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Wheat from chaff: Third-party monitoring and FEC enforcement actions

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Abstract

Regulatory theory suggests that providing agencies with multiple sanctioning options allows them to dispose promptly of less serious matters and thereby conserve resources to pursue serious offenders. However, agencies dependent on third-party monitoring may have their enforcement agendas skewed toward more trivial violations. We consider these competing expectations by analyzing enforcement actions at the US Federal Election Commission (FEC) from 1999 to 2004. The FEC – an agency heavily dependent on third-party monitoring – expanded its enforcement options in 2000 by creating two new programs to pursue low-level offenders, while leaving its monitoring strategy unchanged. We hypothesized that more sanctioning options would allow the FEC to allocate its resources more efficiently, and thus deal more effectively with the skew created by third-party monitoring. We found instead that although the FEC disposed more promptly of low-level infractions, it was no more effective at focusing on serious violations. Our results suggest that for many agencies, expanding enforcement options without addressing monitoring has limited ability to resolve enforcement problems.

Keywords: alternative dispute resolution, regulatory enforcement.

Introduction

Research on regulatory enforcement repeatedly demonstrates that the sanctioning strategies employed by government agencies affect enforcement outcomes. Whether an agency adopts a deterrent or conciliatory approach affects the behaviour of those regulated, as does the variety of sanctions that the agency may bring to bear. Dogmatic, zero tolerance enforcement can antagonize members of regulated groups, erode cooperation between those groups and agency officials, and undermine effective enforcement (Kelman 1984). Alternatively, an overly conciliatory strategy can lead to agency co-optation and serious social harm (Gunningham 1987). Many theorists advocate a flexible

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approach to enforcement, allowing regulators to tailor or “ratchet up” sanctions as necessary (Scholz 1984; Ayres & Braithwaite 1992; Gormley 1998).

Scholars have also demonstrated that monitoring strategies affect enforcement outcomes (McCubbins & Schwartz 1984; O’Rourke 2002). Third-party monitoring, whereby an agency relies upon other actors to bring legal violations to its attention, can be particularly problematic (Bardach & Kagan 1982, pp. 166–171). Third-party monitors (e.g. restaurant patrons reporting health code violations) often refer the most obvious and most trivial regulatory infractions, skewing the enforcement agenda away from the pursuit of serious offenders. However, little research has been conducted on the ways these two components of regulatory enforcement – monitoring and sanctioning – relate. Can agencies enhance deterrence by altering sanctioning strategies when monitoring strategies have not changed?

In this article, we study enforcement patterns at the US Federal Election Commission (FEC) in order to determine whether changes to its sanctioning strategy yielded the desired enforcement outcomes. The FEC, which frequently has been criticized as ineffective (Jackson 1990; Project FEC 2002; Smith & Hoersting 2002), recently adopted two new institutional mechanisms to create a more flexible sanctioning strategy: the Administrative Fines (Fines) program, which imposes automatic “parking ticket” fines for late filing offenses, and the Alternative Dispute Resolution (ADR) program, which seeks cooperative, expedient resolution to low-level violations. In theory, these changes should help the FEC dispose promptly of minor matters, freeing up resources to pursue serious offenders. However, our findings suggest that although the new programs have enhanced the ability of the FEC to dispose of low-level infractions, third-party monitoring appears to have limited the agency’s ability to focus on serious violations. We conclude that there are some situations where problems associated with monitoring overwhelm whatever sanctioning strategy the agency pursues.

Theory and expectations

Many individuals obey the law because they have been socialized to do so (Kagan 1984; May 2004), but moral suasion does not always work. Some parties regulated by government agencies operate as amoral calculators, so sanctions must be created to ensure that it is more costly to violate the law than to obey it. However, because most of the time agency officials are significantly outnumbered by the groups they regulate, resource constraints affect their ability to monitor, investigate, and enforce the law. An agency may wish to use a deterrence based model of sanctioning that relies on zero tolerance, punitive sanctions to secure legal compliance from regulated groups. Yet this strategy is extremely resource intensive, which may lead agencies to opt for a model based on persuasion and conciliation in order to preserve resources (Reiss 1984). Unfortunately, conciliatory strategies can encourage regulated parties to violate the law with impunity or even co-opt the agency (Gunningham 1987). Some research suggests that agencies can avoid this dilemma by establishing a tit for tat strategy (Scholz 1984). An effective agency shows leniency toward regulated parties who make innocent mistakes and then correct their behavior, while increasing sanctions for recalcitrant violators who continually ignore the law or engage in especially egregious behavior. Persuasion and conciliation should be the initial reaction to wrongdoing, but must be backed up with the threat of credible punishment – agencies

should be “benign big guns” (Ayres & Braithwaite 1992, pp. 40–41; Braithwaite 2002, pp. 19–24).

In order to calibrate the sanction to the offense, the agency must have a number of enforcement mechanisms at its disposal. Without them, regulated groups can exploit agency resource constraints by violating the law and forcing the agency to choose between low-cost conciliation and resource intensive sanctions such as lawsuits. In an ideal enforcement pyramid, most low-level violators (those at the base of the pyramid) are informed that they broke the law and instructed as to their legal requirements in a warning letter (Ayres & Braithwaite 1992, pp. 38–39). More serious violators are subjected to administrative penalties, then civil penalties, and finally criminal incarceration. This graduated approach to sanctioning recognizes that many violators simply made mistakes, and that education is sufficient to secure their future compliance. At the same time it acknowledges that there are a small number of “bad apples” who will be deterred only by the threat of harsh punishment.

