



# governmentattic.org

*"Rummaging in the government's attic"*

Description of document:	Federal Election Commission (FEC) Transition Briefing for the Incoming Biden Administration, 2020
Requested date:	01-January-2021
Release date:	10-February-2021
Posted date:	27-June-2022
Source of document:	FOIA Request Federal Election Commission Attn: FOIA Requester Service Center 1050 First Street, NE Washington, DC 20463 Fax: 202-219-1043 Email: <a href="mailto:FOIA@fec.gov">FOIA@fec.gov</a>

The governmentattic.org web site ("the site") is a First Amendment free speech web site and is noncommercial and free to the public. The site and materials made available on the site, such as this file, are for reference only. The governmentattic.org web site and its principals have made every effort to make this information as complete and as accurate as possible, however, there may be mistakes and omissions, both typographical and in content. The governmentattic.org web site and its principals shall have neither liability nor responsibility to any person or entity with respect to any loss or damage caused, or alleged to have been caused, directly or indirectly, by the information provided on the governmentattic.org web site or in this file. The public records published on the site were obtained from government agencies using proper legal channels. Each document is identified as to the source. Any concerns about the contents of the site should be directed to the agency originating the document in question. GovernmentAttic.org is not responsible for the contents of documents published on the website.

From: FOIA <[FOIA@fec.gov](mailto:FOIA@fec.gov)>

Sent: Wed, Feb 10, 2021 1:07 pm

Subject: Your Freedom of Information Act Request to the Federal Election Commission  
FOIA No. 2021-033

This email is in response to the request you filed for information under the Freedom of Information Act (FOIA) dated January 1, 2021 and received by the Federal Election Commission's (FEC) FOIA Requester Service Center on January 4, 2021. Specifically, you requested:

A digital/electronic copy of the transition briefing document(s) (late 2020) prepared by the FEC for the incoming Biden Administration.

We have searched our records and located responsive documents. We are releasing 410 pages of documents to you in their entirety. We are withholding 54 pages in their entirety under Exemption b(5). Exemption 5 protects from disclosure inter- or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency, including documents covered by the attorney work-product, deliberative process, and attorney-client privileges. See 5 U.S.C. § 552(b)(5). Therefore, your request is granted in part.

You may contact our FOIA Public Liaison, Christine McClarin at (202) 694-1485 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

You may appeal any adverse FOIA determination. Any such appeal must be filed in writing and should follow the guidelines set forth in 11 C.F.R. § 4.8. If you have any questions, please contact the FOIA Requester Service Center at [FOIA@fec.gov](mailto:FOIA@fec.gov), or (202) 694-1650.

Sincerely,  
Hina Hussain

Hina Z. Hussain  
Attorney  
OGC - Administrative Law  
Federal Election Commission  
(202) 694-1357 (p)



# **Federal Election Commission**

## **Agency Financial Report**

**Fiscal Year 2020**

# **Federal Election Commission**

## **Agency Financial Report**

Fiscal Year 2020

Federal Election Commission  
1050 First St. NE  
Washington, D.C. 20463

(202) 694-1000  
1-(800) 424-9530  
[www.fec.gov](http://www.fec.gov)

Released November 16, 2020



# Contents

Message from the Chair	1
How to Use This Report	3
SECTION I – Management’s Discussion and Analysis	4
Section I.A: Purpose, Responsibility, and Scope	4
Mission Statement	5
Organizational Structure	5
Sources of Funds	8
Risk Identification and Mitigation	10
Section I.B: Performance Goals, Objectives and Results	13
Strategic Goal	13
Strategic Objectives	13
Section I.C: Analysis of FEC Financial Statements and Stewardship Information	20
Section I.D: Analysis of FEC’s Systems, Controls and Legal Compliance	23
Annual Assurance Statement on Internal Control	25
Section I.E: Limitations of the Financial Statements	26
SECTION II – Auditor’s Report and Financial Statements	27
Message from the Chief Financial Officer	28
OIG Transmittal Letter	29
Independent Auditor’s Report	31
Financial Statements	53
Notes to the Financial Statements	59
SECTION III – Other Information	79
Inspector General’s Statement on FEC Management and Performance Challenges	80
Management’s Response to the Office of Inspector General’s Statement on the Federal Election Commission’s Management and Performance Challenges	94
Payment Integrity	102
Fraud Reduction Report	103
Reporting on Internal Controls Assurances	104
Civil Monetary Penalties Adjustment for Inflation	105
APPENDIX	106
List of Acronyms	106

## Message from the Chair

---



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

OFFICE OF THE CHAIR

November 16, 2020

I am pleased to present the Federal Election Commission's (FEC) Agency Financial Report (AFR) for Fiscal Year (FY) 2020. The AFR reflects the agency's program performance and financial activities over the past year and demonstrates our continued commitment to administering the *Federal Election Campaign Act of 1971*, as amended (the *Act*).

The FEC protects the integrity of the Federal campaign finance process by providing the public with accurate and accessible information about how candidates raise and spend funds to support their campaigns, enforcing the campaign finance laws, and encouraging voluntary compliance through timely advice and educational outreach. By furnishing the public with timely and transparent campaign finance data and fairly and effectively enforcing the law, the Commission safeguards against corruption or its appearance and provides the citizenry with crucial information by which to evaluate candidates for Federal office.

The FEC continues to seek opportunities to make its systems and processes more efficient and effective, including efforts to redesign the FEC website and to migrate data to a cloud environment. As a result, the FEC has been able to accommodate a steep rise in the number of financial transactions reported to the agency over the last several years. At the same time, the FEC has continued to prioritize improving the customer service it provides and ensuring that campaign finance information is readily available to the public.

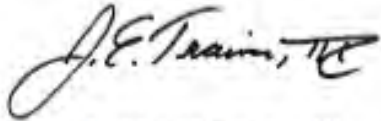
With respect to the agency's FY 2020 annual financial statements, the Commission received an unmodified opinion from its independent auditors. This unmodified opinion reflects the continued commitment by the Commissioners and FEC staff to ensure that the FEC's financial statements fairly present the agency's fiscal position.

Management, which consists of senior managers including the Chief Financial Officer, Acting General Counsel and Staff Director, continue to respond to risks included in the agency Risk Profile (see Section I) and challenges identified by the Inspector General (see Section III).

In addition, the performance data described in the FEC's FY 2020 AFR were compiled and evaluated using appropriate techniques for achieving the desired level of credibility for the verification and validation of performance data relative to its intended use.

The efforts described in this report reflect the work and dedication of the agency's staff. The Commission is committed to continuing to fulfill the mission of the agency in the most efficient manner possible.

On behalf of the Commission,

A handwritten signature in black ink, reading "J.E. Trainor, III". The signature is fluid and cursive, with the initials "J.E." and the name "Trainor" clearly visible, followed by "III".

James E. "Trey" Trainor III  
Chair

## How to Use This Report

---

This Agency Financial Report presents financial information, as well as relevant performance information, on the Federal Election Commission's operations. The report was prepared pursuant to the *Accountability of Tax Dollars Act of 2002* and Office of Management and Budget (OMB) Circular A-136, revised, *Financial Reporting Requirements*, and covers activities from October 1, 2019 through September 30, 2020.

The FEC places a high importance on keeping the public informed of its activities. To learn more about the FEC and what the agency does to serve the American public, visit the FEC's website <https://www.fec.gov/about/reports-about-fec/strategy-budget-and-performance/>.

The FY 2020 Agency Financial Report is organized into three primary sections:

Section I – Management's Discussion and Analysis (MD&A) provides an overview of the FEC. It describes our mission, organizational structure and regulatory responsibilities. It also includes relevant performance information related to the FEC's strategic goals and objectives to provide a forward-looking discussion of future challenges.

Section II – Financial Information, including the Independent Auditor's Report, detailing the FEC's financial performance by 1) highlighting the agency's financial position and audit results and 2) describing the FEC's compliance with key legal and regulatory requirements.

Section III – Other Information includes our Inspector General's (IG) assessment of the FEC's management challenges and the FEC's response.

## SECTION I – Management’s Discussion and Analysis

---

### Section I.A: Purpose, Responsibility, and Scope

The Federal Election Commission is an independent regulatory agency responsible for administering, enforcing, defending and interpreting the *Federal Election Campaign Act of 1971*, as amended (*FECA* or *the Act*).<sup>1</sup> Congress created the FEC to administer, enforce and formulate policy with respect to the *FECA*. The *Act* reflects a belief that democracy works best when voters can make informed decisions in the political process—decisions based in part on knowing the sources of financial support for Federal candidates, political party committees and other political committees. Public confidence in the political process also depends on the knowledge that participants in Federal elections follow clear and well-defined rules and face consequences for non-compliance.

Under the *Act*, all Federal political committees, including the committees of Presidential, Senate and House candidates, must file reports of receipts and disbursements. The FEC makes disclosure reports, and the data contained in them, available to the public through the Commission’s internet-based public disclosure system on the Commission’s website, as well as in a public records office at the Commission’s Washington, D.C. headquarters. The FEC also has exclusive responsibility for civil enforcement of the *Act* and has litigating authority independent of the Department of Justice in U.S. district court and the courts of appeals. Additionally, the Commission promulgates regulations implementing the *Act* and issues advisory opinions responding to inquiries regarding interpretation and application of the *Act* and the Commission’s regulations.

Additionally, the Commission is responsible for administering the Federal public funding programs for Presidential campaigns. This responsibility includes certifying and auditing all participating candidates and committees and enforcing the public funding laws.

The FEC has chosen to produce an Agency Financial Report (AFR) and Annual Performance Report (APR) pursuant to the *Government Performance and Results Act of 1993*, as amended. The FEC will include its FY 2020 Annual Performance Report with its Congressional Budget Justification and will post it on the FEC website at <https://www.fec.gov/about/reports-about-fec/strategy-budget-and-performance/> in 2021.

---

<sup>1</sup> The Commission’s primary responsibilities pertain to the *Federal Election Campaign Act of 1971*, Public Law 92-225, 86 Stat. 3 (1972) as amended (*codified at* 52 U.S.C. §§ 30101-30145) (formerly at 2 U.S.C. §§ 431-55) (the *Act* or the *FECA*). The Commission’s responsibilities for the Federal public funding programs are contained in the *Presidential Election Campaign Fund Act*, Public Law 92-178, 85 Stat. 562 (1971) (*codified at* 26 U.S.C. §§ 9001-13) and the *Presidential Primary Matching Payment Account Act*, Public Law 93-443, 88 Stat. 1297 (1974) (*codified at* 26 U.S.C. §§ 9031-42).

## Mission Statement

The FEC's mission is to protect the integrity of the Federal campaign finance process by providing transparency and fairly enforcing and administering Federal campaign finance laws.

## Organizational Structure

To accomplish its legislative mandate, the FEC is directed by six Commissioners, who are appointed by the President with the advice and consent of the Senate. By law, no more than three Commissioners can be members of the same political party. Each member serves a six-year term, and two seats are subject to appointment every two years. Commissioners may serve beyond their six-year terms until new Commissioners are confirmed. The Chairmanship of the Commission rotates among the members, with no member serving as Chair more than once during his or her six-year term. The Commissioners are responsible for administering and enforcing the *Act* and meet regularly to formulate policy and to vote on significant legal and administrative matters. The *Act* requires the affirmative vote of four members of the Commission to approve official actions, thus requiring bipartisan decision-making. The FEC has its headquarters in Washington, D.C. and does not have any regional offices.

The Federal Election Commission was without a quorum of four Commissioners for approximately 11 months during FY 2020.<sup>2</sup> The *Act* requires the affirmative vote of four Commissioners for many actions. For example, the Commission cannot defend itself in some litigation, reach decisions in enforcement actions, issue advisory opinions or initiate rulemakings without the affirmative votes of four Commissioners. The FEC has identified the loss of a quorum as risk in the Agency-wide Risk Profile. Performance goals negatively affected by the loss of a quorum are noted in the discussion below.

While the *Act* requires an affirmative vote by four Commissioners to make decisions in many areas, including regulations, advisory opinions, audit matters and enforcement, staff continues to further the agency's vital mission of administering the nation's campaign finance laws. The requirements of the *Act* and Commission regulations remain in effect, and political committees and other filers must continue to disclose their campaign finance activity to the Commission on the regular schedule. FEC staff continues to help committees and the public understand and comply with the law, process and review committee reports, and provide public access to campaign finance data. While the Commission cannot act on many legal matters, staff continues to litigate ongoing court cases, process new enforcement complaints and responses, and investigate matters previously authorized by the Commission.

In response to the pandemic caused by the novel coronavirus, the Federal Election Commission closed its offices to visitors and directed all of its employees to telework as of Friday, March 13,

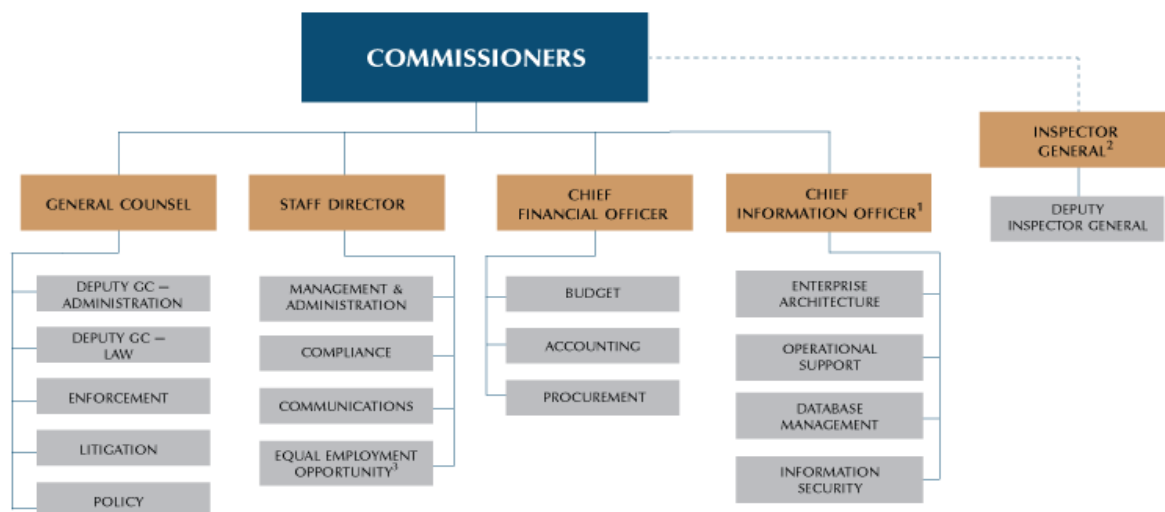
---

<sup>2</sup> The FEC began FY 2020 without a quorum. A quorum was restored on June 5, 2020, when Commissioner James E. "Trey" Trainor, III, was sworn in. The FEC again began working without a quorum on July 3, 2020, with the departure of Commissioner Caroline C. Hunter.



2020. A formal evacuation notice was issued the following week. Nevertheless, the FEC’s website, web-based programs and electronic filing systems have remained online, and staff access to phone and email has been uninterrupted. Most Commission operations were not interrupted by the transition to an exclusively teleworking agency. However, the Commission temporarily suspended its mail operations and ceased fingerprinting new employees. During the suspension of mail operations, the agency did not process any documents submitted on paper, including non-electronically filed reports, advisory opinion requests, enforcement complaints and court-case documents. Website notices directed those interested in those activities to use email and explained the delayed processing of mail. On Thursday, June 18, 2020, the FEC began the initial phase of its return to normal operations. During Phase I of the FEC’s reopening, the agency’s offices remain closed to visitors, and most of its employees continue to telework. However, the FEC resumed processing mail, including any mail delivered since the agency suspended its mail operations in March 2020. Additionally, fingerprinting and onboarding new employees and contractors resumed.

As noted in Figure 1, the offices of the Staff Director, General Counsel, Chief Information Officer and Chief Financial Officer support the agency in accomplishing its mission. The Office of the Inspector General, established within the FEC in 1989 under the 1988 amendments to the *Inspector General Act*, is independent and reports both to the Commissioners and to Congress. The specific roles and responsibilities of each office are described in greater detail below.



<sup>1</sup> The position of Chief Information Officer normally reports directly to the Staff Director who, in turn, reports to the Commission itself. At present, however, the same individual is serving in both the position of the Staff Director and the position of the Chief Information Officer, pursuant to an authorization by the Commission and based, in part, on an advance decision from the Comptroller General. Accordingly, the organizational chart reflects both positions – the Staff Director and the Chief Information Officer – as reporting directly to the Commission.

<sup>2</sup> The Office of the Inspector General (OIG) independently conducts audits, evaluations, and investigations. OIG keeps the Commission and Congress informed regarding major developments associated with their work.

<sup>3</sup> The Director for Equal Employment Opportunity reports to the Staff Director on administrative issues but has direct reporting authority to the Commission on all EEO matters. See 29 CFR 1614.102(b)(4).

**Figure 1: FEC Organizational Chart**

☐ **Office of the Staff Director (OSD)**

The Office of the Staff Director consists of four offices: 1) Management and Administration; 2) Compliance; 3) Communications; and 4) Equal Employment Opportunity. The Office of Management and Administration is responsible for the FEC's strategic planning and performance and works with the Commission to ensure the agency's mission is met efficiently. In addition, this office houses the Commission Secretary, the Office of Human Resources (OHR) and the Administrative Services Division (ASD). The primary responsibilities of the Office of Compliance are the processing and review of campaign finance reports and filing assistance, audits, administrative fines and alternative dispute resolution. The Office of Communications includes divisions charged with making campaign finance reports available to the public, encouraging voluntary compliance with the *Act* through educational outreach and training and ensuring effective communication with Congress, executive branch agencies, the media and researchers and the general public. The Equal Employment Opportunity Office administers and ensures compliance with applicable laws, regulations, policies and guidance that prohibit discrimination in the Federal workplace based on race, color, national origin, religion, age, disability, sex, pregnancy, genetic information or retaliation. The EEO Officer reports to the Staff Director on administrative issues but has direct reporting authority on all EEO matters. *See* 29 CFR 1614.102(b).

☐ **Office of General Counsel (OGC)**

The Office of General Counsel consists of five organizational units: (1) the Deputy General Counsel - Administration; (2) the Deputy General Counsel - Law; (3) the Policy Division; (4) the Enforcement Division; and (5) the Litigation Division. The Deputy General Counsel - Administration directly supervises the Administrative Law Team, the Law Library and all OGC administrative functions. The Deputy General Counsel - Law has the primary responsibility for assisting the General Counsel in all of the substantive aspects of the General Counsel's duties and shares in the management of all phases of OGC programs, as well as directly supervising the agency's ethics program. The Policy Division drafts for Commission consideration advisory opinions and regulations interpreting the Federal campaign finance law and provides legal advice to the FEC's compliance programs. The Enforcement Division recommends to the Commission appropriate action to take with respect to administrative complaints and apparent violations of the *Act*. Where authorized, the Enforcement Division investigates alleged violations and negotiates conciliation agreements, which may include civil penalties and other remedies. If an enforcement matter is not resolved during the administrative process, the Commission may authorize suit in district court, at which point the matter is transferred to the Litigation Division. The Litigation Division represents the Commission before the Federal district and appellate courts in all civil litigation involving campaign finance statutes. This Division assists the Department of Justice's Office of the Solicitor General when the Commission's *FECA* cases are before the Supreme Court.

☐ **Office of the Chief Information Officer (OCIO)**

The Office of the Chief Information Officer (OCIO) consists of four units: (1) Enterprise Architecture; (2) Operational Support; (3) Data Administration; and (4) IT Security. The OCIO provides secure, stable and robust technology solutions for Commission staff and the public. OCIO both develops and maintains the systems that serve as the public's primary source of information about campaign finance data and law and ensures agency employees have a technology infrastructure



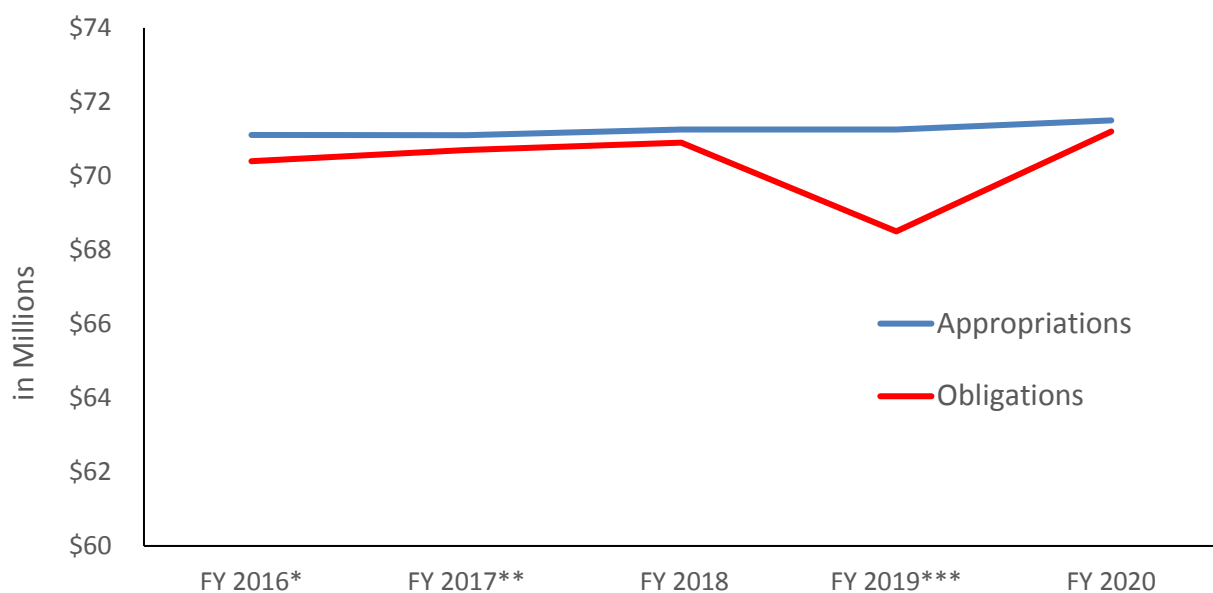
that allows them to perform their day-to-day responsibilities administering and enforcing campaign finance law. OCIO also develops and supports analytic reporting tools that help staff perform their disclosure and compliance duties.

