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October 3, 2018

**ADVISORY OPINION 2018-11**

Mr. Ryan P. Robichaux  
 Senior Attorney  
 Bradley Arant Boult Cummings LLP  
 On behalf of: Alabama Consumer  
 Finance Association Political Action Committee  
 1819 Fifth Avenue North  
 Birmingham, Alabama 35203

Fair Campaign Practices Act/Reduction of  
 Offenses

The number of the offense is included in the term "civil penalty" and may be reduced, along with any monetary fine, at the discretion of the Commission upon a showing of good cause pursuant to Ala. Code § 17-5-19.2.

Dear Mr. Robichaux:

The Alabama Ethics Commission is in receipt of your request for a formal Advisory Opinion of this Commission, and this opinion is rendered pursuant to that request.

**FACTS**

The facts as have been presented to the Commission are summarized as follows:

The Alabama Consumer Finance Association Political Action Committee ("ACFA PAC" or the "PAC") is a PAC that is required to file monthly reports pursuant to Ala. Code §17-5-8(a). Beginning in June 2017, ACFA PAC failed to file their monthly reports through December 2017. On December 4, 2017, when the PAC realized their error, they contemporaneously filed all monthly reports from June until December of 2017 on December 5, 2017. The Secretary of State is not made aware that a candidate or PAC is required to file until that candidate or PAC informs them that they have reached the necessary threshold. Therefore, the Secretary of State did not send notice to the PAC of their failure to file because the Secretary of State did not know they

had failed to file and the PAC had not established a filing schedule. When the PAC filed on December 5, 2017, the Secretary of State was made aware that the PAC should have been filing monthly reports since June 2017. Consequently, on December 6, 2017, the Secretary of State sent the PAC notice that they had not timely filed six monthly reports between June and December 2017 and imposed fines according to the schedule set out in Ala. Code §17-5-19.1. The PAC had not been fined or noticed for a failure to file prior to December 6, 2017.

The PAC filed all delinquent reports contemporaneously upon recognizing the failure to file. Their fines were graduated for each offense as set out in §17-5-19.1. A notice was sent to the Attorney General and the District Attorney as required by §17-5-19.1(c) that the PAC had committed its fourth offense and that per statute a rebuttable presumption was created that they had intentionally failed to file their 4th, 5th, and 6th filings. Therefore, this presumption was created without the PAC ever having been given the opportunity to present any facts regarding the failure to file and before being fined or noticed for a prior offense because the PAC was fined for all six offenses at once.

On December 14, 2017, the PAC appealed the fines assessed on December 6, 2017 and requested the fines be abated. That appeal was heard on April 4, 2018 by the Alabama Ethics Commission as provided in Ala. Code §17-5-19.2. The Alabama Ethics Commission voted to reduce the penalty imposed on AFCA PAC commensurate with a first offense and assessed a fine of \$300. If the Commission is unable to determine the number of offenses committed and if the PAC were to fail to file again during this election cycle, the PAC would be fined as if it were their 7th offense instead of their 2nd offense even though the Commission found there to be good cause for their failure to file and reduced their fine to an amount commensurate with a first offense.

### **QUESTIONS PRESENTED**

1. Does the Ethics Commission have the authority to vacate or reduce the number of civil offenses attributed to a political action committee by an election official?
2. Assuming so, will the Commission confirm that ACFA PAC's next offense, if any, would be considered its second offense and not its seventh offense?

### **ANALYSIS**

The civil penalties set out in Ala. Code §17-5-19.1 were enacted in 2015, but commenced with the 2018 election cycle. Therefore, the question posed by Mr. Robichaux is one of first impression.

The relevant Code sections are:

**Ala. Code § 17-5-19.1**

(a) Commencing with the 2018 election cycle, the appropriate election official, based on the location of filing as required by Section 17-5-9, shall levy an administrative penalty against any person who fails to timely file a report required by this chapter and who does not remedy the filing of the report pursuant to subsection (h). The State Ethics Commission shall have the authority to levy an administrative penalty against any person who files a materially inaccurate report required by this chapter and who does not remedy the filing of the report pursuant to subsection (g).

(b) The schedule of civil penalties shall be as follows:

(1) The lesser of three hundred dollars (\$300) or 10 percent of the amount of contributions or expenditures not properly reported for a first offense in an election cycle.

(2) The lesser of six hundred dollars (\$600) or 15 percent of the amount of contributions or expenditures not properly reported for a second offense in an election cycle.

(3) The lesser of one thousand two hundred dollars (\$1,200) or 20 percent of the amount of contributions or expenditures not properly reported for a third or subsequent offense in an election cycle.

(c) A fourth failure to timely or accurately file a report in an election cycle shall create a rebuttable presumption of intent to violate the reporting requirements of this chapter. The Secretary of State or judge of probate, as appropriate based on the location of filing, shall notify the Attorney General and the appropriate district attorney of all persons who violate the filing requirements four or more times in an election cycle.

(d) Upon imposition of a civil penalty pursuant to this section, the appropriate filing official shall send the person upon whom the penalty is being imposed proper notification by certified mail of the imposition of the penalty. If an electronic mail address is on file with the Secretary of State, the Secretary of State shall also provide such notification by electronic mail.

(e) Civil penalties levied shall be paid to the appropriate filing official within 45 days of the finality of any review. The Secretary of State or judge of probate, through his or her attorney, may institute proceedings to recover any penalties ordered pursuant to this section that are not paid by, or on behalf of, the person against whom they are levied and may collect necessary fees and costs associated with the collection action.

