

Opening Statement
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Good morning, Mr. Chairman and Members of the Committee, and thank you for inviting me here today.

I am pleased to appear before you at this oversight hearing to discuss the Federal Election Commission's operations. The Commission has always had its critics, and does today. And I'd be the first to say that some of the criticisms have merit. But I believe the Commission has made great strides towards improved efficiency and efficacy. We have a relatively new General Counsel, who has reorganized the structure of our legal staff. We have made a promising start at addressing some of the longstanding problems of the agency. The current Commission, with the able support of our Staff Director, Jim Pehrkon, and our General Counsel, Larry Norton, is committed to continued progress towards fulfilling the agency's mission.

Disclosure

The FEC is first and foremost a disclosure agency. The FEC's disclosure program includes not only the review and placement of information on the public record, but also educational outreach, including campaign finance workshops and seminars, a toll-free line for consumer requests, and automatic fax transmission of our publications 24 hours a day, 7 days a week. FEC meeting agendas and related documents also are available on our web site. Our disclosure program accounts for over a third of the agency's staffing (137 FTE), distributed among the Public Records Office, Information Technology Division, Reports Analysis Division, Press Office, Information Office, and those sections of the Office of General Counsel that formulate proposed regulations and draft responses to advisory opinion requests.

Improvements in productivity, aided by Information Technology (IT) enhancements, generally have enabled the FEC to keep pace with the large increases in Federal campaign finance activity during recent election cycles, activity which has nearly doubled in the past 12 years. Total disbursements for a non-presidential election cycle have increased from \$1.1 billion in 1986, to \$3.1 billion in 2002 -- a 282 percent increase. We anticipate \$4 billion in total disbursements for federal campaigns in the 2004 cycle, from about 8,000 committees filing over 90,000 reports and generating 3 million itemized transactions. The 2006 cycle, a congressional cycle, should be slightly lower in volume than the 2004 presidential cycle. Every election cycle since 1992 has seen a new record in total spending in federal elections for congressional and presidential elections. With your help, we are building an impressive communications system capable of handling our IT needs well into the future. This system offers the capability of instantly updating our

database and expanding the types of information collected. As you are aware, however, this system is expensive. The average annual cost is about \$1 million to maintain the electronic filing system. Since the institution of electronic filing, median time to process all documents has improved from 10 to 11 days to 5 to 6 days.

Enforcement

As someone who practiced election law before joining the Commission, I am especially interested in seeing that the Commission enforces the law fairly and efficiently. I had the good fortune of arriving at the Commission at a time when there is a great deal of interest, on the parts of Commissioners, agency staff, and those who practice before the Commission, in improving the enforcement process.

Last year, with the particular encouragement of then-Vice Chairman Smith and the support of all of the Commissioners and the General Counsel, I convened an unusual hearing, focusing on the Commission's enforcement procedures. We invited the regulated and reform communities in to critique our performance and offer suggestions on how we can improve. I am not aware of other agencies so frankly inviting criticism in this way.

The Commission received a number of thoughtful, sensible suggestions, both in writing and through oral testimony. At the hearing, we discussed such topics as the timeliness of investigations; whether the Commission should adopt a publicly available civil penalty schedule; the appropriate scope of treasurer liability; the method by which respondents are identified; the agency's discovery practices; and concerns about the statutory trigger for initiating an investigation, which is a finding by the Commission that there is "reason to believe" that the law has been violated.

In response to that hearing, the Commission has already made several modifications to its enforcement procedures. Witnesses are now given access to their deposition transcripts. The Office of General Counsel has developed new language for our confidentiality advisement, to clarify that there are no statutory restrictions on witnesses' cooperation with respondents' counsel. The agency has sought comment on proposed changes to our practices with respect to naming treasurers as respondents and is close to adopting a final policy. Our staff is developing a new policy on *sua sponte* submissions.

Last year, we began making the public records for closed enforcement matters available on the FEC's website, through the Enforcement Query System (EQS). The EQS was specifically developed to allow easy analysis of the Commission's enforcement decisions. It is no longer just the prerogative of Washington insiders to learn the agency's precedents. And we will soon launch a facelift of our website with improved searching capabilities and a more user-friendly design.