#### □ Office of the Chief Financial Officer (OCFO)

The Office of the Chief Financial Officer consists of three offices: (1) Budget; (2) Accounting; and (3) Procurement. The OCFO is responsible for complying with all financial management laws and standards, and all aspects of budget formulation, budget execution and procurement.

### Sources of Funds

Figure 2 shows the agency's appropriations and obligations from FY 2016 to FY 2020.



- \* \$5 million in 2 year funds related to the FEC office move not included in total.
- \*\* \$8 million in 2 year funds related to the FEC office move not included in total.
- \*\*\* December 22, 2018 through January 25, 2019 the FEC was shut down for 35 days.

**Figure 2: Summary of Funding (in millions of dollars)**

The FEC also has the authority to collect fees from attendees of agency-sponsored educational conferences. The Commission may use those fees to defray the costs of conducting those conferences. The Commission sets its registration fees at a level that covers only the costs incurred by the agency's conference-management contractor, including meeting room rental and conference meals and compensation. All other conference-related expenses, such as materials and staff travel, are paid using appropriated funds. Registration fees for FY 2020 were \$127,170.

### Personnel vs. Non-Personnel Costs

Figure 3 represents the Commission's FY 2020 obligations by personnel and non-personnel costs. Personnel costs, which are primarily composed of salaries and employee benefits, accounted for 70.6 percent of the FEC's costs. The remaining 29.4 percent of the Commission's costs was spent on non-personnel items, such as infrastructure and support, software and hardware, office rent, building security and other related costs.

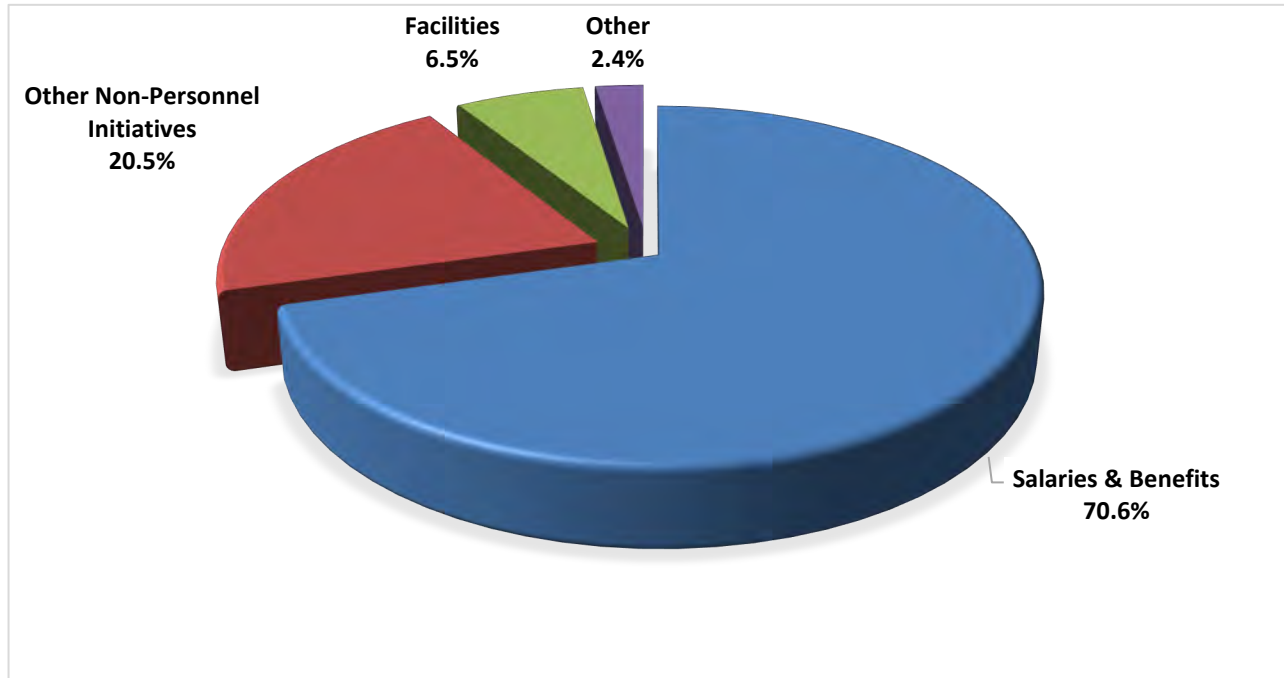


Figure 3: Fiscal Year 2020 by Major Category

## **Risk Identification and Mitigation**

In Fiscal Year (FY) 2017, the FEC formed a Senior Management Council (SMC) to manage internal control and Enterprise Risk Management (ERM) efforts in response to new requirements outlined in OMB Circular A-123. The SMC delivered to OMB an agency-wide Risk Profile to assist in the effective management of risk areas impacting FEC strategic, operational, reporting, and compliance objectives. In FY 2018, the SMC took further steps toward effective management of risk by updating Commission Directive 53 *Implementation of OMB Circular A-123: Internal Control Program* to comply with ERM requirements. In FY 2018, 2019, and 2020 the SMC submitted an updated Risk Profile to OMB.

As part of the annual Internal Control Review (ICR) process, program offices rated each risk from the Risk Profile, detailed how the risk affects their operations, and identified mitigating activities in place to respond to the risk. In addition, program offices thoroughly identified and evaluated fraud risk to support the Fraud Reduction Report. The current Agency-wide Risk Profile is shown below and further discussion on risk is discussed in the remaining MD&A sections.

### Federal Election Commission - FY 2020 ERM Risk Profile

Identified Significant Risk	Inherent Risk Rating	Current Risk Response	Residual Risk Rating	Proposed Additional Action	Proposed Implementation/ Monitoring Process
Significant and Substantive Amendments to FECA/Pending Judicial Opinions	Medium	Acceptance: monitoring	Medium	Not in Management's Control	OGC and Congressional Affairs
Absence of Quorum/Confirmation of Commissioners	Very High	Reduction: Directive 10	Very High	Not in Management's Control	OGC and Congressional Affairs
Significant Increase in Federal Election Campaign Disclosure Activity	High	Reduction: infrastructure improvements	Medium	Move to scalable cloud- based computing and development of new e- filing platform.	OCIO Performance/ Monitoring Reports
Changes to Government-wide Directives including Human Capital and Operating Requirements	Medium	Acceptance: monitoring	Medium	Continue monitoring centralized repository for new executive orders, directives, memorandums, and other guidance.	OGC and OHR
Disruptions to Agency Operations	Medium	Acceptance: monitoring	Medium	Not in Management's control. Updates to the Disaster Recovery Plan, COOP, and Shutdown Plan.	Monitor by Senior Management
Multiple Acting Positions, including key positions	Very High	Acceptance: monitoring	High	Continue to support hiring initiatives and streamline hiring process. The ability to hire GS-15s and SLs when there is lack or quorum is out of Management's control.	Personnel and Finance Committees

Identified Significant Risk	Inherent Risk Rating	Current Risk Response	Residual Risk Rating	Proposed Additional Action	Proposed Implementation/ Monitoring Process
High Volume of Retirement Eligible Employees	Medium	Reduction: succession planning	Medium	Encourage succession planning, cross-training, and pooling support services.	Retirement Eligibility Report
Major Functions Performed by One Individual	Medium	Reduction: cross-train and document processes	Medium	Cross-train individuals to perform major functions. Document procedures and processes.	Internal Controls
Privacy and Data Protection	Medium	Reduction: corrective actions and internal controls	Medium	Continue to implement corrective actions and enhance internal controls.	Corrective Action Plan/Internal Controls
Assessments and System Authorizations	Medium	Reduction: corrective actions and internal controls	Medium	Continue to implement corrective actions and enhance internal controls.	Corrective Action Plan/Internal Controls
Outdated Policies, Procedures, and Commission Directives	Medium	Reduction: implementing, revising, and reviewing policies, procedures, and Directives.	Medium	Update policies, procedures, and Directives in response to the FEC move, new or revised regulatory guidance, and changing operating procedures.	Monitor as part of Internal Control Review

## Section I.B: Performance Goals, Objectives and Results

This section provides a summary of the results of the FEC's key performance objectives, which are discussed in greater detail in the FEC's FY 2020 APR.<sup>3</sup> This report will be part of the FEC's FY 2022 Congressional Budget Justification, which will be available at <https://www.fec.gov/about/reports-about-fec/strategy-budget-and-performance/> in 2021.

### Strategic Goal

The strategic goal of the Federal Election Commission is to fairly, efficiently and effectively administer and enforce the *Federal Election Campaign Act*, promote compliance and engage and inform the public about campaign finance data and rules, while maintaining a workforce that delivers results.

### Strategic Objectives

The *Act* reflects a belief that democracy works best when voters can make informed decisions in the political process—decisions based in part on knowing the sources of financial support for Federal candidates, political party committees and other political committees. As a result, the FEC's first strategic objective is to inform the public about how Federal campaigns and committees are financed. Public confidence in the political process also depends on the knowledge that participants in Federal elections follow clear and well-defined rules and face consequences for non-compliance. Thus, the FEC's second strategic objective focuses on the Commission's efforts to promote voluntary compliance through educational outreach and to enforce campaign finance laws effectively and fairly. The third strategic objective is to interpret the *FECA* and related statutes, providing timely guidance to the public regarding the requirements of the law. The Commission also understands that organizational performance is driven by employee performance and that the agency cannot successfully achieve its mission without a high-performing workforce that understands expectations and delivers results. Consequently, the FEC's fourth strategic objective is to foster a culture of high performance in order to ensure that the agency accomplishes its mission efficiently and effectively.

#### ***Objective 1: Engage and Inform the Public about Campaign Finance Data***

The FEC's eFiling system acts as the point of entry for submission of electronically filed campaign finance reports, providing faster access to reports and streamlining operations. This system provides for public disclosure of electronically filed reports, via the FEC website, within minutes of being filed. When a committee files a financial disclosure report on paper, the Commission ensures that a copy is available for public inspection within 48 hours of receipt, both electronically on the website and at the FEC's offices in Washington, D.C.<sup>4</sup> The FEC is committed to providing timely and

---

<sup>3</sup> The FEC has identified senior-level staff and key managers to serve as goal leaders for each area of the strategic and performance plans. In addition, each strategic activity in the Strategic Plan has been assigned one or more program managers, who are responsible for the delivery and performance reporting of that activity. These managers serve as measure managers and data quality leads to ensure the completeness, consistency and accuracy of the reported data of their respective strategic activity.

<sup>4</sup> In response to the pandemic caused by the novel coronavirus, the FEC closed its offices to visitors as of Friday, March 13, 2020.

transparent campaign finance disclosure to the public and delivering data in accessible and easy-to-use formats.

During FY 2021, the FEC will continue work to upgrade the agency’s eFiling platform. In FY 2017, the Commission published a study of its current eFiling platform, including a survey of the existing functionality of the FEC’s free filing software and an in-depth investigation of needs expressed by filers.<sup>5</sup> The FEC will rely on the recommendations of this study to improve its eFiling platform to allow greater operating system flexibility for users when generating filings for submission to the Commission and increase the consistency and accuracy of reporting. The FEC’s new eFiling platform is expected to improve the process for validating filings prior to acceptance and generate modern file outputs that will provide for more flexibility in accessing data. The FEC had expected to begin the implementation phase of this project during FY 2021. However, COVID-19 related delays in fingerprinting and onboarding new staff and contractors subsequently contributed to delays in the FEC’s efforts to complete the development phase of the eFiling platform during FY 2020. As a result, the FEC expects to begin partial implementation of the new eFiling system during FY 2021 and to complete implementation of the new eFiling platform during FY 2022. Full deployment to filers is expected for the 2023-2024 election cycle.

The Commission is improving and refining its website through iterative development, ensuring the FEC continues to provide an effective, user-centered online platform to deliver campaign finance information to its diverse base of users. This effort will ensure that the FEC provides full and meaningful campaign finance data and information in a manner that meets the public’s increasing expectations for data customization and ease of use.

Performance measures for assessing progress on this Strategic Objective include measures to ensure that data from campaign finance reports are quickly made available to the public and that the FEC pursues programs to make data more accessible to the public.

***Performance Goal 1-1: Improve the public’s access to information about how campaign funds are raised and spent.***

Key Indicator: Percent of reports processed within 30 days of receipt.								
FY 2015 Actual	FY 2016 Actual	FY 2017 Actual	FY 2018 Actual	FY 2019 Actual	FY 2020 Target	FY 2020 Actual	FY 2021 Target	FY 2022 Target
92%	100%	96%	100%	94% <sup>6</sup>	95%	98%	95%	95%

<sup>5</sup> Available at <https://fec.gov/about/reports-about-fec/agency-operations/e-filing-study-2016/>.

<sup>6</sup> The agency’s ability to meet its target for this performance goal during FY 2019 was negatively impacted by the lapse in appropriations from December 22, 2018 to January 25, 2019.

## ***Objective 2: Promote Compliance with the FECA and Related Statutes***

Helping the public understand its obligations under the *Act* is an essential component of voluntary compliance. The FEC places a significant emphasis on encouraging compliance through its Information Division, Reports Analysis Division (RAD), Press Office and Office of Congressional, Legislative and Intergovernmental Affairs. The FEC measures its progress in meeting this Objective through two performance measures: one that measures the agency's efforts to encourage voluntary compliance through educational outreach and information and another that measures the FEC's efforts to seek adherence to *FECA* requirements through fair, effective and timely enforcement and compliance programs. Progress against these measures is detailed in the charts below.

### ***Encourage voluntary compliance with FECA requirements through educational outreach and information.***

The FEC's education and outreach programs provide information necessary for compliance with campaign finance law and give the public the context necessary to interpret the campaign finance data filers disclose. The FEC maintains a toll-free line and public email accounts to respond to inquiries regarding campaign finance data disclosed to the public and questions about how to comply with campaign finance law and its reporting requirements. The FEC's Public Disclosure and Media Relations Division and Congressional Affairs Office also respond to inquiries.

One way the Commission encourages voluntary compliance is by hosting conferences across the country, where Commissioners and staff explain how the *Act* applies to candidates, parties and political action committees. These conferences address recent changes in the law and focus on fundraising, methods of candidate support and reporting regulations.

The FEC also devotes considerable resources to ensuring that staff can provide distance learning opportunities to the general public. The Commission's website is one of the most important sources of instantly accessible information about the *Act*, Commission regulations, and Commission proceedings. In addition to viewing campaign finance data, anyone with internet access can use the website to track Commission rulemakings, search advisory opinions, audits and closed enforcement matters, view campaign finance data, and find reporting dates. The Commission places a high emphasis on providing educational materials about campaign finance law and its requirements. Toward this end, the FEC has moved its focus away from the printing and manual distribution of its educational materials and instead looked for ways to leverage available technologies to create and disseminate dynamic and up-to-date educational materials through the website. While the Commission continues to make available printed copies of its educational brochures and publications, transitioning to primarily web-based media has allowed the agency to reduce significantly its printing and mailing costs and use of resources while at the same time encouraging new and expanded ways of communicating with the public via the website.

As part of this broad effort to improve its internet communications and better serve the educational needs of the public, the Commission maintains its own YouTube channel, which can be found at <http://www.youtube.com/FECTube>. The YouTube channel offers a variety of instructional videos and tutorials that enable users to obtain guidance tailored to their specific activities.



The agency’s educational outreach program has been significantly enhanced with the addition of an online training service that enables political committees, reporters, students and other groups to schedule live, interactive online training sessions with FEC staff. This on-demand service allows the FEC to provide tailored, distance learning presentations and training to the public in a manner that will significantly increase the availability of FEC staff to serve the public. The service also offers an efficient and effective way for alternative dispute resolution and other enforcement respondents to satisfy the terms of their agreements with the agency. These efforts are also important in monitoring and mitigating the risk that amendments to FECA or judicial opinions have on the campaign finance environment and the FEC’s goal of encouraging voluntary compliance with the *Act*.

***Performance Goal 2-1: Encourage voluntary compliance with FECA requirements through educational outreach and information.***

Key Indicator: Educational outreach programs and events achieve targeted satisfaction rating on user surveys.								
FY 2015 Actual	FY 2016 Actual	FY 2017 Actual	FY 2018 Actual	FY 2019 Actual	FY 2020 Target	FY 2020 Actual	FY 2021 Target	FY 2022 Target
4.34	4.53	4.43	4.53	4.45	4.0 or higher on a 5.0 scale	4.51	4.0 or higher on a 5.0 scale	4.0 or higher on a 5.0 scale

***Seek adherence to FECA requirements through fair, effective and timely enforcement and compliance programs.***

The FEC has formed strategies for ensuring that its enforcement and compliance programs are fair, effective and timely. The Commission’s statutory obligation is to administer, interpret and enforce the *Federal Election Campaign Act*, which serves the compelling governmental interest in deterring corruption and the appearance of corruption in financing elections. In doing so, the Commission remains mindful of the First Amendment’s guarantees of freedom of speech and association, and the practical implication of its actions on the political process.

The FEC has exclusive jurisdiction over civil enforcement of Federal campaign finance laws. It consults with the U.S. Department of Justice, as appropriate, on matters involving both civil and criminal enforcement of the *Act*. Commission enforcement actions, which are handled primarily by the Office of General Counsel (OGC), originate from a number of sources, including external complaints, referrals from other government agencies and matters generated by information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. Enforcement matters are handled by OGC pursuant to the requirements of the *FECA*. If the Commission cannot settle or conciliate a matter involving an alleged violation of the *Act*, the Commission may initiate civil litigation by filing and prosecuting a civil action in Federal district court to address the alleged violation. Closed enforcement matters are available via the FEC website.

To augment OGC’s traditional enforcement role, the Office of Compliance manages several programs that seek to remedy alleged violations of the *Act* and encourage voluntary compliance. These programs include: 1) the Alternative Dispute Resolution Program, 2) the Administrative Fine Program and 3) the Audit Program. The Commission’s Alternative Dispute Resolution Program is designed to resolve matters more swiftly by encouraging the settlement of less-complex enforcement matters with a streamlined process that focuses on remedial measures for candidates and political committees, such as training, internal audits and hiring compliance staff. Violations involving the late submission of, or failure to file, disclosure reports are subject to the Administrative Fine Program. This Program is administered by the Reports Analysis Division (RAD) and the Office of Administrative Review (OAR), which assess monetary penalties and handle challenges to the penalty assessments. The Audit Program conducts “for cause” audits under the *FECA* in those cases where political committees have failed to meet the threshold requirements for demonstrating substantial compliance with the *Act* and conducts mandatory audits under the public funding statutes. Subject to limited redactions, threshold requirements approved by the Commission and used by RAD and the Audit Division are public.

***Performance Goal 2-2: Seek adherence to FECA requirements through fair, effective and timely enforcement and compliance programs.***

Key Indicator: Of the enforcement matters resolved during the fiscal year, the percentage that was resolved within 15 months of the date of receipt.								
FY 2015 Actual	FY 2016 Actual	FY 2017 Actual	FY 2018 Actual	FY 2019 Actual	FY 2020 Target	FY 2020 Actual	FY 2021 Target	FY 2022 Target
49%	38%	68%	62%	56%	50%	62%	50%	50%

***Objective 3: Interpret the FECA and Related Statutes***

Commission initiatives, Congressional action, judicial decisions, petitions for rulemaking or other changes in campaign finance law may necessitate that the Commission update or adopt new regulations. Consequently, the FEC undertakes rulemakings either to write new Commission regulations or revise existing regulations. The Commission also provides guidance on how the *Act* applies to specific situations through the advisory opinion process and represents itself in most litigation before the Federal district court and the courts of appeals. The Commission’s three primary means for providing interpretive guidance for the *Act* and related statutes are discussed below.

***Regulations***

The Policy Division of OGC drafts various rulemaking documents, including Notices of Proposed Rulemaking (NPRMs), for Commission consideration. NPRMs provide an opportunity for the public to review proposed regulations, submit written comments to the Commission and, when appropriate, testify at public hearings at the FEC. The Commission considers the comments and testimony and deliberates publicly regarding the adoption of the final regulations and the corresponding Explanations and Justifications, which provide the rationale and basis for the new or revised regulations.

## ***Advisory Opinions***

Advisory opinions (AO) are official Commission responses to questions regarding the application of Federal campaign finance law to specific factual situations. The *Act* generally requires the Commission to respond to AO requests within 60 days. For AO requests from candidates in the two months leading up to an election that present a specific transaction or activity related to that election, the *Act* requires the Commission to respond within 20 days. On its own initiative, the Commission also makes available an expedited process for handling certain time-sensitive requests that are not otherwise entitled to expedited processing under the *Act*. The Commission strives to issue these advisory opinions in 30 days.

## ***Defending Challenges to the Act***

The Commission represents itself in most litigation before the Federal district court and courts of appeals and before the Supreme Court with respect to cases involving publicly financed Presidential candidates. It also has primary responsibility for defending the *Act* and Commission regulations against court challenges. In addition, the *Act* authorizes the Commission to institute civil actions to enforce the *Act*.

## ***Performance Goal 3-1: Provide timely legal guidance to the public.***

Key Indicator: Percent of legal guidance provided within statutory and court-ordered deadlines.								
FY 2015 Actual	FY 2016 Actual	FY 2017 Actual	FY 2018 Actual	FY 2019 Actual	FY 2020 Target	FY 2020 Actual	FY 2021 Target	FY 2022 Target
100% <sup>7</sup>	100% <sup>8</sup>	100% <sup>9</sup>	100% <sup>10</sup>	100% <sup>11</sup>	100%	100% <sup>12</sup>	100%	100%

---

<sup>7</sup> The Commission obtained extensions to consider two advisory opinion requests in FY 2015. The Commission did not have any rulemakings during FY 2015 with statutory or court-ordered deadlines.

