Chapter 8

The Federal Election Commission: Processes and Enforcement

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(Corporate Political, Rel. #3, 6/15)  8–1
§ 8:1 Introduction

The Federal Election Commission (FEC) is an independent federal regulatory agency set up to administer and enforce the Federal Election Campaign Act (FECA). The FEC discloses campaign finance information, enforces FECA’s disclosure requirements, prohibitions, and limitations on contributions, and oversees the public funding of presidential elections. The FEC is based in Washington, D.C. and does not have regional offices. It has unusual features for a federal regulatory agency.

The agency has six Commissioners who are appointed by the president and confirmed by the Senate for six-year terms.¹ The FEC thus has an even number of members. By law, no more than three Commissioners can be members of the same political party, and at least four votes are required for any official Commission action.² The Chairmanship of the Commission rotates among the members each year, with no member serving as chairman more than once during his or her term.³

The FEC’s advisory opinion process is discussed directly below because of its value to the regulated community. Next, the various

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¹. 52 U.S.C. § 30105[a][1]. Note, the Federal Election Campaign Act was recently recodified in Title 52. See Appendix 1C for a reclassification table showing the prior and present codification.
². Id. § 30105[c].
³. 52 U.S.C. § 30105[a][5].
voluntary compliance efforts are summarized. Finally, the FEC’s enforcement process is described in detail so as to prepare any company that finds itself a target of this process.

§ 8:2 Advisory Opinions

Corporations or executives, usually through their counsel, can request interpretive opinions from the FEC that if relied on in good faith protect the requester and others similarly situated from adverse legal consequences for actions that were the subject of the request. These public and formal opinions are called Advisory Opinions (AOs). Such a request, called an Advisory Opinions Request (AOR), must be in writing and must include a complete description of all facts relevant to the specific transaction or activity.

AORs should be forward-looking and concern a specific transaction or activity that the requester plans to undertake or is currently undertaking and intends to continue in the future. The activity must be that of the requester, not a third party, and it may not be purely hypothetical. The AOR cannot address only past activity. AORs should be addressed to the General Counsel, Federal Election Commission, Office of General Counsel, 999 E Street, N.W., Washington, D.C. 20463.

AOs are helpful compliance tools, because an AO provides legal protection not only to the requester but also to any person who acts in good faith in accordance with the AO and whose specific activity is “indistinguishable in all its material aspects” from the activity described in the AO. The FEC website allows searches of past advisory opinions at http://saos.nictusa.com/saos/searchao.

§ 8:2.1 Timetable for Issuance of Advisory Opinions

The FEC must issue an AO within sixty days of receiving a complete AOR, and within twenty days of receipt when the AOR is submitted within sixty days before a federal election. Note that FEC staff may request further information about a request and the above timetable is tolled while the response is pending. The timetable resumes once a response is submitted.

5. 11 C.F.R. § 112.1(c).
6. 11 C.F.R. § 112.1(b).
7. 11 C.F.R. § 112.1(e).
8. 52 U.S.C. § 30108(c)(2); 11 C.F.R. §§ 112.5(a)(1), (2) & 112.5(b).
The AO process is not confidential, with the public entitled to comment and the draft opinion prepared by the staff made public prior to the Commission’s public session consideration of the request. The public nature of this process should be considered prior to a decision to request an AO. In form, AO requests often suggest an answer and ask if the Commission agrees.

§ 8:2.2  Withdrawal of the AOR

The requester may in writing withdraw an AOR at any time before the Commission actually votes on the opinion.

§ 8:3  FEC Educational Outreach

Periodically, the FEC sponsors conferences in Washington, D.C. and around the country where Commissioners and staff conduct workshops on the law, including fundraising, reporting, and other topics. These are ideal sessions for staff newly assigned to political action committee (PAC) activities, as part of a robust compliance program.

In addition to formal AOs, the FEC conducts training conferences, roundtable discussions in its Washington, D.C. office, and state outreach. It publishes materials that explain legal requirements. Further, it staffs a toll-free telephone number and email address for informal questions about any part of the FECA.