A longstanding problem at the agency has been the time it takes to process cases. The Commission began to address the problem with the implementation of the

enforcement priority system (EPS), which has substantially improved the agency's ability to focus its resources on the most important cases. The advent of the Administrative Fine and Alternative Dispute Resolution (ADR) programs has provided streamlined processes for handling less complex matters. One result of these three improvements has been increased overall capacity. But it has also meant that the cases that the agency pursues through its regular enforcement channels tend to be more complicated and substantive. They may thus take longer to resolve, but the resulting penalties are correspondingly larger, and have a correspondingly larger deterrent impact.

The agency's progress can be shown by looking at a few snapshots. In 1991, there were 262 cases closed with civil penalties totaling \$534,000; in 1995, there were 229 cases closed with \$1,967,000 in civil penalties. In FY 2001, with the addition of the Administrative Fine and ADR programs, the FEC closed 518 cases, a 163% increase over the FY 1995-2000 annual average of 197 cases. By FY 2003, there were 535 cases closed with civil penalties and fines totaling \$2,774,603. With three months remaining in this fiscal year, we have already exceeded the FY 2003 civil penalty total.

Within the last year, the Commission reached settlements in one corporate reimbursement case (Audiovox) that totaled \$849,000 – the largest aggregate of civil penalties in one case in the Commission's history. Within the last month, the Commission has announced penalties totaling \$1.1 million in two cases, one (Stipe/Roberts), a massive reimbursed contributions scheme, and one (Kushner), dealing with excessive contributions from a large number of associated partnerships. These represent the third and fifth largest aggregate amounts of civil penalties in individual cases in the Commission's history. Truly, the FEC is a "toothless tiger" no more.

We have essentially eliminated the closing of cases as "stale." Under the Commission's Enforcement Priority System, the General Counsel's Office automatically recommends that the Commission close without action as "stale" any case that has remained inactive and unassigned to staff for 12 months, or 18 months for cases that appear to be the most serious. In fiscal year 1998, the Commission closed 86 stale cases. As recently as fiscal 2002, it closed 11 stale cases. In fiscal 2003, one case was closed as stale, and so far this fiscal year, none have been closed as stale.

For nearly as long as the Commission has existed, people have asked why enforcement cases take so long. Some of the reasons are outside the Commission's control, including delay interposed by actors under investigation who do not move with the greatest of speed to cooperate with us, complicated subject matter, and a procedurally complex statute. With the passage of the Bipartisan Campaign Reform Act (BCRA), more of our cases now involve novel questions of law, which also take longer to resolve.

But there are also reasons within our control, and we are moving to improve our performance. The Commission has placed a strong emphasis this year on disposing of a backlog of older cases. At the same time, we have initiated procedures to expedite the processing of new cases as they are filed. In October, the General Counsel set as an initial goal the production of "First General Counsel's Reports" – the reports

recommending whether the Commission should institute an investigation – within 120 days of activation. For cases activated since November 1, we have tracked the average and median time pending prior to submission of a First General Counsel’s Report. As of June 30, the average stood at 104 days, and the median at 93 days.

This is not to say that I, my colleagues, or our General Counsel are satisfied with the current pace of enforcement. We all realize that we have got to do better. Toward that end, we continue to implement a variety of internal management controls to speed the disposition of cases, and, as noted above, we are starting to see results. We are also beginning to explore whether the strategic use of expert outside mediators at particular points in the process might help to break impasses and thus speed resolution. I personally scrutinize the processing time on every case that comes before me and hold everyone from the staff attorneys to the General Counsel accountable when cases languish. So we continue to look for every avenue for increased efficiency and would welcome any suggestions that you have.

One goal near and dear to my heart that we have not yet accomplished is publicizing our penalty schedule and adopting a policy that the Commission may deviate from that schedule only upon a written explanation of the mitigating or aggravating factors that justify the deviation. Like the sentencing guidelines in criminal cases, such a public penalty schedule would strengthen both the appearance and the reality of consistency and fairness in the agency’s enforcement practices.

I believe that the knowledge that penalties would be administered fairly and consistently would encourage respondents to conciliate and enhance the efficient processing of cases. If you agree with me, I’m sure that a few words of Senatorial encouragement would help to speed the pace of implementing this proposal. It is my personal belief that increased efficiency and increased transparency will go a long way toward alleviating concerns about the agency’s enforcement practices.