<sup>8</sup> The Commission obtained extensions to consider six advisory opinion requests in FY 2016.

<sup>9</sup> The Commission obtained extensions to consider seven advisory opinion requests in FY 2017.

<sup>10</sup> The Commission obtained an extension to consider one advisory opinion request in FY 2018.

<sup>11</sup> The Commission obtained extensions to consider six advisory opinion requests in FY 2019; two of those extensions were lengthened by the partial Federal government shutdown during the first and second quarters of FY 2019.

<sup>12</sup> Due to the lack of a quorum for most of FY 2020, the Commission sought extensions from all advisory opinion requestors. The Commission obtained extensions from seven of those requestors in FY 2020. Two advisory opinion requestors declined to grant an extension and, once the deadline for responding to those requests expired, the Commission notified those requestors that it was unable to approve an advisory opinion by the required affirmative vote of four commissioners.

#### ***Objective 4: Foster a Culture of High Performance***

The Commission understands that the success of its programs depends upon the skills and commitment of its staff. The Commission is focused on ensuring that staff training needs are assessed and met at every level of the agency and that agency leaders receive training necessary to help manage and maintain a fully engaged and productive workforce. The FEC is also focused on decreasing the time to hire, improving the agency's performance management systems and developing a supervisory and managerial training program for senior leaders, mid-career managers and first-time supervisors.

The FEC is also implementing a multi-phase plan to reduce reliance on physical servers and migrate appropriate systems and data to a cloud environment. In conjunction with the redesign of the agency's website, the FEC successfully migrated its largest database, the campaign finance database, to a cloud environment and shut down one physical data center during FY 2018. Cloud hosting offers a number of benefits for the FEC's campaign finance database and website. The agency's internet traffic is variable, with many more visitors accessing the website during election years and near reporting deadlines. With a cloud-hosted application and database infrastructure, the FEC only needs to pay for the actual usage, rather than constantly maintaining the capacity to support peak usage, even during periods of reduced usage. Website downtime is minimized and server maintenance is managed by the cloud computing provider. During FY 2020, the FEC conducted a study to determine how best to migrate other appropriate systems and databases to the cloud, allowing the agency to realize greater efficiency and performance in future years. The FEC will focus on implementing the results of this study during FY 2021.

The Commission's records management program continues to make advancements, as described below. Fiscal Years 2021 and 2022 will bring continued focus on updating the agency's records schedules in compliance with the Transition to Electronic Records Memorandum, updating the agency's Records Management Program, and training all staff on the agency and government-wide records schedules, policies and responsibilities.

#### ***Performance Goal 4-1: Foster a workforce that delivers results.***

Key Indicator: Commission-required quarterly updates meet targeted performance goals.								
FY 2015 Actual	FY 2016 Actual	FY 2017 Actual	FY 2018 Actual	FY 2019 Actual	FY 2020 Target	FY 2020 Actual	FY 2021 Target	FY 2022 Target
80%	76%	85%	73%	53% <sup>13</sup>	65%	73% <sup>14</sup>	65%	65%

<sup>13</sup> The agency's ability to meet its target for this performance goal during FY 2019 was negatively impacted by the lapse in appropriations from December 22, 2018 to January 25, 2019.

<sup>14</sup> The agency's performance under this measure was negatively impacted by the lack of a quorum for most of FY 2020.

## Section I.C: Analysis of FEC Financial Statements and Stewardship Information

The FEC's FY 2020 financial statements and notes are presented in the required format in accordance with OMB Circular A-136, as revised, *Financial Reporting Requirements*. The FEC's current-year financial statements and notes are presented in a comparative format in Section II of this report.

The following table summarizes the significant changes in the FEC's financial position during FY 2020:

Net Financial Condition	FY 2020	FY 2019	Increase (Decrease)	% Change
Assets	\$36,566,339	\$42,400,892	(\$5,834,553)	-14%
Liabilities	\$16,039,162	\$15,238,967	\$800,195	5%
Net Position	\$20,527,177	\$27,161,925	(\$6,634,748)	-24%
Net Cost	\$79,867,804	\$69,259,101	\$10,608,703	15%
Budgetary Resources	\$79,061,462	\$75,551,616	\$3,509,846	5%
Custodial Revenue	\$760,511	\$2,906,662	(\$2,146,151)	-74%

The following is a brief description of the nature of each required financial statement and its relevance. The effects of some significant balances or conditions on the FEC's operations are explained.

### Balance Sheet

The Balance Sheet presents the total amounts available for use by the FEC (assets) against the amounts owed (liabilities) and amounts that comprise the difference (Net Position). As a small independent agency, all of the FEC's assets consist of Fund Balance with Treasury (FBWT), Property and Equipment (P&E) and Accounts Receivable. Fund Balance with Treasury (e.g., cash) is available through the Department of Treasury accounts, from which the FEC is authorized to make expenditures (i.e., obligations) and payments. FBWT decreased by approximately \$2.7 million, or 10 percent, from the prior year.

Accounts Receivable primarily represent amounts due from the public for fines and penalties assessed by the FEC and referred to Treasury for collection, as deemed appropriate. In compliance with the *Debt Collection Improvement Act of 1996* (DCIA), the OCFO takes into consideration the most appropriate approach to debt management. These amounts are not available for FEC operations and are sent to the U.S. Treasury as miscellaneous receipts. Net accounts receivable decreased by approximately \$230 thousand dollars from the prior year.

Total assets decreased by \$5.8 million from the prior year to \$36.5 million. Total liabilities increased by approximately \$800 thousand.

### Statement of Net Cost

The Statement of Net Cost presents the annual cost of operating the FEC program. Gross costs are used to arrive at the total net cost of operations. The FEC's total gross costs in administering the FECA experienced a 15% fluctuation from the prior year.

## **Statement of Changes in Net Position**

The Statement of Changes in Net Position presents in greater detail the net position section of the Balance Sheet, including Cumulative Results of Operations and Unexpended Appropriations. This statement identifies the activity that caused the net position to change during the reporting period. Total Net Position decreased by 24 percent, or approximately \$7 million. In FY 2017, the FEC received approximately \$8 million in two-year appropriated funds, which expired at the end of FY 2018.

## **Statement of Budgetary Resources**

The Statement of Budgetary Resources provides information on the source and status of budgetary resources made available to the FEC during the reporting period. It presents the relationship between budget authority and budget outlays, as well as the reconciliation of obligations to total outlays. Total Budgetary Resources and Status of Budgetary Resources increase by approximately \$4 million, or 5 percent, from the prior year.

## **Statement of Custodial Activity**

The Statement of Custodial Activity represents an accounting of revenue and funds collected by the FEC that are owed to the U.S. Treasury's general fund. These monies are not available for the FEC's use. Collection and revenue activity primarily result from enforcement actions that come before the Commission during the fiscal year. Revenue and collections on the Statement of Custodial Activity consist of collections on new assessments, prior year(s) receivables and Miscellaneous Receipts. In FY 2020, the total custodial revenue and collections decreased by approximately \$2 million from the prior year.

The chart below displays the assessment history for the past 20 years.<sup>15</sup>

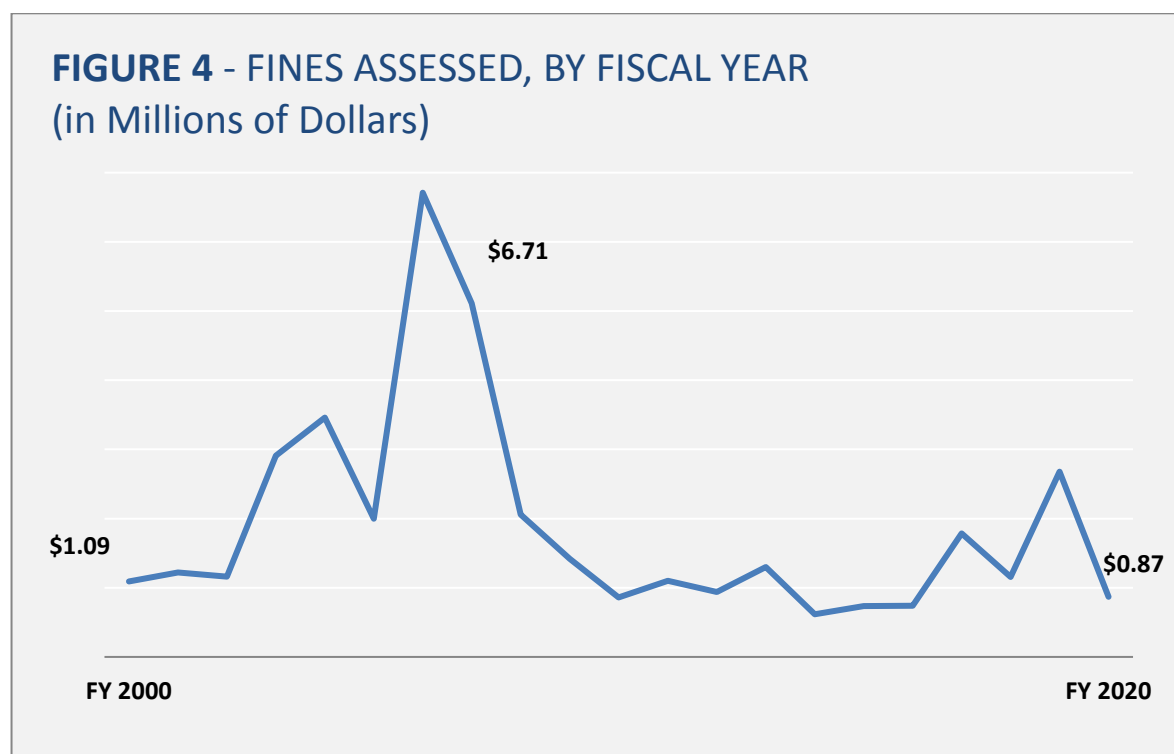


Figure 4: Fines Assessed, by Fiscal Year (in millions of dollars)

### Financial impact, if significant, of the coronavirus disease 2019 (COVID-19)

The FY20 financial impact of the coronavirus disease 2019 on the Federal Election Commission was not significant. Approximately \$20,000 was spent on COVID-19 PPE Equipment, Supplies, Equipment, Signage, and Mitigation Countermeasures. These expenditures were made with FY20 appropriated funds allocated to the Administrative Services Division (ASD) within the scope of their normal budgetary purchasing authorities as outlined in the Management Plan. Expenditures were made either with the ASD Government Purchase Card, or through the GSA Advantage Supply Ordering Mechanism under the Supply & Materials Budget Object Class Code 26 Supplies and Materials. COVID-19 spending only utilized approximately 23% of the FEC's Admin Office's Supplies and Materials Budget for FY20.

<sup>15</sup> One MUR resolved during 2006 yielded the largest civil penalty in agency history, which was \$3.8 million paid by Federal Home Loan Mortgage Corporation (Freddie Mac) for prohibited corporate activity. This 2006 penalty is the primary reason for the largest Fines Assessed (approximately \$6.71 million) in Figure 4.

## **Section I.D: Analysis of FEC's Systems, Controls and Legal Compliance**

### **I.D.i – FEC Integrated Internal Control Framework and Legal Compliance**

The Commission is subject to numerous legislative and regulatory requirements that promote and support effective internal controls. The FEC complies with the following laws and regulations:

*Annual Appropriation Law* – establishes the FEC's budget authority;

*The Antideficiency Act of 1884*, as amended;

*Inspector General Act of 1978*, as amended;

*Federal Managers' Financial Integrity Act of 1982*;

*Federal Civil Penalties Inflation Adjustment Act of 1990*;

*Government Performance and Results Act of 1993*, as amended;

*Federal Financial Management Improvement Act of 1996*;

*Clinger-Cohen Act of 1996*;

*Debt Collection Improvement Act of 1996*, as amended;

*Chief Financial Officers Act*, as amended by the *Accountability of Tax Dollars Act of 2002*; and

*Fraud Reduction and Data Analytics Act of 2015*

The proper stewardship of Federal resources is a fundamental responsibility of the FEC. These laws help the FEC improve the management of its programs and financial operations, and assure that programs are managed in compliance with applicable law.

### **I.D.ii – Management Assurances**

The *Federal Managers' Financial Integrity Act of 1982 (FMFIA)* is implemented by OMB Circular A-123, revised, *Management's Responsibility for Enterprise Risk Management and Internal Control*, with applicable appendices. The FEC management is responsible for establishing and maintaining effective internal control and financial management systems that meet the objectives of the *FMFIA* and for performing a self-assessment under the guidance of its Directive 53, *Implementation of OMB Circular A-123, Internal Control Review*. Directive 53 outlines the process and describes roles and responsibilities for conducting risk assessments and internal control reviews.

Section 2 of the *FMFIA* requires Federal agencies to report, based on annual assessments, any material weaknesses that have been identified in connection with their internal and administrative controls. The reviews that took place during FY 2020 provide unqualified assurance that FEC systems and management controls comply with the requirements of the *FMFIA*.

Section 4 of the *FMFIA* requires that agencies annually provide assurance on programmatic internal controls and financial management systems, and effectiveness of internal control over financial reporting. The FEC evaluated its financial management systems in accordance with the *FMFIA*,



OMB Circular A-123, as applicable, and reviewed the Statements on Standards for Attestation Engagements, Reporting on Controls at a Service Organization (SSAE 18) reports received from its shared service providers. The results of management reviews provided that the FEC's financial systems controls generally conform to the required principles and standards as per Section 4 of the *FMFIA*.

## **Enterprise Risk Management**

In the current fiscal year, the FEC, led by the Senior Management Council (SMC), updated its Enterprise Risk Management (ERM) Risk Profile which captures enterprise level risks, as required by the revised OMB Circular A-123. The SMC identified a total of eleven enterprise level risks the agency faces when seeking to achieve strategic, operational, and compliance objectives and rated these risk as being a medium or high inherent risk. The Risk Profile was delivered to the Office of the Inspector General (OIG) and OMB. The SMC looks forward to continuing to work closely with OIG to remediate any weaknesses which the OIG may deem to be at the level of a material weakness.

## **Prompt Payment Act**

The *Prompt Payment Act (PPA)* requires Federal agencies to make timely vendor payments and to pay interest penalties when payments are late. The FEC's on-time payment rate for FY 2020 was nearly 100 percent, with less than 0.27 percent of all invoices paid after the date required by the *PPA*.

## **Improper Payments**

The *Improper Payments Information Act (IPIA)* of 2002, as amended by the *Improper Payments Elimination and Recovery Act (IPERA)* of 2010, *Improper Payments Elimination and Recovery Improvement Act (IPERIA)* of 2012, and the *Payment Integrity Information Act (PIIA)* of 2019 and OMB guidance require agencies to identify programs that are susceptible to significant improper payments, and determine an annual estimated amount of improper payments made in their operations. The FEC reviewed all of its programs and activities to identify those susceptible to significant improper payments. Approximately 72 percent of the FEC's obligations pertain to salaries and benefits, which represents a low risk for improper payments, based on established internal controls. The FEC also reviewed all of its FY 2020 non-personnel procurements, charge card, and payroll costs to verify their accuracy and completeness. Accordingly, the FEC is unaware of any improper payments. The FEC continues to monitor its payment and internal control process to ensure that the risk of improper payments remains low.

## Annual Assurance Statement on Internal Control



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

### Annual Assurance Statement on Internal Control

The Federal Election Commission (FEC) is responsible for managing risks and maintaining effective internal control to meet the objectives of Sections 2 and 4 of the *Federal Managers' Financial Integrity Act*. The FEC conducted its assessment of risk and internal control in accordance with OMB Circular No. A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control*. Based on the results of the assessment, the Agency can provide reasonable assurance that internal control over operations, reporting, and compliance were operating effectively as of September 30, 2020.

A handwritten signature in black ink, reading "J.E. Trainor, III".

James E. "Trey" Trainor III  
Chair

## **Section I.E: Limitations of the Financial Statements**

The principal financial statements have been prepared to report the financial position and results of operations of the FEC pursuant to the requirements of 31 U.S.C. §3515(b). While the statements have been prepared from the books and records of the FEC in accordance with United States generally accepted accounting principles (GAAP) for Federal entities and the formats prescribed by the OMB, the statements are in addition to the financial reports used to monitor and control budgetary resources which are prepared from the same books and records.

The statements should be read with the realization that they are for a component of the U.S. Government, a sovereign entity.

## **SECTION II – Auditor’s Report and Financial Statements**

## Message from the Chief Financial Officer

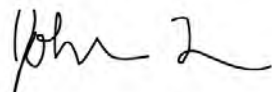
November 16, 2020

I am pleased to present the Commission's financial statements for Fiscal Year (FY) 2020. The financial statements are an integral part of the Agency Financial Report. The Commission received an unmodified (clean) opinion on its financial statements from the independent auditors. This marks the twelfth consecutive year with no material weaknesses identified. I appreciate and applaud the good work of OCFO and all FEC staff who strived diligently throughout the fiscal year to achieve these results and maintain a commitment to excellence.

During fiscal year 2020, FEC made considerable progress improving internal controls and agency operations. These efforts include strengthening FEC's annual review of internal controls by maturing FEC's risk identification and mitigation processes by better aligning individual program office with identified enterprise risks. In addition, I am pleased to see the progress in reducing outstanding recommendations made by the Office of the Inspector General (OIG). Working through the FEC's Senior Management Council and OIG, the agency has resolved 29 recommendations since August of 2018 and addressing outstanding recommendations no longer appears as a top management challenge. We look forward to continuing to work with the OIG to improve agency operations and further reduce outstanding recommendations.

The FEC also continues to seek opportunities to modernize and upgrade business systems to improve operational effectiveness and efficiency. We are confident that FEC employees' commitment to the agency's mission will provide an opportunity to build on the prior year's financial management successes. The OCFO looks forward to another successful year.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Quinlan', with a stylized flourish at the end.

John Quinlan  
Chief Financial Officer



## OIG Transmittal Letter




Federal Election Commission  
Office of the Inspector General

### MEMORANDUM

---

TO: The Commission

FROM: Christopher Skinner 

SUBJECT: Transmittal of the Federal Election Commission's Fiscal Year 2020 Financial Statement Audit Report

DATE: November 16, 2020

Pursuant to the Chief Financial Officers Act of 1990, as amended, this memorandum transmits the Independent Auditor's Report issued by Brown & Company Certified Public Accountants and Management Consultants, PLLC (Brown & Company) for the fiscal year (FY) ending September 30, 2020. Enclosed you will find the Independent Auditor's final audit report on the FEC (i.e., the "FEC" or "Commission") FY 2020 Financial Statements. The final audit report is additionally included in Section II of the FEC's FY 2020 Agency Financial Report.

The audit was performed under a contract with, and monitored by, the OIG in accordance with generally accepted government auditing standards, the Comptroller General's *Government Auditing Standards*, and applicable provisions of Office of Management and Budget (OMB) Bulletin No. 17-03, *Audit Requirements for Federal Financial Statements*.

In Brown & Company's opinion, the financial statements present fairly, in all material respects, the financial position, net cost, changes in net position, budgetary resources, and custodial activity of the FEC as of, and for the year ending, September 30, 2020, in conformance with accounting principles generally accepted in the United States of America.

Additionally, due to the Commission's position that it is legally exempt from the Federal Information Systems Management Act (FISMA), the OIG requires an assessment of the agency's Information Technology (IT) systems security controls. Accordingly, the audit included an examination of the Commission's IT security in comparison to government-wide best practices. The OIG acknowledges that the independent auditors are only required to explicitly opine on internal controls that have a material impact on agency financial statement reporting.

Brown & Company did not report any material weaknesses. However, they identified significant deficiencies with the Commission's internal controls related to IT security and documented six recommendations (four of which were repeat recommendations from the FY 2019 report) to address the deficiencies noted. The OIG acknowledges that three prior year recommendations have been closed. Management was provided a draft copy of the audit report for review and comment, and the official management comments to the report can be found in Exhibit C of the report.

The OIG reviewed Brown & Company's report and related documentation and provided the required oversight throughout the course of the audit. Our review and oversight are limited to ensuring the audit complies with applicable standards; however, we do not express an opinion regarding its results. The OIG's review determined that Brown & Company complied, in all material respects, with applicable Government Auditing Standards.

In accordance with OMB Circular No. A-50, *Audit Follow-up*, revised, the FEC is to prepare a corrective action plan (CAP) that will set forth the specific actions planned, along with other detailed requirements, to implement the agreed upon recommendations. Per Commission Directive 50, *Audit Follow-up*, the Commission has designated the Chief Financial Officer to be the audit follow-up official (AFO) for the financial statement audit. The AFO has thirty days from the release date of the audit report to provide the OIG with a draft CAP that will address the report findings and recommendations. The OIG will review the CAP and provide any comments within fifteen days of receipt. Thereafter, the AFO will finalize the CAP and provide the final CAP to the Commissioners with a courtesy copy to the OIG.