Regardless of sanctioning strategy, a regulator must first discover wrongdoing; the probability of detection can be more important in deterring legal violations than the probability or severity of sanction (Braithwaite & Makkai 1991). The monitoring strategy an agency adopts partially determines the types of violations it will find. Many agencies possess the ability to monitor regulated groups themselves, with tools such as random auditing of financial records or on-site inspections. A second option is to rely on self-monitoring, also known as “internal monitoring” (O’Rourke 2003, p. 6). A final alternative is to rely on complaints from third parties, so that regulated groups are monitored by public interest groups, industry competitors or individual citizens.

Although it conserves agency resources, third-party monitoring may prove unsystematic, unreliable, or lack necessary oversight (O’Rourke 2003, p. 21). Moreover, it skews enforcement agendas because the types of violations detected under this strategy tend to be trivial infractions (Bardach & Kagan 1982, p. 166; Kagan 1984, p. 40; O’Rourke 2002). Absent the reliable oversight provided by methods like random auditing, potential law breakers have an incentive to engage in hidden and often fraudulent behavior. In competitive environments, third-party monitoring also may create incentives for competitors to file frivolous complaints. These issues are especially worrisome in regulatory rather than criminal enforcement, where aggressively pursuing low-level violations can chill legitimate behavior, imposing costs that exceed social benefits (Kagan 1989, p. 104).

The extent to which monitoring strategies affect sanctioning strategies varies by agency. Some agencies, such as the California Franchise Tax Board, only monitor and have no enforcement power; potential campaign finance violators are turned over to the California Fair Political Practices Commission (California Fair Political Practices Commission 2007). In such clearly bifurcated regulatory regimes, monitoring strategies will at most affect the universe of matters referred to the enforcement agency. However, many federal regulatory agencies such as the FEC (Federal Electoral Commission [FEC] 2007d), the Securities and Exchange Commission (US Securities and Exchange Commission 2007), the Food and Drug Administration (US Food and Drug Administration 2007), and the Occupational Safety and Health Administration (US Department of Labor 2007a) engage in both monitoring and sanctioning (although the most severe sanctions, such as criminal prosecution, usually are handled by the Department of Justice). For these agencies, which possess their own enforcement mechanisms, the

monitoring approach can directly influence their sanctioning strategy. As a result, effective regulatory enforcement often requires both a diverse sanctioning strategy and unbiased monitoring. However, it is not clear what happens when sanctioning options expand while questionable monitoring practices do not change.

A review of practices at the FEC, which in 2000 changed its sanctioning practices but not its monitoring practices, offers an excellent opportunity to determine the relationship between monitoring and sanctioning strategy. The FEC, charged with interpreting and enforcing federal campaign finance law, has been criticized extensively for its enforcement efforts. Some observers suggest that FEC weakness is due largely to agency unwillingness to enforce the law (Jackson 1990; Project FEC 2002). Others claim that the FEC seeks to enforce the law but has lacked the enforcement tools necessary to deter regulated groups ([Colloquy] 1994, pp. 241–243; Thomas & Bowman 2000). Still others argue that FEC officials overzealously push the limits of enforcement, thereby chilling legitimate contributor behavior (Smith & Hoersting 2002).

Before 2000, when a potential violation first came to the FEC's attention, either through its own investigation or a complaint filed by a third party, the agency had only one enforcement process. A proceeding termed a "matter under review" (MUR) was begun by the FEC's Office of the General Counsel, which conducted a preliminary investigation to determine whether or not there was reason to believe that a violation had taken place. The General Counsel then referred the MUR to the six FEC commissioners, who would do one of three things: (i) decide that there was no reason to believe that a violation occurred and dismiss the matter; (ii) decide that there was "reason to believe, but [take] no further action" and dismiss the matter (a means of disposing of trivial violations); and (iii) direct the General Counsel to pursue a full investigation. If the General Counsel was directed to pursue a full investigation, the alleged violators were offered the opportunity to admit fault and negotiate a settlement. At the conclusion of the investigation the MUR was again forwarded to the commissioners. The commissioners then decided either to dismiss the MUR or to find that there was probable cause to believe that a violation had occurred. If probable cause was found, the commissioners referred the MUR back to the Office of the General Counsel, which again attempted to negotiate a settlement. If negotiations failed the FEC could initiate a civil suit in federal district court. When the FEC found a knowing and willful violation of campaign finance law that the respondent had attempted to conceal, it could refer the matter to the Department of Justice for criminal prosecution. However, criminal prosecution of campaign finance violations is extraordinarily rare (Donsanto & Stewart 1995).

Research on FEC enforcement suggests that the agency has suffered from both limited sanctioning options and overreliance on third-party monitoring. The FEC historically has had legal authority to send a letter of admonishment, to attempt a negotiated settlement, or to file a civil suit in federal court. Until recently it could not unilaterally impose administrative fines. This allowed regulated groups to manipulate the agency by demanding a very low settlement agreement or forcing the agency to expend its resources litigating a suit (Lochner & Cain 1999, p. 1931). In addition, a study of FEC enforcement patterns in 1991 and 1993 found that the agency relied heavily on third-party monitoring, initiating only 30% of the matters that it investigated, while third-party monitors, usually competing campaigns and parties, initiated 63% of investigations (Lochner & Cain 1999, p. 1910). Finally, FEC penalties were very low. Sixty-seven percent of candidates and groups brought before the FEC were found to have committed no infraction,

while another 11% were found to have violated the law but were fined less than \$1,000 (Lochner & Cain 1999, pp. 1916–1918). Such modest fines can be internalized by campaigns, parties, and political action committees as the costs of doing business, as a former General Counsel of the FEC readily admitted ([Colloquy] 1994, p. 232).