One service useful to PAC committee staff is the FEC’s “Tips for Treasurers,” periodic guidance and current compliance tips from FEC staff and from the compliance community. Community members can offer their own compliance tips by email to info@fec.gov. Treasurers can sign up to RSS Feeds for new additions to this compilation at www.fec.gov/info/Tips4Treasurers.xml.

§ 8:4  FEC Enforcement: Summary of Features

The FEC has exclusive jurisdiction over civil enforcement of the FECA. It exercises this jurisdiction via an administrative enforcement

10. 52 U.S.C. § 30108[d]; 11 C.F.R. § 112.3[e].
11. FEC telephone and email: toll free at 800-424-9530; email at info@fec.gov.
12. 52 U.S.C. § 30106[b][1].
process conducted by its General Counsel with Commission involve-
ment at all significant stages of the process.\(^\text{13}\)

The FEC commences most enforcement investigations via formal
complaints or via internal monitoring of campaign and PAC reports. These enforcement actions are confidential until the case is resolved, but once resolved are made public. Cases are called “Matters Under Review” (MURs).

FEC enforcement cases not disposed of summarily most often resolve via formal settlements with civil penalties and remedial steps. Stages of a case include the “reason to believe” stage, where the FEC first decides whether to open an investigation, the investigative stage; and the “probable cause” stage after an investigation is completed. This process is investigative in nature; that is, the FEC does not have administrative law judges to adjudicate violations and it must bring a de novo lawsuit in federal court at the end of the process if it is not resolved sooner.

\section{§ 8:4.1 Generation of Cases}

The FEC commences most enforcement investigations via formal
complaints.\(^\text{14}\) The source of such complaints range from campaign
opponents to other interested observers, and from participants in the campaign process to disgruntled former employees. Investigations also arise from the FEC’s monitoring of campaign reports, from the FEC’s audit of a committee, from referrals from local, state, or other federal government agencies, and from sua sponte submissions; that is, self-reports, from a respondent. The following discussion focuses primarily on complaint-generated cases; self-reporting is discussed in more detail in section 8:6.2.

\section{§ 8:5 Bringing a Complaint-Generated Case}

\subsection{§ 8:5.1 Complaint Requisites and Notifications}

Any person may file in writing with the FEC. The complaint must include the full name and address of the person filing the complaint (the law specifically forbids anonymous complaints)\(^\text{15}\) and be signed, sworn to, and notarized. The persons alleged in the complaint to have violated the election law are called “respondents.” Respondents are notified of the complaint and

\begin{itemize}
\item \text{13.} 52 U.S.C. § 30109.
\item \text{14.} 52 U.S.C. § 30109(a)(1).
\item \text{15.} Id.
\end{itemize}
have an opportunity to respond in writing before the FEC makes any decision to pursue the matter.

§ 8:5.2 Time to Respond

The FEC provides fifteen days to respond to a complaint. While modest extensions of time to respond may be granted if good cause is described, quickly bringing this to the attention of in-house or outside counsel gives the best opportunity for counsel to respond quickly and effectively.

If such a complaint comes to corporate personnel, they should immediately bring it to the attention of the Law Department or outside counsel.

The FEC’s Alternative Dispute Resolution (ADR) program and Fast Track Resolution (FTR) process are alternative programs that can much more quickly resolve matters if you are the target of an FEC complaint. See section 8:6.1 for more on these programs.

§ 8:5.3 Response Issues

[A] Designation of Counsel

If a corporation or corporate employee will be represented by counsel, the named respondent must sign and submit a “statement of designation of counsel.” Once received, this ensures that all communications with the FEC will go through the designated counsel. 16

[B] Response Strategies

Corporate or outside counsel will discuss strategies for responding. No response is required. On the other hand, failure to respond or submitting a response that does not fully address the factual allegations may result in further proceedings by the agency.

§ 8:5.4 The First Stage: Determining Whether to Open an Investigation—“Reason to Believe”

Along with analysis of the complaint and responses, staff evaluates the case based on objective criteria approved by the FEC under its enforcement priority system. This system determines whether the case warrants use of the FEC’s limited resources—it can shunt some cases toward dismissal and others toward increased resources to investigate more effectively.