We appreciate the collaboration and support from FEC staff and the professionalism that Brown & Company exercised throughout the course of the audit. If you have any questions concerning the enclosed report, please contact my office at (202) 694-1015

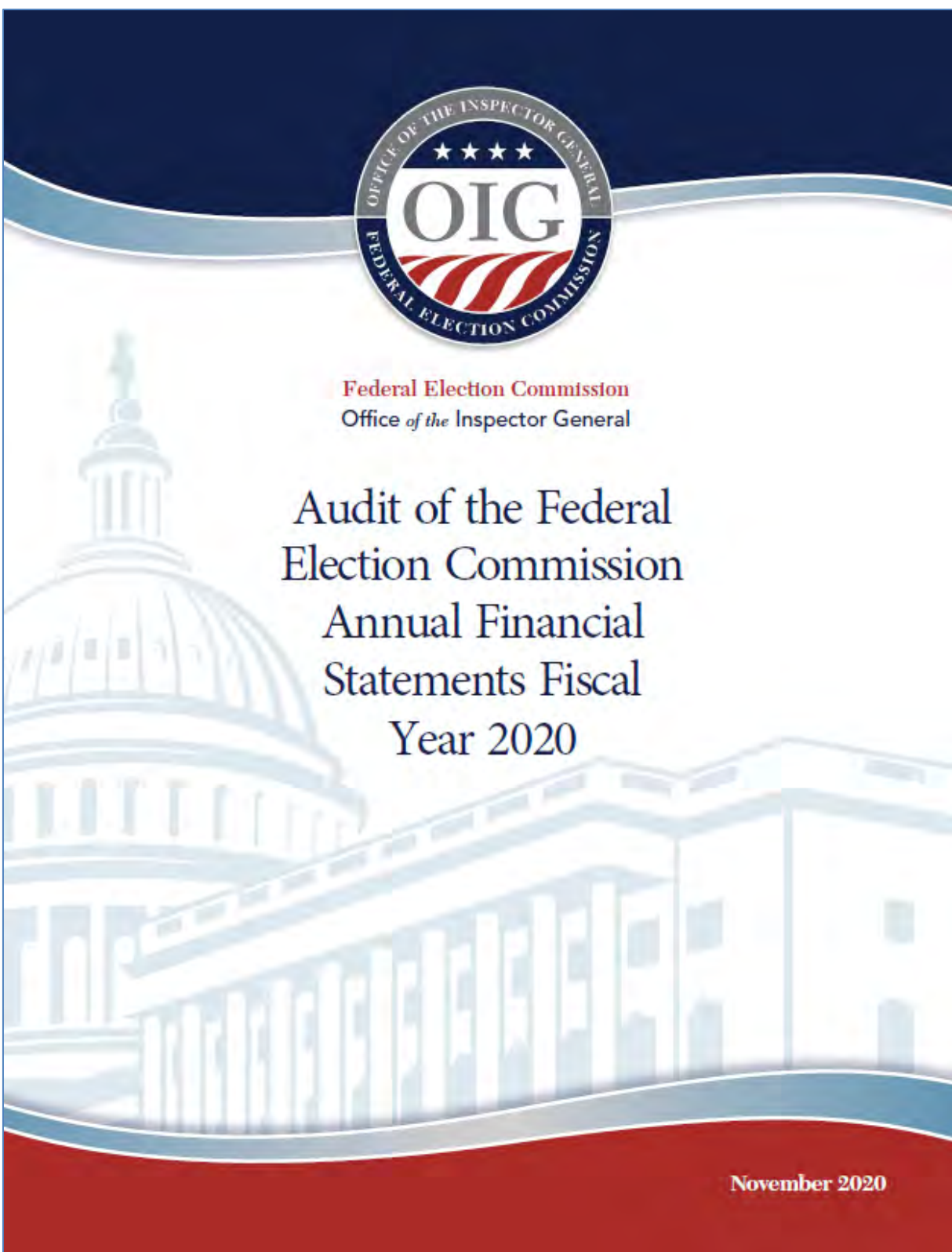
Thank you.

cc: John Quinlan, Chief Financial Officer  
Alec Palmer, Staff Director/Chief Information Officer  
Lisa Stevenson, Acting General Counsel  
Gilbert A. Ford, Director of Budget  
Greg Baker, Deputy General Counsel  
Christine McClarin, Acting Deputy Staff Director for Management and Administration





## Independent Auditor's Report





**FEDERAL ELECTION COMMISSION**  
**INDEPENDENT AUDITOR'S REPORT**  
**FOR THE YEARS ENDED**  
**SEPTEMBER 30, 2020 AND 2019**



Prepared By:  
Brown & Company CPAs and Management Consultants, PLLC  
November 16, 2020

## Table of Contents

Independent Auditor's Report	1
Exhibit A - Significant Deficiencies	6
Exhibit B - Status of Prior Year's Findings and Recommendations	14
Exhibit C - Management's Response to the Auditor's Report	15



**BROWN & COMPANY**

CERTIFIED PUBLIC ACCOUNTANTS AND MANAGEMENT CONSULTANTS, PLLC

## **Independent Auditor's Report**

Inspector General  
Federal Election Commission  
Washington, D.C.

In our audit of the fiscal year 2020 and 2019 financial statements of the Federal Election Commission (FEC), we found:

- FEC's financial statements as of and for the fiscal year ended September 30, 2020, and 2019, are presented fairly, in all material respects, in accordance with U.S. generally accepted accounting principles;
- no material weaknesses in internal control over financial reporting based on the limited procedures we performed; and
- no reportable noncompliance for fiscal year 2020 with provisions of applicable laws, regulations, contracts, and grant agreements we tested.

The following sections discuss in more detail (1) our report on the financial statements, which includes required supplementary information (RSI) and other information included with the financial statements; (2) our report on internal control over financial reporting; and (3) our report on compliance with laws, regulations, contracts, and grant agreements.

### **Report on the Financial Statements**

In accordance with the provisions of Accountability of Tax Dollars Act of 2002 (ATDA) (Pub. L. No. 107-289), we have audited FEC's financial statements. FEC's financial statements comprise the balance sheets as of September 30, 2020 and 2019; the related statements of net cost, changes in net position, budgetary resources, and custodial activity for the fiscal years then ended; and the related notes to the financial statements.

We conducted our audit in accordance with U.S. generally accepted government auditing standards. We believe that the audit evidence we obtained is sufficient and appropriate to provide a basis for our audit opinions.

### **Management's Responsibility**

FEC's management is responsible for (1) the preparation and fair presentation of these financial statements in accordance with U.S. generally accepted accounting principles; (2) preparing, measuring, and presenting the RSI in accordance with U.S. generally accepted accounting principles; (3) preparing and presenting other information included in documents containing the audited financial statements and auditor's report, and ensuring the consistency of that information with the audited financial statements and the RSI; and (4) maintaining effective internal control over financial reporting, including the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.



### Auditor's Responsibility

Our responsibility is to express an opinion on these financial statements based on our audit. U.S. generally accepted government auditing standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material misstatement. We are also responsible for applying certain limited procedures to RSI and other information included with the financial statements.

An audit of financial statements involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the auditor's assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit of financial statements also involves evaluating the appropriateness of the accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements. Our audit also included performing such other procedures as we considered necessary in the circumstances.

### Opinion on Financial Statements

In our opinion, FEC's financial statements present fairly, in all material respects, FEC's financial position as of September 30, 2020, and 2019, and its net cost of operations, changes in net position, budgetary resources, and custodial activity for the fiscal years then ended in accordance with U.S. generally accepted accounting principles.

### Other Matters

#### Required Supplementary Information

U.S. generally accepted accounting principles issued by the Federal Accounting Standards Advisory Board (FASAB) require that the RSI be presented to supplement the financial statements. Although the RSI is not a part of the financial statements, FASAB considers this information to be an essential part of financial reporting for placing the financial statements in appropriate operational, economic, or historical context. We have applied certain limited procedures to the RSI in accordance with U.S. generally accepted government auditing standards, which consisted of inquiries of management about the methods of preparing the RSI and comparing the information for consistency with management's responses to the auditor's inquiries, the financial statements, and other knowledge we obtained during the audit of the financial statements, in order to report omissions or material departures from FASAB guidelines, if any, identified by these limited procedures. We did not audit and we do not express an opinion or provide any assurance on the RSI because the limited procedures we applied do not provide sufficient evidence to express an opinion or provide any assurance.

#### Other Information

FEC's other information contains a wide range of information, some of which is not directly related to the financial statements. This information is presented for purposes of additional analysis and is not a required part of the financial statements or the RSI. We read the other



information included with the financial statements in order to identify material inconsistencies, if any, with the audited financial statements. Our audit was conducted for the purpose of forming an opinion on FEC's financial statements. We did not audit and do not express an opinion or provide any assurance on the other information.

### **Report on Internal Control over Financial Reporting**

In connection with our audit of FEC's financial statements, we considered FEC's internal control over financial reporting, consistent with our auditor's responsibility discussed below. We performed our procedures related to FEC's internal control over financial reporting in accordance with U.S. generally accepted government auditing standards.

#### **Management's Responsibility**

FEC management is responsible for maintaining effective internal control over financial reporting, including the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.

#### **Auditor's Responsibility**

In planning and performing our audit of FEC's financial statements as of and for the year ended September 30, 2020, in accordance with U.S. generally accepted government auditing standards, we considered the FEC's internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances for the purpose of expressing our opinion on the financial statements, but not for the purpose of expressing an opinion on the effectiveness of FEC's internal control over financial reporting. Accordingly, we do not express an opinion on FEC's internal control over financial reporting. We are required to report all deficiencies that are considered to be significant deficiencies or material weaknesses. We did not consider all internal controls relevant to operating objectives, such as those controls relevant to preparing performance information and ensuring efficient operations.

#### **Definition and Inherent Limitations of Internal Control over Financial Reporting**

An entity's internal control over financial reporting is a process effected by those charged with governance, management, and other personnel, the objectives of which are to provide reasonable assurance that (1) transactions are properly recorded, processed, and summarized to permit the preparation of financial statements in accordance with U.S. generally accepted accounting principles, and assets are safeguarded against loss from unauthorized acquisition, use, or disposition, and (2) transactions are executed in accordance with provisions of applicable laws, including those governing the use of budget authority, regulations, contracts, and grant agreements, noncompliance with which could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct, misstatements due to fraud or error.

#### **Results of Our Consideration of Internal Control over Financial Reporting**

Our consideration of internal control was for the limited purpose described above, and was not designed to identify all deficiencies in internal control that might be material weaknesses and significant deficiencies or to express an opinion on the effectiveness of FEC's internal control over



financial reporting. Therefore, material weaknesses or significant deficiencies may exist that have not been identified. Given these limitations, during our audit, we did not identify any deficiencies in internal control over financial reporting that we consider to be material weaknesses. However, material weaknesses may exist that have not been identified.

During our FY 2020 audit, we identified deficiencies in FEC's internal control over financial reporting that we do not consider to be material weaknesses. Nonetheless, these deficiencies warrant FEC management's attention. We have communicated these matters to FEC's management. Below and in Exhibit A are the significant deficiencies:

1. Logical account management activities are not consistently performed for separated users.
2. Baseline configuration standards are not fully implemented for all Windows devices.
3. Continuity of Operations Plan is not implemented and tested.
4. Security awareness training was not completed by all FEC system users.
5. Corrective Action Plans are not compliant with government requirements.

#### Intended Purpose of Report on Internal Control over Financial Reporting

The purpose of this report is solely to describe the scope of our consideration of FEC's internal control over financial reporting and the results of our procedures, and not to provide an opinion on the effectiveness of the FEC's internal control over financial reporting. This report is an integral part of an audit performed in accordance with U.S. generally accepted government auditing standards in considering internal control over financial reporting. Accordingly, this report on internal control over financial reporting is not suitable for any other purpose.

#### Report on Compliance with Laws, Regulations, Contracts, and Grant Agreements

In connection with our audit of FEC's financial statements, we tested compliance with selected provisions of applicable laws, regulations, contracts, and grant agreements consistent with our auditor's responsibility discussed below. We caution that noncompliance may occur and not be detected by these tests. We performed our tests of compliance in accordance with U.S. generally accepted government auditing standards.

#### Management's Responsibility

FEC management is responsible for complying with laws, regulations, contracts, and grant agreements applicable to FEC.

#### Auditor's Responsibility

Our responsibility is to test compliance with selected provisions of applicable laws, regulations, contracts, and grant agreements applicable to FEC that have a direct effect on the determination of material amounts and disclosures in FEC's financial statements, and perform certain other limited procedures. Accordingly, we did not test compliance with all laws, regulations, contracts, and grant agreements applicable to FEC.

#### Results of Our Tests for Compliance with Laws, Regulations, Contracts, and Grant Agreements

Our tests for compliance with selected provisions of applicable laws, regulations, contracts, and grant agreements disclosed no instances of noncompliance for FY 2020 that would be reportable under U.S. generally accepted government auditing standards. However, the objective of our tests was not to

provide an opinion on compliance with laws, regulations, contracts, and grant agreements applicable to FEC. Accordingly, we do not express such an opinion.

#### Intended Purpose of Report on Compliance with Laws, Regulations, Contracts, and Grant Agreements

The purpose of this report is solely to describe the scope of our testing of compliance with selected provisions of applicable laws, regulations, contracts, and grant agreements, and the results of that testing, and not to provide an opinion on compliance. This report is an integral part of an audit performed in accordance with U.S. generally accepted government auditing standards in considering compliance. Accordingly, this report on compliance with laws, regulations, contracts, and grant agreements is not suitable for any other purpose.

#### **Status of Prior Year's Findings and Recommendations**

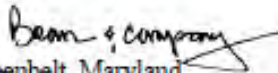
We have reviewed the status of open recommendations from the FY 2019 Independent Auditor's Report, dated November 19, 2019. The status of prior year recommendations is presented in Exhibit B.

#### **Management's Response to the Auditor's Report**

Management has presented a response to the findings identified in our report. Management's response to the report is presented in Exhibit C. We did not audit FEC's response and, accordingly, we express no opinion on it.

#### **Evaluation of Management's Response to the Auditor's Report**

In response to the draft report, FEC provided its plans to address the findings, and agreed with the recommendations to improve information system security controls. There are five findings of which two are new findings and six open recommendations. FEC comments are included in their entirety in Exhibit C.

  
Greenbelt, Maryland  
November 16, 2020



## Exhibit A - Significant Deficiencies

### Effectiveness of Information System Controls Over Financial Reporting

#### Findings and Recommendations

#### IT Finding 2020-01: Logical Account Management Activities Are Not Consistently Performed For Separated User (Repeat Finding)

##### Condition:

We identified an inconsistent implementation of FEC's account management controls for separated employees. FEC account management did not document its annual review of user accounts for the General Support System (GSS) and major application systems in accordance with their system security plan. Specifically, FEC's account management did not review user account access rights and privileges for the financial systems such as the WebTA, Pegasys and Comprizon systems. As a result, FEC management did not timely remove system user's accounts when the user separated from the agency.

Based on our review of active IT System user accounts, we identified:

- three of eleven GSS users were not removed timely; and
- one of 302 WebTA user accounts was not removed timely.

We note that upon notifying management of this finding, the three GSS user accounts were immediately removed.

##### Criteria:

NIST Special Publication (SP) 800-53, Revision 4 (Rev. 4), *Security and Privacy Controls for Federal Information Systems and Organizations*, Security Control AC-2 Account Management, states the following:

Control: The organization:

- f. Creates, enables, modifies, disables, and removes information system accounts in accordance with [Assignment: organization-defined procedures or conditions];
- g. Monitors the use of information system accounts;
- h. Notifies account managers:
  1. When accounts are no longer required;
  2. When users are terminated or transferred; and
  3. When individual information system usage or need-to-know changes;
- i. Authorizes access to the information system based on:
  1. A valid access authorization;
  2. Intended system usage; and
  3. Other attributes as required by the organization or associated missions/business functions;
- j. Reviews accounts for compliance with account management requirements [Assignment: organization-defined frequency]; and
- k. Establishes a process for reissuing shared/group account credentials (if deployed) when individuals are removed from the group.



*FEC Account Management Policy*, states:

All user account access rights and privileges should be reviewed annually and validated in accordance with General Support System and Major Application system security plans by the user's Direct Manager. The level of approval authority granted for user accounts should be based on the business criticality of the information or system to which the accounts are associated.

Accounts of users terminated under non-hostile circumstances should be suspended not later than the close of business (8:00 p.m.) of their final day of employment.

**Cause:**

FEC management has not complied with the FEC Account Management Policy or implemented sufficient monitoring controls to ensure compliance with NIST account management standards and guidelines.

**Effect:**

By not implementing a periodic review of all user accounts and disabling the accounts according to policy, there is an increased risk users could gain or retain unauthorized access and/or perform unauthorized functions and transactions within FEC systems.

**Recommendation 1:**

We recommend the FEC OCIO in conjunction with the direct managers perform and document periodic user access reviews for FEC systems according to the agency's system security plan.

**IT Finding 2020-02: Baseline Configuration Standards Are Not Fully Implement For All Windows Devices.**

**Condition:**

FEC has not fully implemented baseline configuration standards for all Windows environments in accordance with Security Technical Implementation Guide (STIG). A STIG is a cybersecurity methodology for standardizing security protocols within networks, servers, computers, and logical designs to enhance overall security. When implemented, these guides enhance security for software, hardware, physical and logical architectures to further reduce vulnerabilities.

FY 2020, FEC OCIO changed their standard configuration baseline requirements for Windows operating systems from the United States Government Configuration Baseline (USGCB) to STIG. The FEC OCIO is currently replacing Windows 7 operating systems with Windows 10 to meet the STIG requirements. However, the implementation of STIG configuration standards has not been fully implemented.

**Criteria:**

NIST Special Publication (SP) 800-53, Revision 4 (Rev. 4), *Security and Privacy Controls for Federal Information Systems and Organizations*, Security Control CM-2 Baseline Configuration, states the following:

**Control:**

The organization develops, documents, and maintains under configuration control, a current baseline configuration of the information system.

NIST SP 800-53, Rev. 4, *Security and Privacy Controls for Federal Information Systems and Organizations*, April 2013, Security Control CM-6, Configuration Settings, states the following:

**Control:** The organization:

- a. Establishes and documents configuration settings for information technology products employed within the information system using [Assignment: organization-defined security configuration checklists] that reflect the most restrictive mode consistent with operational requirements;
- b. Implements the configuration settings;
- c. Identifies, documents, and approves any deviations from established configuration settings for [Assignment: organization-defined information system components] based on [Assignment: organization-defined operational requirements]; and
- d. Monitors and controls changes to the configuration settings in accordance with organizational policies and procedures.

**Cause:**

The FEC OCIO postponed full implementation of the STIG baseline configuration standards last year because it was in the process of rolling out new laptops that would include Windows 10. However, this process was further delayed due to the COVID-19 environment constraints.

**Effect:**

FEC information systems are at increased risk by not implementing its STIG baseline configuration standards established for the agency.

**Recommendation 2:**

We recommend that the FEC OCIO fully implement STIG baseline configuration standards for Windows devices.

**IT Finding 2020-03: Continuity Of Operations Plan Is Not Implemented And Tested (Repeat Finding)**

**Condition:**

Based on our review of the most current FEC *Continuity of Operations Plan* (COOP) and other supporting documentation, we conclude that the COOP has not been fully implemented and tested. In FY 2020, the FEC OCIO updated the *FEC Continuity of Operation Plan*. However, FEC management has not performed test, training and exercise (TT&E) activities in accordance with the FEC COOP. TT&E aids in verifying that an organization's continuity plan is capable of supporting the continued execution of the organization's essential functions throughout the duration of a continuity event. Specifically, FEC has not fully developed, coordinated, and conducted TT&E to assess and validate its continuity plans, policies, procedures, and systems.

Also, as reported in prior periods, the FEC did not implement the agency's policy to develop system-specific contingency plans for critical information systems.



**Criteria:**

NIST Special Publication (SP) 800-53, Revision 4 (Rev. 4), *Security and Privacy Controls for Federal Information Systems and Organizations*, Security Control CP-2 Contingency Plan, states the following:

Control: The organization:

- a. Develops a contingency plan for the information system that:
  1. Identifies essential missions and business functions and associated contingency requirements;
  2. Provides recovery objectives, restoration priorities, and metrics;
  3. Addresses contingency roles, responsibilities, assigned individuals with contact information;
  4. Addresses maintaining essential missions and business functions despite an information system disruption, compromise, or failure;
  5. Addresses eventual, full information system restoration without deterioration of the security safeguards originally planned and implemented; and
  6. Is reviewed and approved by [Assignment: organization-defined personnel or roles];
- b. Distributes copies of the contingency plan to [Assignment: organization-defined key contingency personnel (identified by name and/or by role) and organizational elements];
- c. Coordinates contingency planning activities with incident handling activities;
- d. Reviews the contingency plan for the information system [Assignment: organization-defined frequency];
- e. Updates the contingency plan to address changes to the organization, information system, or environment of operation and problems encountered during contingency plan implementation, execution, or testing;
- f. Communicates contingency plan changes to [Assignment: organization-defined key contingency personnel (identified by name and/or by role) and organizational elements]; and
- g. Protects the contingency plan from unauthorized disclosure and modification.

NIST Special Publication (SP) 800-53, Revision 4 (Rev. 4), *Security and Privacy Controls for Federal Information Systems and Organizations*, Security Control CP-4 Contingency Plan Testing, states the following:

Control: The organization:

- a. Tests the contingency plan for the information system [Assignment: organization-defined frequency] using [Assignment: organization-defined tests] to determine the effectiveness of the plan and the organizational readiness to execute the plan;
- b. Reviews the contingency plan test results; and
- c. Initiates corrective actions, if needed.

The FEC *Continuity of Operations and Disaster Recovery Policy*, Policy Number 58-2.9, was adopted in September 2004 and updated in February 2010. The FEC policy states:

Business continuity and disaster recovery plans should be tested/re-assessed on a regular basis.

- Plans should not be considered valid until tested for practicality, executability, errors and/or omissions. The initial validation test should consist of a simulation or tactical test.
- Once validated, plans should be tested annually, or when substantive changes occur to the system, to the system environment, or to the plan itself.
- Test results should be maintained in a journal format and retained for analysis.
- Validated change recommendations resulting from testing activities should be incorporated into plans immediately.