In the 1990s, FEC regulators recognized that they could not handle every complaint through the MUR process because the backlog was undermining the ability of the agency to enforce the law (FEC 2006, p. 13). In 1993, the FEC instituted the Enforcement Priority System (EPS), which makes a preliminary assessment at intake as to the probable severity of a matter. Between 1995 and 2000, the FEC used the EPS to dismiss 54% of all of its enforcement matters which either were regarded as trivial or had become stale (FEC 2006, p. 16). Still, it determined that additional institutions were needed to make case disposition more efficient for matters deemed worthy of investigation.

In 2000, two such institutions were created, the first of which was the Administrative Fines program (Fines; this summary was taken from FEC 2007a). The Fines program allows the FEC to impose modest administrative penalties in some instances. If the Commissioners find “reason to believe” that a late filing violation has occurred, a summary of their findings and a proposed fine are sent to the respondent. This fine is based on the dollar amount of the transaction, the lateness of the filing, the number of previous violations by that respondent, and whether the filing is election sensitive (reports filed immediately prior to an election). If a respondent disputes the findings, the matter is reviewed by a new FEC officer and a recommendation is forwarded to the Commissioners. If the Commissioners impose the fine, the respondent must either pay it or seek review in the US district court. The Fines program is a parking ticket type model of enforcement for late filing offenses that shifts the burden of persuasion onto the respondent.

The second sanctioning option created was the Alternative Dispute Resolution (ADR) program (this summary was taken from FEC 2007b). The ADR program was designed to streamline enforcement to yield a faster, less adversarial procedure for low-level violations. The FEC retains discretion over which respondents will be allowed to proceed under the ADR program, and respondents who consent to its terms must agree to nonbinding mediation. The respondent enters a conciliation process with an FEC representative; failing agreement, negotiations are conducted by a private sector mediator. If these negotiations fail, the matter is returned to the traditional MUR program.

By providing institutions that quickly resolve low-level violations, the FEC sought to deal expediently with trivial violations and focus more attention on serious offenders (FEC 2000). As then-FEC Chairman Scott Thomas noted in regard to the Fines program, “we can dispose of cases more rapidly and assign more of our resources to cases warranting greater attention” (FEC 1999), which would accomplish two objectives. First, disposing quickly of trivial violations can ameliorate overenforcement, an especially serious concern when regulated conduct, like making campaign contributions, implicates First Amendment rights. Second, focusing on serious offenders allows the FEC to demonstrate that it is not a captured or impotent agency (Smith & Hoersting 2002, p. 145); also, the ability to deter amoral calculators with “big guns” is a necessary precondition for an effective enforcement pyramid (Ayres & Braithwaite 1992, pp. 40–41). Initial scholarly reaction to these programs was hopeful and optimistic (Thomas & Bowman 2000; Smith & Hoersting 2002). The FEC recently noted that these programs have dramatically reduced the number of matters summarily dismissed under the EPS system from 54%

Table 1 Expectations for more efficient FEC regulatory enforcement

	Expectation	Findings
Number of matters under review (MURs) opened	Decrease	Yes
Percentage of MURs initiated by outside parties	Decrease	No
Percentage of MURs dismissed	Decrease	No
Percentage of MURs resulting in fines	Increase	No
Percentage of MURs involving serious infractions	Increase	No
Average fine amount	Increase	Yes
Outcome of MURs initiated by the FEC	Fine more likely	Yes
FEC initiated MURs after expansion of sanctions	Fine more likely	No
Enforcement for incumbents and non-incumbents	Equivalent	Yes

in 1995–2000 to a mere 11% in 2001–2005. In addition, the total fines assessed and penalties negotiated by the FEC increased significantly between 1995–2000 and 2001–2005 (FEC 2006, pp. 2–3, 12).

These new programs merit closer scrutiny. Consistent with both the expectations of FEC officials and previous research, we hypothesize that an agency with more sanctioning options will be able to allocate its resources more efficiently to address the bias created by third-party monitoring. First, by expanding its enforcement pyramid as envisioned by Ayres and Braithwaite, the FEC should be better able to deal expeditiously with low-level infractions, allowing the MUR process to focus on more serious offenders. There should be fewer MURs initiated (as less serious matters that previously were handled as MURs are now disposed of using the ADR or Fines system), but those MURs that are initiated should result in fewer dismissals, a greater likelihood of fines or other serious sanctions, and larger fines. Second, because third-party initiated complaints often are trivial (Bardach & Kagan 1982; Lochner & Cain 1999), the number of MURs initiated by third parties should decrease as these low-level infractions are handled by the ADR or Fines systems. Third, consistent with arguments made by Lochner and Cain, proceedings initiated by the FEC should be more likely to result in a fine or other serious sanctions, whereas proceedings initiated by third parties should be more likely to be dismissed. Finally, if FEC officials are correct in that the agency does not have a systemic bias, regulations should be enforced impartially against incumbents and non-incumbents alike. We provide a summary of specific expectations of what would constitute more efficient regulatory enforcement for the FEC in Table 1.

