



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matters of)	
)	
The Committee to Elect Sekhon for Congress and)	
Daljit Kaur Sekhon, in her official capacity as treasurer)	MURs 5957, 6031
)	
Hagan Senate Committee, Inc. and)	
Nancy M. Bremmer, in her official capacity as treasurer)	

STATEMENT OF REASONS
Vice Chairman MATTHEW S. PETERSEN and
Commissioners CAROLINE C. HUNTER and DONALD F. McGAHN II

MUR 5957 presents an enforcement action that should have been handled differently from start to finish. The matter illustrates a number of shortcomings in the Commission's procedures and processes (particularly in the areas of due process and civil penalty calculation), and highlights a troubling disparity in campaign finance law: rote enforcement of hyper-technical rules often has an unfair impact on inexperienced political participants. And tragically, being subjected to such treatment leads many to swear off future involvement in the federal election process.¹ That such shortcomings tend to have a disparate impact on inexperienced candidates who operate on small budgets and rely on non-professional staff is illustrated by comparing MURs 5957 (Sekhon) and 6031 (Hagan). Both matters concerned campaigns that ran into problems with a technical reporting issue commonly called "best efforts." Under that rule, campaign treasurers are supposed to report the occupation and employer of its contributors; however, contributors are not required to provide such information.²

MUR 5957 involves a self-employed medical doctor serving in the U.S. Army Reserve, who ran for the U.S. House as a Democrat against a long-serving incumbent Republican House member in a heavily Republican district. The candidate, Dr. A.J. Sekhon, raised less than \$200,000, and had a family member serve as his campaign treasurer. Mr. Sekhon lost his race by roughly a 2-1 margin. In identifying certain contributors in its electronically filed reports, the campaign listed "self" in both the

¹ See, e.g., ADR 433 (Trupiano); ADR 428 (Lavigne); ADR 463 (Carter).

² See *Republican Nat'l Comm. v. FEC*, 76 F.3d 400 (D.C. Cir. 1996).

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employer and occupation fields. Regardless of whether this was the result of a software problem or simple confusion about how to report occupation information, no complaint was filed against the campaign regarding the issue. Instead, more than a year after the 2006 election, the Commission initiated an internally generated enforcement action, over what was at best a single reporting issue that was multiplied a number of times. Critically, unlike complaint-generated matters (where the Act provides the subject of the complaint an opportunity to respond to the allegations before the Commission takes any action), Dr. Sekhon was never afforded the opportunity to address the Commission before it voted to find reason to believe he had violated the Act.

Compare this with MUR 6031, which concerned a top-tier successful Senate campaign that raised about \$8.5 million. In that matter, a complaint was filed, alleging that, *inter alia*, the Hagan Senate Committee failed to include the occupation and employer for what was estimated to be \$350,000 to \$500,000 in contributions (more than double what Sekhon raised for his entire campaign). Per established procedural protections, the Hagan campaign (unlike Sekhon) had the opportunity to respond to the allegations contained in that complaint prior to the Commission voting on the matter. The campaign also had sufficient resources to retain counsel, who filed a persuasive response. Ultimately, on the weight of that response, the Commission agreed by a vote of 5-0 to dismiss the matter.

That the Sekhon and Hagan campaigns suffered different fates is cause enough for frustration. Certainly, the Sekhon matter could have been dismissed as a matter of prosecutorial discretion; at the outset, it could have been referred to the Commission's Office of Alternative Dispute Resolution with an eye toward promoting compliance. But by the time it was presented to us (about two years after Sekhon lost the 2006 election), the sole issue concerned the imposition of a monetary penalty under a settlement that had been conducted while the Commission lacked a quorum during the first part of 2008. Notwithstanding this lack of quorum, the enforcement process continued to grind forward.³ That it took our rejection of a proposed settlement to end the Sekhon matter more than two years after his unsuccessful election effort is cause for concern.

As if this were not enough, recent case law called into question the Commission's past approach to the calculation of civil penalties in certain matters. In *FEC v. Kalogianis*, a case decided around the time of the Commission's initial vote in the Sekhon matter, a court considered and rejected the agency's request for more than

³ Although the Commission voted to initiate an enforcement proceeding and enter into conciliation in this matter on December 3, 2007, from January 2008 through early-July 2008, the Commission lacked a quorum. Absent a quorum, the Commission lacked legal authority to act on enforcement matters. See *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) ("*NLRB*") (vacating action of NLRB because the NLRB was not properly constituted due to a lack of a quorum (after a number of recess appointments failed to be confirmed)). See also 11 C.F.R. § 2.2(d)(1) (defining "meeting" as "the deliberation of at least four voting members of the Commission in collegia where such deliberations determine or result in the joint conduct or disposition of official Commission business"); 11 C.F.R. § 2.1 (stating that 11 C.F.R. Part 2 was "promulgated pursuant to the directive of 5 U.S.C. 552b(g) which was added by section 3(a) of [the Government in Sunshine Act], and specifically implemented section 3 of that Act."); Sunshine Act Regulations: Scope and Definition; Meetings, 90 Fed. Reg. 39967 (Oct. 1, 1985).

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\$300,000 in civil penalties from a vanquished candidate, and instead imposed a \$7,000 penalty.⁴ And the teachings of *Kalogianis* are nothing new, as its rationale was based on cases more than a decade old. To approve the proposed resolution of the Sekhon matter - which was based on the same approach pursued by the Commission and rejected in *Kalogianis* - would have required the Commission to ignore that case, something that cannot be done.

Some of our colleagues, however, find such an action "inexplicable." What is inexplicable is failing to understand the plight of novice candidates, or how the Commission's own procedures tend to affect those political actors. The reality is that it is not unusual for neophyte candidates to find themselves entangled in the Commission's enforcement process. For example, the story of another vanquished candidate received national attention last fall when John Stossel presented a news segment on ABC's "20/20" entitled "Campaign Finance Reform Meets Unintended Consequences." Stossel told the story of Ada Fisher, a retired doctor in North Carolina who was a candidate for the U.S. House of Representatives. In that segment, viewers learned that Fisher ran for Congress on a shoe-string budget, campaigned out of her own car, made her own signs and buttons, relied exclusively on volunteers to staff her campaign, and supported her campaign with her own funds. Dr. Fisher lost the election, but became ensnared in the agency's processes.⁵

According to the "20/20" segment, the Commission notified Dr. Fisher that she allegedly failed to file the required campaign finance reports, and sought a civil penalty. Moreover, Stossel pointed out that, even though nearly two years had elapsed since the last election in which Dr. Fisher was a candidate, the Commission had not allowed her to terminate her campaign committee, and thus she was still subject to ongoing reporting requirements. Between January 2007 and January 2009, she filed nearly 100 pages of additional reports with the Commission in an effort to comply with those applicable and seemingly never-ending requirements. But as Dr. Fisher explained to the Commission:

The above campaigns represent my attempts at elective office on the national level whose files on record keeping I would like to close given that there has been no appreciable financial income or activities on them for several years. There are debts due me by these campaigns. The requirement to file reports is burdensome and as there is no money to be recovered by the campaigns and these campaigns are closed for my purposes as they should be closed on your records.⁶

⁴ 2007 WL 4247795 (M.D. Fla. 2007).