One persistent myth about the agency must be refuted. That is the canard that the agency is unable to function because it is plagued by gridlock, matters being stymied by 3-3 party-line voting. This does occasionally happen, and when it does, it is a serious and frustrating problem. The impact of gridlock on the Commission’s functioning, however, is vastly overstated. Of the 4,972 votes on enforcement cases by the Commission between FY 1995 and FY 2003, only 45 (less than 1%) resulted in tie votes. Of those, in 14 votes, roughly one-third, the ties did not go down party lines.

In the vast majority of cases, the bipartisan nature of the body forces Commissioners to seek common ground. It also, I believe, enhances civility. Any proposal to reconstitute the Commission with an odd number of members would rupture that bipartisan balance and substitute a campaign administration with a partisan tilt. Such an imbalanced Commission could result in one party being repeatedly and unfairly penalized at the hands of the other. Even the appearance of that threat could jeopardize the credibility of any findings against the minority party and could encourage reckless

behavior by members of the majority party. That would be a cure far worse than the disease.

Budget

Our FY 2005 appropriation request is for \$52,159,000, an increase of \$2,016,596 or 4.02%, and for 391 FTE, the same as our FY 2004 FTE level. This year, as last year, the FEC is seeking only a modest increase over the FY 2004 budget of \$50,142,404 (less the government-wide across-the-board .59% rescission) and 391 FTE. I am pleased to report this request conforms to the President's FY 2005 budget request for the FEC.

The FY 2005 request represents a continuation of FY 2004 funding levels, adjusted for inflation, and salary and benefit increases (\$1,744,700 -- a 4.85% increase). As such, it represents a Current Services request for FY 2005, with no additional funds or staff for new programs or initiatives by the FEC and represents an overall increase of only 1.92% for non-personnel costs.

Because we are a small agency whose budget is primarily allocated toward salaries, the enactment of a major piece of legislation has the potential to overwhelm our relatively meager resources. Not surprisingly, the enactment of the Bipartisan Campaign Reform Act placed significant financial demands on the Commission. Specifically, the Commission was faced with a massive and expensive regulatory undertaking under tight time constraints. At the same time, the Commission was a major participant in the *McConnell* case, funding complex litigation to defend the statute from constitutional challenges. BCRA also required significant expansion of our filing systems and outreach services in order to assist the regulated community in compliance with the new provisions of the Act.

Congress recognized these needs and provided the Commission with the resources to help meet these challenges, including a \$5,366,200 BCRA supplement primarily earmarked for hiring staff to meet new Commission responsibilities found in specific provisions of the law. As a result, the Commission has been able to meet its new responsibilities. The Commission enacted all the required regulations within the statutory deadlines. We also substantially contributed to the successful defense of BCRA against facial challenges.

Although the more high profile activities have been completed, BCRA continues to require significant fiscal allocations by the Commission which may not be apparent at first impression. The Commission was required to overhaul the entire electronic filing system in order to accommodate the changes in filing responsibilities and to handle the 20% increase in filing under BCRA (largely attributable to the change to monthly from quarterly filings by large committees). Such an undertaking requires funds not just for the initial outlay of equipment and upgrades, but also requires permanent increases in staff, such as the hiring of analysts to review reports.

Additionally, outreach services to the regulated community continue to be a top Commission priority. In addition to conferences, roundtables and other informational meetings designed to provide critical opportunities for the regulated community to learn about the new BCRA requirements, the Commission has undertaken an overhaul of brochures and printed materials to accurately reflect the fundamental changes to the Federal Election Campaign Act. In addition, we have had to develop procedures and materials for new provisions of the law, such as the Millionaire's Amendment. Our current funding levels allow us to continue providing these services, which in turn increase disclosure and compliance.

Finally, the needs of our General Counsel's Office have increased dramatically. With the implementation of a new law, complaints that are received invariably require more staff resources, as the issues raised are often ones of first impression. We are also confronted with a dramatic increase in Advisory Opinion requests on issues of increased complexity and scope. We believe it will be necessary to maintain our increased staffing to properly examine the myriad unique issues that are raised by BCRA. Over time, this increase will shift to our litigation staff, because "as applied" challenges may arise as a direct result of enforcement.