**Cause:**

The FEC OCIO did not prioritize resources to implement and perform a routine test of its COOP to familiarize staff members with their roles and responsibilities during an emergency, ensure that systems and equipment are maintained in a constant state of readiness, and validate certain aspects of the COOP.

**Effect:**

Without implementing and testing a COOP before one is needed, increases the risk that the FEC's contingency plan would not include everything it needs and/or not be able to execute the plane in the most effective, efficient, and secure way

**Recommendation 3:**

We recommend the FEC OCIO utilize lessons learned from the COVID-19 pandemic to determine if any revisions are need to the *Continuity of Operation Plan*, and schedule periodic testing.

**Recommendation 4:**

We recommend that the FEC develop system-specific contingency plans, as appropriate for the agency risk level. (Repeat Recommendation)

**IT Finding 2020-04: Security Awareness Training Was Not Completed By All FEC System Users**

**Condition:**

Based on our review of FEC's security training status reports for FY 2020, all FEC system users (employees and contractors) did not complete security awareness training as required by the FEC *Federal Security Training and Awareness Policy*, Policy Number 58-1.2. The FEC Chief Information Officer (CIO) oversees the implementation and enforcement of the training policy. FEC OCIO provides training to all system users through its online training program that notifies users of training requirements and due dates. However, all system users did not complete the required training.

Specifically, based on our review of the security awareness training status reports, nine employees and one contractor of 379 system users listed did not complete training. Based on our review of the phishing training status report, one employee of 345 system users listed did not complete training.



**Criteria:**

National Institute of Standards and Technology (NIST) *Special Publication (SP) 800-53, Rev. 4, Security and Privacy Controls for Federal Information Systems and Organization*, AT-2 Security Awareness Training, states the following:

**Control:** The organization provides basic security awareness training to information system users (including managers, senior executives, and contractors):

- a. As part of initial training for new users;
- b. When required by information system changes; and
- c. [Assignment: organization-defined frequency] thereafter.

*FEC Security Training and Awareness Policy, Policy Number 58-1.2.*, states the following:

...  
A training curriculum for each group of employees, vendors and consultants should be established and maintained; all personnel should be trained and educated in system security principles appropriate to their level of management responsibility and access.

**Cause:**

The FEC OCIO does not have effective procedures to enforce the *FEC Security Training and Awareness Policy* to ensure all system users complete annual training.

**Effect:**

Without adequate training, employee may not understand system security risks and their role in mitigating those risks.

**Recommendation 5:**

We recommend the FEC OCIO implement an effective procedure to enforce compliance with the security awareness training policy to ensure all system users complete security training in accordance with the *FEC Security Training and Awareness Policy*.

**IT Finding 2020-05: Corrective Action Plans Are Not Compliant With Government Requirements (Repeat Finding)**

**Condition:**

During the fiscal year (FY) 2020 audit, the FEC Deputy Chief Information Officer updated the FEC Corrective Action Plan (CAP) and Plan of Action and Milestone (POA&M). However, the FEC CAP and POA&M need improvement to comply with government requirements. We identified the following areas where improvements are needed:

- The plan does not identify the resources required to correct a deficiency, including the types of resources needed to correct the deficiency.

- The plan does not have critical path milestones that affect the overall schedule or the corrective actions needed to resolve the deficiency, including a “date certain” that the deficiency will be corrected.
- Concerning the requirement in OMB Circular A-123 and Commission Directive 50, the agency must promptly resolve and perform internal control testing to validate the correction of the control deficiency.

**Criteria:**

OMB Circular A-123, *Management’s Responsibility for Enterprise Risk Management and Internal Control*, dated July 2016, requires each agency’s CAP to address the following areas:

- Resources required to correct a control deficiency. The corrective action plan must indicate the types of resources needed (e.g., additional personnel, contract support, training, etc.), including non-financial resources, such as Senior Leadership support for correcting the control deficiency.
- Critical path milestones that affect the overall schedule for implementing the corrective actions are needed to resolve the control deficiency. The milestones must lead to a date certain of the correction of the control deficiency.
- Require prompt resolution and internal control testing to validate the correction of the control deficiency.
- Procedures to ensure that accurate records of the status of the identified control deficiency are maintained and updated throughout the entire process.

OMB Circular A-123, Section V, provides that agency managers are responsible for taking timely and effective action to correct deficiencies; correcting deficiencies is an integral part of management accountability and must be considered a priority by the agency; corrective action plans should be developed for all material weaknesses, and progress against plans should be periodically assessed and reported to agency management. Management should track progress to ensure timely and effective results.

National Institute of Standards and Technology (NIST) Special Publication (SP) 800-37, Revision (Rev.) 2, *Risk Management Framework (RMF) for Information Systems and Organizations*, December 2018, states the following in regard to plan of action and milestones:

*Plan of Action and Milestones, Task A-6:* Prepare the plan of action and milestones based on the findings and recommendations of the assessment reports.

*Discussion:* The plan of action and milestones is included as part of the authorization package. The plan of action and milestones describes the actions that are planned to correct deficiencies in the controls identified during the assessment of the controls and during continuous monitoring. The plan of action and milestones includes tasks to be accomplished with a recommendation for completion before or after system authorization; resources required to accomplish the tasks; milestones established to meet the tasks; and the scheduled completion dates for the milestones and tasks.



NIST SP 800-53A, Rev. 4, *Assessing Security and Privacy Controls in Federal Information Systems and Organizations*, - *Building Effective Assessment Plans*, December 2014, Security Control CA-5, Plan of Action and Milestones, states the following:

Determine if the organization:

- Develops a plan of action and milestones for the information system to:
  - document the organization's planned remedial actions to correct weaknesses or deficiencies noted during the assessment of the security controls;
  - reduce or eliminate known vulnerabilities in the system;
- Defines the frequency to update the existing plan of action and milestones;
- Updates the existing plan of action and milestones with the organization-defined frequency based on the findings from:
  - security controls assessments;
  - security impact analyses; and
  - continuous monitoring activities

**Cause:**

FEC has not implemented procedures to comply with the requirements for a plan of actions and milestones that meet federal requirements. This condition is also caused by a need for additional oversight and monitoring to ensure the agency meets Commission Directive A-50 and related OMB regulations.

**Effect:**

The agency is unable to:

- Ensure that realistic milestones are established;
- Ensure that targeted resolution dates are consistently met to reduce the agency's risk exposure; and
- Determine if risks are not accepted, mitigated or responded to with actionable plans and decisions.

**Recommendation 6:**

We recommend that the FEC Chief Information Officer improve the plan of action and milestones report for the information system to include:

- Resources required to correct a control deficiency.
- Critical path milestones that affect the overall schedule for implementing the corrective actions are needed to resolve the control deficiency.
- Plan for prompt resolution and internal control testing to validate the correction of the control deficiency.

## Exhibit B - Status of Prior Year's Findings and Recommendations

Number	Status of FY 2019 and Prior Year's Audit Recommendations	Status as of September 30, 2020
1.	Take actions to ensure that the agency's CAP includes all of the requirements of Commission Directive A-50 and OMB Circular A-123.	Open See Finding 5
2.	Complete the project relating to review of user access authorities and ensure necessary budgetary and personnel resources are provided to complete this project in a timely manner.	Open See Finding 1
3.	Finalize the draft FEC policies that require annual recertification of users' access authorities. Ensure that the policies address privileged accounts, and require validation to actual system access records, by supervisory personnel who would have knowledge of the users' requirements for accessing FEC information and information systems.	Open See Finding 1
4.	Implement USGCB baseline configuration standards for all workstations regardless of the current hardware in use.	Closed
5.	Ensure that sufficient resources are assigned to the task of testing the COOP, a critical IT control process, in order to reduce risk to the FEC, and complete all requires tests in a timely manner.	Open See Finding 3
6.	Develop system specific contingency plans, as required by the NIST RMF.	Open See Finding 3
7.	Develop and update, a plan of action and milestones for the information system that documents the organization's planned, implemented, and evaluated remedial actions to correct deficiencies noted during the assessment of the security controls and to reduce or eliminate known vulnerabilities in the system.	Open See Finding 5
8.	Review information system accounts in accordance with organization-defined frequency; and the FEC initiates required actions on information system accounts based on the review.	Open See Finding 1
9.	Update the FEC's Segregation of Duties Policy to include defining information system access authorizations to support separation of duties.	Closed
10.	Implement session lockout control in accordance with organization-defined procedures.	Closed



## Exhibit C - Management's Response to the Auditor's Report



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 16, 2020

On behalf of Federal Election Commission (FEC) Management, I would like to thank the FEC Office of the Inspector General and Brown & Company for their diligent work auditing the FEC's FY 2020 financial statements. The unmodified opinion that you rendered is reflective of the hard work and continued process improvements made by the FEC staff. The close-out of several recommendations from previous financial statement audits demonstrates significant progress in improving the FEC's IT security posture and resilience. We also note that the financial statement audit made several other recommendations related to IT systems and corrective action plan reporting. Enclosed herein is responses to those recommendations, as provided by the FEC Chief Information Officer.

On behalf of Management,

A handwritten signature in black ink, appearing to read "John Quinlan".

John Quinlan  
Chief Financial Officer

## **Agency Response to the Final Draft Report**

The Agency continues on the path to remediate all findings. Our responses provide an overview of how we plan to remediate each of the findings.

### **Findings and Recommendations**

#### **IT Finding 2020-01: Logical Account Management Activities Are Not Consistently Performed for Separated User (Repeat Finding)**

**Auditor's recommendation:** We recommend the FEC OCIO in conjunction with the direct managers perform and document periodic user access reviews for FEC systems according to the agency's system security plan.

#### **Management response:**

Management concurs with this recommendation but notes that this finding has no impact on the actual security of FEC systems.

While OCIO has implemented strict account management procedures, it recognizes the need to document these procedures, including periodic user access reviews for FEC systems. OCIO continues to research effective ways to review account management procedures. If an effective procedure is found for a reasonable cost, it will be implemented to enable supervisors to review user access authorities annually.

In regard to the three IT user accounts in the GSS that were noted in the audit finding, OCIO wishes to note for the record that these users no longer have network access.

#### **IT Finding 2020-02: Baseline Configuration Standards Are Not Fully Implement for All Windows Devices**

**Auditor's recommendation:** We recommend that the FEC OCIO fully implement STIG baseline configuration standards for Windows devices.

#### **Management response:**

Management concurs with the Auditor regarding the full implementation of security technical implementation guide (STIG) baseline configuration standards for Windows 10 devices. In early 2020, the OCIO began distributing Windows 10 laptops then had to suspend temporarily due to the COVID-19 pandemic. As of October 2020, Windows 10 laptop distribution has resumed and DISA STIGs are being tested with an expected implementation date of Spring 2021.



**IT Finding 2020-03: Continuity of Operations Plan Is Not Implemented and Tested (Repeat Finding)**

Auditor's recommendation: We recommend the FEC OCIO utilize lessons learned from the COVID-19 pandemic to determine if any revisions are need to the *Continuity of Operation Plan*, and schedule periodic testing.

**Management Response:**

Management concurs with the Auditor's recommendation to use lessons learned from the pandemic and schedule periodic testing.

In 2019, the OCIO awarded a contract for a complete update to the COOP plan. Phase 1 of this update was completed at the end of FY 2020, with the delivery of an updated COOP plan. Mandatory COOP training was also conducted during FY 2020.

Phase II of the implementation of the COOP plan has begun. We will look at the lessons learned during the pandemic and implement them into these updated plans and periodic testing accordingly. The OCIO is actively engaged in reviewing test plans and exercises and anticipates completion of these items by Spring 2021.

Auditor's Recommendation: We recommend that the FEC develop system-specific contingency plans, as appropriate for the agency risk level. (Repeat Recommendation)

**Management Response:**

Management concurs with the Auditor's recommendation and is actively engaged in Phase II of the COOP Plan to complete information system contingency plans for mission essential functions. Expected completion is September 29, 2021. We believe it is important to note that the worldwide COVID-19 pandemic has demonstrated the FEC's commitment to ensuring its continuity of operations. In March 2020, the agency went into an evacuation order and moved swiftly and successfully to a 100 percent mandatory telework scenario.

**IT Finding 2020-04: Security Awareness Training Was Not Completed by All FEC Employees**

Auditor's recommendation: We recommend the FEC OCIO implement an effective procedure to enforce compliance with the security awareness training policy to ensure all system users complete security training in accordance with the *FEC Security Training and Awareness Policy*.

**Management Response:**

Management concurs with this recommendation and is committed to continued education of all staff and contractors in information security awareness. During FY 2020, the OCIO conducted anti-phishing training in April 2020 and began its annual security training during September 2020.



While some users did not complete the required phishing training on time; the OCIO continued to prod users to complete the training. By the end of FY 2020, all staff and contractors had finished the phishing training except for two individuals.

The agency conducted annual password training in September 2020, with a due date of October 21, 2020. Based on lessons learned from the phishing training, OCIO implemented an enforcement mechanism: Users were warned to complete the training by October 21 or have their network access revoked. This newly implemented mechanism proved successful as all active users completed the password training, except for one who has received an exception due to a long-term illness and one contractor on a stop-work order due to the pandemic.

Based on the success of the enforcement mechanism in the September – October 2020 password training, OCIO believes this finding should be closed. Going forward, the OCIO intends to continue to use the penalty of network access revocation combined with intensive outreach efforts to FEC staff and contractors to ensure they are aware of their responsibilities regarding information security and complete all required training

**IT Finding 2020-05: Corrective Action Plans Are Not Compliant with Government Requirements (Repeat Finding)**

**Auditor's Recommendation:**

We recommend that the FEC Chief Information Officer improve the plan of action and milestones report for the information system to include:

- Resources required to correct a control deficiency.
- Critical path milestones that affect the overall schedule for implementing the corrective actions are needed to resolve the control deficiency.
- Plan for prompt resolution and internal control testing to validate the correction of the control deficiency.

**Management Response:**

Management agrees with the Auditor's recommendation to improve the POAM used for documenting and tracking the agency's planned, implemented and evaluated remedial actions to correct deficiencies noted during the assessment of security controls. During FY 2020, the CIO and CISO developed a plan of action and milestones report for information systems and management continued to update and report on corrective action plans in accordance with the timeline identified in Commission Directive 50. OCIO's Security and Operational groups have a weekly meeting to go over vulnerability of GSS systems and prioritize and fix vulnerabilities, with the critical ones fixed first. Detailed POAM sheets are used to document the work of planning, implementing and evaluating actions noted during the assessment of security controls. OCIO's Security and Operational teams are fully committed to reduce or eliminate known vulnerabilities in agency's information systems and will continue to work on including the items noted in the audit findings.

This page marks the end of the Independent Auditor's Report

# Financial Statements

## BALANCE SHEET

As of September 30, 2020 and 2019 (in dollars)

	2020	2019
<b>Assets: (Note 2)</b>		
Intragovernmental:		
Fund Balance With Treasury (Note 3)	\$ 23,431,710	\$ 26,164,174
Total Intragovernmental	23,431,710	26,164,174
Accounts Receivable, net (Note 4)	352,810	583,160
General Property, Plant and Equipment, Net (Note 5)	12,781,818	15,653,558
<b>Total Assets</b>	<b>\$ 36,566,338</b>	<b>\$ 42,400,892</b>
<b>Liabilities: (Note 6)</b>		
Intragovernmental:		
Accounts Payable	\$ 1,249,618	\$ 276,752
Other: (Note 7)		
Employer Contributions and Payroll Taxes Payable	555,293	413,442
Other Post Employment Benefits Due and Payable	3,500	3,500
Unfunded FECA Liability	-	61
Custodial Liability (Note 12)	352,811	583,160
Deferred Rent (Note 9)	7,254,175	7,850,409
Total Intragovernmental	9,415,397	9,127,324
Accounts Payable	1,037,120	1,363,678
Federal Employees and Veterans Benefits	232	7,792
Other: (Note 7)		
Accrued Funded Payroll and Leave	1,884,885	1,505,528
Employer Contributions and Payroll Taxes Payable	84,731	65,896
Unfunded Leave	3,546,642	3,112,591
Liability for Advances and Prepayments	70,155	56,158
<b>Total Liabilities</b>	<b>\$ 16,039,162</b>	<b>\$ 15,238,967</b>
<b>Net Position:</b>		
Unexpended Appropriations - All Other Funds		
(Consolidated Totals)	\$ 18,546,408	\$ 22,479,219
Cumulative Results of Operations - All Other Funds		
(Consolidated Totals)	1,980,769	4,682,706
Total Net Position - All Other Funds		
(Consolidated Totals)	20,527,177	27,161,925
<b>Total Net Position</b>	<b>20,527,177</b>	<b>27,161,925</b>
<b>Total Liabilities and Net Position</b>	<b>\$ 36,566,338</b>	<b>\$ 42,400,892</b>

The accompanying notes are an integral part of these statements.

## STATEMENT OF NET COST

For The Years Ended September 30, 2020 and 2019 (in dollars)

	2020	2019
<b>Program Costs:</b>		
Administering and Enforcing the <i>FECA</i>		
Gross Costs	\$ 80,027,415	\$ 69,333,519
Less: Earned Revenue	112,883	74,418
Net Program Costs	79,914,532	69,259,101
<b>Net Cost of Operations</b>	<b>\$ 79,914,532</b>	<b>\$ 69,259,101</b>

The accompanying notes are an integral part of these statements.

# STATEMENT OF CHANGES IN NET POSITION

For The Years Ended September 30, 2020 and 2019 (in dollars)

	FY 2020	
	All Other Funds (Consolidated)	Consolidated Total
<b>Unexpended Appropriations:</b>		
Beginning Balance	\$ 22,479,219	\$ 22,479,219
<b>Budgetary Financing Sources:</b>		
Appropriations received	71,497,000	71,497,000
Other adjustments	(476,424)	(476,424)
Appropriations used	(74,953,387)	(74,953,387)
<b>Total Budgetary Financing Sources</b>	<b>(3,932,812)</b>	<b>(3,932,812)</b>
<b>Total Unexpended Appropriations</b>	<b>18,546,408</b>	<b>18,546,408</b>
<b>Cumulative Results from Operations:</b>		
Beginning Balances	4,682,706	4,682,706
Beginning balance, as adjusted	4,682,706	4,682,706
<b>Budgetary Financing Sources:</b>		
Appropriations used	74,953,387	74,953,387
Other	46,728	46,728
<b>Other Financing Sources (Non-Exchange):</b>		
Imputed financing	2,259,208	2,259,208
Other	(46,728)	(46,728)
Total Financing Sources	77,212,595	77,212,595
Net Cost of Operations	79,914,532	79,914,532
Net Change	(2,701,937)	(2,701,937)
<b>Cumulative Results of Operations</b>	<b>1,980,769</b>	<b>1,980,769</b>
<b>Net Position</b>	<b>\$ 20,527,177</b>	<b>\$ 20,527,177</b>

The accompanying notes are an integral part of these statements.



**STATEMENT OF CHANGES IN NET POSITION**  
**For The Years Ended September 30, 2020 and 2019 (in dollars)**

**FY 2019**

	<b>All Other Funds (Consolidated Totals)</b>	<b>Consolidated Total</b>
<b>Unexpended Appropriations:</b>		
Beginning Balance	\$ 16,421,949	\$ 16,421,949
<b>Budgetary Financing Sources:</b>		
Appropriations received	71,250,000	71,250,000
Other adjustments	(386,245)	(386,245)
Appropriations used	(64,806,485)	(64,806,485)
<b>Total Budgetary Financing Sources</b>	<b>6,057,271</b>	<b>6,057,271</b>
<b>Total Unexpended Appropriations</b>	<b>22,479,219</b>	<b>22,479,219</b>
<b>Cumulative Results from Operations:</b>		
Beginning Balances	6,247,456	6,247,456
Beginning balance, as adjusted	6,247,456	6,247,456
<b>Budgetary Financing Sources:</b>		
Appropriations used	64,806,485	64,806,485
<b>Other Financing Sources (Non-Exchange):</b>		
Imputed financing (Note 10)	2,887,867	2,887,867
Total Financing Sources	67,694,351	67,694,351
Net Cost of Operations	69,259,101	69,259,101
Net Change	(1,564,750)	(1,564,750)
<b>Cumulative Results of Operations</b>	<b>4,682,706</b>	<b>4,682,706</b>
<b>Net Position</b>	<b>\$ 27,161,925</b>	<b>\$ 27,161,925</b>

The accompanying notes are an integral part of these statements.

**STATEMENT OF BUDGETARY RESOURCES****For The Years Ended September 30, 2020 and 2019 (in dollars)**

	<b>2020</b>	<b>2019</b>
	<b>Budgetary</b>	<b>Budgetary</b>
<b>BUDGETARY RESOURCES</b>		
Unobligated balance from prior year budget authority, net (discretionary and mandatory)	\$ 7,439,271	\$ 4,169,352
Appropriations (discretionary and mandatory)	71,497,000	71,250,000
Spending authority from offsetting collections (discretionary and mandatory)	125,191	132,264
<b>Total budgetary resources (Note 11)</b>	<b>\$ 79,061,462</b>	<b>\$ 75,551,616</b>
<b>STATUS OF BUDGETARY RESOURCES</b>		
New obligations and upward adjustments (total)	\$ 72,007,887	\$ 69,232,534
Unobligated balance, end of year:		
Apportioned, unexpired account	374,272	2,851,236
Unapportioned, unexpired accounts	-	7,264
Unexpired unobligated balance, end of year	374,272	2,858,500
Expired unobligated balance, end of year	6,679,303	3,460,582
Unobligated balance, end of year (total)	7,053,575	6,319,082
<b>Total budgetary resources</b>	<b>\$ 79,061,462</b>	<b>\$ 75,551,616</b>
<b>OUTLAYS, NET</b>		
Outlays, net (discretionary and mandatory)	73,753,039	64,987,148
<b>Agency outlays, net (discretionary and mandatory) (Note 11, 14)</b>	<b>\$ 73,753,039</b>	<b>\$ 64,987,148</b>

The accompanying notes are an integral part of these statements.