16. 11 C.F.R. § 111.23.
Out of this process, the FEC notifies the respondents whether it has “found reason to believe,” that is, has decided to open an investigation.\(^\text{17}\)

According to the FEC, a “reason to believe” finding does not establish that the law has been violated, only that a violation may have occurred if the facts as described in the complaint or referral are true. This finding under the statute authorizes an investigation to evaluate the validity of the facts as alleged.

The four possible agency actions at this initial stage of the process are:

- A “Reason to Believe” finding followed by an investigation, where a credible allegation of a significant violation is made, but further investigation is needed to determine whether a violation occurred and, if so, how serious it is.

- A “Reason to Believe” finding followed by a settlement offer (called “conciliation”), where a violation took place that is significant enough to merit pursuit, but further investigation is not needed under the circumstances.

- Dismissal and dismissal with admonishment—exercising its prosecutorial discretion, the FEC will dismiss matters that do not merit further use of agency resources, for example, minor violations. When there is an apparent violation but size or significance does not warrant opening an investigation, the FEC will send a letter admonishing the respondent.

- A “No Reason to Believe” finding also results in closure of the matter; for example, when the response or other evidence convincingly demonstrates that no violation has occurred.

§ 8:5.5 The Second Stage: The Investigation

The FEC opens an investigation per a “Reason to Believe” finding (see above) via a letter signed by the FEC Chairman notifying the respondent. This notification includes a “factual and legal analysis” that usually provides a thorough analysis of the FEC’s initial view of the matter. In this instance, the letter will usually ask for a written reply and may include specific questions that address the allegations.

The FEC conducts its investigation via the General Counsel’s staff attorneys. These government lawyers craft a formal process that the FEC can issue, including document subpoenas, orders requiring sworn

\(^{17}\) 52 U.S.C. § 30109(a)(2).
written answers, and subpoenas for testimony under oath. In appropriate circumstances, the FEC will use its Audit Division staff to carry out financial record audits as part of the investigation.

§ 8:5.6  **FEC Administrative Subpoenas**

The FEC’s administrative subpoenas are not self-enforcing. This means that in contrast to grand jury subpoenas enforced via contempt, the recipients of administrative subpoenas can elect not to comply without penalty and the agency must go to court to ask a federal district court to enforce these subpoenas and orders.\(^1\) Still, for companies not wishing to be sued in federal court by the FEC, ignoring such process is not recommended. Respondents may move to quash a subpoena but must do so within five days of receipt.\(^2\)

Practical techniques to respond to FEC subpoenas include the following. If an FEC Order for Answers to Written Questions or Subpoena for Documents appears overly broad or burdensome, FEC attorneys are usually willing to listen to reasonable concerns. It would be considered a mark of good faith to quickly produce subpoenaed material that is non-controversial. Staged production based upon effort needed to assemble different types of responsive material can usually be worked out. Negotiated subpoena compliance very often obviates the need for federal court litigation over the scope of FEC subpoenas.

[A]  **Specific Concerns About Subpoenas Issued to Financial Institutions**

Personal bank account information is protected by the Right to Financial Privacy Act (RFPA).\(^3\) Federal agencies like the FEC seeking to subpoena customer information from a financial institution must comply with this law. Financial institutions must also comply and are subject to penalties if they disclose such information in violation of this law. Financial institution refers to banks, savings banks, and credit unions, as well as credit card companies.\(^4\) Bank “customers” protected by the RFPA means an individual or a partnership of five or fewer individuals,\(^5\) thus, the RFPA does not protect financial account information of corporations, partnerships of six or more partners, trusts, associations, or other legal entities. The FEC must provide the covered customers with a notice and an opportunity to object before a

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19. 11 C.F.R. § 111.15.
22. Id. § 3401[4], (5).
bank or other such institution can disclose personal financial information to the federal government agency.\(^{23}\)

Thus, banks and credit card companies who receive an FEC subpoena should assemble the requested information,\(^{24}\) but take care not to turn over any personal financial information either voluntarily or in response to formal process until they receive an FEC certification of compliance with these requirements.\(^{25}\)

The financial institution is entitled to reimbursement from the FEC for the costs of searching, assembling, reproducing, and forwarding the subpoenaed information.\(^{26}\)

\section*{§ 8:5.7 Enforcement Depositions}

In fact-intensive investigations, FEC subpoenas often will require administrative depositions. Some practice points about FEC depositions follow:

\textit{Scheduling:} If relations with FEC staff are collegial, scheduling can be arranged through mutual agreement. FEC attorneys will usually travel to the location of the witness—and arrange for space at the local U.S. Attorney’s office—but are sometimes willing to defray the cost of the witness’s travel to Washington, D.C. for convenience of the government, particularly if the respondent’s counsel is D.C.-based.

