# Chapter Seven
## Agency Competence: An Examination

The ability of regulatory agencies to accomplish their legislative charge often requires more than the development of a technical expertise in the policy area – it also requires competence on the part of the regulatory agency. In the book, Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government, Kenneth J. Meier outlines four factors that determine regulatory agency competence. These four factors are effectiveness, timeliness, efficiency, and reliability. Each of these factors must be present for the regulatory agency to be deemed "competent." In order to determine if the Federal Election Commission is "competent" in carrying out its legislative charge to enforce federal campaign finance law, each will now be explored.

**Effectiveness:**

Agency effectiveness is a measure of how well the regulatory agency achieves the policy objectives established by the "norm" or the adjusted law. This dissertation seeks to determine if the enactment of the Enforcement Prioritization System by the Federal Election Commission has made the agency more effective in its enforcement of campaign finance law. Three factors are examined: impact of the Enforcement Prioritization System, the imposition of fines by the Federal Election Commission, and the issuance of admonishment letters to respondents.

Impact of the Enforcement Prioritization System. The data contained in the enforcement profiles indicate that

enforcement of federal campaign finance law is occurring across the range of possible violations. The Federal Election Commission is “keeping its finger” in a wide array of allegations in order to send the message to the regulated community that all types of allegations will be enforced. In some instances the agency appears to impose large punitive fines upon a few participants in order to discourage others from violating the law. In other instances the agency appears to take a scattered approach by undertaking enforcement in some cases, but not in others. The result is that those who face allegations for violating federal campaign finance law may or may not find enforcement action being taken against them.

As the enforcement profiles presented in the previous chapter document, very few types of allegations result in the Federal Election Commission taking significant action. During the post-enforcement prioritization time period, the Federal Election Commission appears to be having mixed success in the area of enforcement against political action committees. A total of 73.81% of allegations lodged against political action committees for failure to register and file disclosure statements were resolved through conciliation agreements, while only 16.67% of these same allegations saw the FEC take no action. An examination of the data shows a striking difference when one looks at contribution limitation or excessive contribution related allegations brought against political action committees. Two-thirds of these allegations saw the FEC take no action, while 22.22% resulted in conciliation agreements, and 11.11% were closed after the agency found “Reason to Believe” that the allegations were true. The conclusion that can be reached is that the degree of FEC enforcement

action taken on allegations brought against political action committees during the post-enforcement prioritization time period is mixed.

Among individual respondents, the Federal Election Commission's record of enforcement action during the post-enforcement prioritization period also appears to be mixed. First, some enforcement by the FEC also appears to be present for allegations of contributions in the names of others that were brought against individuals. The FEC found "Reason to Believe" that nearly fourteen percent (13.89%) of these allegations were true, while it reached conciliation agreements to settle another 13.89% of the allegations. The problem, however, is that the agency took no action on nearly two-thirds (61.11%) of the allegations. Second, the FEC did not undertake significant enforcement against individuals for corporate contributions during the post-enforcement prioritization time period. The FEC did not act on four-in-five (78.87%) of these allegations brought against individuals. This compares with only 11.27% of this same type of allegation resulting in FEC findings of "Reason to Believe" that the allegations were true. A majority (75.36%) of contribution limit or excessive contribution related allegations saw the FEC take no action. Some enforcement, however, is present with the FEC finding "Reason to Believe" that 10.14% of the allegations were true. Likewise, the FEC and respondents entered into conciliation agreements with respondents to settle another 10.14% of these allegations. Lastly, more than four-in-five (80.60%) of the allegations falling into the "other assorted allegations" category that were brought against individuals saw the FEC take no action. In general, it appears that significant action on the part of

the FEC for allegations brought against individuals during the post-enforcement prioritization time period appears to be minimal.

Enforcement efforts by the Federal Election Commission against corporations, organizations, *et al.* also appear to be mixed. The Federal Election Commission did not act on a majority (73.15%) of allegations of corporate contributions brought against corporations, organizations, *et al.*; however, it appears to be enforcing allegations of foreign national contributions brought against them. Approximately one-third (32.94%) of the foreign national contribution related allegations brought against corporations, organizations, *et al.*, resulted in the FEC finding "Reason to Believe" that the allegations were true. Furthermore, another 25.88% of these allegations were resolved through conciliation agreements between the respondents and the FEC. Lastly, the FEC took no action on 83.33% of the single allegations against corporations, organizations, *et al*. Overall, the FEC's enforcement efforts on allegations lodged against corporations, organizations, *et al.*, appears to be mixed, if not weak, overall.