(f) All penalties collected by a judge of probate shall be distributed to that county's general fund, and all penalties collected by the Secretary of State shall be distributed to the State General Fund.

(g) A person who voluntarily files an amended report to correct an error in an otherwise timely filed report without being prompted by a filing official shall not have committed an offense or be subjected to a civil penalty under this section, so long as, in the case of a candidate, the corrected report is filed prior to the election at issue, and so long as, in the case of a political action committee, the corrected report is filed prior to the close of the calendar year.

(h) Failure to file a timely report shall not be considered an offense or subjected to a civil penalty pursuant to subsection (a) so long as it is the first failure by that candidate or political action committee for the election cycle and the report is filed within 48 hours of the time it was due.

(i) Any penalties assessed pursuant to this section may be paid with campaign funds.

**Ala. Code §17-5-19.2**

(a) Any person upon whom a civil penalty has been imposed pursuant to Section 17-5-19.1 may seek a review of such penalty by filing a written notice with the Secretary of State or judge of probate no later than 14 days after the date on which notification of the imposition of the penalty was mailed to the person's last known address in accordance with Section 17-5-19.1. The Secretary of State or judge of probate shall refer such review to the State Ethics Commission.

**(b) The commission may set aside or reduce a civil penalty upon a showing of good cause. The person seeking review shall bear the burden of proof. (Emphasis added)**

The Legislative Findings for the FCPA declare there to be a “compelling state and public interest” in the disclosure of the source of campaign funds. Ala. Code § 17-5-8.2. To that end, the Code provides for a mandatory but graduated imposition of civil fines for failing to file required campaign disclosures. The Code states, however, that the Commission can reduce or “set aside” these “civil penalt[ies]” upon a showing of good cause. Ala. Code § 17-5-19.2(b). ACFA PAC has asked, therefore, if that same statutory provision gives the Commission the ability to reduce the number of “offenses” committed, as well. The answer to this question matters because of the presumption of intent to violate the Act, which Section 19.1 creates and the burden of showing good cause for the reduction of the civil penalty created by 19.2.

According to Black's Law Dictionary, "set aside" means, "to cancel, annul, or revoke [penalties] at the instance of a party unjustly or irregularly affected by them." The Code allows the Commission to determine whether any penalty should have been imposed in the first place or if the facts provide a sufficient excuse for that failure to file. The rebuttable presumption created by Section 19.1 may be used in a criminal proceeding against a non-filer if criminal charges are initiated. Because of this, a rebuttable presumption of intent is penalizing to the one against whom the presumption is made. Further, the offense number determines the amount a filer will be fined for any subsequent violation. Therefore, the terms' usage within the statute makes the fine and the number of offenses, together, a "penalty." The Code places with the Commission the authority to weigh the facts presented in each appeal and determine whether there is good cause to reduce the "penalty" assessed to the appellant. Because of the rebuttable presumption that is created, and the graduated fining schedule based on the number of the offense, the offense number is included in the term "civil penalty." For comparison, the Fair Election Commission ("FEC") has a graduated scale of administrative fines imposed for failure to comply with filing requirements.<sup>1</sup> The penalty increases for each "prior violation." A "prior violation" is defined as the "[n]umber of times that the committee was assessed a fine during the current and previous two-year election cycles." *Id.* The FEC does not impose a graduated fine unless there has previously been a fine assessed.

Moreover, if a fine is set aside after an appeal, the Commission has made a factual determination that good cause exists that the filer should not be penalized. The Legislature would not have allowed the Commission to eliminate the fine altogether while prohibiting the Commission from reducing the number of offenses if the facts point to that conclusion. Otherwise, the fine reduction would be nothing more than an arbitrary act on the Commission's part endorsed by statute. The Commission cannot determine the issue of the fine without necessarily addressing the intent of the filer, so as a practical matter the act of reducing the monetary fine is a determination contrary to the presumption which § 17-5-19.1 creates. That being said, the FCPA gives independent authority to both District Attorneys and the Attorney General to prosecute intentional violations of the Act. The Commission's determination of the number of offenses may be relevant but does not foreclose other investigations into the same conduct by any law enforcement agency or prosecutorial authority.

This conclusion is consistent with the basic notions of due process which must be respected. Under these Code sections, the Secretary of State's office is required to impose the fines pursuant to the schedule in the statute without discretion. The first time a filer is allowed to produce facts in his or her defense in any meaningful way is during the appeal process. For that reason, and in light of the authority to set aside fines altogether, it is clear that the Legislature intended for the Commission to weigh the facts,

determine how the conduct giving rise to the fine imposition should be viewed, and to grant meaningful relief to filers who have shown good cause as required per Section 19.2.

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<sup>1</sup> See <https://www.fec.gov/legal-resources/enforcement/administrative-fines/calculating-administrative-fines/>


The second question posed is outside the authority of the Commission to answer through an Advisory Opinion, but the requestor may seek clarification from the Commission itself through a separate request for clarification of its decision on ACFA PAC's appeal.

**CONCLUSION**

It is the conclusion of this Commission that the number of the offense is included in the term "civil penalty" and may be reduced, along with any monetary fine, at the discretion of the Commission after an appeal has been timely filed and upon a showing of good cause by the appellant. Any reduction of a penalty by the Ethics Commission shall not impede the independent prosecutorial authority of the District Attorney or the Attorney General.

**AUTHORITY**

  
By 3-0-1 vote of the Alabama Ethics Commission on October 3, 2018.

  
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Jerry L. Fielding, Ret. Sr. Circuit Judge  
Chair  
Alabama Ethics Commission