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October 31, 2011

Chairman Gregg Harper
Subcommittee on Elections
Committee on House Administration
1309 Longworth House Office Building
Washington, DC 20515

Re: Federal Election Commission — Reviewing Policies, Processes and Procedures

Dear Chairman Harper:

Thank you for the opportunity to submit comments in conjunction with the Subcommittee on Elections' November 3, 2011, hearing on the Federal Election Commission — Reviewing Policies, Processes and Procedures. This hearing is an important step toward improving the Commission's effectiveness and improving public confidence in both the Commission and the electoral process.

The comments I am submitting are my own and are not submitted on behalf of any client. Nor do my views necessarily reflect the views of any client. By way of background, I am Chairman of the Election and Political Law Practice Group of Covington & Burling LLP. Covington has one of the nation's oldest election and political law practices. We advise a wide variety of corporate and trade association clients, as well as political parties, PACs, lobbying firms, tax-exempt organizations, and individuals, concerning compliance with the federal election laws. Our election and political law clients include some of the nation's leading trade associations, financial institutions, manufacturers, and technology companies. We regularly represent clients in enforcement matters before the Federal Election Commission.

Currently, the Federal Election Commission does not publicly release the methodology that it uses to make an initial assessment of penalties in an enforcement action. The Commission's practice of maintaining secrecy around its determination of penalties adversely shapes the way that regulated persons view the enforcement process, and it discourages those persons from voluntarily disclosing compliance issues to the Commission. Making the methodology for initial penalty assessments available to the public would make the enforcement process more fair and transparent, reduce the risk of

improper strategic behavior by enforcement staff during conciliation negotiations, and greatly increase the incentive for voluntary disclosure of violations to the Commission.

Other federal agencies understand this fundamental logic. A number of federal agencies currently disclose their methodologies for determining civil penalties. *See, e.g.,* Nuclear Regulatory Commission Enforcement Policy (July 14, 2011)[1]; 2010 Federal Sentencing Guidelines Manual (Nov. 1, 2010)[2]; 74 Fed. Reg. 57593 (Nov. 9, 2009) (Office of Foreign Assets Control Economic Sanctions Enforcement Guidelines)[3]; 15 C.F.R. Part 766 Supps. 1 & 2 (Export Administration Regulations); 47 C.F.R. § 1.80 (Federal Communications Committee Forfeiture Proceedings); Civil Money Penalties Policy, Comptroller of the Currency Administrator of National Banks, Policies & Procedures Manual 5000-7 (June 16, 1993)[4].

For instance, the Environmental Protection Agency's ("EPA") website publishes a list of civil penalty policies for a number of the laws EPA administers.[5] One of several EPA policies that sets settlement penalties is the Public Water System Supervision Program Settlement Penalty Policy under the Safe Drinking Water Act (the "SDWA Policy").[6] The 14-page policy was introduced in 1994 and includes a worksheet for calculating settlement penalties. The SWDA Policy sets forth the maximum penalties allowed by statute and then discusses a two-step process for calculating penalties, which includes how to compute an "economic benefit" component and a "gravity" component. SDWA Policy at 3. The figure is then adjusted based on a number of factors, including the degree of willfulness, history of noncompliance, litigation considerations, and ability to pay. The SWDA Policy gives detailed guidance regarding how the EPA arrives at each of these figures. It also gives the EPA flexibility to reduce a penalty amount in exchange for the party completing an environmentally beneficial project. *See id.* at 12. The SWDA Policy makes clear that it applies only in settlement negotiations and that EPA will seek the statutory maximum in a

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[1] *At* http://pbadupws.nrc.gov/docs/ML0934/ML093480037.pdf. This policy has been updated several times. Those updates are available on the NRC's website at http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html.

[2] *At* http://www.ussc.gov/guidelines/2010_guidelines/index.cfm.

[3] OFAC publishes guidance, including risk matrices, for several economic and trade sanctions online at http://www.treasury.gov/resource-center/sanctions/Pages/default.aspx.

[4] *At* http://www.occ.gov/news-issuances/bulletins/pre-1994/banking-circulars/bulletin-273a.pdf.

[5] *See* http://cfpub.epa.gov/compliance/resources/policies/civil/penalty/. The EPA has published penalty policies for at least 18 distinct programs the agency administers.

[6] *At* http://www.epa.gov/compliance/resources/policies/civil/sdwa/sdwapen.pdf.

litigation proceeding. The EPA reserves the right to "change this policy at any time, without prior notice, or to act at variance to this policy" and the policy "does not create any rights, implied or otherwise, in any third parties." *Id.* at 14.

The Commission should follow the example of the numerous federal agencies that publish methodologies for computing penalties. The Commission's disclosure of the criteria for assessing penalties would give the public a greater sense that the Commission is acting consistently and fairly. This will positively affect enforcement proceedings.