Allegations against candidate, national parties, or other political committees during the post-enforcement prioritization time period appear to be not significantly enforced by the FEC. The FEC did not act on 65.22% of general disclosure related allegations lodged against candidate, national party, or other political committees. That said, the FEC did find "Reason to Believe" that 17.39% of these allegations were true, while reaching conciliation agreements to settle another 8.70%. In the area of failure to register and file disclosure statements or statements of organization, a plurality had no action taken by the FEC.

Another 38.81% of these allegations were settled through conciliation agreements. Lastly, 10.45% were closed after the FEC found "Reason to Believe" that the allegations were true. Clearly, enforcement action by the FEC is taking place among some, but not all, of the allegations lodged against candidate, national party, or other political committees.

In many cases, the strongest action that the agency appears to take is a finding of "Reason to Believe." While a finding of "Reason to Believe" may sometimes include the issuance of an admonishment letter from the Federal Election Commission to the respondent, this type of finding does not typically include the levying of a fine. Furthermore, fines occur most often when conciliation agreements are reached or when the Federal Election Commission has won a judgment after a lengthy court battle. But, only 9.46% of allegations during the post-enforcement prioritization time period resulted in conciliation agreements. And, a total of 66.67% of the allegations that were litigated resulted in the issuance of fines, but this accounted for only six of nine allegations that were litigated.

Fines. The data indicate that not only are a larger percentage of allegations against respondents during the post-enforcement prioritization system time period resulting in no fine being levied, but a smaller percentage of fines in the $1,000 to $4,999, and sub $1,000, categories are being levied, as well. Additionally, with the exception of several fine categories for candidate, national party, or other political committees, and corporations, organizations, *et al*., fewer allegations have been included in Matters Under Review that resulted in

larger category fines during the five years since the enactment of the Enforcement Prioritization System, than in the time period covered by the pre-enforcement profile.

Countering the perception that the Federal Election Commission is not taking action or issuing a large number of fines is the Federal Election Commission itself. In recent years, the Federal Election Commission has successfully won, or leveled, a number of large fines. Additionally, the amount that the agency can fine respondents has increased. Therefore, the Federal Election Commission is bringing in significant amounts of money through the levying and collection of fines. But, the collection of larger fines does not mean that the law is being enforced in such a manner as to be a significant deterrent when winning is at stake for a member of the regulated community. The data clearly indicate that only a small percentage of allegations against respondents actually result in fines being assessed. And, the data further indicate that the percentage of allegations resulting in fines appears to have dropped since the implementation of the Enforcement Prioritization System. So, if fines are money – and money talks loudly in politics, then the fines of the Federal Election Commission are but a distant whisper.

Admonishment Letters. The data clearly indicate that the Federal Election Commission is issuing more admonishment letters during the post-enforcement prioritization time period, than the agency issued during the pre-enforcement prioritization time period.

**Timeliness:**

Regulatory agencies are supposed to carry out their legislative charges in a timely manner. For purposes of evaluating timeliness, this dissertation asks: did the Federal Election Commission generally resolve compliance cases within one election cycle or twenty-four months? The data indicate that, in numerous instances, the Federal Election Commission resolves allegations in a timely manner. The FEC resolved two of the top three types of referral allegations (contributions in the names of others, 2.67 months; corporate contributions, opened and closed in the same day; general disclosure related allegations, 61.57 months) within this time period.

The FEC also resolved two of the top three allegations brought by outside individuals, committees, *et al.* (contributions by foreign nationals, 38.57%; corporate contributions, 13.97 months; and allegations falling into the "other assorted allegations" category, 15.00 months) within the twenty-four month period.

The FEC also met the twenty-four month goal for resolving the top allegations initiated by the FEC. The FEC on average took 6.43 months to resolve the allegations brought by the FEC for the failure of respondents to register and file disclosure statements or statements of organization. The FEC also resolved FEC initiated allegations of failure to file 48-hour reports in an average of 12.18 months. The FEC also took an average of 14.76 months to resolve FEC initiated contribution limitation violations or excessive contributions, and an average of 21.51 months to resolve FEC initiated allegations of corporate expenditures.