Methods and data

To study the effects that the ADR and Fines programs have had on federal campaign finance enforcement, we used the FEC's online Enforcement Query System to code all FEC actions between 1999 and 2004 (available at FEC 2007c). Using multivariate analysis, we considered predictors of *whether a fine was levied* and noted the *amount of the fine* (if applied) and the *share of fine paid by each respondent* (if there were multiple respondents). We also coded for the *identity of the initiator* (FEC, another government agency, an opposing campaign, outside organization, or self), the *identity of the respondent* (candidate or campaign, political party, contributor), whether candidates were *incumbents* and whether they had *won the election*, and the most serious statutory offense

Table 2 Descriptive statistics

Disposition of proceedings	
Dismissed, no reason to believe	33.3%
Dismissed, reason to believe but no further action	27.1%
Dismissed to enforcement priority system	7.6%
Dismissed, other or no reason given	7.3%
<i>Subtotal</i>	75.4%
Fine	23.2%
Suit authorized	0.4%
Incomplete or could not be determined	1.1%
Initiator of claim	
FEC	21.6%
Other government agency	5.1%
Opposing party or campaign	30.0%
Other outside organization	35.3%
Sua sponte (self-initiated)	8.1%
Respondent type	
Individual	43.2%
Political party	7.8%
Political action committee, corporation, or other private organization	23.9%
Political campaign	24.5%
Candidate or candidate family member	0.6%
<i>Total respondents</i>	1,656

Source: Federal Election Commission, data compiled by the authors.

alleged. Distributions of key variables are provided in Table 2. Our baseline comparison case was a complaint made by an opposing campaign or another government agency; we expected that these complaints would be more trivial than those initiated by the FEC, but less so than those brought by other outside organizations.

Both the Fines and ADR programs were instituted in July 2000, so we included a variable indicating whether the case was initiated *after the FEC expansion of sanctions*, which served to test the effect of this change. To control for the fact that the FEC requires up to 18 months to close many of its investigations, we excluded all data from July 2000 through to December 2001 to ensure that claims initiated prior to the new programs were not included in the post-implementation dataset. As a result the “before” data begin in January of 1999, run until July of 2000, and contain only MURs (the only FEC enforcement procedure at the time). The “after” data begin in January of 2002, run through the end of 2004, and contain both MURs and ADRs. Additional information on the Fines program was obtained from FEC publications. We reviewed how the ADR and Fines programs affected the administration of the MUR program by comparing the disposition of cases before and after the creation of these new enforcement options.

We defined a respondent as any unique individual or entity receiving a separate disposition. For example, if a campaign and its treasurer were listed as having entered into a single conciliation agreement with a single outcome, both were collapsed into a single respondent and coded under the name of the campaign. This also was the case for political action committee (PAC) and party treasurers, as well as corporations and their executives. This approach was necessary given that in most instances, the separate inclusion of corporate officers, candidates, and campaign managers in a complaint is due

to pro forma pleading rather than a separate substantive legal claim. If one or more respondents were dismissed while other respondents in the same matter received substantive dispositions, the dismissed respondents remained in the dataset.

We used descriptive data to indicate the range of outcomes over time, and relied on logit analysis to determine the association between the outcome of cases (a fine versus some other resolution) and a range of independent variables including the party that initiated the case, the type of respondent, and most importantly, whether the case was brought before or after the change in the FEC sanctioning process. Our expectation, as noted above, was that after creating the ADR process FEC enforcement would be more efficient, meaning that the variable *after the FEC expansion of sanctions* would be statistically significant and associated with an increase in the likelihood of a fine, particularly for the most serious cases brought under the MUR process.

Our analysis was made somewhat more complex because the same MUR or ADR could encompass multiple respondents. To compensate for the correlated errors observed when the same investigation appeared multiple times in the dataset, we used robust standard errors with clustering, where each individual investigation appearing multiple times constituted a cluster. Errors were correlated within the cluster representing a single investigation, but we assumed that each case was independent of the others. For analysis at the level of the investigation (e.g. the identity of the initiator or the disposition of the case) our analysis was conducted at the level of the investigation, rather than at the level of the respondent, eliminating this potential duplication.

Results

We began by analyzing how the Fines and ADR programs affected the volume of matters handled under the MUR program. Figure 1, based upon data contained in a 2005 FEC report, documents the total number of cases closed by program from fiscal years 1995 to 2005. The number of MURs closed per year decreased over time while the number of ADR closures increased. All told, the FEC disposed of many more matters each year after the creation of the Fines and ADR programs, although Fines comprised a majority of all closures since 2001. The FEC cites similar data as proof that the Fines program is effective (FEC 2006), although these data reveal that the number of matters disposed under the Fines programs varies widely by year. Nonetheless, low-level matters that used to be dismissed are now handled through the Fines program (FEC 2006). Over a four-year time period, the Fines program disposed of an average of 252 matters per year and imposed a mean fine of \$1,872.