\textit{Attendance:} Because this testimony is part of a confidential enforcement investigation, third parties are not permitted to attend or participate.

\textit{Read and sign, and copy of transcript:} FEC regulations incorporate Rule 30(e) of the Federal Rules of Civil Procedure, thus providing the opportunity to review and sign FEC depositions. Under Federal Rule 30(e), if requested before completion of the deposition, the witness has an opportunity to review the transcript for accuracy and sign it while explaining any changes to it. After the deposition, counsel for respondent may in writing request a copy of the transcript. Absent good cause to the contrary, the FEC attorney will notify the court reporter that the deponent may at his or her expense obtain a copy of the transcript from the court reporter. The FEC policy statement on this issue cites the Administrative Procedure Act provision to the same effect.\(^{27}\) If FEC Enforcement concludes there is “good cause” to

\begin{itemize}
\item \(^{23}\) 12 U.S.C. § 3402.
\item \(^{24}\) 12 U.S.C. § 3411.
\item \(^{25}\) 12 U.S.C. § 3403(b).
\item \(^{26}\) 12 U.S.C. § 3415.
\item \(^{27}\) 5 U.S.C. § 555(c).
\end{itemize}
withhold a copy of the transcript, it would notify the respondent that the transcript would not be released then. In practice, the FEC rarely invokes the good cause provision to withhold.

§ 8:5.8 Investigators

The General Counsel also employs professional investigators who work with the attorneys using informal investigative techniques, such as third-party interviews, developing timelines of events, and otherwise assisting in reviewing information and developing other lines of investigation.

PRACTICE NOTES

Be aware when presenting information to the FEC that the FEC attempts to develop information from third parties to corroborate the information presented by respondents. Interaction with FEC attorneys can be in person or by telephone. In fact, an initial meeting can be helpful to develop relationships, assure cooperation, and gauge agency interest and seriousness.

[A] FEC Contact with Corporate Employees

After a respondent designates counsel to act on that person’s behalf, rules of professional ethics bar FEC counsel from communicating directly with that respondent. Current employees of a respondent corporation that is represented by counsel are, as a general matter, ordinarily considered part of the represented corporation. As a result, FEC enforcement attorneys will most often discuss with corporate counsel any desire they or their investigators have to interview a current employee. The rule is far less clear for former employees, however, so corporate respondents should not be surprised that FEC investigative information could well come from direct contact with former employees. When a corporate respondent is aware that former employees could have probative information and they left on good terms, there is no barrier to reaching out to a former employee at the start of a case and offering corporate paid legal representation should they be contacted by the FEC.
§ 8:5.9 Stage Three: Early Resolution of Complaint (Pre-Probable Cause Conciliation)

When the investigation is complete and before the FEC proceeds to the “probable cause” stage of the case, a respondent may request settlement negotiations. The FEC calls these negotiations “pre-probable cause conciliation” negotiations because they precede the “probable cause” stage, and also because the FECA requires the FEC to attempt to settle the matter before it can file an enforcement suit in federal court. The following practice elements about these negotiations should be kept in mind.

The agency tries to limit settlement discussions at this stage to thirty days. The FEC usually makes the opening offer in the form of a draft “conciliation agreement.” These negotiations present the major advantage of early settlement—less expense. Some terms may be more flexible at this stage than later. For example, the FEC’s policy to encourage early settlement extends to discounting the civil penalty it seeks through its opening settlement offer at this stage (normally 25%, although this may not be visible to the respondent).