⁵ As one commentator explained, "People like the idea of campaign finance reform. Yet, campaign finance law, like all of government's laws, is subject to a still more powerful law: the law of unintended consequences." John Stossel, Patrick McMnamin, and Miguel Sancho, "Campaign Finance Reform Meets Unintended Consequences," *available at* <http://abcnews.go.com/Politics/Vote2008/story?id=6049954&page=1> (accessed Feb. 2, 2009).

⁶ Fisher for Congress 2006, Miscellaneous Report to the FEC (Feb. 26, 2008).

Three months later, Dr. Fisher again wrote to the Commission, pleading that, “I would like the above accounts closed as we have had no activity on them and my personal losses have been financially devastating.”⁷ Dr. Fisher’s requests to terminate her campaign committees went unanswered by the Commission’s Reports Analysis Division (“RAD”) (which is not surprising, given that there is no formal Commission procedure that empowers RAD to act on such a request – one of several issues that the Commission itself ought to address). Ordinarily, we never would have known about Dr. Fisher’s situation; there is currently no formal procedure in place where an individual in Dr. Fisher’s position can address the Commission directly.⁸ Fortunately, upon learning about her case through John Stossel’s “20/20” segment, we set in motion the necessary steps to have her campaign committees terminated, thereby relieving her of any further reporting requirements in connection with her prior campaigns. On February 6, 2009, the Commission administratively terminated Dr. Fisher’s campaign committee.

There are echoes of Dr. Fisher’s story, such as the inability to be heard by the Commission, in MUR 5957 (Sekhon). Both committees, and numerous others over the years, have been caught up in the enforcement machinery of the Commission, a machinery created by the Commission’s policies, practices and procedures. Such policies, practices and procedures are intended to both prioritize the use of Commission resources,⁹ and ensure that those who deal with the Commission receive equal treatment. A desire for even-handedness is certainly a well-intentioned goal, but as Justice Scalia noted in dissent in *McConnell v. FEC*: “... as everyone knows, [campaign finance] is an area in which evenhandedness is not fairness.”¹⁰ Years ago, Justice Stewart similarly observed that “[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.”¹¹

⁷ Fisher for Congress 2006, Miscellaneous Report to the FEC (May 14, 2008).

⁸ Some attorneys who regularly practice before the Commission have adopted the informal practice of providing courtesy copies of their filings in a matter to the Commissioners, or filing motions or briefs not contemplated under current Commission practices. If Dr. Fisher communicated thusly to the Commission, we may have addressed her situation in a timelier manner, without having to rely on the happenstance of Stossel’s report. Although the practice of counsel (or respondents) providing copies of their filings and correspondence to all Commissioners is often beneficial (perhaps by bringing additional relevant information to the Commission’s attention), this is, at best, a stop-gap measure. Unfortunately (and unintentionally) it benefits respondents who hire sophisticated counsel familiar with this practice – which is not what we, as Commissioners, seek to promote. Additionally, writing directly to the Commission has its downsides – bypassing Commission staff can result in material not being properly docketed, and can create issues under the Commission’s *ex parte* rules. Consistent with these concerns, Commission procedures ought to be modified to provide more opportunity for respondents to address the Commission directly.

⁹ See *Heckler v. Cheney*, 470 U.S. 821, 831 (1985) (concluding that an agency generally cannot act against each technical violation of the statute it is charged with enforcing; and holding that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion).

¹⁰ *McConnell v. FEC*, 540 U.S. 93, 249 (2003) (Scalia, J., concurring in part and dissenting in part).

¹¹ *Jenness v. Fortson*, 431 U.S. 431, 442 (1971) (recognizing and approving reasonable differences in the treatment of major and lesser parties based on their demonstrated relative strength).

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But it is not enough to merely point out problems without offering solutions. At our suggestion, the Commission held a hearing earlier this year, as one needs to be clear on the problem before offering the fix.¹² For example, as that hearing illustrated, too often it is assumed that the Commission staff is to blame. But the Commission staff are merely acting pursuant to a variety of agency guidelines (such as the “referral thresholds” at issue in the Sekhon matter) adopted by the Commission itself to prioritize matters requiring Commission resources. Certainly, these thresholds provide the appearance of objectivity and preciseness, but as the name suggests, thresholds are mere starting points, not conclusions. Some disagree, and find deviation from these abstracts as “inexplicable.” But such a mechanical application of the thresholds in the name of equality can mask arbitrariness that results when dissimilar political matters are treated the “same.” If such simplistic notions of “equality” were all that mattered, there would be no need for Commissioners at all, as all matters could simply be plugged into a formula that would then yield the “proper” result.

But this is precisely why judgment is necessary. In such instances where rigid formulas produce an absurd or unfair result, Commissioners must exercise discretion to ensure an appropriate and just result is ultimately achieved. The Act demands this, and directs the Commission to “administer, seek to obtain compliance with, and formulate policy with respect to [the Act].”¹³ Congress has granted the Commission discretion over these duties, the exercise of which the courts have vigorously protected. Thus, to the extent the Commission is serious about fulfilling its statutory duties, it must not robotically apply penalties irrespective of the particulars of the violation. Instead, the Commission must act in the manner intended by Congress—as a deliberative body that exercises discretion in carrying out its responsibilities under the Act.¹⁴

Such a situation presented itself in the Sekhon matter. After reviewing the file in this matter and balancing the alleged violation against the proposed penalty, we opted to

¹² In December 2008, the Commission issued a notice of public hearing and request for public comments on its compliance and enforcement processes. Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74,495 (Dec. 8, 2008). The testimony of the witnesses at the hearing, which was held on January 14-15, 2009, addressed many of the issues raised in these matters. The comments received by the Commission, as well as the transcript of the hearing are available at <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>.

¹³ 2 U.S.C. § 437c(b)(1).

¹⁴ While some may fear that the exercise of the Commission’s discretion may be tainted by partisanship, recent Commission cases demonstrate that the Commission is able to put aside partisanship to fairly administer the Act. *See, e.g.*, MUR 6044 (Musgrove for U.S. Senate) (by a vote of 5-0, the Commission rejected OGC’s recommendation to find RTB); MUR 5974 (New Summit Republicans) (by a vote of 6-0, the Commission rejected OGC’s recommendation to find RTB); LRA 748 (Mike Gravel for President 2008), Determination of Ineligibility and Letter of Candidate and Committee Certification and Agreement (Agenda Document 08-44, Dec. 4, 2008) (by a vote of 4-2, the Commission rejected OGC’s recommendation to find that the candidate was ineligible to receive matching funds); LRA 731 (John McCain 2008, Inc.), Presidential Primary Matching Payment Program (Agenda Document 08-17, Aug. 21, 2008) (by a vote of 6-0, the Commission adopted OGC’s recommendation to grant Senator McCain’s request to withdraw from the Matching Payment Program).

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exercise our prosecutorial discretion pursuant to *Heckler v. Cheney*¹⁵ and voted to close the file.