The Federal Election Commission appears to have acted within the twenty-four month time span for the top

allegations brought against political action committees. The FEC took an average of 6.49 months to resolve allegations that political action committees failed to register and file disclosure statements or statements of organization. The FEC was able to resolve allegations of contribution limitation violations or excessive contribution related allegations brought against political action committees typically within 11.27 months.

The Federal Election Commission also appears to have been successful in acting on average within twenty-four months for the top allegations brought against individuals. The FEC took an average of 20.02 months to resolve allegations against individuals for contributions in the names of others. Allegations of corporate contribution took an average of only 14.46 months to resolve.

The Federal Election Commission's record of acting within twenty-four months for allegations against candidate, national party, or other political committees, and against corporations, organizations, *et al.*, were both mixed. The FEC was able to resolve allegations of improper corporate contributions or corporate expenditures brought against candidate, national party, or other political committees, on average within the twenty-four month time period (14.80 months).

The data tell the reader that for most types of respondents, and for most types of allegations, the Federal Election Commission has been quite successful in acting within a span of twenty-four months.

**Efficiency:**

Agency efficiency in the area of compliance competency measures whether the Federal Election Commission is able to

cope with its compliance case workload. One of the primary reasons the Federal Election Commission adopted the Enforcement Prioritization System was to improve agency efficiency. When taken as a whole, it does appear that the adoption of the enforcement prioritization system by the Federal Election Commission has improved the agency's ability to handle its compliance caseload within its limited resources. The agency disposed of more allegations in the several years under the prioritization system than in the years immediately proceeding the new system. On the other hand, the vast majority of the allegations that the Federal Election Commission is disposing of are cases that have had no action, or limited action, taken. Therefore, while the agency may be disposing of more cases, the agency's overall record of enforcement within the regulated constituency appears mixed.

**Reliability:**

The last major factor of competence that Kenneth Meier considers is reliability. Three aspects were considered: (1) do agency officials know what they are doing; (2) do agency officials act consistently; (3) is agency behavior predictable.[1] Federal Election Commission officials appear to know what they are doing. Agency officials appear to understand the technical nature of federal campaign finance law. They also appear to act in a consistent and predictable manner. The Enforcement Prioritization System serves as a consistent guide for agency officials in determining what types of allegations will be pursued and what types of allegations will be ignored. Federal Election Commission officials also utilize set formulas in

[1] Ibid.

order to determine when to audit respondents and what types of fines to assess. Furthermore, when agency Commissioners move beyond the action guidelines presented by the Office of the General Counsel, Federal Election Commissioners appear to readily bargain in favor of equitable solutions to compliance case allegations. In sum, it appears that agency officials at the Federal Election Commission are both knowledgeable about federal campaign finance law and consistent in their application and enforcement of the law.

Agency officials also appear to act in a fairly predictable manner. First, the previous chapter's examination of regulatory agency decision-making demonstrated the importance of repeat bargaining. When a bargain was reached, that bargain was found to serve as the basis of the next bargain. Second, the Federal Election Commission's use of Advisory Opinions provides the regulated community with a fair degree of predictability as to what the agency will do when given as specific situation. Third, the regulated community is free to contact agency analysts in order to receive advice on how to comply with the federal campaign finance laws.

**Chapter Discussion and Conclusion:**

On the surface, the data appear to buttress the fact that the Federal Election Commission, as a regulatory agency, is being more efficient in its enforcement of the law. But, efficiency is not the same thing as being effective. The degree of enforcement action, and the penalties involved when violations are found, is not extensive. When taken together, findings of "Reason to Believe," "Probable Cause to Believe" but no further action taken, and "Probable Cause to Believe" litigation initiated

by the Federal Election Commission, and the reaching of conciliation agreements between the respondents and the Federal Election Commission accounted for slightly more than one quarter (25.39%) of all single allegation dispositions. Furthermore, these were the only categories in which fines or admonishment letters were issued to respondents. Either a fine was assessed or an admonishment letter was sent for respondents involved in approximately 21.89% of all single allegations during the post-enforcement prioritization time period. This means that more than three quarters (78.11%) of all allegations during this time period generally do not result in the equivalent of a slap on the wrist. So, while the Federal Election Commission disposes of a large number of compliance case allegations in a timely manner, the enforcement that is taking place is not significant.