The elements of a “conciliation agreement” follow:

- Facts—describing what happened
- Conclusion—a civil violation
- Civil penalty being imposed
- Corrective, remedial action required

In a negotiated resolution, terms and penalties are by agreement, not imposed. They are heavily dependent on the facts of the case. As a practical matter, as the FEC makes the first offer, the respondent can and should try to persuade the FEC to view the case differently. For both sides, behavior reflecting serious attempts at compliance improve the ultimate document. Bona fide steps to correct the violation or prevent recurrence are also helpful. It is best to emphasize the concrete steps taken to ensure no recurrence, or that a true Act of God, or genuinely accidental mistake, was responsible for the violation. Alternatively, it is important to give evidence/proof that the scope of the violation is smaller than the FEC thinks. Complete cooperation with the FEC’s reporting division and/or later with General Council staff is invaluable.

On the other hand, there are a number of negative avenues that should be avoided, such as being less than completely forthcoming or making representations that do not hold up when questioned. It is never appropriate to receive FEC letters but not read or respond to them, or to fail to respond to analysts’ requests for additional information.
It may be strategically useful to submit the penalty amount with the signed agreement—this can be a small carrot to offer the agency, because the form agreement contemplates payment of the penalty after the agreement is finalized and accepted by the FEC. The form agreement recites that the respondent “will pay” a civil penalty of [fill in the amount], and boilerplate language requires compliance with or implementation of the agreement’s requirements within thirty days of the effective date, that is, after it is accepted by the FEC. While the FEC deposits all penalty checks as part of its accounting controls, it will return the penalty should negotiations fail or should the Commission reject the agreement.

[A] Mechanics of a Negotiation with the FEC

The goal is a settlement that can be recommended by the General Counsel. While the Commission itself must vote to accept a proffered conciliation agreement, reaching a negotiated settlement with the GC staff is the first step. Thus, it is often best to make a complete counteroffer. Negotiations can take the form of traded draft language or draft documents, culminating in a complete offer upon the conclusion of the negotiations, which best takes the form of a complete agreement signed by the respondent.

[B] What Happens Next?

If the General Counsel’s office puts it before the Commission, and the Commission accepts it, the General Counsel or her designate provides the second signature on the agreement and this makes the agreement effective. The FEC forwards a copy of the effective agreement. If there are no other respondents in the matter, this correspondence will also close the case.

The respondent in the agreement must take care to carry out all the requirements of the agreement within thirty days of the effective date, including payment of the penalty, amendment of the campaign reports, disgorgement of contributions, or other action.

28. 52 U.S.C. § 30109[a][4][A][i].
§ 8:5.10 Stage Four, If Negotiation Fails: “Probable Cause to Believe”

If the negotiations do not resolve the matter, the FEC can proceed to the “probable cause” stage of the enforcement process.29

[A] General Counsel’s and Respondent’s Briefs

The General Counsel prepares a brief that explains the factual and legal issues of the case and recommends whether the FEC should find “probable cause to believe” a violation has occurred. The respondent is sent a copy of the brief and has fifteen days to file a reply brief explaining the respondent’s position.

[B] Information Exchange at This Stage

Early in the case, the FEC does not disclose the contents of its investigative file to the respondent. To make the briefing process meaningful, the General Counsel’s Brief will often attach investigative file documents that came from third-party witnesses. A determination should be made of whether or not it is appropriate at this stage to make specific requests for underlying documents referred to in or relevant to points in the General Counsel’s Brief, particularly if this information is necessary to craft a meaningful response.

§ 8:5.11 Oral Hearing Before the FEC

When submitting a probable cause response brief, a respondent may request a probable cause hearing.30 Such a request must explain the need for a hearing and detail the issues the respondent expects to address. At the hearing, respondents may only raise issues that were identified in the respondent’s hearing request, and that were previously presented during the enforcement process. Such issues can include legal and factual matters and even civil penalty amounts. The FEC will grant a request for an oral hearing if any two Commissioners agree that a hearing would help resolve significant or novel legal issues, or significant questions about the application of the law to the facts.

These are not evidentiary hearings and no sworn testimony may be offered; they more resemble appellate arguments. Hearings are confidential and not open to the public; generally only respondents and their counsel may attend. The FEC emphasizes that probable cause hearings are optional and no negative inference will be drawn if respondents do not request a hearing. Moreover, the FEC points out that the majority of its enforcement cases resolve through pre-probable cause conciliation, the FEC often reduces the penalty it seeks to

29. 11 C.F.R. § 111.16.
encourage an early settlement, and proceeding to a probable cause briefing (the stage at which this oral hearing could be available) requires a substantial investment of limited agency resources.

