are provided, counsel must depend on the FEC staff and on their reputed willingness to be cooperative and helpful to those who are subject to FECA.

139. INSTITUTE OF POLITICS, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, AN ANALYSIS OF THE IMPACT OF THE FEDERAL ELECTION CAMPAIGN ACT, 1972-78 16 (prepared for the House Comm. on Administration).

140. *Id.*

141. *Id.* This criticism accompanied a recommendation that Congress amend FECA by providing for a presidentially appointed Chairman who would have administrative powers. *See generally Reform-Spawned Agency Stirs Discontent*, 38 CONG. Q. WEEKLY REP. 1019, 1025 (1980).