It is unclear whether the Fines program actually conserves FEC resources, given that the FEC now expends some attention on low-level infractions that previously had been dismissed. Yet the absolute number of matters disposed is not necessarily a good indicator of regulatory efforts. We hypothesized that the matters subjected to the MUR process after 2000, while fewer, would be more serious offenses requiring more FEC attention, in keeping with FEC goals for the program. We expected that the matters handled by the ADR program would be fairly low-level violations, more serious than those disposed of by the Fines program, but less serious than those subjected to the traditional MUR process. Because the FEC disposes of more total referrals today than it did prior to adoption of the Fines and ADR programs, we expected the total number of third-party-initiated claims in our dataset to remain stable or slightly increase. To the

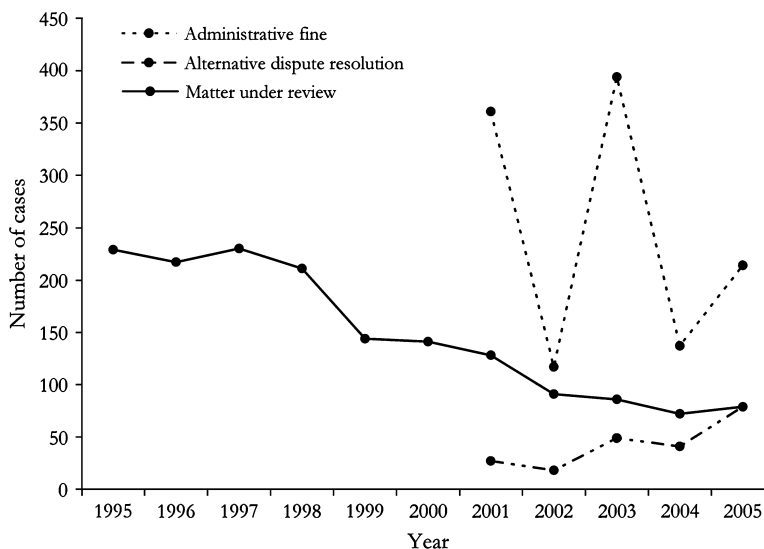


Figure 1 FEC enforcement proceedings by program. Note: Year indicates FEC fiscal year. Source: FEC (2005, p. 4)

extent that third-party claims often focus on more obvious, less serious offenses, these claims should be dealt with primarily by the Fines and ADR systems.

If the FEC has become more efficient, third-party-initiated claims funneled through the MUR process in the past should have decreased as investigators used MURs to focus on more serious offenses. Table 3 shows the percentages of respondents initiating each kind of case before and after the institution of the new enforcement options. More cases were initiated by outside organizations after 2000, but the initiators of MURs did not change with the creation of new enforcement options that should have redirected third-party complaints. Although the number of MURs initiated by opposing parties and campaigns declined somewhat after the institution of the Fines and ADR programs, this decline is matched by an increase in the number of MURs brought by other outside organizations in the same time period. Even after institutional change in the sanctioning options available to the FEC, the MUR process continues to be dependent largely on third-party monitoring.

It is possible that in the wake of the new enforcement options these third-party monitors changed their behavior and initiated claims involving more serious offenses. Using logit analysis, we considered this possibility by reviewing the possible predictors of whether or not cases resulted in a fine, including the initiator of the case, and the type of respondent under investigation. Most importantly, we considered whether or not the case was brought before or after the institution of the new enforcement programs for: (i) all cases, both MURs and ADRs; and (ii) MURs alone. In addition, we reviewed the outcomes of investigations brought specifically against candidates, to determine whether the FEC, as some researchers have suggested (see Ortiz 1994), is a biased agency advancing the interests of incumbents. Our findings are summarized in Table 4. Finally, we included interaction terms to measure whether the FEC itself became more efficient after the expansion of sanctions. These results are discussed in the text below.

Table 3 Initiators of regulatory proceedings before and after FEC expansion of sanctions

	Before	After (all cases)	After (MURs only)
Federal Election Commission	31%	28%	30%
Other government agency	5%	4%	5%
Opposing party or campaign	29%	22%	23%
Other outside organization	33%	42%	38%
Sua sponte (self-initiated)	2%	4%	3%
<i>N</i>	238	293	154

Source: FEC (2007c).

Our analysis allows for a comparison of the disposition of cases before and after the implementation of new sanctioning strategies that created the opportunity to place low-level offenses in the ADR process. The variable measuring the implementation of this change, *after FEC expansion of sanctions*, is significantly correlated with an increase in the share of all cases with fines levied, which grew from 13% to 21%, controlling for other variables (probability estimates were generated using Clarify (Tomz *et al.* 2001) with other independent variables set to their means). However, there was no significant difference in the disposition of cases when MURs were considered alone; MURs brought after 2001 still had only a 13% chance of an outcome imposing a fine, controlling for other variables.

After the FEC expanded its sanctioning options, all cases were more likely to result in a fine. However, it is evident from these data that this result was driven entirely by the success of the ADR program in pursuing small-scale violations. To the FEC's credit, the ADR program appears to be better at disposing of low-level violations than the MUR-only program in place before 2000, where a majority of matters simply were dismissed (FEC 2006). For MURs alone, however, which should constitute more serious violations if the new programs absorbed trivial cases, the chances of levying a fine remained unchanged. It does not appear that the FEC was successful in using the new programs to refocus its MUR program on more serious violations.

It is important to disconfirm an alternative explanation for these data. One might suggest that the proportion of MURs resulting in fines did not increase, not because the FEC was less efficient (our explanation), but rather because the institutional changes allowed the FEC to do more of everything – thus the percentage of MURs resulting in fines remained the same, but the total number of fines increased. However, the findings discussed above and in Figure 1 demonstrated that the number of proceedings initiated after the institution of the new programs did not increase substantially. Indeed, they decreased: fewer MURs and ADRs were initiated after the new system was implemented than MURs were initiated under the old system.