Legislative Recommendations

I would be remiss if I did not take this opportunity to put in a plug for our legislative recommendations. This year, the agency submitted twelve legislative recommendations. While I would be thrilled if you decided to pass all twelve (and I encourage you to consider doing so), let me, in a more modest spirit, highlight our top two recommendations, recommendations that all six commissioners support and which we do not believe to be controversial or in any way to undermine the important goals of BCRA.

First, the Commission has recommended that Congress amend 2 U.S.C. § 439a(a) to allow, as a permissible use of Federal campaign funds, donations to State and local candidates, subject to the limits and prohibitions of State law, and to allow the use of Federal campaign funds for any other lawful purpose that does not violate subsection (b) of section 439a (the prohibition on personal use of campaign funds).

BCRA amended 2 U.S.C. § 439a. In the floor debate on BCRA, Senator Feingold stated that the intent of the revised section 439a was to codify the Commission's regulations on the use of campaign funds. Section 439a, as amended by BCRA, lists four explicitly permitted uses of campaign funds in paragraphs (a)(1)-(4) and then, in subsection (b), states that campaign funds may not be converted to personal use. However, unlike the pre-BCRA version of section 439a and unlike the pre-BCRA regulations to which Senator Feingold referred, the use of campaign funds for "any other lawful purpose" (as long as they are not converted to personal use) is no longer listed as a statutorily permitted use. There was no record of abuses in connection with conduct permitted under the "any other lawful purpose" provision, and we can find no evidence that its deletion was in fact intentional. Restoring the language would in no way permit

personal uses of campaign funds. Nevertheless, in post-BCRA rulemakings and advisory opinions, the Commission has had no choice but to interpret this statutory deletion as meaning that the list of permissible uses in section 439a(a) is exhaustive.

Restoring the “any lawful purpose” provision would allow a Federal candidate or officeholder to donate his or her campaign funds to State and local candidates (a common practice before the passage of BCRA), even if he or she is no longer a candidate for Federal office. It would also permit Federal candidates and officeholders who decide to run for non-Federal offices to donate their Federal campaign funds to their own campaigns for State and local offices, if State law permits. It would further permit retiring Members to convert their leftover campaign funds to multicandidate committees (another fairly common pre-BCRA practice). Finally, it would allow the Commission to approve atypical uses of campaign funds that do not raise personal use issues but do not fall under any of the enumerated permitted uses. In the past, for example, this provision allowed the Commission to permit a Federal officeholder to retire debt from a state campaign,¹ to permit an unsuccessful candidate to donate excess funds to a trust fund for the benefit of an unrelated orphan,² and to permit a candidate to donate funds to a public housing residents’ council (which had not yet received IRS approval of its non-profit status) to make improvements and institute programs for the benefit of the residents of a high crime neighborhood.³

Our second recommendation is that Congress amend 2 U.S.C. § 432(e)(3)(B) to permit contributions from one principal campaign committee to another in amounts of up to \$2,000. Prior to BCRA, the amount of support that an authorized committee could give to another authorized committee and the contribution limit for candidates and authorized committees with respect to any election for Federal office were both \$1,000. 2 U.S.C. §§ 432(e)(3)(B) and former 441a(a)(1)(A). In BCRA, Congress raised the section 441a(a)(1)(A) contribution limitation for candidates and authorized committees to \$2,000, but did not change the 2 U.S.C. § 432(e)(3)(B) limitation on support from one authorized committee to another. That is, as the law currently stands, everyone who used to be able to give an authorized committee \$1,000 may now give \$2,000, except for another authorized committee, which is still limited to \$1,000. Again, there is no legislative history indicating that this variance was purposeful, and it has caused confusion. The Commission therefore recommends that the section 432(e)(3)(B) limit be increased to \$2,000, consistent with 2 U.S.C. § 441a(a)(1)(A).

We appreciate the interest that the Rules Committee has shown in the FEC’s operations. I would be happy to answer any questions that you have.

¹ See Advisory Opinion 1980-32.

² See Advisory Opinion 1986-39.

³ See Advisory Opinion 1992-32.