The hearings will be transcribed, become part of the record of the enforcement matter, and be made public after the matter is closed.

§ 8:5.12 Closing Steps

After receiving the response brief and, if applicable, holding the probable cause hearing, the General Counsel prepares a report to the Commission recommending FEC action.\(^{31}\) The FEC then decides whether there is "probable cause to believe" that a violation has occurred.\(^{32}\)

If the Commission determines that there is "probable cause to believe" the law has been violated, the General Counsel attempts (for at least thirty days, but not more than ninety) to resolve the violation via conciliation (see discussion at section 8:5.9). A successful conciliation agreement at this stage concludes the case and it is made public.

The FEC also may refer knowing and willful violations of FECA to the Department of Justice for criminal prosecution after it finds probable cause to believe, and need not attempt conciliation before it does so.\(^{33}\) If no criminal referral is involved, and settlement is attempted but does not result in an agreement within the ninety-day period, the FEC may file suit against the respondent in federal district court to remedy the civil violation.\(^{34}\)

§ 8:6 FEC Alternative Approaches to Enforcement Cases

§ 8:6.1 Alternative Dispute Resolution Program

Through the Alternative Dispute Resolution (ADR) program, the FEC tries to encourage settlements outside the traditional enforcement processes. ADR is initiated by FEC invitation after response to the complaint (or upon an internal referral). It is offered at the discretion of the FEC for basic violations, where a complete response is made and responsibility is accepted by the respondent. The respondent must confirm interest in resolving via this process, and must waive the statute of limitations for the duration of the ADR process.

The process involves bilateral negotiations with FEC representatives separate from the usual enforcement process. If the bilateral

\(^{31}\) 11 C.F.R. § 111.16.


process is unsuccessful, the matter may be sent to an independent mediator. ADR settlements are made public at the end of the process.

§ 8:6.2 Self-Reporting of FECA Violations (Sua Sponte Policy)

This policy, issued in April 2007, offers to reward self-reporting of violations with reduced penalties and sets up a fast-track resolution within the enforcement process (the policy statement is in Appendix 8A).

PRACTICE NOTES

Factors for reduced penalties are present if the respondents alert the FEC before the violation had been or was about to be discovered by any outside party, including the FEC; the violation immediately ceased and was promptly reported to the FEC upon discovery; respondents take appropriate and prompt corrective action (for example, changes to internal procedures; increased training; disciplinary action where appropriate); respondents amend reports or disclosures to correct past errors, if applicable; any appropriate refunds, transfers, and disgorgements are made and/or waived; and respondents fully cooperate with the FEC in ensuring that the sua sponte submission is complete and accurate.

[A] Fast-Track Resolution

Complaints are eligible for Fast-Track Resolution (FTR) if all potential respondents in a matter have joined in a self-reporting submission that acknowledges their respective FECA violations; those violations do not appear to be knowing and willful; the submission is substantially complete and reasonably addresses the issues related to the violation; and the factual and legal issues are reasonably clear.

[B] Form of Fast-Track Resolution

Rather than the formal Commissioner findings ordinarily required to open investigations, respondents eligible for the FTR process negotiate with General Counsel staff for a proposed conciliation agreement before the Commission makes any formal findings. This process will allow for more expedited processing of certain types of violations where factual and legal issues are reasonably clear, for example, matters in which the initial self-reporting submission is sufficiently thorough that little follow-up is necessary to complete the factual record. Respondents may request this FTR process when they respond to a complaint.
§ 8:7 Other Enforcement Issues

§ 8:7.1 Complainant’s Role

If the FEC dismisses a case, a complainant who disagrees with the dismissal or who believes that it failed to act in a timely manner may sue the FEC in federal court in Washington, D.C.\(^{35}\)

§ 8:7.2 Confidentiality and Closed Enforcement Matters

As noted above, statutory confidentiality attends FEC action in enforcement matters.\(^{36}\) More specific guidance on the reach of that confidentiality and the FEC’s process once cases are closed includes the following:

1. Information about an FEC notification of findings may not be disclosed.

2. A complainant is not prevented from disclosing the substance of the complaint itself or a respondent from disclosing the response to that complaint.\(^{37}\)