The successes of third-party monitors in bringing substantive complaints are, as expected, quite limited. Whether we consider MURs alone or both MURs and ADRs, investigations initiated by the FEC were significantly more likely to result in fines. However, the interaction terms detailing the behavior of the FEC before and after the expansion of sanctions paint a bleaker picture. MURs brought by the FEC were substantially less likely to result in a fine after the expansion of sanctions (29%) than before (39%).

Contrary to the assertions of some critics that the FEC is used as a weapon by incumbents against challengers, our evidence showed little evidence of such bias. Cases

Table 4 Predictors of whether or not FEC levied fine

	MURs and ADRs	MURs only
<i>All respondents</i>		
The FEC initiated the proceeding	1.30**	1.19**
An outside party initiated the proceeding	-0.92**	-1.35**
Sua sponte (self-initiated)	1.04	0.87
After FEC expansion of sanctions	0.57*	0.09
Campaign or candidate was under investigation	0.72**	0.34
Political party was under investigation	1.09**	0.77**
Constant	-1.91	-1.51
<i>N</i>	1645	1464
Clusters	557	414
Pseudo <i>R</i> ²	0.17	0.20
<i>Candidates only</i>		
The FEC initiated the proceeding	2.20**	1.70
An outside party initiated the proceeding	-0.19	-0.64
Sua sponte (self-initiated)	-0.17	
After FEC expansion of sanctions	1.13**	0.36
Candidate under investigation was an incumbent	-0.24	-0.16
Candidate under investigation won the election	0.11	0.41
Constant	-2.21	-1.93
<i>N</i>	388	287
Clusters	324	229
Pseudo <i>R</i> ²	0.17	0.15

* $P < .05$; ** $P < .01$.

Figures are logit regression coefficients using robust standard errors with clustering (generated by Stata 9).

Source: FEC (2007c).

filed against political parties were more likely to result in fines. But in the review of cases brought against candidates, there was no apparent preference for incumbents or candidates who won elections; cases brought against them were not disposed of in a significantly different manner than cases brought against non-incumbents or candidates who lost their elections. Ultimately, the FEC did not appear to be particularly successful in its pursuit of candidate cases; MURs initiated by the FEC against political candidates were no more successful than MURs initiated by outside groups. Critics may debate whether the FEC is ineffectual, but it does not appear to be biased in favor of incumbents.

When we consider individual respondents rather than matters, the results show similar weaknesses in the use of the MUR program after the expansion of enforcement options. Table 5 shows the disposition of proceedings for respondents before and after 2000. Although fewer respondents had their cases dismissed, this was again the result of increased efficiency in the ADR program. The percentage of MUR respondents with their cases dismissed and the percentage facing a fine were nearly identical before and after 2000.

If the probability of imposing a fine did not change, what about the magnitude of fines that were imposed? The FEC claimed that the expansion in the total fines it levies is a measure of the success of the MUR program after 2000 in pursuing serious violations

Table 5 Disposition for respondents before and after FEC expansion of sanctions

	Before	After (all cases)	After (MURs only)
Dismissed	79%	74%	80%
Fine	18%	25%	19%
<i>N</i>	477	1179	998

Source: FEC (2007c).

(FEC 2006, p. 12). However, this emphasis on total fines obscures the fact that MURs disposed of under the new enforcement regime have more respondents than in the past; before 2000, MURs had an average of two respondents, and after 2000 an average of 3.7, so these higher fines are distributed across more respondents. The average fine per respondent did increase following the new programs; pre-2000 the average fine was a little over \$16,000 while afterward it was nearly \$30,000, a difference that at face value appears to be quite substantial. However, a test of the difference between these means shows that the difference was not statistically significant, nor do the FEC data control for inflation.

In order to examine further whether or not the new programs adopted by the FEC allowed the MUR process to target more serious offenders, we aggregated all conciliation agreements in which respondents agreed to pay a fine of \$50,000 or more, all civil suits initiated by the FEC involving enforcement actions, and all criminal matters referred to the Department of Justice. Fines from both conciliation agreements and civil suits were adjusted for inflation using the Department of Labor's Consumer Price Index calculator. Results are provided in Table 6.

Adoption of the ADR and Fines programs did not result in the FEC appreciably pursuing more serious offenders. The number of civil suits remained both constant and very small, and no criminal referrals occurred during either time period. Serious fines arising from conciliation agreements increased only marginally, from 1.9% to 3.0% of all MURs – and, as noted above, these fines were divided between a greater number of respondents after the expansion of sanctions, meaning that individual respondents paid less of the overall fine. The mean fines in civil suits increased noticeably, from \$14,110 to \$39,687, but the infrequency of these suits cautions against making generalizations about FEC efficacy. Moreover, we are doubtful, given the statements of former FEC General Counsel Noble, that determined campaign finance offenders will be deterred by sanctions of this magnitude ([Colloquy] 1994, p. 232). This is especially the case in the current political environment, where PAC, party, and candidate war chests often exceed seven figures. And as documented in Table 5, fewer than one in five respondents handled under the MUR system faced fines of any sort.

Overall, our findings suggest that the expanded enforcement options available to the FEC have not had all the effects that regulatory theory would anticipate and that the agency wanted. Although the overall number of MURs decreased, third-party-initiated claims continued to make up the majority of MURs, the rate of MUR dismissals remained unchanged at more than 80%, and the fines levied per respondent showed no statistically significant change. The FEC does initiate fewer trivial or non-meritorious cases than outside parties but its attention to serious cases did not appreciably increase in the wake of expanded sanctions.

