

**Commissioner Robert D. Lenhard, FEC Nominee,
Responses to Questions Submitted by Chairman Dianne Feinstein
for the U. S. Senate Committee on Rules and Administration
Hearing Record of June 13, 2007
July 6, 2007**

1. Since the 1970's, the Department of Justice and the Federal Election Commission have operated under a Memorandum of Understanding to effectuate referrals for potential criminal violations of the campaign finance laws. While such criminal violations should be investigated and prosecuted, it is in the FEC's interest to have a well understood referral process. This relationship has been settled for some time. From your perspective, what is the FEC's public policy on referrals to the Attorney General of the Department of Justice for prosecution consideration?

Please explain the legal authority for these referrals, the agency's practice with regard to these referrals, and provide the Rules Committee with the number of referrals to the Department of Justice in the past five years. How do you see the role and relationship of the FEC and DOJ moving forward in the coming year?

The Federal Election Campaign Act of 1971, as amended, (FECA) contains two provisions that define how the FEC is to refer potential criminal violations to the Department of Justice. The first is at 2 U.S.C. 437g(a)(5)(C) and provides:

If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States...

This has traditionally been viewed as the method by which the Commission should refer potential criminal violations of FECA to the Department of Justice.

The second provision is located at 2 U.S.C. 437d(a)(9). That provision states that the Commission has the authority to "conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities." This section has been construed traditionally as the method by which the Commission should refer potential criminal violations of federal statutes other

than FECA, such as perjury or mail fraud, to the Department of Justice, or violations of state law to the appropriate state authorities.

In 1978, the FEC and the Department of Justice issued a Memorandum of Understanding (MOU) describing the referral policy. See Department of Justice, Federal Election Commission Memorandum of Understanding, 43 Fed. Reg. 5441 (February 8, 1978). In the MOU, the Department of Justice recognized that the FEC has exclusive jurisdiction over civil enforcement of FECA and Chapters 95 and 96 of the Internal Revenue Code. The MOU notes that Congress intended to centralize civil enforcement of FECA in the FEC and consequently Congress conferred to the FEC “a broad range of powers and dispositional alternatives for handling nonwilful or unaggravated violations.”

The FEC and Department of Justice further recognized that all violations, even those committed knowingly and willfully, may not be proper subjects for criminal prosecution. However, “[t]hose knowing and wilful violations which are significant and substantial and which may be described as aggravated in the intent in which they were committed or in the monetary amount involved should be referred by the Commission to the Department for criminal prosecution review.” Moreover, consistent with the statutory language at 2 U.S.C. 437g(a)(5)(C), the MOU states that the FEC will only refer a potential criminal violation to the Department of Justice upon the affirmative vote of four Commissioners that there is probable cause to believe that there has been a knowing and willful violation of the statute.

During my tenure at the FEC, the Commission has followed the policy set forth in the MOU. Since January 1, 2002, the FEC has referred four cases to the Department of Justice. Two of those referrals occurred in 2002, one occurred in 2004, and one occurred in 2007. The one matter that was referred during my tenure at the FEC involved a scheme to funnel illegal campaign contributions to a federal political committee using multiple straw donors and intermediaries who served as conduits for the illegal contributions made through the straw donors.

From my perspective, the Department of Justice and the FEC have a good working relationship. A criminal referral is appropriate in the extraordinary circumstance of a knowing and willful violation which is significant and substantial and which is aggravated in the intent or in the amount at issue. In circumstances where the Commission has concluded that the standard has been met, it has referred the matter to the Department of Justice. It is worth noting that under the MOU, the Department of Justice has made a concurrent commitment to refer matters to the FEC that warrant civil prosecution, which it does periodically.

2. Some critics would charge that the FEC is viewed as an ineffective agency. Watchdog groups are vigilant to ensure that FEC Commissioners will enforce the laws on the books, as well as highlight any attempts to undermine implementation of the Bipartisan Campaign Reform Act of 2002. We are interested in Commissioners’

perspectives on how they view the Commission's compliance with the campaign finance laws. How would you describe your record at the FEC in terms of effective enforcement of campaign finance laws?

I believe that the agency's enforcement record reflects my commitment to enforce the campaign finance laws effectively. Since my arrival at the FEC almost eighteen months ago, the agency's enforcement record has been stronger than it has ever been. In 2006, the agency collected the largest yearly total of civil penalties in its history (\$6.2 million). This included the largest single civil penalty in its history (\$3.8 million) and almost 25% of all penalties over \$100,000 the agency has ever collected. That record of strong enforcement continued in the first quarter of 2007, when the agency collected more in penalties (over \$1.1 million) than in any first quarter in the agency's history, as well as the third largest penalty in the agency's history (\$750,000).

While the agency's record in civil enforcement has been strong since my arrival, I believe that the most important enforcement approach the agency can take is to increase voluntary compliance. Some of the actions I am most proud of since arriving at the FEC involve encouraging voluntary compliance with the law. For example, I have tried to ensure that in rulemaking the agency provides clear standards of compliance, so that those who seek to comply with the law will understand what is required of them. Similarly, we have frequently used policy statements to provide the regulated community with guidance on how the FEC is interpreting the law in complex areas. These have included a policy to encourage regulated entities that have violated the law to correct and report those violations. We have adopted a policy designed to prevent embezzlement of campaign funds and the misreporting that often accompanies it. We have also issued a policy statement to help ease compliance with our reporting obligations for campaign expenditures. Overall, the FEC has made significant improvements in facilitating voluntary compliance.