I. BACKGROUND

A. Agency Procedures & the Lack of Due Process Rights

Most would assume that when an individual or entity is accused of violating the law, that individual or entity would be notified of the allegation and be afforded an opportunity to respond. Unfortunately, under the Commission's current enforcement procedures, this does not always occur. Unlike matters initiated by the filing of a complaint -- where respondents are afforded the opportunity to challenge the allegation made against them before the Commission takes any formal action -- in so-called internally generated matters, a respondent is not provided a meaningful opportunity to be heard prior to the Commission's decision on whether to commence an enforcement action.

The consequences of this significant procedural distinction are illustrated by MURs 5957 and 6031, matters which both turn on the application of one of the Commission's more technical reporting requirements regarding the disclosure of the occupation and employer of campaign contributors. In MUR 5957 (Sekhon), OGC's recommendation to the Commission was based on information RAD ascertained and referred to OGC. The Commission voted on and approved OGC's recommendation to find RTB without giving the respondent a meaningful opportunity to be heard. On the other hand, MUR 6031 (Hagan) originated from a complaint filed by the North Carolina Republican Party against the principal campaign committee of Kay Hagan, the Democratic candidate for the U.S. Senate from North Carolina. After receiving a copy of the complaint from the Commission, the respondent's counsel filed a response, asking that "the complaint be dismissed," and setting forth the factual and legal basis for such a request.¹⁶ After considering this response, the Commission unanimously voted to dismiss that matter. That two cases that both turn on the application of the Commission's "best-efforts" rules could proceed so differently illustrates significant shortcomings in the Commission's procedures.¹⁷

¹⁵ 470 U.S. at 831.

¹⁶ MUR 6031 (Hagan), Response, at 1, 4 (concluding that "we believe that the above addresses all of the allegations in the complaint and that there are inadequate grounds for the Commission to proceed against the Campaign").

¹⁷ The similarities to an externally generated matter are unmistakable: one division of the Commission (in this case, RAD) files a document with Office of General Counsel setting forth alleged violations of the Act and/or Commission regulations. See MUR 5957 (Sekhon), Reports Analysis Referral to Office of General Counsel, available at <http://eqs.nictusa.com/eqsdocs/28044220518.pdf>. However, unlike in an externally generated matter, this quasi-complaint (which became public once the matter was closed) was not served on the respondent.

B. “Best Efforts”

The treasurer of a political committee must file periodic reports with the Commission.¹⁸ Both the contents of the required reports and the reporting schedule for all political committees is set forth in the Act.¹⁹ Each report must disclose the aggregate totals of the committee’s receipts and disbursements, as well as certain details thereof. In particular, the treasurer must keep an account of, and report, the “identification” of each person who makes a contribution or contributions aggregating more than \$200 during a calendar year (hereinafter referred to as “itemized contributions”), together with the date and amount of any such contribution.²⁰ An individual’s “identification” means his or her name, mailing address, occupation, and employer.²¹ In the event a committee does not obtain such information, if a treasurer demonstrates that “best efforts” have been used to obtain, maintain, and submit the required information, any report or record shall nonetheless be considered in compliance with the Act (the so-called “best efforts” provision).²²

Congress enacted the “best efforts” provision in 1976. Senator Packwood, the provision’s sponsor, explained that it was an “anti-nit-picking amendment,” which “merely says that if a finding is made that they tried in good faith to try to comply with the law they shall not be harassed.”²³ Similarly, Senator Stevens, who apparently drafted the provision, emphasized that it was meant to lessen the “nit-picking that has been going on about these reports,” which he attributed not to the Commission’s actions but to the “very, very rigid” requirements of the statute.²⁴ As Congress recognized, when the best efforts provision was re-codified²⁵ in 1979:

If the committee does not report the occupation and principal place of business for each itemized individual contribution, the Commission’s review and enforcement procedures must be geared to determining whether the committee exercised its best efforts to obtain the information. The best efforts test is crucial since contributor information is voluntarily supplied by persons who are not under the control of the committee.²⁶

¹⁸ 2 U.S.C. § 434(a)(2).

¹⁹ 2 U.S.C. § 434(b).

²⁰ Contributions from individuals must be “itemized” if they exceed \$200 per year. *Id.* §§ 432(c)(3), 434(b)(3).

²¹ *Id.* § 431(13).

²² *Id.* § 432(i).

²³ 122 Cong. Rec. 7922-23 (1976) (statement of Sen. Packwood).

²⁴ *Id.* at 7196 (statement of Sen. Stevens).

²⁵ The only change made in the re-codification of the provision in 1979 was the deletion of “candidates” as persons to whom the provision applied, leaving the remaining language essentially intact. Federal Election Campaign Act Amendments of 1979, Pub.L. No. 96-187, 93 Stat. 1339, 1347 (formerly codified at 2 U.S.C. § 432(i) (1976 & Supp. 1979)).

²⁶ HR. Rept. No. 422, 96th Cong., 1st Sess., at 14 (1979).

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In 1980, the Commission issued a regulation that for the first time interpreted "best efforts."²⁷ In 1992, dissatisfied with the extent to which political committees were obtaining the requested information from contributors, the Commission gave notice that it intended to revise the "best efforts" provision.²⁸ Notwithstanding Congress's recognition that contributor information is "voluntarily supplied," the Commission proposed revising the best efforts provision to "indicate that requests for contributor information must state that federal law requires the committee to report the information."²⁹ Echoing the concerns of Congress, one commenter on the proposed rule noted:

It is possible that some contributors simply do not believe it appropriate for the federal government to require the identification of their occupation or name of employer.... Some contributors are genuinely reluctant to answer the question, more out of a personal embarrassment or even 'principle' than out of a desire, for example, to conceal embarrassing professional connections.³⁰

Despite these and other similar comments, in 1993 the Commission issued a new "best efforts" rule asserting that Federal law "requires" political committees to report contributor information.³¹ This part of the rule was struck down.³² As the D.C. Circuit explained:

The statute does *not* require political committees to report the information for "each" donor. It only requires committees to use their *best efforts* to gather the information and then report to the Commission whatever information donors choose to provide.³³

In other words, in an effort to promote increased disclosure of contributor information, the Commission attempted to go beyond the reach of the Act. The D.C. Circuit went on to say that the Commission's "inaccurate characterization of the law may lead unsuspecting donors to believe that they must supply the requested information."³⁴ The Court unequivocally stated that "no federal law requires donors to report their name,

²⁷ 11 C.F.R. § 104.7 (1981 ed.) Under this provision, the Commission generally considered a political committee to have exercised "best efforts" if the committee made a clear request for the information in its initial solicitation for funds.

²⁸ Recordkeeping and Reporting by Political Committees: Best Efforts, 57 Fed. Reg. 44,137 (Sept. 24, 1992).

²⁹ *Id.*

³⁰ Comments of Robert Bauer, Perkins Coie, Recordkeeping and Reporting by Political Committees: Best Efforts, 57 Fed. Reg. 44,137 (Sept. 24, 1992), at 4-5.

³¹ 11 C.F.R. § 104.7(b)(1)-(2) (1994 ed.).

³² *Republican Nat'l Comm. v. FEC*, 76 F.3d 400 (D.C. Cir. 1996).

³³ *Id.* at 407 (emphasis in original).