Table 6 Serious sanctions imposed by the FEC pre- and post-implementation of expanded sanctions

	Before	After
Conciliation agreements		
\$50,000 to \$99,000	1.3%	1.7%
\$100,000 to \$199,999	0.2%	0.8%
\$200,000+	0.4%	0.5%
<i>Subtotal</i>	1.9%	3.0%
Civil suits initiated	0.6%	0.5%
Criminal suits initiated	0.0%	0.0%
Total serious sanctions	2.5%	3.5%
Mean fine in civil dispositions	\$14,110	\$39,687

Fine amounts given in 1999 real (inflation-adjusted) dollars. Figures include MURs with multiple responsible parties.

Sources: Data on civil suits initiated by the FEC were obtained by examining monthly copies of the FEC Record (available at FEC 1999–2004). Data on FEC criminal referrals were obtained from the Transactional Records Access Clearinghouse database (available at Transactional Records Access Clearinghouse [TRAC] 2007). CPI calculations were drawn from the US Bureau of Labor Statistics Inflation Calculator (US Department of Labor 2007b).

Discussion

Our findings argue for some revision to theoretical expectations about the value of expanding sanctioning strategies for regulators. Despite research suggesting that this change should increase regulatory efficiency, the expansion of enforcement options at the FEC does not appear to have helped the agency focus its MUR process on serious offenses. We review possible explanations for this outcome, and conclude that the explanation that best fits the data is a modification to existing regulatory theory.

The first possible explanation for these findings is that the underlying incidence of serious campaign finance violations decreased over time. That is, creation of the Fines and ADR programs did in fact enable the FEC to pursue more serious offenders, but there simply were fewer serious offenses to investigate between 2002 and 2004. The difficulty with this explanation is threefold. First, it is inconsistent with the data; if the FEC were more efficient, the share of MURs dismissed should have decreased, when in fact it remained constant. Second, this explanation cannot be empirically validated or disproven. The most serious campaign finance violations, such as contributions in the name of another or collusion to exceed contribution limits, are not self-evident from reporting forms, do not create a readily apparent victim who could document the crime, and are unlikely to be self-reported. Sometimes regulators or third parties will stumble upon the smoking gun, or co-conspirators will confess their crimes, but the incidence of many of the more serious campaign finance violations is unknowable. Finally, this explanation is counterintuitive. The total amount of money spent in federal campaigns, as well as the total number of regulated transactions, has increased significantly over time. The FEC reports that in the 2006 congressional election cycle, candidates raised \$1.14bn and spent just over \$965m, a “30% increase in receipts and 36% in disbursements over the comparable period in 2004” (Biersack *et al.* 2006). Although we cannot definitively reject the possibility that there were fewer serious offenders than in earlier years, the intensely

competitive and partisan nature of current politics, coupled with the fact that many regulated groups are willing to internalize FEC fines, makes this explanation unlikely.

A second possible explanation is that there were many serious offenses that the FEC could have pursued but chose not to. This familiar iteration of the bias theory made by some critics suggests that the agency is beholden to its congressional patrons and willfully ignores serious violators (Jackson 1990). Again, there are multiple reasons to be suspicious of this explanation. First, this explanation is inconsistent with the data, which show no evident bias toward incumbents or candidates that win election. Second, concerns about ideologically driven behavior or agency co-optation at the FEC normally center on highly visible and contentious areas of constitutional law, such as the FEC's unwillingness in the late 1990s to regulate issue ads or soft money (Smith & Hoersting 2002). The more serious infractions in our dataset, however, relate to behavior that was unquestionably illegal and fraudulent, such as attempts to conceal the identity of contributors, or efforts to make corporate contributions to campaigns with checks bearing the terms "Corporation" or "Inc." in the donor name field. It is one thing for the FEC to be cautious (or docile) in issues involving complex legal ambiguities, but few critics expect it to ignore the regulatory equivalent of armed bank robbery. Third, federal law provides third parties rights of action to sue the FEC in federal court if they feel that the agency is not properly enforcing the law. Citizen suits have become a significant factor in other areas of regulatory enforcement such as environmental oversight (Heyes 1998), and numerous private actors such as opposing candidates, parties, and public interest groups have incentives to monitor and challenge FEC complacency (FEC 2007f).¹

A third possible explanation relates to resource constraints. Perhaps there were bad apples, and the FEC wanted to investigate and sanction them, but simply lacked the resources to do so. However, this explanation also is inconsistent with available evidence. The overall budget for the FEC, the specific budget for its compliance division, and full time equivalent (FTE) staffing positions for its compliance division all increased over the time period of our study. In 2000, the total FEC budget was just over \$38m, the budget for the compliance division was \$9.3m, and the number of FTEs working in compliance was 104. By 2004, those figures had increased to \$50.4m, \$29.8m, and 197 FTEs respectively, due largely to the fact that Congress earmarked substantial increases in FEC resources for Bipartisan Campaign Reform Act enforcement (FEC 2007e).

We conclude that the reason changes in the FEC's sanctioning ability did not improve its ability to pursue more serious offenders relates to the problems of third-party monitoring. Expansion of sanctioning alternatives in many situations operates to conserve agency resources, but for the FEC the result may have been exactly the opposite. Instead of largely ignoring or dismissing low-level violations as was the case prior to adoption of the Fines and ADR programs, the FEC now provides a modest sanction. These changes offer third parties more rather than less incentive to report offenses, no matter how trivial. The problem with expanding FEC sanctioning options is based in the task environment in which the FEC operates – an environment characterized by zero-sum interests among regulated groups.