3. The amount of money that candidates and committees have been spending has sharply increased. The federal election in 2008 may likely be the most expensive campaign we have ever seen, with unprecedented amounts of fundraising. From your perspective, as the current Chairman of the FEC, how is the agency preparing for the 2008 Presidential and Congressional elections?

Traditionally, the FEC retains a small number of contract employees to process the additional paperwork associated with the presidential public financing program, redeploys some staff to handle the increased volume of campaign finance disclosure reports, and remains open for extended hours on certain filing dates. The agency is preparing for similar personnel actions in 2008 as well.

The FEC has also significantly improved how information about money raised and spent in federal elections is presented on the internet. We began this with the presidential campaign finance data this year and anticipate these improvements will be available for

all our data by the end of 2007. As a result, for the 2008 election, citizens will be able to search the FEC's data more easily by state, by races within the state, and by zip code, all with a new, easy to use map interface.

In addition, the agency has been improving its enforcement process in order to ensure that we can efficiently handle complaints in the 2008 cycle. For instance, in 2006, the agency processed its cases more than 30% faster than in earlier years and approximately 85% of cases were closed within two years of filing. This improvement will allow us to more promptly address violations in the coming election cycle.

4. One of the split votes that the Federal Election Commission made during your tenure on the Commission is in respect to the Audit of Bush-Cheney '04, Inc., on March 22, 2007. That audit involved "hybrid advertisements," in which the national candidates as well as references to members of Congress were mentioned. Please explain your vote on this matter and your general perspective on handling such advertisements.

Attached please find a statement I issued with Commissioners Walther and Weintraub that provides a detailed explanation of my vote on this matter.¹ The FEC has begun a rulemaking to address the hybrid advertisement issue. The public comment period closed on June 11, 2007, and we will hold a public hearing on July 11, 2007. I am hopeful the Commission will be able to issue a final rule on hybrid advertisements prior to the end of this year.

¹ The statement is also available at www.fec.gov/members/lenhard/speeches/statement20070321.pdf.

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Responses to Questions Submitted by Senator Daniel Inouye
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1. As members of the Federal Election Commission, you have all testified to the wonderful working environment that exists. Given the record number of fines through settlement, improved management of increased filings, increased efficiency in the enforcement process, to name a few, I would like to learn of your thoughts on the current campaign finance laws and procedures that are in place. Where do you believe the problems are in current law that may be addressed by Congress, by clarifying the law or closing loopholes, in order to increase transparency and make accountability easier to monitor?

The Commission's legislative recommendations for 2007 highlight five changes I believe Congress should consider.¹ One area of particular note is requiring electronic filing of Senate reports. Data from electronically filed reports is received, processed, and disseminated to the public more easily and efficiently, resulting in better use of government resources. Reports that are filed electronically are normally available to the public within minutes and the data is integrated into the FEC's database within days. In contrast, campaign reports that are filed on paper must first be scanned by hand before they are available on the internet and frequently it takes up to 30 days for the data to be integrated into the Commission's searchable database.

While the FEC did not make a specific recommendation, there is no doubt that the system of public financing for the presidential election campaigns is on its last legs. Because the amount of money a successful candidate can raise outside of the public financing system is so much larger than the sums available to candidates who accept public financing, few candidates who believe they can win are willing to take public financing. It will be up to Congress to decide prior to the beginning of the 2012 campaign if it wishes to preserve the system by increasing the funds available to publicly financed candidates or if, instead, it concludes that this system has outlived its usefulness.

2. The 2008 Presidential election season started off early. In addition, the fundraising that is necessary for candidates in federal elections is at an all-time high. It seems as though the "down time" for candidates in between election cycles has shortened dramatically. Do you believe

¹ The Commission's legislative recommendations are available at http://www.fec.gov/law/legislative_recommendations_2007.shtml.

this is straining the ability of the FEC to keep track of campaign finances due to an increased volume?

The Commission has been working to ensure that we can handle the increasing level of campaign activity, and we are confident that we will be able to handle the 2008 activity effectively. We have been using the time since the 2006 election to put measures in place, such as improving how we present disclosure data to the general public, so that we are prepared for the 2008 elections. We significantly improved how our presidential campaign finance data is presented and continue to improve our use of technology to keep up with the volume of transactions we monitor.

3. Finally, I would like to hear your thoughts regarding the issue of “527s”, and the impact on the FEC’s ability to accurately track campaign finances. What, if anything, do you believe might assist your agency in its efforts to keep the American electorate informed about candidates’ campaign finances?

Under current law, entities that operate under section 527 of the Internal Revenue Code that qualify as a federal “political committee” under FECA must register and report their financial activity with the FEC. Most of these organizations file their reports electronically, and those reports are generally available on the FEC’s website within minutes of being filed. Through recent rulemakings and enforcement actions, the Commission has made clear that it will insist that 527 organizations that qualify as federal political committees must register and report their activities to the FEC. Over the past year, the FEC collected over \$1.45 million in fines from groups that failed to properly register their 527 organizations with the Commission. Congress has mandated that 527 organizations that are not required to register and report with the FEC must register and report their financial activities to the Internal Revenue Service or to the state government in the State where they operate. Congress has required that these reports also be available to the public over the internet.

While we can always improve the amount, speed, and access to information about campaign finance, we should also be mindful that at no point in history have citizens of any country had access to as much information about the money raised and spent in politics as Americans do today. Similarly, at no point in history has that information been so easily accessible to all citizens. This is especially striking at this agency, when we consider how much information is available to citizens today, relative to what was available when the FEC opened its doors thirty-two years ago. The FEC has operated effectively under Congress’s existing disclosure framework, it will continue to seek improvements under the existing statute, and will work to implement any legislative changes that would require additional disclosure.