³⁴ *Id.*

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address, occupation, and employer as a condition of supporting the political party of their choice.”³⁵

The Commission subsequently revised the provision, to make clear that the Act only requires committees to “report whatever information donors choose to provide.”³⁶ Pursuant to the revised regulation, a political committee is not required to report contributor information, unless it is provided by the contributor or is otherwise in the committee’s possession.³⁷ Whether characterized as an affirmative defense or safe harbor,³⁸ “best efforts” purports to recognize the tension between the Act’s recordkeeping and reporting requirements and a contributor’s right not to provide that information. It does not give rise to any independent recordkeeping or reporting requirements.

Under 11 C.F.R. § 104.7(b), a committee will be deemed to have exercised “best efforts” if all of its written solicitations for contributions include “a clear request” for the contributor’s information and “an accurate statement of Federal law regarding the collection and reporting of individual contributor identifications,” and the request and statement “appear in a clear and conspicuous manner on any response material included in a solicitation.”³⁹ And for contributions aggregating in excess of \$200 per calendar year or election cycle, received without adequate contributor information, the committee must make “at least one effort” to obtain the missing information.⁴⁰ The request, which may be written or oral, must be made no later than 30 days after receipt of the contribution, shall not include a solicitation or any other material, must clearly ask for the missing information, and must include an accurate statement of Federal law.⁴¹

Where a committee uses and demonstrates its use of “best efforts,” the committee will be considered in substantial compliance with the Act, even if the committee is unable to obtain “contributor information” as defined by 2 U.S.C. § 431(13).⁴² Thus, under

³⁵ *Id.*

³⁶ Recordkeeping and Reporting by Political Committees: Best Efforts, 62 Fed. Reg. 23,335 (Apr. 30, 1997).

³⁷ See 11 C.F.R. § 104.7(b)(3). However, the regulations set forth a committee’s reporting requirements in the event that missing contributor information is received after a contribution has been received and reported in due course. 11 C.F.R. § 104.7(b)(4) (a committee must “file with its next regularly scheduled report an amended memo Schedule A listing all contributions for which contributor information have been received during the reporting period covered by the next regularly scheduled report together with the dates and amounts of the contribution(s) and an indication of the previous report(s) to which the memo Schedule A relates; or file on or before its next regularly scheduled reporting date, amendments to the report(s) originally disclosing the contribution(s), which include the contributor identifications together with the dates and amounts of the contribution(s).”).

³⁸ OGC characterizes it as a “safe harbor.” See MUR 6031 (Hagan), First General Counsel’s Report, at 5.

³⁹ Authorized political committees are only required to attempt to collect and retain contributor information for contributions exceeding \$50. See 11 C.F.R. §§ 102.8, 102.9.

⁴⁰ 11 C.F.R. § 104.7(b)(2).

⁴¹ 11 C.F.R. § 104.7(b)(1)(i).

⁴² See 2 U.S.C. § 432(i); 11 C.F.R. § 104.7.

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Commission regulations, when a committee receives a contribution without the required contributor information or a check is received as a result of an oral solicitation, and the contributor information is not otherwise in the committee's possession, the committee may demonstrate the use of "best efforts" by providing a copy of the solicitation (containing the clear and conspicuous request and statement), and a sample letter or phone log showing at least one effort to obtain the missing information.⁴³ Although we were not Members of the Commission when the regulation was promulgated, this interpretation is consistent with the Commission's statements that its recordkeeping and reporting regulations are not particularly difficult or burdensome.⁴⁴

II. DISCUSSION

A. MUR 6031 (Hagan)

This matter was prompted by a June 26, 2008 complaint against the Hagan Senate Committee, the principal campaign committee of Kay Hagan's successful run for U.S. Senate during the 2008 election cycle. The complaint, filed by Hagan's political opposition, made three specific allegations: that the respondent (1) received excessive contributions; (2) filed two late 48-Hour Reports; and (3) failed to disclose required contributor information, specifically the occupation and employer of certain contributors.⁴⁵ All three allegations were based upon the respondents' 2007 Year-End and 2008 Pre-Primary Reports and related Request for Additional Information ("RFAI") letters RAD sent to the Hagan campaign.⁴⁶

⁴³ Neither 2 U.S.C. § 431(i) or 11 C.F.R. § 104.7 set forth a standard for "demonstrating" best efforts. And 11 C.F.R. § 102.9(d), the recordkeeping provision applicable to the substantive "best efforts" provision, only requires a treasurer to keep "a complete record of such efforts." Neither the Act, Commission regulations, nor any Commission policy statement or other guidance requires committees to keep a record of *each* follow-up letter in order to "demonstrate" best efforts. *Cf.* 11 C.F.R. § 110.1(l)(4) (specifying that in the event that a political committee relies on presumptive redesignation or reattribution, the committee must retain "the notices sent to the contributors"). Thus, in our view, evidence of written procedures plus a sample letter or phone log satisfactorily "demonstrates" compliance with the best efforts safe harbor.

⁴⁴ *See* Recordkeeping and Reporting by Political Committees: Best Efforts, 58 Fed. Reg. 57,725, 57,726 (Oct. 27, 1993) (stating that, in "weigh[ing] ... the cost, burdensomeness, and effectiveness of various modifications to the regulations," the Commission concluded that the new regulation would impose minimal burdens); Brief of the Federal Election Committee, *Republican National Committee*, 76 F.3d at 13-14 (describing the requirements as "simple," "modest," "minimally burdensome," and "narrowly tailored to serve compelling interests"); *id.* at 19 (noting that the Commission has "required much less than what political committees could do"); *id.* at 21 ("The requirements for taking advantage of this regulation are narrowly tailored and impose no unnecessary burden.").

⁴⁵ *See* MUR 6031 (Hagan), Complaint.

⁴⁶ *See, e.g.* MUR 6031 (Hagan), Complaint at 4-5 ("In its 2007 Year-End Report filed on January 31, 2008, Respondent Hagan Committee reported contributions from 427 donors but failed to disclose legally required information for 120 of the donors. . . . Respondent Hagan Committee's 2008 Pre-Primary Report filed on April 28, 2008, reflected records of 848 donors, 252 of which were missing information required by law to be disclosed."). The allegations in the complaint, to which respondents were afforded an opportunity to respond, are the same as the violations alleged by RAD in the referral to OGC in MUR 5957

In its response to the RFAI-based complaint, the Hagan Committee addressed each allegation, and argued that “there are inadequate grounds for the Commission to proceed.”⁴⁷ In response to the complaint’s accusation that the Committee failed to adequately disclose contributor information on its 2007 Year-End and 2008 Pre-Primary Reports (based upon the March 20, 2008 RFAI⁴⁸), the Hagan Committee asserted that it complied with the “best efforts” requirement, but was not successful in every instance in obtaining the information from the contributor.⁴⁹

Despite concluding that “the Committee failed to disclose the required identifying information and did not demonstrate ‘best efforts’ for a significant number of contributors,”⁵⁰ OGC recommended that the Commission dismiss this matter with a caution to the Hagan Committee.⁵¹ In support of its recommendation, OGC relied upon information provided in the respondent’s “response to the complaint,” “indicating that actions were taken consistent with the ‘best efforts’ safe harbor.”⁵² By a vote of 5-0,⁵³

(Sekhon), to which the respondent did not have a meaningful opportunity to respond prior to Commission consideration.