**STATEMENT OF CUSTODIAL ACTIVITY****For The Years Ended September 30, 2020 and 2019**

	<b>2020</b>	<b>2019</b>
<b>Revenue Activity</b>		
Sources of cash collections		
Civil penalties	\$ 831,658	\$ 2,046,477
Administrative fines	136,799	362,800
Miscellaneous receipts	22,404	361,361
<b>Total cash collections</b>	<b>990,861</b>	<b>2,770,638</b>
Accrual adjustments	(230,350)	136,024
<b>Total custodial revenue (Note 12)</b>	<b>\$ 760,511</b>	<b>\$ 2,906,662</b>
 <b>Disposition of Collections</b>		
Transferred to Treasury	990,861	2,770,638
Amount yet to be transferred	(230,350)	136,024
<b>Total disposition of collections</b>	<b>\$ 760,511</b>	<b>\$ 2,906,662</b>
<b>Net custodial activity</b>	<b>\$ -</b>	<b>\$ -</b>

The accompanying notes are an integral part of these statements.

## Notes to the Financial Statements

### Note 1 – Summary of Significant Accounting Policies

#### Reporting Entity

The Federal Election Commission (FEC or Commission) was created in 1975 as an independent regulatory agency with exclusive responsibility for administering, enforcing, defending and interpreting the *Federal Election Campaign Act of 1971* (FECA), 2 U.S.C. 431 et seq., as amended (“the Act”). The Commission is also responsible for administering the public funding programs (26 U.S.C. §§ 9001- 9039) for Presidential campaigns, which include certification and audits of all participating candidates and committees, and enforcement of public funding legislation.

The financial activity presented relates to the execution of the FEC’s Congressionally approved budget. Consistent with Federal Accounting Standards Advisory Board’s (FASAB) *Statement of Federal Financial Accounting Concept No. 2, “Entity and Display,”* the Presidential Election Campaign Fund is not a reporting entity of the FEC. Financial activity of the fund is budgeted, apportioned, recorded, reported and paid by the U.S. Department of Treasury (Treasury). The accounts of the Presidential Election Campaign Fund are therefore not included in the FEC’s financial statements.

#### Basis of Accounting and Presentation

As required by the *Accountability of Tax Dollars Act of 2002*, the accompanying financial statements present the financial position, net cost of operations, changes in net position, budgetary resources and custodial activity of the FEC. While these financial statements have been prepared from the books and records of the FEC in accordance with U.S. generally accepted accounting principles (GAAP) for the Federal Government and in accordance with the form and content for entity financial statements specified by the Office of Management and Budget (OMB) in Circular A-136, as revised, *Financial Reporting Requirements*, as well as the accounting policies of the FEC, the statements may differ from other financial reports submitted pursuant to OMB directives for the purpose of monitoring and controlling the use of the FEC’s budgetary resources.

These financial statements reflect both accrual and budgetary accounting transactions. Under the accrual method of accounting, revenues are recognized when earned and expenses are recognized when a liability is incurred, without regard to receipt or payment of cash. Budgetary accounting is designed to recognize the obligation of funds according to legal requirements. Budgetary accounting is essential for compliance with legal constraints and controls over the use of federal funds.

Throughout these financial statements, assets, liabilities, revenues and costs have been classified according to the type of entity with which the transactions are associated. Intragovernmental assets and liabilities are those resulting from transactions with other federal entities. Intragovernmental earned revenues are collections or accruals of revenue from other federal entities and intragovernmental costs are payments or accruals to other federal entities. These statements should be read with the understanding that they are for a component of the Federal Government, a sovereign entity.

## **Assets**

Assets that an entity is authorized to use in its operations are termed entity assets, whereas assets that are held by an entity and are not available for the entity's use are termed non-entity assets. Most of the FEC's assets are entity assets and are available for use in carrying out the mission of the FEC as appropriated by Congress. The FEC also has non-entity assets which primarily consist of receivables from fines and penalties. These custodial collections are not available to the FEC to use in its operations and must be transferred to Treasury.

## **Fund Balance with Treasury**

The FEC does not maintain cash in commercial bank accounts. Treasury processes cash receipts and disbursements. Fund Balance with Treasury consists of appropriated funds and custodial collections. With the exception of the custodial collections, these funds are available to pay current liabilities and finance authorized purchase commitments. Custodial collections, which are not available to finance FEC activities, are classified as non-entity assets.

## **Accounts Receivable**

The FEC's Accounts Receivable mainly represents amounts due from the public for fines and penalties assessed by the FEC and referred to Treasury for collection. The FEC establishes an allowance for the estimated loss on accounts receivable from the public that are deemed uncollectible accounts. This allowance is included in Accounts Receivable, net on the balance sheet. The allowance is a percentage of the overall receivable balance, based on the collection rate of past balances.

## **General Property and Equipment**

General Property and Equipment (P&E) is reported at acquisition cost, and consists of items that are used by the FEC to support its mission. Depreciation or amortization on these assets is calculated using the straight-line method with zero salvage value. Depreciation or amortization of an asset begins the day it is placed in service. Maintenance, repairs and minor renovations are expensed as incurred. Expenditures that materially increase the value, capacity or useful life of existing assets are capitalized. Refer to Note 5 *General Property and Equipment, Net* for additional details.

## **Liabilities**

Liabilities represent amounts that are likely to be paid by the FEC as the result of transactions or events that have already occurred; however, no liabilities are paid by the FEC without an appropriation. Intragovernmental liabilities arise from transactions with other federal entities. Liabilities classified as not covered by budgetary resources are liabilities for which appropriations have not been enacted (e.g., annual leave benefits and actuarial liability under the *Federal Employees Compensation Act*), or those resulting from the agency's custodial activities. The FEC has an intragovernmental liability to Treasury for fines, penalties and miscellaneous receipts which are due from the public but have not yet transferred. These funds may not be used to fund FEC operations.

## **Accounts Payable**

Accounts Payable consists of liabilities to other entities or persons for amounts owed for goods and services received that have not yet been paid at the end of the fiscal year. Accounts Payable also consists of disbursements in-transit, which are payables that have been recorded by the FEC and are

pending payment by Treasury. In addition to accounts payables recorded through normal business activities, unbilled payables are estimated based on historical data.

### **Accrued Payroll and Employer Contribution**

Accrued payroll and benefits represent salaries, wages and benefits earned by employees, but not yet disbursed as of the statement date. Accrued payroll and Thrift Savings Plan contributions are not classified as intragovernmental. Employer contributions and payroll taxes payable are classified as intragovernmental.

### **Annual, Sick and Other Leave**

Annual leave is recorded as a liability when it is earned by FEC employees; the liability is reduced as leave is taken. On a quarterly basis, the balance in the accrued leave account is adjusted to reflect the current leave balances and pay rates. Accrued annual leave is paid from future funding sources and is reflected as a liability not covered by budgetary resources. Sick leave and other types of non-vested leave are expensed as taken.

### **Federal Employee Benefits**

A liability is recorded for estimated and actual future payments to be made for workers' compensation pursuant to the *Federal Employees Compensation Act*. The liability consists of the net present value of estimated future payments calculated by the Department of Labor (DOL) and the actual unreimbursed cost paid by DOL for compensation paid to recipients under the *Federal Employee's Compensation Act*. The future workers' compensation estimate is generated by DOL through an application of actuarial procedures developed to estimate the liability for the *Federal Employee's Compensation Act*, which includes the expected liability for death, disability, medical and miscellaneous costs for approved compensation cases. The liability is calculated using historical benefit payment patterns related to a specific incurred period to estimate the total payments related to that period. These projected annual benefits payments are discounted to present value.

### **Employee Retirement Plans**

Each fiscal year, the Office of Personnel Management (OPM) estimates the Federal Government service cost for all covered employees. This estimate represents an annuity dollar amount which, if accumulated and invested each year of an employee's career, would provide sufficient funding to pay for that employee's future benefits. As the Federal Government's estimated service cost exceeds the amount of contributions made by employer agencies and covered employees, this plan is not fully funded by the FEC and its employees. As of September 30, 2020, the FEC recognized approximately \$ 2,259,200 as an imputed cost and related financing source, for the difference between the estimated service cost and the contributions made by the FEC and its employees. This represents a 22% decrease when compared to the \$ 2,887,900 of imputed cost and related financing source recognized in Fiscal Year 2019.

FEC employees participate in either the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS), which became effective on January 1, 1987. For employees participating in CSRS, the FEC withheld 7% of base pay earnings and provided a matching contribution equal to the sum of the withholding. For employees covered by FERS, the FEC withheld .8% of base pay earnings and provided the agency contribution. The majority of FEC employees hired after December 31, 1983, are automatically covered by FERS.

Effective January 1, 2013, the *Middle Class Tax Relief and Job Creation Act of 2012* created a new FERS retirement category, Revised Annuity Employees (RAE) for new federal employees hired in calendar year (CY) 2013 or thereafter. In FY 2020, the FERS-RAE employee contribution rate was 3.1%.

Effective January 1, 2014, the *Bipartisan Budget Act of 2013* introduced a new FERS retirement category, Further Revised Annuity Employees (FRAE) for new federal employees hired in CY 2014 and thereafter. In FY 2020, the FERS-FRAE employee contribution rate was 4.4%.

FERS contributions made by employer agencies and covered employees are comparable to the Federal Government's estimated service costs. For FERS covered employees, the FEC made contributions of 15.8% of basic pay for FY 2020. For both FERS-RAE and FERS-FRAE covered employees, the FEC made contributions of 9.4% and 14.2% respectively of basic pay for FY 2020.

Employees participating in FERS are covered under the *Federal Insurance Contribution Act (FICA)*, for which the FEC contributed 6.2% to the Social Security Administration in FY 2020. Effective in FY 2012 FERS and CSRS – Offset employees were granted a 2% decrease in Social Security for tax year (CY) 2012 under the *Temporary Payroll Tax Cut Continuation Act of 2011*; and *H.R. 3630, the Middle Class Tax Relief and Job Creation Act of 2012*. During FY 2013, employees contributed 4.2% to Social Security through December 31, 2012. Effective January 1, 2013 the employee contribution rate is 6.2%.

### **Thrift Savings Plan**

The Thrift Savings Plan (TSP) is a retirement savings and investment plan for employees covered by either CSRS or FERS. The TSP is administered by the Federal Retirement Thrift Investment Board on behalf of federal agencies. For employees belonging to FERS, the FEC automatically contributes 1% of base pay to their account and matches contributions up to an additional 4%. For employees belonging to CSRS, there is no governmental matching contribution.

The FEC does not report on its financial statements CSRS and FERS assets, accumulated plan benefits or unfunded liabilities, if any, which may be applicable to FEC employees. Reporting such amounts is the responsibility of the Office of Personnel Management. The portion of the current and estimated future outlays for CSRS and FERS not paid by the FEC is in accordance with *Statement of Federal Financial Accounting Standards (SFFAS) No. 5, Accounting for Liabilities of the Federal Government*, and is included in the FEC's financial statements as an imputed financing source.

### **Commitments and Contingencies**

A contingency is an existing condition, situation or set of circumstances involving uncertainty as to possible gain or loss. The uncertainty will ultimately be resolved when one or more future events occur or fail to occur. SFFAS No. 5, as amended by SFFAS No. 12, *Recognition of Contingent Liabilities Arising from Litigation*, contains the criteria for recognition and disclosure of contingent liabilities. A contingency is recognized in the financial statements when a past event or exchange transaction has occurred, a future outflow or other sacrifice of resources is probable and the future outflow or sacrifice of resources is measurable. A contingency is disclosed in the footnotes when any of the conditions for liability recognition are not met and the chance of the future confirming event or events occurring is more than remote but less than probable. In other words, contingent losses that are assessed as probable and measurable are accrued in the financial statements. Losses that are assessed to be at least reasonably possible are disclosed in the notes.



According to OMB Circular A-136, as revised, in addition to the contingent liabilities required by SFFAS No. 5, the following commitments should be disclosed: 1) an estimate of obligations related to cancelled appropriations for which the reporting entity has a contractual commitment for payment; and 2) amounts for contractual arrangements which may require future financial obligations. The FEC does not have commitments related to cancelled appropriations or amounts for contractual arrangements that would require future financial obligations.

## **Revenues and Other Financing Sources**

### **Annual Appropriation**

As a component of the Government-wide reporting entity, the FEC is subject to the Federal budget process, which involves appropriations that are provided annually and appropriations that are provided on a permanent basis. The financial transactions that are supported by budgetary resources, which include appropriations, are generally the same transactions reflected in agency and the Government-wide financial reports.

The FEC received all of its funding through an annual appropriation as provided by Congress. Additionally, the FEC received funding through reimbursement for services provided to other Federal agencies. Services performed for other Federal agencies under reimbursable agreements are financed through the account providing the service and reimbursements are recognized as revenue when earned.

The FEC's budgetary resources reflect past congressional action and enable the entity to incur budgetary obligations, but they do not reflect assets to the Government as a whole. Budgetary obligations are legal obligations for goods, services, or amounts to be paid based on statutory provisions (e.g., Social Security benefits). After budgetary obligations are incurred, Treasury will make disbursements to liquidate the budgetary obligations and finance those disbursements in the same way it finances all disbursements, using some combination of receipts, other inflows, and borrowing from the public (if there is a budget deficit).

### **Imputed Financing Sources**

In accordance with OMB Circular A-136, as revised, all expenses should be reported by agencies whether or not these expenses would be paid by the agency that incurs the expense. The amounts for certain expenses of the FEC, which will be paid by other federal agencies, are recorded in the Statement of Net Cost (SNC). A corresponding amount is recognized in the "Statement of Changes in Net Position" as an "Imputed Financing Source." These imputed financing sources primarily represent unfunded pension costs of FEC employees, as described above.

### **Statement of Net Cost**

Net cost of operations is the total of the FEC's expenditures. The presentation of the statement is based on the FEC's strategic plan, which presents one program that is based on the FEC's mission and strategic goal. The program that reflects this strategic goal is to administer and enforce the *Federal Election Campaign Act* efficiently and effectively.

### **Net Position**

Net position is the residual difference between asset and liabilities and consists of unexpended appropriations and cumulative results of operations. Unexpended appropriations include the portion of the FEC's appropriations represented by undelivered orders and unobligated balances.

Unobligated balances associated with appropriations that expire at the end of the fiscal year remain available for obligation adjustments, but not for new obligations, until that account is cancelled, five years after the appropriations expire. Cumulative results of operations represent the excess of financing sources over expenses since inception.

### **Statement of Custodial Activity**

The Statement of Custodial Activity summarizes collections transferred or transferable to Treasury for miscellaneous receipts, fines and penalties assessed by the FEC. These amounts are not available for FEC operations, and accordingly, are reported as custodial revenue.

### **Use of Estimates**

The preparation of the accompanying financial statements in accordance with GAAP requires management to make certain estimates and assumptions that directly affect the reported amounts of assets, liabilities, revenues and expenses. Actual results could differ from these estimates.

### **Classified Activities**

Accounting standards require all reporting entities to disclose that accounting standards allow certain presentations and disclosures to be modified, if needed, to prevent the disclosure of classified information. The FEC has no classified activities.

## Note 2 Non-Entity Assets

Non–entity assets, which primarily represent amounts due to the FEC for fines and penalties on those that violated the requirements of the *Federal Election Campaign Act*, consisted of the following as of September 30, 2020 and September 30, 2019:

	2020	2019
<b>With the Public</b>		
Accounts Receivable - Custodial	352,810	583,160
<b>Total non-entity assets</b>	352,810	583,160
<b>Total entity assets</b>	36,213,528	41,817,732
<b>Total Assets</b>	36,566,338	42,400,892

### Note 3 Fund Balance with Treasury

Fund Balance with Treasury consisted of the following as of September 30, 2020 and September 30, 2019:

	2020	2019
<b>Fund Balances</b>		
Appropriated Funds	\$ 23,431,710	\$ 26,164,174
<b>Total</b>	<u>\$ 23,431,710</u>	<u>\$ 26,164,174</u>

	2020	2019
<b>Status of Fund Balance with Treasury</b>		
Unobligated Balance		
Available	\$ 374,272	\$ 2,851,236
Unavailable	6,679,303	3,467,846
Obligated Balance not yet Disbursed	<u>16,378,135</u>	<u>19,845,092</u>
<b>Total</b>	<u>\$ 23,431,710</u>	<u>\$ 26,164,174</u>

Available unobligated balances represent amounts that are apportioned for obligation in the current fiscal year. Unavailable unobligated balances represent amounts that are not apportioned for obligation during the current fiscal year and expired appropriations that are no longer available to incur new obligations. Obligated balances not yet disbursed include amounts designated for payment of goods and services ordered but not received, or goods and services received but for which payment has not yet been made.

## Note 4 - Accounts Receivables, Net

All accounts receivable are with the public and consisted of the following as of September 30, 2020 and September 30, 2019:

	2020		
	Gross Accounts Receivable	Allowance	Net Accounts Receivable
<b>Intragovernmental</b>			
Intragovernmental	\$ -	\$ -	\$ -
<b>Total Intragovernmental</b>	\$ -	\$ -	\$ -
<b>With the Public</b>			
Fines and Penalties	\$ 528,125	\$ 175,315	\$ 352,810
<b>Total Non-Entity</b>	\$ 528,125	\$ 175,315	\$ 352,810
<b>Total</b>	<u>\$ 528,125</u>	<u>\$ 175,315</u>	<u>\$ 352,810</u>
	2019		
	Gross Accounts Receivable	Allowance	Net Accounts Receivable
<b>Intragovernmental</b>			
Intragovernmental	\$ -	\$ -	\$ -
<b>Total Intragovernmental</b>	\$ -	\$ -	\$ -
<b>With the Public</b>			
Fines and Penalties	\$ 714,855	\$ 131,695	\$ 583,160
<b>Total Non-Entity</b>	\$ 714,855	\$ 131,695	\$ 583,160
<b>Total</b>	<u>\$ 714,855</u>	<u>\$ 131,695</u>	<u>\$ 583,160</u>

Non-Entity receivables consist of civil penalties and administrative fines assessed by the FEC through its enforcement processes or conciliation agreements reached with parties. The FEC has three offices that administer the penalties: the Office of General Counsel (OGC); the Office of Administrative Review (OAR); and the Office of Alternative Dispute Resolution (ADR). Each office has a distinct role in the enforcement and collection process. The allowance is based on the historical rate of collection and an overall assessment of the debtor's willingness and ability to pay. Delinquent debts are referred to Treasury in accordance with the *Debt Collection Improvement Act of 1996*. The terms of the agreement between the FEC and the parties establish the conditions for collection.

## **Note 5 General Property and Equipment, Net**

General Property and Equipment (P&E) is reported at acquisition cost. The capitalization threshold is established at \$25,000 and a useful life of two or more years. For bulk purchases, items are capitalized when the individual useful lives are at least two years and have an aggregate value of \$250,000 or more. Acquisitions of P&E that do not meet the capitalization criteria are recorded as operating expenses.

General P&E consists of items that are used by the FEC to support its mission. Depreciation or amortization on these assets is calculated using the straight-line method with no salvage value. Depreciation or amortization begins the day the asset is placed in service. Maintenance, repairs and minor renovations are expensed as incurred. Expenditures that materially increase values, change capacities or extend useful lives are capitalized.

Effective FY 2017, the estimated useful life of assets such as office furniture and motor vehicles is five years. The estimated useful life of assets such as office equipment, IT equipment, IT software, telecommunications equipment, and audio/visual equipment is three years.

The office building in which the FEC operates is leased through the General Services Administration (GSA) under an occupancy agreement, which manages the lease agreement between the Federal Government and the commercial leasing entity. The FEC is billed by GSA for the leased space based upon estimated lease payments made by GSA plus an administrative fee. The cost of the office building is not capitalized. The costs of any leasehold improvements, which are managed through GSA, are financed with FEC appropriated funds. Construction costs of \$25,000 or more are accumulated as construction in progress until completion and then are transferred and capitalized as a leasehold improvement. Leasehold improvements are amortized over the lesser of five years or the remaining life of the lease term.

The internal use software development and acquisition costs capitalization threshold changed as a result of a new policy that was implemented in FY 2011. Internal use software development and acquisition costs of \$250,000 are capitalized as software in development until the development stage is completed and the software is tested and accepted. At acceptance, costs of software in development are reclassified as internal use software costs and amortized using the straight-line method over an estimated useful life of three years. Purchased commercial software that does not meet the capitalization criteria is expensed. In addition, enhancements which do not add significant new capability or functionality are also expensed.

