WOMBLE CARLYLE SANDRIDGE & RICE
A PROFESSIONAL LIMITED LIABILITY COMPANY

1401 Eye Street, NW
Seventh Floor
Washington, DC 20005

Telephone: (202) 467-6900
Fax: (202) 467-6910
www.wcsr.com

Lawrence H. Norton
James A. Kahl
Direct Dial (LHN): (202) 857-4429
Direct Dial (JAK): (202) 857-4417

January 5, 2009

Stephen Gura, Esquire
Deputy Associate General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comment on Commission Policies and Procedures

Dear Mr. Gura:

We submit the following comments in response to the notice published in the Federal Register by the Federal Election Commission ("FEC" or "Commission") regarding the Commission's policies and procedures (Notice 2008-13). 73 Fed. Reg. 74494 (December 8, 2008). Our comments are submitted in our personal capacities, based on our experience as counsel for entities and individuals regulated by the Commission, and our prior experience as the Commission's General Counsel and Deputy General Counsel, spanning the period from 2001-2007.

The FEC asks a broad range of questions, such as: Should the Commission entertain motions from those who file complaints and those it investigates (respondents), such as motions to reconsider, dismiss, or take some other action? Should respondents receive access to all relevant documents in the agency's possession, including transcripts of testimony obtained by investigators from non-party witnesses? Should respondents be entitled to appear before the FEC before the Commission decides to open an investigation?

We applaud the Commission's willingness to reexamine its processes and procedures. Indeed, a similar undertaking in 2003 led the FEC to make several constructive changes to its internal procedures. While the current initiative is no doubt well-intended, there is a risk that adopting ever more elaborate processes for investigating potential campaign finance violations will delay resolution of complaints to the detriment of respondents. The Commission and respondents have experienced this problem before.

Several years ago, it was common for FEC investigations to languish for years, at times surpassing the five-year statute of limitations for a court to impose civil penalties. In our first year heading the FEC's Office of General Counsel (2001-2002), members of the election bar commonly complained that enforcement matters would disappear into the ether, with years transpiring between contacts with Commission staff. We regularly considered staff requests to negotiate agreements with respondents' counsel to toll the statute of limitations. And as for the

few matters that went to federal court, a final ruling could come a decade after the conduct at issue. Little wonder federal judges gave such cases short shrift. As one former Commissioner tartly observed, the punishment is the process.

Through a series of common sense management initiatives, strong Commissioner backing, and the hard work of Commission staff, this situation changed dramatically, so that by 2007 the FEC was resolving 85% of complaints within a two-year election cycle. Tolling agreements became a thing of the past. Not coincidentally, Commission fines reached record levels during the same period, owing at least in part to the fact that the fines were negotiated while the alleged wrongdoing was still relatively fresh.

But what about fairness to respondents? Certainly, it is in everyone's interest for the FEC to treat respondents fairly. But in deciding whether to create new procedural rights for respondents, it is important to keep a few things in mind.

First, the current process already allows multiple opportunities for respondents to address the allegations and evidence.

Respondents are entitled to respond to a complaint in writing before the FEC can even open an investigation. If an investigation is opened, the Commission typically authorizes staff to try to negotiate a settlement before the agency makes findings that a violation has occurred. If no settlement can be achieved at this stage, the General Counsel must furnish respondents with a brief, laying out the factual and legal basis for finding probable cause to believe a violation has occurred, and respondents may then submit a reply brief and request oral argument before the full Commission. After all of these steps, if the Commission finds probable cause that a violation has occurred, it must attempt to negotiate a settlement for another 30 days or more – even if agency lawyers have already tried for months to negotiate a settlement under the same or similar terms.

Second, unlike many enforcement agencies, the FEC lacks authority to *impose* fines on anyone other than late filers. The FEC is an investigator and conciliator, not a judge. In the ordinary matter, if a settlement cannot be reached, the Commission must file suit in federal court, where respondents may present their case anew – and where they are entitled to the full panoply of due process rights.

Third, the FEC's request for public comment neglects to indicate what perceived unfairness it is attempting to address. Some of the proposals would no doubt enhance procedural rights. But absent a record of abuse or unfairness, we wonder whether these are solutions in search of a problem.

In sum, as the Commission strives to improve, it should consider just how much process is necessary to ensure fairness in a proceeding that adjudicates no rights and allows multiple opportunities to address the evidence. Equally essential to procedural fairness is the interest that respondents have in the prompt administrative resolution of the allegations against them. New procedural rights will be of little comfort to respondents if they must endure additional months or years under a cloud of suspicion.

While we are skeptical that more process is the answer, opportunities abound to improve transparency. The FEC could start by more clearly and contemporaneously describing its actions in audits, enforcement cases, and advisory opinions. Civil penalties and other enforcement actions are announced in a manner that is difficult to decipher and does little to promote understanding or deterrence. As a general matter, finding information on the Commission's website, about enforcement matters, audits, or advisory opinions, is a challenge - a strange circumstance for a disclosure agency. The FEC should also examine which internal processing policies, such as those triggering referrals from the Audit and Reports Analysis Divisions to the General Counsel for enforcement action, could be made public without compromising statutory requirements. Modest changes such as these could have a big impact on compliance, as well as promoting insight into agency functions.

There is a balance to be struck in fashioning a system that is both fair and efficient, and that promotes compliance with the law. We trust the Commission will be mindful of it.

Thank you for the opportunity to submit these comments.

Sincerely yours,

WOMBLE CARLYLE SANDRIDGE & RICE
A Professional Limited Liability Company

Lawrence H. Norton

James A. Kahl