Under the Commission's current practice, penalties may vary widely in what appear to be similar cases. For years, practitioners have been pondering how the Commission makes an initial assessment of penalties. Yet, it remains a mystery that only those who have experience on the inside can answer. And even former insiders can only speculate, at best, based on past practices. To outsiders, there appears to be little rhyme or reason to these assessments. Sometimes penalties seem to be influenced by subjective factors, such as the size or prominence of the respondent or the respondent's reputational or political vulnerability, rather than by objective, quantifiable factors. This leads to a situation where penalties in like cases do not always appear to be consistent and creates an appearance that the Commission is treating respondents in an arbitrary and unfair manner. Conciliation proceedings are likely to progress more smoothly when respondents feel they are being treated fairly and understand how the Commission arrives at an opening settlement offer.

Publishing the Commission's methodology for assessing penalties is also likely to increase voluntary self-reporting. Currently, the incentives for regulated committees and corporations to self-disclose violations, where disclosure is not required by law, are greatly reduced. This is because a respondent cannot asses the level of the fine the Commission may impose with any reasonable amount of confidence. A potential respondent is more likely to make a *sua sponte* disclosure of a violation if the likely penalty can be assessed prior to contacting the Commission.

In 2007, the Commission adopted a voluntary disclosure policy statement, which sought to encourage voluntary disclosures of Federal Election Campaign Act ("FECA") violations by offering to reduce penalties by 25% to 75%, if certain conditions are met. *See* Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions), 72 Fed. Reg. 16695 (Apr. 5, 2007). However, the Commission's voluntary disclosure policy is substantially undermined by the fact that the Commission refuses to make public the methodology by which it makes an initial assessment of penalties. In the absence of clear and transparent standards for determining the initial assessment, it is difficult or impossible to predict the impact of the promised 25% to 75% reduction for a voluntary disclosure. Because the Commission staff can simply adjust the initial assessment of the penalty upward to "compensate" for the effect of the 25% to 75%

reduction — and can do so in a manner that is permanently shrouded from public scrutiny — the Commission's voluntary disclosure policy has had far less effect than it otherwise might have. If the Commission is free simply to ratchet up the initial assessment to offset the promised reduction, the incentive to self-disclose under the policy is rendered meaningless.

The Commission may fear that creating a formula, publicizing it, and applying it consistently will impair its ability to exercise discretion to adjust penalties in appropriate circumstances. However, the agency methodologies cited above provide for adjustments based on mitigating factors, aggravating factors, and/or other circumstances (such as ability to pay). Like these other policies, the Commission's criteria could incorporate limited adjustments or exceptions the Commission feels are needed to apply discretion, as the Commission has already done in its voluntary disclosure policy statement.

There may also be concerns that giving the public greater insight into the Commission's penalty structure will permit bad actors to calculate the likely cost of a violation in advance. This could allow so-called bad actors to simply figure the penalty into the "cost of doing business." However, the penalty structure can take such a conscious violation into account. Acting with knowing and willful intent to violate the law may trigger criminal sanctions, which is a significant deterrent.

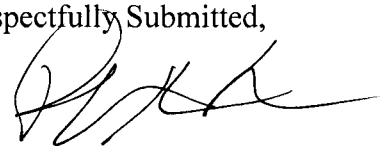
Further, if the Commission is concerned that disclosing the civil penalties authorized in FECA would be an insufficient deterrent to unlawful behavior, then the solution is to seek statutory increases to those penalties, not to cloak the existing penalty regime under a veil of secrecy.[7] If the Commission needs statutory authority to stiffen penalties, the Commission should seek that authority. But the penalty regime itself must be transparent, coherent, and predictable to help ensure fundamental fairness.

It is time to lift the veil of secrecy that shrouds the process the Commission uses to determine fines that should be imposed in enforcement actions. The Commission's current approach can seem opaque and unpredictable, which undermines public confidence and empowers the Commission's critics. Cloaking the penalty process in mystery encourages the public to suspect that the Commission plucks penalties from thin air based on what the Commission thinks it can achieve, rather than based on identifiable law. While I do not believe it would be an accurate inference, the public cannot be faulted for drawing the inference that penalties are handed out in a smoke-filled room guided by politics, not law, in the face of the Commission's reluctance to explain its own

[7] For example, the Federal Sentencing Guidelines set forth very high, but very clear, penalties. *See* 2008 Federal Sentencing Guidelines Manual, *supra*.

procedures. The Commission could blunt some public criticism by revamping its procedures to enhance due process protections for respondents and to increase the transparency of its decision making.

Respectfully Submitted,



Robert K. Kelner