We recognize that there are many different types of third-party monitors and conceptualize the incentives of regulated groups themselves as lying along a spectrum from collusion to zero-sum. At one end, situations disclosed by a regulated party about a competitor's wrongdoing may hurt the accuser itself by bringing unwanted attention

to industry practices. For example, tobacco companies might have been willing to disclose the industry's manipulation of nicotine in cigarettes to the US Patent Office (so as to distinguish their own brands to procure patent protection), but not to the Food and Drug Administration (Coglianese *et al.* 2004, p. 325). A study of the Los Angeles garment manufacturing industry suggests a similar outcome – when large clothing manufacturers agreed to self-monitor their own contractors for labor violations, the results were at best ambivalent (Esbenshade 2001). At this end of the spectrum, third-party monitoring is collusive, and at extremes may approach collective silence.

In the middle of the spectrum are situations in which reporting by the regulated group of another's infractions will neither appreciably help nor harm the accuser. Restaurants in large cities provide a good example. The owner of a deli in New York City could expend resources gathering information about a competitor's health code violations, but reporting to the government is unlikely to result in an appreciable benefit to the deli owner. Even if a competitor were shut down, its previous clientele would be dispersed to various restaurants. Here, there is little incentive either to monitor competitors or to collude with them.

At the other end of the spectrum rests the nearly zero-sum game of federal elections, where agency actions that disadvantage the Democratic candidate will almost always benefit the Republican candidate, and vice versa. Campaigns are not materially disadvantaged by FEC investigations or fines; as discussed above, the amount of fine in most cases is unlikely to be burdensome. Rather, FEC investigation may create actual or perceived reputational costs to a campaign, party or PAC that can be exploited by its opponents. Research validates the importance of reputation interests in promoting regulatory compliance (Kagan & Scholz 1984; May 2004), and there is preliminary evidence to suggest that this enforcement dynamic may function in the context of campaign finance enforcement (Lochner & Cain 2000).

Federal campaigns are not zero-sum between two competing groups in every case. Outside parties that are not themselves seeking election may affect campaign strategy. Further, only some political interests face diametric opposites. Planned Parenthood has a strong incentive to bring to light legal violations of pro-life PACs, but there is a classic collective action problem between, for example, the mohair lobby (which seeks to maintain a subsidy through an active trade group) and the consumer (whose interests are diffuse and unrepresented) (Rauch 1999). Generally speaking, however, opposing candidates, parties, and PACs have a clear interest in "ratting out" the opposition – their interests are asymmetric (Coglianese *et al.* 2004, pp. 280–281) – and the complexity of campaign finance law provides them ample opportunity to do so.

This dynamic of overzealous outside monitoring explains the enforcement dynamic described above: the high level of third-party initiated complaints, the high level of complaints without merit, and the ultimate failure of the ADR and Fines programs to shift FEC attention to more serious offenses. To the extent that these new programs increased the investigation and sanction of low-level offenses (which they did), they created additional incentives for regulated groups to report one another – and generated more complaints that, when they are not without merit entirely, focus the FEC's attention on obvious infractions typically discovered by third-party monitoring. The entire FEC regulatory structure is undermined by third-party monitoring, and this fact greatly reduces the ability of the agency to filter out insignificant claims. The enforcement pyramid assumes that a regulatory agency is capable of separating the wheat from the chaff, but this task is difficult when the agency is drowning in chaff.

Scholars persuasively have argued that regulatory context differs between agencies, and that enforcement strategies should be tailored to an agency's individual task environment. We expand upon these findings about the importance of task environment by demonstrating how one particular facet of regulatory context – the influence of third-party monitoring where regulated parties have zero-sum interests – affects sanctioning strategy. Existing regulatory theory suggests that the greater the number of sanctioning options, the better able an agency is to employ a responsive strategy that separates low-level from serious offenders. Although this observation may be true in many cases, our findings suggest that in some environments the expansion of sanctioning options may not improve enforcement capability. When an agency is heavily dependent on third-party monitoring, and those private parties themselves have strong incentives to report the real or imagined indiscretions of their competitors, expansion of sanctions can exacerbate overzealous reporting, forcing the agency to deal with the more obvious, and usually more trivial, infractions that third-party monitors discover.

One proposed institutional change frequently advocated by FEC critics to address the flaws in agency monitoring is to reinvest the agency with the ability to conduct random audits, coupled with a sizeable increase in FEC staff. But even this solution is only incrementally useful and could be swamped by third-party monitoring. In this environment, groups still would have incentives to overstate the opposition's indiscretions and misdirect agency resources.

These incentives are comparable to situations faced by other federal agencies in similar situations. Precisely because enforcement context matters to regulatory efficacy, a better understanding of the relationship between monitoring strategies and sanctioning strategies helps scholars understand and practitioners create more efficient enforcement regimes. In an enforcement context characterized by zealous regulated groups eager to report their competitors' infractions, and by agencies heavily dependent upon those regulated to report offenses, a bigger enforcement pyramid is not necessarily a better one.

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Note

- 1 Two of the most prominent of such groups have been Common Cause and Judicial Watch. Beginning in the 1980s, Common Cause filed 11 civil suits against the FEC based on the agency's decision not to pursue an enforcement action. Of these suits, Common Cause was victorious – that is, won its lawsuit or had its suit dismissed because the FEC agreed to pursue the enforcement action – in six cases. Judicial Watch brought three such actions since 1999, though the FEC was victorious in all cases.

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