⁴⁷ MUR 6031 (Hagan), Response at 4. Regarding the allegedly excessive contributions, the Hagan Committee asserts that the contributions complied with the limits because the contributions were either designated by the contributors, were made by separate checks, or presumptively re-attributed or re-designated by the Hagan Committee under an established policy for doing so. As for the 48-Hour Reports, the Hagan Committee acknowledged that one report was technically untimely filed, but explained that the Committee mistakenly thought that the 48-hour period did not include weekends and thus filed the report on Monday instead of the preceding Saturday or Sunday. As to the third report, the Hagan Committee explained that the report was actually timely filed, but misreported the date of receipt of the contribution, making the report appear on its face to be untimely filed.

⁴⁸ Unfortunately, the use of a Commission RFAI or Audit Report as the basis of a complaint has become increasingly prevalent.

⁴⁹ MUR 6031 (Hagan), Response at 4.

⁵⁰ In advising the Commission on the matter, OGC noted that in its 2007 Year-End Report, the Hagan Committee reported receiving itemized contributions totaling \$499,000, and in its 2008 Pre-Primary Report, reported receiving itemized contributions totaling \$731,525.15. Moreover, the Hagan Committee failed to provide contributor information for 169 of the 468 itemized contributions reported (36%) in its 2007 Year-End Report, and that in its 2008 Pre-Primary Report, it disclosed 1,150 itemized contributions from individuals, but failed to provide complete contributor information for 219 (19%). OGC further asserted that although the Hagan Committee timely responded to the March 27, 2008 RFAI, it “failed to provide documentation of its efforts to obtain complete contributor information.” See MUR 6031 (Hagan), First General Counsel’s Report at 5. Based on our review of the reports at issue, it is probable that the amount of contributions for which the Hagan Committee allegedly failed to provide complete contributor information is between \$350,000 and \$500,000 (which is more than the total amount of contributions received by the Sekhon Committee for the entire election cycle).

⁵¹ MUR 6031 (Hagan), Certification, dated March 11, 2009.

⁵² MUR 6031 (Hagan), First General Counsel’s Report at 3 (“In its answer to the complaint, the Committee assert[ed] a ‘best efforts’ defense, maintaining that it complied with all of the requirements of 11 C.F.R. § 104.7(b) to attempt to obtain identifying information, including contacting the contributor within 30 days of receipt of the contribution and reviewing previous contributor information.”).

⁵³ MUR 6031 (Hagan), Certification, dated March 11, 2009.

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the Commission voted to accept OGC's recommendation to dismiss this matter on the grounds of prosecutorial discretion.⁵⁴

In our view, dismissing this matter with a caution to the respondent was properly within our discretion.⁵⁵ The committee demonstrated that procedures were in place to obtain contributor information to the greatest extent allowed by law. Any violations committed by the Hagan Committee, if any, were minor technical violations which did not significantly affect the disclosure of the committee's activity – and the Commission cautioned the committee in an effort to promote future compliance.

B. MUR 5957 (Sekhon)

Unlike the victorious now-Senator Hagan, A.J. Sekhon was a neophyte candidate, a self-employed medical doctor serving in the U.S. Army Reserve, who chose to challenge an incumbent Member of Congress. Sekhon raised less than \$200,000 for his entire election effort, and lost his election bid by a significant margin, receiving less than 33% of the vote in 2006. There was no complaint filed against Sekhon – no voter, political opponent, or so-called watchdog group believed what happened here warranted Commission review. Instead, this matter is entirely a creation of the Commission itself, and is based solely on the numerous reports filed by the Sekhon committee.

Although a detailed summary of Sekhon's reports may appear tedious, it is necessary to understand the issue in the matter. On October 18, 2006, the Sekhon Committee timely filed its 2006 October Quarterly Report; on October 26, 2006, the Sekhon Committee timely filed its 2006 12-Day Pre-General Report; on December 7, 2006, the Sekhon Committee timely filed its 2006 30-Day Post-General Report; and on March 12, 2007, filed its 2006 Year-End Report. However, approximately six months after the election, RAD sent the Sekhon Committee three RFAs, one dated April 27, 2007, and two dated May 1, 2007, concerning the Sekhon committee's 2006 12-Day Pre-General, 30-Day Post-General Election, and Year-End Reports.⁵⁶ These RFAs became the basis of the enforcement proceeding against the Sekhon committee:

- The first RFA, dated April 27, 2007, questioned the Sekhon committee's 2006 12-Day Pre-General Report (filed more than six months earlier). It requested additional information about 17 potentially prohibited or excessive contributions, and stated that "[y]our report discloses contributions from individuals for which the identification is not complete."⁵⁷

⁵⁴ See *Heckler*, 470 U.S. at 831.

⁵⁵ *Id.*, 470 U.S. at 831-32 (emphasis added). See also *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454, 19 L.Ed. 196 (1869)).

⁵⁶ Cf. Request for Additional Information (RFAI) from the Commission to Linda S. Cary, Re: 2007 Year End Report (Hagan Senate Committee, Inc.), March 27, 2008 (sent to the Hagan Committee two months after the report was filed (and eight months before the election)).

⁵⁷ Request for Additional Information (RFAI) from the Commission to Daljit Kaur Sekhon, Re: 12-Day Pre-General Election Report (Committee to Elect Sekhon for Congress), dated April 27, 2007, at 1.

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- A second RFAI was sent April 27, 2007, this one prompted by the Sekhon committee's Year-End Report. The RFAI requested "an itemization of information," but explained only that "Schedule A of your report discloses one or more contributions received after the general election that are designated for the general."⁵⁸ The RFAI also noted that the Sekhon Committee's beginning cash on hand for the period did not equal the ending cash on hand balance for the previous reporting period, and directed the Sekhon Committee to correct the discrepancy and amend all subsequent reports.
- On May 1, 2007, RAD issued a third RFAI, prompted by the Sekhon committee's 2006 30-Day Post-General Report (filed by the Sekhon Committee approximately six months earlier, and six months before the report referenced in the second RFAI). This RFAI identified eight potentially prohibited or excessive contributions, and also stated that "[y]our report discloses contributions from individuals for which the identification is not complete."⁵⁹ The RFAI included a general discussion of the definition of "purpose" under the Commission's regulations, and simply instructed: "Please amend Schedule B of your report to correct the descriptions that do not meet the requirements of the Regulations." Figuring out which Schedule B descriptions were potentially not in compliance was left to the Sekhon Committee.

Nearly six weeks later, on June 13, 2007, when RAD followed up with the Sekhon Committee about the RFAs, the Sekhon Committee's treasurer informed the RAD Analyst that she had not received the RFAs. RAD faxed the RFAs, and issued a response deadline of June 25, 2007, less than two weeks later. On June 23, 2007, the Sekhon Committee's report preparer contacted the Commission, asking for clarification of the RFAs and assistance with compliance.