3. Respondent may waive in writing his or her right to confidentiality. This confidentiality does not preclude making public substantial information from the case file within thirty days after notice that the entire case has been closed.\(^{38}\)


§ 8:7.3 Statute of Limitations

FEC enforcement cases are subject to the general five-year statute of limitations applicable to the enforcement of civil penalties under 28 U.S.C. § 2462.\(^{39}\) This limitation is referred to above, for example, in the ADR process. Accrual under this provision begins on the date the violations occurred. While most cases are resolved well in advance of this limitation period, respondent’s counsel in the enforcement track will at times be faced with requests for tolling from FEC attorneys. Modest and limited tolling requests may not be objectionable. Note

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35. 52 U.S.C. § 30109(a)(8).
38. 11 C.F.R. § 111.20; AFL-CIO v. FEC, 333 F.3d 168 [D.C. Cir. 2003].
39. FEC v. Williams, 104 F.3d 237 [9th Cir. 1996].
that the FECA statute of limitations at 2 U.S.C. § 455, referring to “indictment or information” only applies to criminal matters.40

§ 8:8 Criminal Prosecution by the Department of Justice

The Public Integrity Section within the U.S. Department of Justice’s Criminal Division oversees federal prosecution of campaign finance and other election crimes. These attorneys prosecute selected cases against federal, state, and local officials, and also help oversee and supply advice and expertise to local U.S. Attorney offices bringing campaign finance prosecutions. Because of the complexity of the area for criminal prosecutions, local U.S. Attorney offices must consult the Public Integrity Section before beginning criminal investigations or prosecutions of campaign finance activities. Public Integrity advises generally that the elevated motive (called “scienter”) requirement for criminal liability (discussed below) requires clear application of the law to the facts in question, that is, that criminal cases are not appropriate in cases with seriously contested legal issues.

§ 8:8.1 Civil Versus Criminal Jurisdiction; Violations

The FEC’s exclusive jurisdiction over civil enforcement does not supplant DOJ’s jurisdiction over criminal enforcement. Thus, DOJ can and does bring criminal prosecutions independent of whether the FEC formally refers a case that it has investigated.41

In one example, DOJ prosecuted executives of Mattel, Inc. in connection with a straw donor contribution reimbursement scheme after the FEC had conciliated with the individuals and closed the case.42

At the same time, DOJ cannot waive or obviate the FEC’s civil jurisdiction.43 Thus, according to Public Integrity, criminal plea agreements with defendants who have possible FEC civil exposure should include the specific disclaimer that the DOJ is not waiving the civil enforcement jurisdiction of the FEC.

42. See MUR 5187 (Mattel decision); Press Release, United States Department of Justice, Former Senior Vice President of Mattel, Inc. Pleads Guilty to Causing the Submission of False Statements [Apr. 25, 2005], available at www.usdoj.gov/opa/pr/2005/April/05_crm_214.htm.
§ 8:8.2  Criminal FECA Violations

FECA violations can rise to the level of criminal liability either as misdemeanors (when the sentence may not exceed one year in prison) or felonies (greater than one year in prison). The Bipartisan Campaign Reform Act of 2002 (BCRA) significantly increased the criminal penalties; before this change in the law, criminal FECA violations were misdemeanors with only a three-year statute of limitations. The new penalties include felonies with a more standard five-year statute of limitations.

FECA felonies are “knowing and willful” violations that meet the following thresholds:

- Contribution violations aggregating $25,000 or more\(^{44}\) (maximum sentence of five years in prison);
- Straw donor—contribution reimbursement scheme violations\(^{45}\);
- Maximum sentence of two years if aggregating at least $10,000; and
- Maximum sentence of five years if $25,000 or more.\(^{46}\)

FECA misdemeanors are “knowing and willful” but below the amounts described above:

- Contribution violations aggregating from $2,000 to $25,000;\(^{47}\)
- Violations of the prohibition against the use of coerced contributions by corporations and unions\(^{48}\) that aggregate at least $250;\(^{49}\) and
- Fraudulent misrepresentations of campaign authority,\(^{50}\) without regard to amount.\(^{51}\)