The general components of capitalized property and equipment, net of accumulated depreciation or amortization, consisted of the following as of September 30, 2020 and September 30, 2019, respectively:

**2020**

<b>Asset Class</b>	<b>Service Life (years)</b>	<b>Acquisition Value</b>	<b>Accumulated Depreciation/Am ortization</b>	<b>Net Book Value</b>
Software	3	\$ 19,935,722	\$ 17,683,340	\$ 2,252,382
Computers and peripherals	3	\$ 3,328,407	\$ 2,449,332	\$ 879,075
Furniture	5	\$ -	\$ -	\$ -
Leasehold Improvements	5	\$ 10,125,947	\$ 4,950,903	\$ 5,175,044
Software-in-Development	n/a	\$ 4,475,317	\$ -	\$ 4,475,317
<b>Total</b>		<u>\$ 37,865,393</u>	<u>\$ 25,083,575</u>	<u>\$ 12,781,818</u>

**2019**

<b>Asset Class</b>	<b>Service Life (years)</b>	<b>Acquisition Value</b>	<b>Accumulated Depreciation/Am ortization</b>	<b>Net Book Value</b>
Software	3	\$ 18,703,643	\$ 14,228,331	\$ 4,475,312
Computers and peripherals	3	\$ 3,067,116	\$ 3,067,116	\$ -
Furniture	5	\$ 852,754	\$ 852,754	\$ -
Leasehold Improvements	5	\$ 9,964,256	\$ 2,697,201	\$ 7,267,055
Software-in-Development	n/a	\$ 3,911,191	\$ -	\$ 3,911,191
<b>Total</b>		<u>\$ 36,498,960</u>	<u>\$ 20,845,402</u>	<u>\$ 15,653,558</u>



## Note 6 Liabilities Not Covered by Budgetary Resources

Liabilities Not Covered by Budgetary Resources consisted of the following as of September 30, 2020 and September 30, 2019:

	2020	2019
<b>Intragovernmental:</b>		
Custodial Fines and Civil Penalties	\$ 352,810	\$ 583,160
Deferred Rent	7,254,175	7,850,409
Unfunded FECA Liability	-	61
<b>Total Intragovernmental</b>	<b>7,606,985</b>	<b>8,433,630</b>
<b>With The Public:</b>		
Unfunded Annual Leave	3,546,642	3,112,591
Liabilities for Advances and Prepayments	70,155	56,158
Actuarial FECA Liability	232	7,792
<b>Total Liabilities Not Covered by Budgetary Resources</b>	<b>\$ 11,153,859</b>	<b>\$ 11,554,013</b>
<b>Total Liabilities Covered by Budgetary Resources</b>	<b>\$ 4,815,148</b>	<b>\$ 3,628,796</b>
<b>Total Liabilities Not Requiring Budgetary Resources</b>	<b>\$ 70,155</b>	<b>\$ 56,158</b>
<b>Total Liabilities</b>	<b>\$ 16,039,162</b>	<b>\$ 15,238,967</b>

Liabilities not covered by budgetary resources require future congressional action whereas liabilities covered by budgetary resources reflect prior congressional action. Regardless of when the congressional action occurs, when the liabilities are liquidated, Treasury will finance the liquidation in the same way that it finances all other disbursements, using some combination of receipts, other inflows, and borrowing from the public (if there is a budget deficit). Liabilities that do not require the use of budgetary resources are covered by monetary assets that are not budgetary resources to the entity.

Beginning FY 2018, the FEC entered into a new lease agreement for its office building that provided a rent abatement of \$8,943,504, which covers the equivalent of 22 months of rent. Consistent with generally accepted accounting principles, the FEC has recorded rent abatement as deferred rent, which is amortized over the life of the ten-year lease.

The FEC accrued a liability related to the *Federal Employees' Compensation Act* as of September 30, 2020 and September 30, 2019.

Liabilities for Advances and Prepayments consist of unearned revenue from registration fees collected for the Regional Campaign Finance Conferences. As part of its program to encourage voluntary compliance with the Federal Election Campaign Act, the Federal Election Commission hosts educational conferences throughout the country. The FEC has received additional reimbursable authority for FY 2020 for conferences.

## Note 7 Other Liabilities

As of September 30, 2020 and September 30, 2019, respectively, components of amounts reported on the Balance Sheet as Other Intragovernmental Liabilities and Other Liabilities along with a categorization of current versus long-term are as follows:

	2020 Non-Current	2020 Current	2020 Total
<b>Other Intragovernmental Liabilities:</b>			
Employer Contributions and Payroll Taxes Payable	\$ -	\$ 555,293	555,293
Other Post Employment Benefits Due and Payable	-	3,500	3,500
Unfunded FECA Liability	-	-	-
Custodial Liability	159,207	193,604	352,811
Deferred Rent	6,657,942	596,233	7,254,175
<b>Total Other Intragovernmental Liabilities:</b>	<b>\$ 6,817,149</b>	<b>\$ 1,348,630</b>	<b>\$ 8,165,779</b>
<b>Other Non-Federal Liabilities</b>			
Accrued Funded Payroll and Leave	-	1,884,885	1,884,885
Employer Contributions and Payroll Taxes Payable	-	84,731	84,731
Unfunded Leave	-	3,546,642	3,546,642
Liability for Advances and Prepayments	-	70,155	70,155
<b>Total Other Non-Federal Liabilities</b>	<b>\$ -</b>	<b>\$ 5,586,413</b>	<b>\$ 5,586,413</b>
<b>Total Other Liabilities</b>	<b>\$ 6,817,149</b>	<b>\$ 6,935,043</b>	<b>\$ 13,752,192</b>

	2019 Non-Current	2019 Current	2019 Total
<b>Other Intragovernmental Liabilities:</b>			
Employer Contributions and Payroll Taxes Payable	\$ -	\$ 413,442	\$ 413,442
Other Post Employment Benefits Due and Payable	-	3,500	3,500
Unfunded FECA Liability	-	61	61
Custodial Liability	27,030	556,130	583,160
Deferred Rent	7,254,175	596,234	7,850,409
<b>Total Other Intragovernmental Liabilities:</b>	<b>\$ 7,281,205</b>	<b>\$ 1,569,367</b>	<b>\$ 8,850,572</b>
<b>Other Non-Federal Liabilities</b>			
Accrued Funded Payroll and Leave	-	1,505,528	1,505,528
Employer Contributions and Payroll Taxes Payable	-	65,896	65,896
Unfunded Leave	-	3,112,591	3,112,591
Liability for Advances and Prepayments	-	56,158	56,158
<b>Total Other Non-Federal Liabilities</b>	<b>\$ -</b>	<b>\$ 4,740,173</b>	<b>\$ 4,740,173</b>
<b>Total Other Liabilities</b>	<b>\$ 7,281,205</b>	<b>\$ 6,309,540</b>	<b>\$ 13,590,745</b>

## Note 8 Commitments and Contingencies

As of September 30, 2020, in the opinion of FEC management and legal counsel, the FEC was not party to any legal action which results in a probable, measurable future outflow of resources that requires recognition in the financial statements. However, the FEC was party to legal action which could result in losses that are at least reasonably possibly. Furthermore, there are cases where amounts have not been accrued or disclosed because the amounts of the potential loss cannot be estimated or the likelihood of an unfavorable outcome is considered remote.

For comparative purposes, the following table includes the status of Commitments and Contingencies as of September 30, 2019.

**Contingent Loss Table**

	<b>Accrued Liabilities</b>	<b>Estimated Range of Loss</b>	
		<b>Lower End</b>	<b>Upper End</b>
<b>As of September 30, 2020 Legal Contingencies:</b>			
Probable	\$ -	\$ 500	\$ 500
Reasonably Possible	\$ -	\$ 34,483	\$ 34,483
<b>As of September 30, 2019 Legal Contingencies:</b>			
Probable	\$ -	\$ -	\$ -
Reasonably Possible	\$ -	\$ 255,401	\$ 255,401

## Note 9 Leases

The FEC did not have any capital leases as of September 30, 2020 or September 30, 2019. The FEC has a non-cancellable operating lease for its office space through November 30, 2032.

As contained in the FEC's Occupancy Agreement with the General Services Administration (GSA), as amended July 30, 2019, future payments under the operating lease are as follows:

### Future Payments Due for Non-Cancelable Operating Lease - Building

2020	
Fiscal Year	Lease Payment
2021	5,161,065
2022	5,215,071
2023	5,270,698
2024	5,327,993
2025	5,387,007
2026	5,447,791
2027	5,510,399
2028	5,708,203
2029	5,801,287
2030	5,869,701
2031	5,940,166
2032	6,012,746
2033	933,755
<b>Total</b>	<b>\$ 67,585,882</b>

As per the terms of the lease agreement, the FEC was granted a total of \$8,943,503.52, or 22 months, in free rent from the lessor. Per the FEC's policy, the total free rent will be amortized as deferred rent over the life of the lease.

The table above represents the actual cash outlays for rent payments, as contained in the FEC's Occupancy Agreement with GSA, and does not include the amortized Deferred Rent referenced above.

## Note 10 Inter-Entity Costs

The FEC recognizes certain inter-entity costs for goods and services that are received from other Federal entities at no cost or at a cost less than the full cost. Consistent with accounting standards, certain costs of the providing entity that are not fully reimbursed are recognized as imputed cost [in the Statement of Net Cost], and are offset by imputed revenue [in the Statement of Changes in Net Position]. Such imputed costs and revenues relate to employee benefits and claims to be settled by the Treasury Judgement Fund. The FEC recognizes as inter-entity costs the amount of accrued pension and post-retirement benefit expenses. However, unreimbursed costs of goods and services other than those identified above are not included in our financial statements for current employees. The assets and liabilities associated with such benefits are the responsibility of the administering agency, OPM. For the periods ended September 30, 2020 and 2019, respectively, inter-entity costs were as follows:

	<b>2020</b>	<b>2019</b>
Office of Personnel Management	\$ 2,259,208	\$ 2,887,867
Total Imputed Financing Sources	\$ 2,259,208	\$ 2,887,867

## Note 11 Explanation of Differences between the Statement of Budgetary Resources and the Budget of the U.S. Government

The Statement of Budgetary Resources (SBR) compares budgetary resources with the status of those resources. For the year ended September 30, 2020, budgetary resources were \$79,061,462 and net outlays were \$73,753,039. For the year ended September 30, 2019, budgetary resources were \$75,551,616 and net outlays were \$64,987,148.

### Apportionment Categories of Obligations Incurred

The FEC receives apportionments of its resources from OMB. Apportionments are for resources that can be obligated without restriction, other than to be in compliance with legislation for which the resources were made available.

For the years ended September 30, 2020 and September 30, 2019, direct obligations incurred amounted to \$71,882,696 and \$69,100,270, respectively. For the years ended September 30, 2020 and September 30, 2019, reimbursable obligations incurred amounted to \$125,191 and \$132,264, respectively.

### Comparison to the Budget of the United States Government

SFFAS No. 7, *Accounting for Revenue and Other Financing Sources and Concepts for Reconciling Budgetary and Financial Accounting*, requires an explanation of material differences between budgetary resources available, the status of those resources and outlays as presented in the Statement of Budgetary Resources to the related actual balances published in the *Budget of the United States Government* (Budget). The Budget that will include FY 2020 actual budgetary execution information is scheduled for publication in February 2021, which will be available through OMB's website at <http://www.whitehouse.gov/omb/budget>. Accordingly, information required for such disclosure is not available at the time of publication of these financial statements.

Balances reported in the FY 2019 SBR and the related President's Budget reflected the following:

FY 2019	Budgetary Resources	New Obligations & Upward Adjustments	Distributed Offsetting Receipts	Net Outlays
Statement of Budgetary Resources	\$75,551,616	\$ 69,100,270	\$ -	\$ 64,987,148
<i>Budget of the U.S. Government</i>	71,000,000	68,000,000	-	65,000,000
<b>Difference</b>	<u>\$ 4,551,616</u>	<u>\$ 1,100,270</u>	<u>\$ -</u>	<u>\$ (12,852)</u>

The difference between the Statement of Budgetary Resources and the *Budget of the United States Government* for budgetary resources is primarily due to expired unobligated balances. The differences for obligations incurred and net outlays are due to rounding.

## Note 12 Custodial Revenues and Liability

The FEC uses the accrual basis of accounting for the collections of fines, penalties and miscellaneous receipts. The FEC's ability to collect fines and penalties is based on the responsible parties' willingness and ability to pay:

<b>Custodial Revenue</b>	<b>2020</b>	<b>2019</b>
Fines, Penalties, and Other Miscellaneous Revenue	\$760,511	\$ 2,906,662
<b>Custodial Liability</b>		
Receivable for Fines and Penalties	\$ 528,126	\$ 714,855
Less: Allowance for Doubtful Accounts	\$ (175,315)	\$ (131,695)
<b>Total Custodial Liability</b>	<b>\$ 352,810</b>	<b>\$ 583,160</b>

The Custodial Liability account represents the amount of custodial revenue pending transfer to Treasury. Accrual adjustments reflected on the Statement of Custodial Activity represent the difference between the FEC's opening and closing accounts receivable balances. Accounts receivable are the funds owed to the FEC (as a custodian) and ultimately to Treasury. The accrual adjustment for civil penalties is composed of a net decrease of approximately \$306,000 for FY 2020 and a net increase of approximately \$119,000 for FY 2019, respectively. The accrual adjustment for administrative fines is composed of a net increase of approximately \$316,000 in FY 2020 and a net decrease of approximately \$74,000 in FY 2019, respectively.



**Note 13 Undelivered Orders at the End of the Period**

For Fiscal Year 2020, Unpaid Undelivered orders were \$12,420,553, of which \$2,388,787 were Federal and \$ 10,031,766 were non-Federal. As of September 30, 2020, there were no Fiscal Year 2020 Paid Delivered Orders.

For Fiscal Year 2019, Unpaid Undelivered Orders were \$16,582,115, of which \$3,331,937 were Federal and \$13,250,178 were non-Federal. As of September 30, 2019, there were no Fiscal Year 2019 Paid Delivered Orders.

## Note 14 - Reconciliation of Net Operating Cost to Net Budgetary Outlays

Budgetary and financial accounting information differ. Budgetary accounting is used for planning and control purposes and relates to both the receipt and use of cash, as well as reporting the federal deficit. Financial accounting is intended to provide a picture of the government's financial operations and financial position so it presents information on an accrual basis. The accrual basis includes information about costs arising from the consumption of assets and the incurrence of liabilities. The reconciliation of net outlays, presented on a budgetary basis, and the net cost, presented on an accrual basis, provides an explanation of the relationship between budgetary and financial accounting information. The reconciliation serves not only to identify costs paid for in the past and those that will be paid in the future, but also to assure integrity between budgetary and financial accounting. The analysis below illustrates this reconciliation by listing the key differences between net cost and net outlays.

### Reconciliation of Net Operating Cost and Net Budgetary Outlays

	<u>Intragovernmental</u>	<u>With the Public</u>	<u>Total FY 2020</u>
<b>Net Operating Cost (SNC)</b>	<b>\$ 79,867,804</b>	<b>\$ -</b>	<b>\$ 79,867,804</b>
<b>Components of Net Operating Cost Not Part of the Budgetary Outlays</b>			
Property, plant, and equipment depreciation	-	(5,743,370)	(5,743,370)
<b>(Increase)/Decrease in Liabilities not affecting Budget Outlays:</b>			
Accounts payable	(972,867)	312,561	(660,306)
Salaries and benefits	(141,851)	(398,192)	(540,043)
Other liabilities (Unfunded leave, unfunded FECA, actuarial FECA)	596,294	(426,491)	169,803
<b>Other financing sources</b>			
Federal employee retirement benefit costs	(2,259,208)	-	(2,259,208)
<b>Total Components of Net Operating Cost Not Part of the Budget Outlays</b>	<b>(2,777,631)</b>	<b>(6,255,491)</b>	<b>(9,033,123)</b>
<b>Components of the Budget Outlays That Are Not Part of Net Operating Cost</b>			
Acquisition of capital assets	352,760	2,565,598	2,918,358
<b>Total Components of the Budgetary Outlays That Are Not Part of Net Operating Cost</b>	<b>352,760</b>	<b>2,565,598</b>	<b>2,918,358</b>
<b>Other Temporary Timing Differences</b>	<b>-</b>	<b>-</b>	<b>-</b>
<b>Net Outlays</b>	<b>\$ 77,442,933</b>	<b>\$ (3,689,894)</b>	<b>\$ 73,753,039</b>
<b>Related Amounts on the Statement of Budgetary Resources</b>			
Outlays, net (SBR)			73,753,039
<b>Agency Outlays, Net (SBR)</b>			<b>\$ 73,753,039</b>

### **SECTION III – Other Information**

---

## Inspector General's Statement on FEC Management and Performance Challenges




Federal Election Commission  
Office of the Inspector General

### MEMORANDUM

---

TO: The Commission

FROM: Christopher Skinner 

SUBJECT: Inspector General (IG) Statement Summarizing the Management and Performance Challenges Facing the Federal Election Commission (FEC) for FY 2021

DATE: November 13, 2020

In accordance with the Reports Consolidation Act of 2000, the Federal Election Commission (*i.e.*, the "FEC" or "Commission") Office of Inspector General (OIG) identifies the most serious management and performance challenges facing the Commission and provides a brief assessment of the Commission's progress in addressing those challenges.<sup>1</sup> By statute this report is required to be included in the FEC's Agency Financial Report.

The Government Performance and Results Modernization Act of 2010 identifies major management challenges as programs or management functions that are vulnerable to waste, fraud, abuse and mismanagement and where a failure to perform well could seriously affect the ability of the FEC to achieve its mission objectives. Each challenge area is related to the FEC's mission and reflects continuing vulnerabilities and emerging issues. The FEC OIG identified the top management and performance challenges facing the Commission as the following:

1. Growth of campaign spending
2. Lack of quorum
3. Coronavirus (COVID-19) pandemic
4. Lack of full-time support to Chief Information Officer (CIO) and General Counsel Positions
5. Cybersecurity

---

<sup>1</sup> The Reports Consolidation Act of 2000 permits agency comment on the IG's statements. Accordingly, we provided senior management a draft of our statement for comment on October 23, 2020.



We hope that continued attention to the management challenges identified in this report will improve the Commission's ability to execute its mission objectives. The FEC OIG encourages the Commission to continue to focus on addressing the management challenges discussed herein. We hope that this report, accompanied by the oversight work we perform throughout the year, assists the Commission in its efforts to improve the effectiveness and efficiency of its programs and operations.

We appreciate the Commission's cooperation throughout the year in addressing the management challenges process. Please contact me if you have any concerns regarding the identified challenges.

cc: Alec Palmer, Staff Director and Chief Information Officer  
John Quinlan, Chief Financial Officer  
Lisa Stevenson, Acting General Counsel



FEC OIG 2021-11-006



**Federal Election Commission**  
Office of the Inspector General

# **Management and Performance Challenges Facing the FEC for Fiscal Year 2021**

**November 13, 2020**

## *Table of Contents*

Introduction and Approach.....	1
Management and Performance Challenge: Growth of Campaign Spending.....	2
Management and Performance Challenge: Lack of Quorum.....	4
Management and Performance Challenge: COVID-19 Pandemic.....	5
Management and Performance Challenge: Lack of Full-Time Chief Information Officer (CIO) and General Counsel Positions.....	6
Management and Performance Challenge: Cybersecurity.....	7
FY 2020 Management Challenges not Included in FY 2021 Report.....	8
Appendix: Hotline Poster.....	10

## Introduction and Approach

### Why do we publish this report?

In accordance with the Reports Consolidation Act of 2000, the Federal Election Commission (*i.e.*, the “FEC” or “Commission”) Office of Inspector General (OIG) identifies the most serious management and performance challenges facing the Commission and provides a brief assessment of the Commission’s progress in addressing those challenges. By statute this report is required to be included in the FEC’s Agency Financial Report.

### What are management challenges?

The Government Performance and Results Modernization Act of 2010 identifies major management challenges as programs or management functions that are vulnerable to waste, fraud, abuse and mismanagement and where a failure to perform well could seriously affect the ability of the FEC to achieve its mission objectives. Each challenge area is related to the FEC’s mission and reflects continuing vulnerabilities and emerging issues. The FEC OIG identified the top management and performance challenges facing the Commission as the following:

- Growth of campaign spending
- Lack of quorum
- Coronavirus (COVID-19) pandemic
- Lack of full-time support to Chief Information Officer (CIO) and General Counsel Positions
- Cybersecurity

### How did we identify these challenges?

We identified the Commission’s major management and performance challenges by recognizing and assessing key themes from OIG audits, special reviews, hotline complaints, investigations, and an internal risk assessment, as well as reports published by external oversight bodies, such as the Office of Personnel Management (OPM) and the Government Accountability Office (GAO). Additionally, we reviewed previous management challenge reports to determine if those challenges remain significant for this submission. Finally, we considered publicly available information and internal Commission records. As a result, we identified five key management and performance challenges, which are detailed herein.

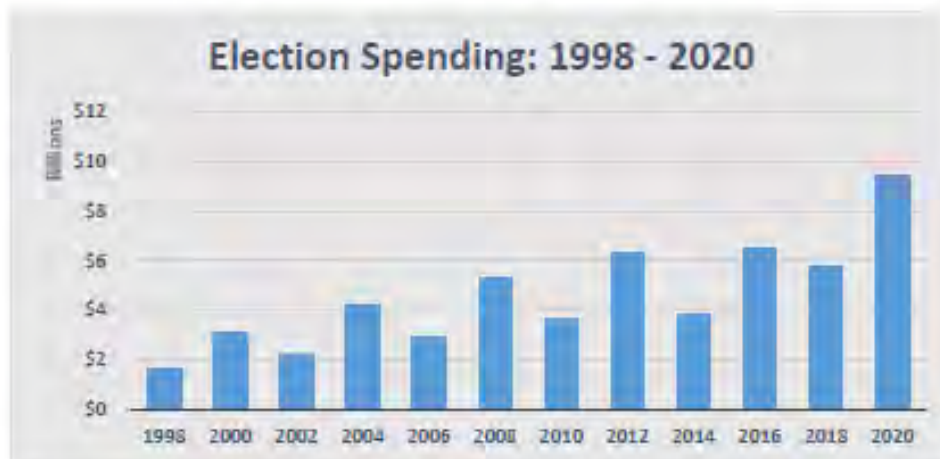


---

### Management and Performance Challenge: Growth of Campaign Spending

---

The FEC was established nearly fifty years ago to provide oversight of federal campaign finance. Since then, federal campaign fundraising and spending have increased dramatically, particularly after the U.S. Supreme Court's decision in *Citizens United v. FEC* in 2010. Indeed, total spending on federal election campaigns has increased from \$1.6 billion in 1998 to more than \$10 billion projected for 2020.