Three days later, on June 26, 2007, the Sekhon Committee filed amended 2006 12-Day Pre-General and 30-Day Post-General Reports. However, on that date, RAD notified the Sekhon Committee's report preparer that the amended reports did not "adequately" correct the problems identified in the RFAs. The Sekhon Committee's report preparer asserted that, based on the RFAs, he believed the Sekhon Committee was only required to correct the potentially prohibited and excessive contributions specifically identified in the RFAs. RAD stated that the Sekhon Committee still needed to provide the missing contributor information or demonstrate compliance with the Commission's so-called "best efforts" regulations – even though the RFAs never specified which information was missing (this is an issue the Commission has now corrected).

⁵⁸ Request for Additional Information (RFAI) from the Commission to Daljit Kaur Sekhon, Re: Year-End Report (Committee to Elect Sekhon for Congress), dated April 27, 2007, at 1.

⁵⁹ Request for Additional Information (RFAI) from the Commission to Daljit Kaur Sekhon, Re: 30-Day Post General Report (Committee to Elect Sekhon for Congress), dated April 27, 2007, at 1.

On August 8, 2007, more than nine months after the election was over, the Sekhon Committee was referred⁶⁰ to OGC for potential commencement of enforcement proceedings. Four months after that (and over a year after the election), on November 27, 2007, OGC recommended that the Commission find RTB that the Sekhon Committee failed to report adequate contributor information and failed to use “best efforts” to obtain that information. This recommendation, which was never served on the Sekhon Committee, included some allegations and potential errors that were never raised with the Sekhon Committee in an RFAI.⁶¹ The Commission, on a tally vote, approved OGC’s recommendations on December 3, 2007.⁶²

The Sekhon Committee only learned about the vote after the fact, through a form letter from the Commission, signed by the Chairman, saying that, not only had the matter been referred from RAD to OGC, but that the Commission had already voted to open a Matter Under Review (“MUR”) and found RTB that the Sekhon Committee violated the law. Approximately two weeks after the respondent was notified of the Commission’s RTB vote, the Commission ceased to have the required number of Commissioners to constitute a quorum; without a quorum, the Commission could not vote to accept a conciliation agreement or counteroffer.⁶³

This matter came before us soon after we joined the Commission, which was two years after the reports in question were filed by the Sekhon Committee. At that time, OGC recommended that we approve a conciliation agreement⁶⁴ that had been negotiated

⁶⁰ Such referrals are based upon certain confidential criteria, which have been adopted by the Commission. Moreover, the referral appears to have included only those issues raised in the first and third RFAIs, so the Committee either corrected the issues raised in the second RFAI, or the nature and degree of the errors did not trigger the referral criteria. The answer is unclear because, even though the RFAIs are on the public record, OGC, in its First General Counsel’s Report, does not mention the second RFAI.

⁶¹ OGC, in its recommendation to the Commission, alleges that the Committee disclosed 10 contributions from individuals on Schedule A of its 2006 October Quarterly Report, but failed to provide the occupation and/or name of the employer for 2 of those 10 entries, or 20% of the contributions. However, since RAD never sent the Committee a RFAI in connection with its 2006 October Quarterly Report, the Committee never received notice of the alleged violations, nor an opportunity to respond or make any necessary cures. Moreover, the copy of the report that is currently on the FEC’s website (time-stamped Oct. 18, 2006), lists 14 contributions from individual contributors, totaling \$8,401. And, in fact, the Committee listed an occupation for each contributor listed on the report, and filled out the field for the name of employer.

⁶² MUR 5957 (Sekhon), Certification, dated Dec. 3, 2007.

⁶³ See Rules of Procedure, 73 Fed. Reg. 5688 (Jan. 30, 2008) (On December 20, 2007, the Commission adopted revisions to its rules of conduct, including the addition of a new section to provide rules of conduct when the Commission has fewer than four Members). Cf. *NLRB*, 564 F.3d at 472-73.

⁶⁴ See MUR 5957 (Sekhon), Certification dated September 11, 2008, available at <http://eqs.nictusa.com/eqsdocs/28044220537.pdf> (accessed Apr. 10, 2009). However, 2 U.S.C. § 437g(a)(4)(B)(i) states that “no information derived, in connection with any conciliation attempt by the Commission” may be made public by the Commission, unless both the respondent and the Commission consents in writing. Section 111.21 of the Commission’s regulation reiterates the language of 2 U.S.C. § 437g(a)(4)(B)(i): “Except as provided in §111.20(b), no action by the Commission or any person, and no information derived in connection with any conciliation efforts pursuant to 11 CFR 111.18 may be made public by the Commission without the written request by the respondent and approval thereof by the Commission.” Section 111.18 makes clear that this protection applies to both pre- and post-probable cause

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while the Commission lacked a quorum. We reviewed the entire record and, based upon that review, came to the conclusion that the Sekhon committee did not “fail to provide” contributor information “for 219 of 245 contributions from individuals, or approximately 89% of contributions from individuals,” or “fail[] to establish that it used best efforts to obtain that information.”⁶⁵ Accordingly, having been presented with the proverbial all-or-nothing proposition, we voted not to accept the agreement, and to close the file.⁶⁶

For 228 of the approximately 230 itemized contribution entries at issue, the Sekhon committee listed “self” for both occupation and employer.⁶⁷ While this might be deemed inadequate contributor information, it is, nonetheless, contributor information. Remarkably, Sekhon’s first reports (completed by hand and filed on paper due to insubstantial activity) appeared to be correct. Although many of the contributors were listed as self-employed, several were doctors. Only when the committee was required to file electronically did this issue arise. Thus, based upon our experience, this error may be attributable to a software glitch. These entries may also be attributable to the confusion the Commission has created regarding the reporting of contributor information where the contributor is retired, unemployed, or self-employed -- categories of information which

conciliation. Section 111.20(b) states that “[i]f a conciliation agreement is finalized, the Commission shall make public such conciliation agreement forthwith.” When conciliation is “finalized,” it is governed by section 111.18(b): “A conciliation agreement is not binding upon either party unless and until it is signed by the respondent and the General Counsel upon approval by the affirmative vote of four (4) members of the Commission.” The language of the Act and regulation is broad and unequivocal, thus including factual materials, admissions, draft conciliation agreements (whether signed by a respondent or not), and anything else a respondent may submit or action he may take (such as signing an agreement) for Commission consideration in the context of conciliation. Thus, pursuant to 2 U.S.C. § 437g(a)(4)(B)(i), all information derived in connection with any conciliation attempt by the Commission is confidential, and ordinarily we would be bound by the Act not to disclose it. However, this information has been released to the public. See Kenneth P. Doyle, “GOP Members Deadlock FEC, Undermining Position of 527s, Embezzlement, Disclosure,” MONEY & POL. REP. (BNA) (Jan. 02, 2009) (“[C]ommissioners voted to drop [the Sekhon matter] after the campaign had already agreed to a settlement.”). Thus, our discussion of this conciliation (many months after its release by the Commission – a decision on which we were not consulted, to which we would have objected, and about which we only learned through press accounts) is based solely on information already on the public record and available to any member of the public. It is our understanding that this information was released by OGC pursuant to its interpretation of the Commission’s so-called “Interim Disclosure Policy,” which provides that General Counsel’s Reports recommending “acceptance of a conciliation agreement” will be placed on the public record upon the termination of an enforcement matter. Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426, 70427 (Dec. 18, 2003). But per our reading of the statute itself, until a conciliation agreement is finalized, any and all information obtained by the Commission in the course of attempting to conciliate a matter is confidential. 2 U.S.C. § 437g(a)(4)(B)(i). A conciliation agreement is not finalized until it is accepted by the Commission, by four affirmative votes. 11 C.F.R. § 111.18(b). Therefore, no conciliation agreement in this matter was ever finalized. Accordingly, the Commission should not have disclosed that there was a rejected conciliation agreement in this matter. Nonetheless, the un-redacted vote certification in this matter has been included on the public record.