§ 8:8.3  FEC/DOJ Memorandum of Understanding and Current Trend

The FEC and the DOJ concluded a Memorandum of Understanding in 1977 expressing the division of jurisdiction between the two agencies. In 2003, the FEC expressed the intention to update the

\(^{44}\) 52 U.S.C. § 30109(d)[1][A][i].
\(^{45}\) 52 U.S.C. § 30122.
\(^{46}\) 52 U.S.C. § 30109(d)[1][D].
\(^{47}\) 52 U.S.C. § 30109(d)[1][A].
\(^{48}\) 52 U.S.C. § 30118(b)[3][A].
\(^{49}\) 52 U.S.C. § 30109(d)[1][B].
\(^{50}\) 52 U.S.C. § 30124.
\(^{51}\) 52 U.S.C. § 30109(d)[1][C].
MOU, but as of May 2014, no updated document has been made public. Notwithstanding, the following observations about the current interaction can be made.

Be aware that DOJ views its role in enforcing campaign finance laws through criminal prosecutions as expanded dramatically based upon BCRA’s enhancements to FECA’s criminal penalties. Recent years have seen an upsurge in global settlements where, in parallel civil and criminal investigations, a contemporaneous resolution takes place with a criminal plea alongside a civil conciliation agreement.

**PRACTICE NOTES**

Pay careful attention to whether terms contained in a conciliation agreement with the Commission may affect potential criminal liability. While the FEC cannot immunize respondents from possible criminal exposure, respondents’ counsel should try to use the conciliation agreement to emphasize the mitigating aspects of the violations in question.\(^{52}\)

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**§ 8:9 Other Regulators**

As noted in chapter 5 on Pay-to-Play Rules, the SEC and the MSRB have jurisdiction over SEC Rule 206(4)-5 and MSRB Rule G-37, respectively. The MSRB issues interpretive notices and letters, and the SEC has enforcement authority over actions. The SEC also must approve MSRB interpretive notices and rules. Their contact information is listed in section 8:9.1.

The Financial Industry Regulatory Authority [FINRA] is a non-governmental self-regulatory organization that promulgates rules for brokers and exchange markets, including rules on gifts to public officials. FINRA is sanctioned by the SEC to discipline member firms and individuals who do not comply with FINRA rules (or federal securities laws). Requests for waivers under MSRB Rule G-37 must come through FINRA.

The Clerk of the House and the Secretary of the Senate issue advice and guidance concerning federal lobby filings and compliance, and interpretation of federal lobbying law. The Government Accounting Office [GAO] is charged with implementing random audits. The Attorney General has ultimate authority over prosecuting any violations of HLOGA.

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52. See 52 U.S.C. § 30109[d][2].
The House Committee on Standards and the Senate Ethics Committee provide guidance and will issue opinions to congressional members and informal advice to the public. Gifts that violate a House or Senate gift rule may trigger liability under HLOGA's criminal or civil provisions, and thus such violations are under the jurisdiction of the Department of Justice.

Virtually all states and many localities have state elections or campaign finance boards, and state entities regulating lobbying. In addition, violation of gift, lobby or campaign finance laws in many states results in criminal liability. Many state boards issue advisory opinions on aspects of the laws under their jurisdiction, or at the least are able to provide informal advice.

§ 8:9.1 Contact List for Regulatory Bodies

Senate and House Ethics Committees

Senate

http://ethics.senate.gov/public/

220 Hart Building
United States Senate
Washington, D.C. 20510
Phone: 202-224-2981
Fax: 202-224-7416

House

http://ethics.house.gov/

1015 Longworth House Office Building (LHOB)
Washington, D.C. 20515
Phone: 202-225-7103
Fax: 202-225-7392

State and Local

Secretaries of State

(online directory of the National Association of Secretaries of State)

Ethics or Election Agencies

Securities and Exchange Commission

http://www.sec.gov
100 F Street, NE
Washington, D.C. 20549
Phone: 1-800-SEC-0330

Municipal Securities Rulemaking Board

http://www.msrb.org/
1900 Duke Street Suite 600
Alexandria, VA 22314
Phone: 703-797-6600

Financial Industry Regulatory Authority

http://www.finra.org/
1735 K Street, NW
Washington, D.C. 20006
Phone: 301-590-6500