Kenneth Meier's definition of regulatory agency competence requires that all four of the factors that were outlined previously be met. It is clear that the Federal Election Commission is generally efficient and timely in the manner that it resolves compliance cases. The agency also appears to operate in a fairly reliable manner. The agency does not appear, however, to act in an "effective manner." As a result, the Federal Election Commission can not be considered "competent" in its enforcement of federal campaign finance law.

But, perhaps the agency's lack of success in the area of effectiveness, and hence its lack of competence, should be expected. Chapter Four explained how the Federal Election Commission is constrained. The implementation of the Enforcement Prioritization System did not eliminate any of the policy tools available to Members of Congress and

the President, nor did implementation of the Enforcement Prioritization System alter the four factors, outlined by Matthew Holden, Jr. that constrain the regulatory agency's decision-making processes. Commissioners are still faced with the technical complexity of federal campaign finance law. The social myths and values related to the role of money in the American political process continue to permeate society. The same avenues of repair for members of the regulated community to appeal for a better judgement continue to exist. And, the need for repeat interactions among the actors in the campaign finance process has not changed. Added to this is the static nature of the Commission's structure, its requirement for a bi-partisan vote in order for any formal action to be taken by the Commission, and its tight agency budget.

The result is a policy outcome that is fully consistent with Holden's theory. As the theory would expect to find, the implementation of the Enforcement Prioritization System by the Federal Election Commission did not substantially change the level of enforcement action or the penalties involved. Constrained bargaining continues to guide the decision-making process of agency regulators, thus leading to a furthering of the deviation between the ideal legislated policy "norm" enacted by the Congress and the President, and the enforcement reality that is taking place.

Is this lack of "effectiveness" on the part of the Federal Election Commission due to the constrained nature of the policy process? Or, is this lack of "effectiveness" due to the policy tools utilized by Congress and the President? The answer clearly is <u>yes</u> to both of these questions. The level of agency "efficiency" is clearly a

result of the policy tools available to Members of Congress and the President, and the four policy constraints outlined by Holden's theory.

In truth, many individuals and political entities within the agency's regulated community voluntarily comply with the Federal Election Commission's interpretation of the law. In this sense, the agency does seem to be effective in compelling voluntary compliance. It is primarily at the edges of the law, when winning is on the line, that interpretations of the law become murky. These individuals, campaign committees, and political action committees, rationally push the political envelope in their effort to win, or to influence those who win, because the political stakes are so great and enforcement by the Federal Election Commission will take place necessarily after the fact and with minimal, if any, consequence. But, this type of action is only rational!

If the Federal Election Commission does not take significant action on the vast majority of allegations, and what action it takes will necessarily be constrained and occur after the fact, what does this say to those who would consider pursuing their own self interests by pushing the limits of the law?

And, suppose that the United States Congress and the President made changes to our nation's federal campaign finance laws and enact a new ideal policy "norm." What would happen then? These new laws would add to the compendium of laws already on the books that regulate federal campaign finance in the United States. As with all other laws, these changes to our campaign finance system can, and likely would, be challenged in our nation's federal courts, thus allowing the federal courts to issue

their interpretations as to the meaning of one or more portions of any new federal campaign finance laws.

One can not forget, however, that a federal agency, be it the Federal Election Commission or some other regulatory agency, must be charged with implementing any existing and/or new federal campaign finance laws. The result will be that the regulatory agency will add its own interpretation to those offered by the Congress and the federal courts. This agency, as has been seen with the present Federal Election Commission, will have to interpret the law, structure a regulatory agency to accomplish what their interpretation of the law sets out, and enforce the law against a regulated constituency through a constrained regulatory decision-making process.

Once again, however, any new regulatory agency will be constrained by the technical nature of federal campaign finance. The agency will still have to determine who to regulate and who to ignore, how long to wait before regulating, and what to accept as compliance with the federal campaign finance laws. The devil will continue to be in the technical details of the law. Social values and myths will continue to impact the decision-making processes of Commissioners and other individuals involved in the regulatory process. Avenues of appeal for members of the regulated community will continue to exist. And, the repeat interaction by the actors in the American political process will continue. As in the past, the ideal policy “norm” will continue to be subject to the revision of the same Congress and President that the agency is charged with regulating. Lastly, the agency’s interpretations of the law, and the manner in which it implements and enforces the law, will be subject to examination, interpretation, and re-interpretation by the

federal courts. The process is dynamic. The impact is significant. But, the result will determine the extent of our nation's federal campaign finance laws well into the $21^{st}$ Century.