⁶⁵ MUR 5957 (Sekhon), First General Counsel’s Report at 2. *But see id.* at 1 (identifying 230 “deficient contribution entries” from the same three reports).

⁶⁶ MUR 5957 (Sekhon), Certification, dated Sept. 15, 2008.

⁶⁷ MUR 5957 (Sekhon), First General Counsel’s Report at 2.

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do not seem to fit neatly into the boxes provided on the Commission’s reporting forms.⁶⁸ Moreover, some of the contributors may have been reluctant (or refused⁶⁹) to provide their information, a scenario which the Commission’s guidance to political committees does not sufficiently address. Critically, in filing its amended reports, the Sekhon Committee’s treasurer contends that she did attempt to obtain the requisite contributor information.

Whatever the cause, the appearance of the duplicative entries suggests a single error,⁷⁰ and not the artificially high percentage brandished about by OGC and our colleagues. In reality, there was at worst a single mistake – but the committee made the same alleged “mistake” 219 times and then triggered the Commission’s non-public referral threshold.⁷¹ Rather than receiving assistance to correct the problem after it first appeared in the committee’s 2006 October Quarterly report, the Sekhon Committee was not notified of the problem until six months later, by which time the Sekhon Committee had filed three more reports, and the election was long over. Nevertheless, when the errors were brought to the Sekhon Committee’s attention, it filed three amended reports, and contacted RAD to seek assistance on compliance. This demonstrates apparent good-faith intent to comply with the Commission’s RFAs and, ultimately, the law.

This error could have been promptly cured with clear and timely guidance to the Committee, in accord with the Commission’s statutory direction to “seek to obtain compliance” with the Act.⁷² The combination of three vague RFAs issued more than six months after the election, plus the full force of the Commission’s enforcement processes cannot possibly be the best way to seek compliance. We need not use a sledgehammer to crack a walnut. That the Committee also appears to have acted in good faith, and filed amended reports upon being notified of the errors, did not matter to others.

⁶⁸ 2 U.S.C. § 432(c)(3) provides that a committee’s treasurer must “keep an account of” the “identification” of any person who makes a contribution or contributions aggregating more than \$200 during a calendar year. To find the meaning of “identification,” one must look to 2 U.S.C. § 431(13)(A), which defines it as “the name, mailing address, and the occupation of such individual, as well as the name of his or her employer.” 11 C.F.R. § 100.12 defines “identification” as “full name... ; mailing address; occupation; and the name of his or her employer....” 11 C.F.R. § 100.20 defines occupation as “the principal job title or position of an individual and whether or not self-employed.” And 11 C.F.R. 100.21 defines “employer” as “the organization of person by whom an individual is employed, and not the name of his or her supervisor.” This regulatory regime does not lend itself easily to a clear understanding of how to report the contributor information of individuals who are self-employed, unemployed, or retired, or some combination thereof, or what to do in the case of contributors who choose not to provide their information in whole or in part.

⁶⁹ See *Republican Nat’l Comm.*, 76 F.3d at 407 (“[N]o federal law requires donors to report their name, address, occupation, and employer as a condition of supporting the political party of their choice.”).

⁷⁰ This conclusion is commensurate with the statement of the Committee’s report preparer: that he did not understand how to interpret the RFAs regarding contributor information, and his later statement that he did not understand how to amend the Committee’s reports to address the issues raised in the RFAI.

⁷¹ The Hagan Committee actually made the same “mistake” more times than the Sekhon committee, though the “mistake” impacted a larger percentage of the Sekhon committee’s itemized contributions. We can find no reasonable grounds to treat the committees differently on this meager basis.

⁷² 2 U.S.C. § 437c(b).

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Moreover, because the supposed violation in this matter was repetitive in nature, the penalty proposed was disproportionate to the seriousness of the conduct. In reality, the Committee was accused only of making a single mistake – failing to report the required contributor information. The penalty recommendation in the Sekhon matter was informed by the “amount in violation” standard.⁷³ Like referral thresholds, OGC’s penalty recommendations are generally based on the “amount in violation.”⁷⁴ But the mechanical application of an “amount in violation” penalty formula is ill-suited to situations like this. The statute at issue is a reporting requirement applicable to each report filed by the committee⁷⁵ and stems from a committee’s information-gathering and reporting obligations.⁷⁶ The violation does not involve a prohibited or excessive contribution; thus, the committee is not in receipt of any illegal funds, rendering “amount in violation” a misnomer. Under these circumstances, basing a penalty on a suggested “amount in violation” leads to disproportionate penalties⁷⁷ where the violation is really a single mistake that is wholly separate from and irrelevant to the amount allegedly misreported.⁷⁸

A better approach is to refer matters such as this to the Commission’s Alternative Dispute Resolution Office (“ADRO”) for remedial action, as necessary.⁷⁹ In fact, the

⁷³ See 2 U.S.C. § 437g(a)(6)(B) (permitting courts to impose a maximum civil penalty for campaign finance violations “which does not exceed the greater of \$5,000 or an amount equal to any contribution or expenditure involved in such violation”)

⁷⁴ For example, if a committee is found to have accepted \$100,000 in contributions from prohibited sources, the applicable penalty would be based on an amount in violation of \$100,000.

⁷⁵ See 2 U.S.C. § 434(b) (“Each report under this section shall disclose....”).

⁷⁶ See *Republican Nat’l Comm.*, 76 F.3d at 407 (“The statute does not require political committees to report the information for ‘each’ donor.”).

⁷⁷ For example, if a self-funding candidate (i) puts \$100,000 into his campaign (a right guaranteed by the First Amendment); (ii) doesn’t realize that in doing so, he has triggered a 48-Hour Report Notice (plausible, because putting one’s own money into one’s campaign isn’t instinctively thought of as a “contribution”); yet (iii) issues a press release disclosing the amount of money given to the campaign (and based upon which his opponent or other interested party files a complaint with the Commission), the result is a single \$100,000 reporting violation. On the other hand, suppose his opponent fails to report the receipt of multiple contributions totaling \$20,000, as well as expenditures on advertising totaling \$20,000 (all of which, in all likelihood, would not be disclosed to the public in any format). Under the “amount at issue” standard, the self-funding candidate could face a more severe punishment, even though (i) he made fewer mistakes (failure to report a single contribution versus failure to report multiple contributions and expenditures); and (ii) the unreported activity was nevertheless disclosed to the public.

⁷⁸ See *Kalogianis*, 2007 WL 4247795 at *7 (the Court imposed a \$1,000 per violation for a total \$7,000 civil penalty rather than the Commission’s requested \$300,000 penalty). Congress has recognized the distinction between reporting violations and other types of violations in the penalty context. For example, Congress established the Administrative Fine Program, under which the Commission is authorized to impose fines, calculated using published schedules, for violations of certain reporting requirements. See 2 U.S.C. § 437g(a)(4); 11 C.F.R. § 111.30 *et. seq.*

⁷⁹ The Commission established the alternative dispute resolution (“ADR”) program to promote compliance with the federal election law by encouraging settlements outside the traditional enforcement or litigation processes. By expanding the tools for resolving referrals from the RAD, the program aims to resolve matters faster, and reduce costs to the Commission and respondents. Sending matters like this one to ADR accomplishes several goals: (1) it promotes timely compliance, rather than after-the-fact punishment, thus

Commission has previously referred matters that concerned “best efforts” to ADRO.⁸⁰ And since this was an internally generated matter, under the Commission’s current procedures, a referral to ADRO, unlike a referral to OGC, would have provided the respondent with an opportunity to be heard.⁸¹

III. CONCLUSION

In December 2008, the Commission sought public comments on its enforcement and compliance policies and procedures, including processes regarding audits, matters under review, reports analysis, and alternative dispute resolution.⁸² The Commission received numerous comments in response. And on January 14-15, 2009, the Commission held a hearing on this issue at which it heard testimony from 16 witnesses.⁸³

Several witnesses focused their comments on RAD. One commenter suggested that RAD should provide more information on how to comply with reporting requirements.⁸⁴ Specifically, he explained that “not obtaining clear answers to filing questions can be discouraging for filers,” and noted that a committee’s report preparer may receive different answers to the same question from different RAD analysts.⁸⁵ To

advancing the twin goals of greater legal adherence in the so-called “regulated community” and more efficient use of agency resources; (2) it provides greater due process by furnishing an opportunity for the committee to be heard; and (3) it results in faster resolution of matters than does OGC enforcement.

⁸⁰ See, e.g., ADRs 284 (Republican Party of Idaho) (where the committee reported “information requested” for 90% of the entries which audit identified as having failed to adequately disclose contributor information), 264 (Brady for Congress) (internal referral dismissed), 293 (Thelma Drake for Congress) (internal referral dismissed).

⁸¹ By using ADR as a compliance tool, the Commission can more efficiently, effectively, and fairly enforce the Act. To accomplish this goal, the Commission first needs to move away from its current system, under which some complaints are dismissed out of hand simply because of the low dollar amount at issue, whereas other, potentially less serious violations are pursued simply because the dollar amount at issue is allegedly higher. The size of the civil penalties collected by the Commission is not the proper metric for evaluating the success of the Commission’s enforcement program. In fact, in many instances, large civil penalties may indicate that the Commission is not adequately educating the so-called “regulated community” regarding its legal obligations under the Act. Moreover, while ADR is being more commonly used throughout the civil court system, even in multi-billion dollar disputes, the Commission has been reluctant to use ADR in matters with larger dollar amounts. Oftentimes, unsuccessful first-time candidates will seek federal office in the future. ADR provides the means by which a candidate and his or her authorized committee’s treasurer can learn how to put steps in place to prepare and file reports in compliance with the Act. We encourage Respondents to request ADR in appropriate situations, and hope to implement a formal policy to consider such requests.

⁸² Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74,495 (Dec. 8, 2008).

⁸³ The notice of public hearing and request for public comments as well as the comments received and the transcript of the hearing are available at <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>.

⁸⁴ Comments of Robert Kelner, Covington & Burling, LLP, Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74,495 (Dec. 8, 2008), at 7.

⁸⁵ *Id.*

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the extent this is true, we see the problem as resting more on the murkiness of the regulations and the deficiencies in the process of requesting formal Commission guidance, not on RAD.⁸⁶ Another commenter went so far as to say that RAD's practices "warrant a thorough reexamination and overhaul" and suggested that RAD's RFAIs should be "rewritten for brevity and clarity" and should "precisely identify every assertedly deficient entry in a committee's report, rather than leave the committee to figure out which entries the RFAI is addressing."⁸⁷ We have already undertaken steps to address some of these concerns.

The issue of notice to respondents was also given prominent attention. Commenters opined that "the Commission should never find reason to believe that a violation occurred, without first giving the respondent the opportunity to respond to the underlying complaint."⁸⁸ One witness, a former Chairman of the Commission, recommended instituting a program whereby potential respondents in a referral would be given a written summary of the matter and an opportunity to respond in writing before the Commission makes its RTB finding. As he explained, such an opportunity would at least put respondents on notice of the potential outcome of the proceeding.⁸⁹ Other commenters urged the Commission to adopt procedures to notify committees of any referrals from RAD to OGC or ADRO,⁹⁰ and to implement procedures to provide respondents with the opportunity to "review and respond to any adverse course of action" recommended by OGC.⁹¹

The Commission is in the process of considering policies that would allow for more interaction between respondents and the Commission in internally generated matters. It is also examining other, similar types of concerns, including the provision of hearings for audited committees in a manner not unlike the Commission's successful probable cause hearing process. We wholeheartedly support these efforts. By establishing new procedures, the Commission will be providing respondents the same opportunity to receive notice and respond early in the enforcement or audit process that is afforded to respondents in complaint-generated matters. Submissions by respondents, especially when made early in the process, aid Commission decision-making by providing additional factual information and addressing pertinent legal issues. This, in turn, assists the Commission in reaching sound and speedy resolutions of matters. Thus, with the benefit of increased interactions between parties and the Commission itself, we will be better able to prioritize our resources and exercise our statutory duty to fairly and

⁸⁶ After all, Commission regulations have grown over one hundred pages over the past several years.

⁸⁷ Comments of Laurence Gold, Lichtman, Trister & Ross, PLLC, Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74,495 (Dec. 8, 2008), at 3.

⁸⁸ Comments of Robert F. Bauer, Judith L. Corley, Marc E. Elias and Brian G. Svoboda, Perkins Coie, LLP, Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74,495 (Dec. 8, 2008), at 3.

⁸⁹ Comments of Scott Thomas, Dickstein Shapiro, LLP, Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74,495 (Dec. 8, 2008), at 7.

⁹⁰ Comments of Laurence Gold, *supra* note 87.

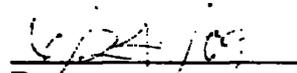
⁹¹ Comments of Robert F. Bauer, Judith L. Corley, Marc E. Elias and Brian G. Svoboda, *supra* note 88.

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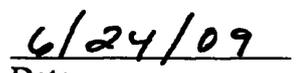
faithfully enforce the Act. Furthermore, such procedures will help ensure that Commission enforcement does not fall disproportionately on the less sophisticated and less affluent. We hope these new procedures will be put in place in the very near future.

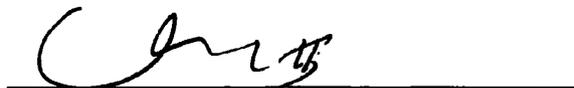
Accordingly, for these reasons, we voted against OGC's recommendation and, instead voted to close the file in MUR 5957 (Sekhon).

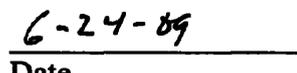

MATTHEW S. PETERSEN
Vice Chairman


Date


CAROLINE C. HUNTER
Commissioner


Date


DONALD F. McGAHN II
Commissioner


Date

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