*Figure: Total expenditures per election cycle reported to the FEC by all filers. 2020 data is as of June 30, 2020 and projected to exceed \$12 - \$14 billion. The totals in this figure represent aggregate expenditures by all filers, including campaigns, party committees, and political action committees (PACs), obtained from FEC filings.*

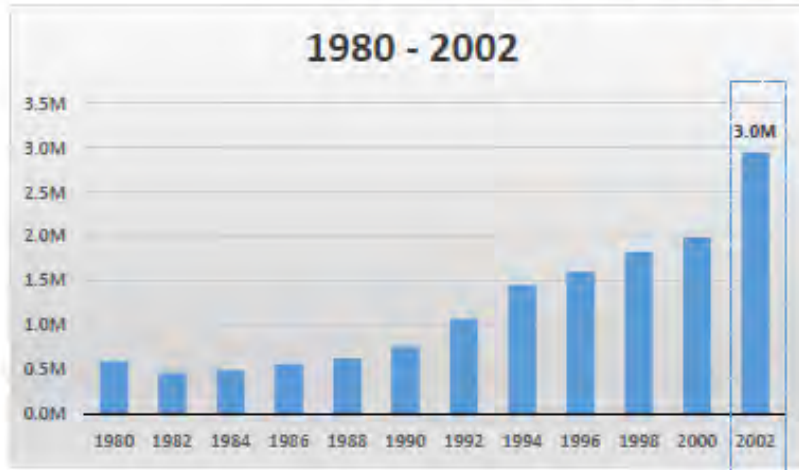
The total number of transactions subject to FEC regulation and oversight have also dramatically increased, especially in recent years. Transactions include mandatory filings and consist of financial reports filed with the FEC and include summary financial information and itemized details of receipts (including contributions), disbursements (including expenditures) and other financial activity.

Indeed, as detailed further in the figure below:

- Between 1980 and 2002, the total number of transactions subject to FEC regulation and oversight increased from approximately 602,000 to nearly three million.
- In 2018, the FEC handled nearly 270 million transactions.
- That number is projected to exceed 600 million in 2020.

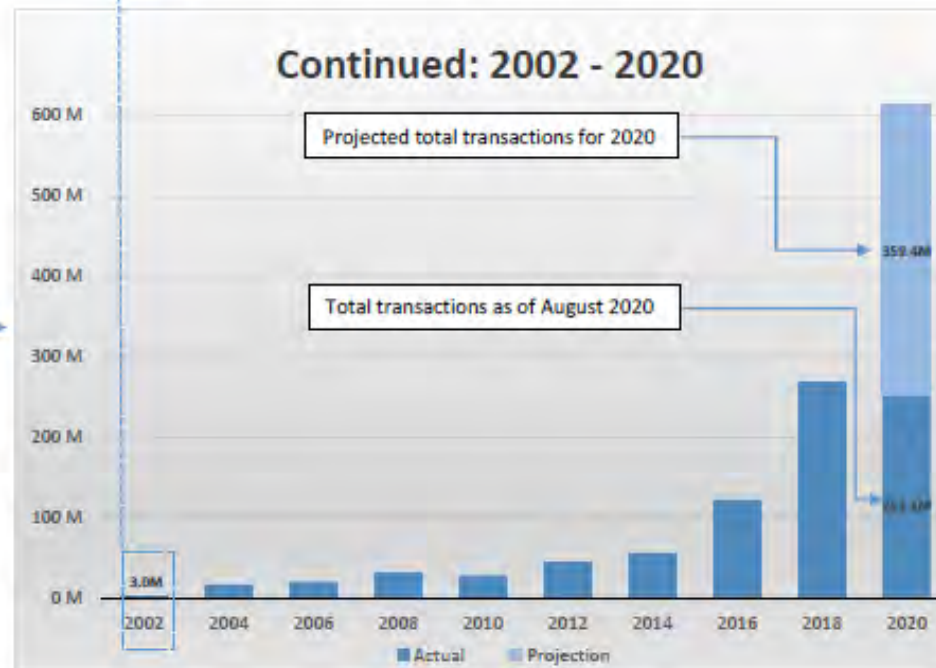


## FEC Total Transactions (1980 – 2020)



Between 1980 and 2002, the total number of transactions subject to FEC regulation and oversight increased from approximately 602,000 to nearly three million.

By 2018, the FEC handled nearly 270 million transactions. That number is projected to exceed 600 million in 2020.



Despite dramatic increases in campaign expenditures and the number of transactions subject to FEC regulation and oversight, the Commission's budget has remained largely static. Since 2008, the FEC's budget has increased by an average of only 0.66% per year. Those increases have not kept up with inflation, which has averaged approximately 1.6% per year since 2008.

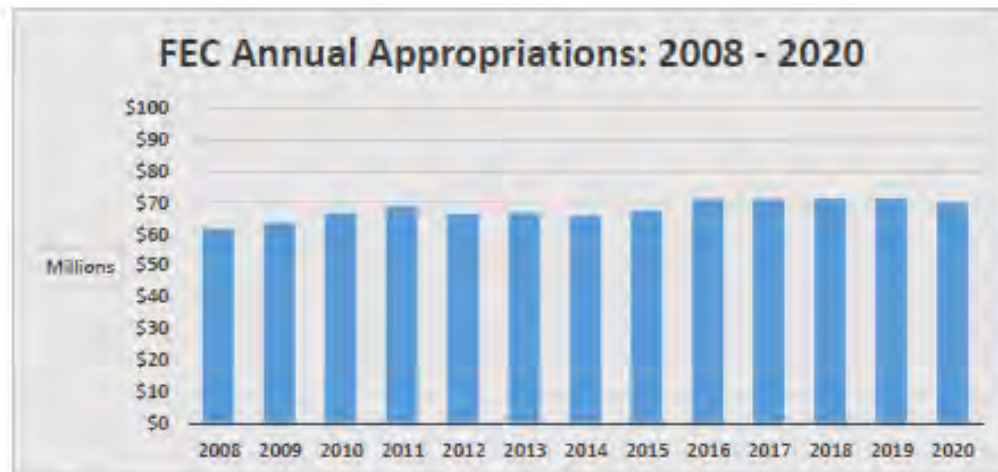


Figure: Annual congressional budget appropriations to the FEC, as reported in Congressional budget justifications.

In addition, the nature of federal campaigns has evolved in recent years. Online fundraising, the influence of dark money, and potential foreign electoral influence will continue to place further strain on the FEC's ability to provide oversight of federal campaigns. As such, absent additional resources, the FEC faces challenges in successfully regulating campaign finance with its current funding, which has essentially remained the same over the past thirteen years or more.

---

#### Management and Performance Challenge: Lack of Quorum

---

A significant management and performance challenge for FY 2021 resides with the July 2020 announcement of the resignation of Commissioner Caroline Hunter, leaving the FEC without a four-member quorum. The Commission is required to be composed of six commissioners, appointed by the President, with no more than three members affiliated with the same political party.<sup>1</sup> Furthermore, 52 U.S.C. § 30106 requires the affirmative vote of four members to act on certain matters. The FEC has lacked a quorum for all but 29 days in FY 2020. Since its inception, the FEC has lacked a quorum on three occasions: a six-month period in 2008, from September 2019 to May 2020, and from July 4, 2020, to the present.

The lack of a quorum prevents the Commission from among other things, issuing decisions on pending enforcement actions, opening investigations, and issuing advisory opinions. This concern also prominently directly and indirectly impacts agency programs and procedures.

---

<sup>1</sup> See 52 U.S.C. § 30106.



Commission Directive 10, Section L sets forth the rules of procedure to be followed when the Commission has fewer than four sitting members and includes a list of matters on which the Commission may still act. These include notices of filing dates, non-filer notices, debt settlement plans, administrative terminations, and appeals under the Freedom of Information and Privacy Acts.

While the *Federal Election Campaign Act of 1971*, as amended (FECA), requires an affirmative vote by four Commissioners to make decisions in many areas, including regulations, advisory opinions, audit matters and enforcement, the Commission remains open for business. Staff continues to further the agency's vital mission of administering the nation's campaign finance laws.

The OIG understands that this management challenge is beyond the control of the Commission; but we would be remiss if we fail to acknowledge the lack of a quorum is an ongoing significant management challenge.

---

#### Management and Performance Challenge: COVID-19 Pandemic

---

The ongoing COVID-19 pandemic poses many management and performance challenges to the Commission. Most notably, it has forced the FEC, and many other agencies, to operate in a remote status since March 2020.

Fortunately, much of the Commission's business is being accomplished remotely. One critical mission area the pandemic has affected relates to the submission and acceptance of campaign finance complaints. By law, all complaints must be made in writing and must provide the full name and address of the person filing the complaint.<sup>2</sup> Complaints must be signed, sworn, and notarized, meaning that the notary's certificate must state that the complaint was "signed and sworn to before me" or must indicate that the complainant affirmed the complaint "under penalty of perjury." Currently, the FEC is processing mail on an intermittent basis until it resumes normal mail operations and as a result, the Commission has requested that anyone who wishes to file a complaint with Office of General Counsel (OGC) Enforcement, do so by mail and send an electronic copy of the complaint via email. In addition, the Commission has encouraged the use of electronic signatures and notarizations where permitted by state law.<sup>3</sup>

Additionally, due to the intermittent processing of mail, the FEC OIG has experienced delays in responding to hotline complaints delivered via mail. As such, we have posted announcements to our webpage, email, and hotline phone recording that strongly encourages complainants to file all inquiries and/or complaints through the newly-established [FEC OIG Hotline Portal](#).

Management was forced to react to the COVID-19 pandemic and as a result, established a COVID management team to address and act on pandemic-related concerns. A few of those actions include but are not limited to:

---

<sup>2</sup> See 52 U.S.C. § 30109(a)(1).

<sup>3</sup> Electronically submitted copies of complaints that otherwise appear to be in order are deemed received on the date the copy was electronically received by staff. Complaints that are filed only by mail will be deemed received when actually received by OGC staff, subject to mail processing delays.



- Establishing flexible work schedules and waiving core working hour requirements
- Purchasing and implementing video communication tools
- Providing video conferencing trainings and telework security best practice tips
- Communicating a weekly compilation of guidance and information to assist FEC staff while the agency is under mandatory telework
- Establishing a Phase 1 re-opening quick reference guide
- Establishing Phase I re-opening training for FEC staff members which includes a self-check for COVID form, FEC contact tracing log, and protective personal equipment for staff members entering the office during Phase I
- Mandating face masks in common areas, limiting the number of people in the building, and establishing enhanced cleaning protocols
- Issuing an evacuation order on March 24, 2020 and renewing that order on September 18, 2020 to reduce concerns regarding potential COVID-19 exposure pursuant to OPM's regulations at 5 C.F.R. Part 550, Subpart D
- Tracking the operating status of approximately 25 public school districts in DC, Maryland, and Virginia

In addition, the Commission launched a re-opening survey to staff members in July 2020 in efforts to use employee feedback in conjunction with government regulations to formulate a plan for a phased re-opening approach. The survey received a 90% response rate in which a majority of respondents reported that they would like to continue to remain in a maximum telework state due to COVID-19 concerns and that they can successfully complete work tasks from home. Moreover, half of the respondents reported concerns regarding exposure to COVID-19 with the use of public transportation.

Out of short-term necessity, the Commission has implemented agency-wide procedures in reaction to the COVID-19 pandemic. We identify this as a continued challenge facing the Commission in FY 2021 due to the volatility of the situation and encourage the agency to be proactive in its response strategy in FY 2021 to mitigate potential impacts to mission requirements.

---

#### Management and Performance Challenge: Lack of Full-Time Chief Information Officer (CIO) and General Counsel Positions

---

Currently, the senior leadership roles of the Staff Director and CIO are occupied by the same individual and have been since August 2011. Information technology is ever-evolving, which affects all government agencies and without a fully dedicated CIO to focus on technological issues to ensure resources are properly allocated and adequate processes are in place for the protection and safeguards of the agency, the agency will remain at risk.

On April 1, 2019, the Committee on House Administration of the U.S. House of Representatives posed a number of questions to the FEC Commissioners about agency



operations, including if the Commission agreed with concerns that the CIO and Staff Director should have a full-time dedicated person for each position. The Commissioners agreed with this concern and added that the salary limit placed on the Staff Director by the FECA is capped at Level IV of the Executive Schedule. This statutory requirement provides that the Staff Director supervises personnel at the GS-15 and Senior Level pay scales, whom often have higher salaries than the Staff Director. Once the Commission promoted the CIO to the Staff Director, the Commission allowed him to continue to serve as the CIO and be compensated at that level rather than take a pay cut.

Similarly, the Deputy General Counsel for Law is concurrently serving as the Acting General Counsel and has been doing so since September 2016. This has potential to put the agency at risk and inhibit the agency to effectively and efficiently meet its mission requirements, as robust internal dialogue and diversity of opinion are essential to ensuring the agency considers competing legal theories and courses of action.

The Committee on House Administration of the U.S. House of Representatives similarly inquired as to why the position of General Counsel had not been permanently filled. In response, the Commission identified that the FECA requires the General Counsel to be paid at Level V of the Executive Schedule and that this limitation can make difficult to attract and retain good talent. Similar to the Staff Director position, the General Counsel supervises personnel at the GS-15 and Senior Level pay scales, which often provide higher salaries than level V of the Executive Schedule.

Management previously reported that the Commission adopted legislative recommendations in 2018, 2017, 2016, 2015, 2014, 2013 and 2011 that urged Congress to remove the statutory references to the Executive Schedule in FECA with respect to the FEC Staff Director and General Counsel Positions. The removal of that reference would ensure the two positions be compensated under the same schedule as the Commission's other senior managers.

Filling the CIO and General Counsel Positions with full-time incumbents would help ensure the FEC is effectively and efficiently supporting its overall mission objectives. Assigning acting personnel to two essential leadership positions on a long-term basis is not an efficient solution. Conversely, due to the lack of a quorum, the Commissioners have opted not to approve the selections of GS-15 and Senior Level positions. Based on the foregoing and upon renewal of a quorum, we encourage the agency to hire or appoint someone to carry out the agency CIO and General Counsel duties on a full-time basis.

---

### Management and Performance Challenge: Cybersecurity

---

Protecting data, systems, and networks from threats remains a top challenge. The FEC was established to protect the integrity of federal campaign finance by providing transparency and enforcing and administering federal campaign finance laws. In doing so, the FEC discloses campaign finance data to the public and as a result, encounters large volumes of webpage traffic from stakeholders and members of the public. In efforts to streamline transparency initiatives and improve business processes, the Commission is more technology reliant today, as is society; as such, it is imperative that the Commission continue to prioritize cybersecurity.



Cybersecurity encompasses attempts from criminals and adversaries to obtain sensitive information linked to government networks, personal identifiable information, intellectual property and other sensitive data. Cyber threats may arise from phishing, ransomware or other malware attacks and can infiltrate any level within an organization.

Since August 2019, the Commission engaged in three joint efforts with the Department of Homeland Security (DHS) to improve its overall security posture:

1. The Commission encountered an issue where an employee was terminated for downloading prohibitive software on their FEC-issued laptop. This incident prompted FEC management to partner with the DHS Cybersecurity and Infrastructure Security Agency (CISA) Hunt and Incident Response Team (HIRT) in August 2019, to perform an assessment to determine if an intrusion occurred within the FEC's network environment.

2. In January 2020, at the request of the OIG, the CISA HIRT performed a Risk and Vulnerability Assessment (RVA) of the FEC network which included a penetration test and phishing assessment.

3. In May 2020, CISA performed a Security Assessment Review (SAR) to assist with identifying additional cyber risks.

As a result of the foregoing reviews, the DHS teams identified potential risks and provided recommendations to improve the FEC's overall security posture. Additionally, in efforts to help safeguard the Commission's network and instill a culture of cybersecurity, all staff, including contractors, are required to successfully complete recurring information security training.

It is essential that the Commission continue to maintain the integrity and availability of its information as it looks to modernize its systems, which include moving towards a cloud environment. In large part, the agency has been reactive to cybersecurity concerns and we encourage the Commission to be proactive in establishing a cybersecurity framework and strengthen internal controls to mitigate external threats from entering the FEC's network.

## Conclusion

The OIG presents these challenges as previous and evolving issues facing the FEC in FY 2021. The challenges serve as impending barriers to promote efficiency and effectiveness in the management of FEC operations and procedures. The OIG remains dedicated to independent oversight to ensure accountability of the mission of the FEC.

## FY 2020 Management Challenges not Included in FY 2021 Report

### Management Challenge: Address outstanding OIG audit recommendations

The OIG and FEC have made tremendous progress in resolving 29 recommendations since August 2018. The OIG acknowledges that from November 2018 to August 2019, the FEC OIG lacked an Inspector General and Deputy Inspector General and, as a result, could not approve actions requested to close outstanding recommendations.

Currently, there are 21 outstanding audit recommendations that date back to 2010. The agency should continue to devote attention to address the outstanding recommendations in efforts to ensure adequate internal controls are identified, documented, and implemented. The OIG will continue to promote ongoing and recurring discussions with management to help focus attention to current processes and recommend specific actions to close out remaining recommendations.

**Management Challenge: Address results from the annual FEVS and 2016 Root Causes of Low Employee Morale Study**

In the OPM Human Capital Management Evaluation report of the FEC dated August 13, 2019, OPM identified that FEC lacks a formal process for using FEVS results to inform management decisions and focus improvement efforts. The OIG believes that implementing a formal process to address employee concerns would further benefit the agency and increase employee morale. The agency continues to make strides in improving agency morale through the improvements in management training, professional development, and increased communications. Management should continue to develop and implement action plans to address these concerns.

The Commission stated that it planned to launch an outreach program to learn from staff how best to build on the successes reported in the 2019 FEVS and how to address those employee issues that continue to require management's focused attention. The OIG acknowledges that this effort will take time and we plan to revisit this concern at a later date.





Federal Election Commission  
Office *of the* Inspector General

## REPORT FRAUD, WASTE, & ABUSE

**OIG Hotline Portal**  
<https://fecoirg.ains.com>



\* Also accessible via:  
<http://www.fec.gov/oig>

**OIG Hotline Phone**  
**202-694-1015**



\* Available from 9:00 a.m. to 5:00 p.m.  
Eastern Standard Time, Monday through  
Friday, excluding federal holidays.

Or you may call toll free at 1-800-424-9530 (press 0; then dial 1015). You may also file a complaint by completing the Hotline Complaint Form (<http://www.fec.gov/oig>) and mailing it to: 1050 First Street, N.E., Suite 1010, Washington DC 20463.

Individuals including FEC and FEC contractor employees are encouraged to alert the OIG to fraud, waste, abuse, and mismanagement of agency programs and operations. Individuals who contact the OIG can remain anonymous. However, persons who report allegations are encouraged to provide their contact information in the event additional questions arise as the OIG evaluates the allegations. Allegations with limited details or merit may be held in abeyance until further specific details are reported or obtained. Pursuant to the Inspector General Act of 1978, as amended, the Inspector General will not disclose the identity of an individual who provides information without the consent of that individual, unless the Inspector General determines that such disclosure is unavoidable during the course of an investigation. To learn more about the OIG, visit our Website at: <http://www.fec.gov/oig>.

**Together we can make a difference!**

## Management's Response to the Office of Inspector General's Statement on the Federal Election Commission's Management and Performance Challenges <sup>16</sup>

November 13, 2020

In its Statement on the FEC's Management and Performance Challenges ("Statement"), the Office of the Inspector General ("OIG") identified five overarching management and performance challenges for inclusion in the FEC's Agency Financial Report for Fiscal Year 2020. Management's response to the OIG statement is below.

### Challenge 1: Growth of Campaign Spending

As illustrated in the OIG's description of this management challenge, increases in the amount of money raised and spent in federal elections, and changes in the way political committees raise and report contributions, have resulted in explosive growth in the number of campaign finance transactions reported to the FEC each election cycle. Each of these transactions represents a data element that must be received by the FEC, added to our database and disclosed and made searchable on the FEC website and via the FEC campaign finance API.

In large part in response to projected increases in campaign finance activity, in FY 2015 the FEC proactively launched a comprehensive, multi-year IT Modernization project. Since this project was launched, the Commission has requested and received as part of its annual budget funds to support this crucial effort. As part of the IT Modernization project, the FEC redesigned its website and migrated both the website and the campaign finance database that supports it to a cloud environment. In addition to providing faster and easier access to campaign finance data hosted in the cloud, this migration allowed the agency to shut down one of its physical data centers during FY 2018, realizing attendant costs associated with maintaining that data center. During FY 2020, the FEC made additional database enhancements to improve database performance and control costs of hosting and maintaining the database.

To continue to mitigate an anticipated steep rise in future cost from maintaining physical data centers, the FEC is pursuing a modernization plan which requires investment now and over the next several years to continue cloud migration and realize improvements in its IT processes. During FY 2020, the FEC conducted a study to determine how best to migrate other appropriate systems and databases to the cloud, allowing the agency to realize greater efficiency and performance in future years. The FEC will continue to implement the recommendations of this study during FY 2022 with the goal of reducing costs in future years while maintaining high levels of service to the public.

In addition, the FEC is currently working to upgrade the agency's eFiling platform. In order to reduce the financial burden of compliance for committees and other individuals and groups who must file with the FEC under the *Federal Election Campaign Act* (the Act), the FEC provides access to free filing software. In FY 2017, the Commission published a study of its current eFiling

---

<sup>16</sup> Management consists of the agency's senior managers, including the Staff Director, General Counsel and Chief Financial Officer.

platform, including a survey of the existing functionality of the FEC's free filing software and an in-depth investigation of needs expressed by filers.<sup>17</sup> The FEC will rely on the recommendations of this study to improve its eFiling platform to allow greater operating system flexibility for users when generating filings for submission to the Commission and increase the consistency and accuracy of reporting. The FEC's new eFiling platform is expected to improve the process for validating filings prior to acceptance and generate modern file outputs that will provide for more flexibility in accessing data. The FEC had expected to begin the implementation phase of this project during FY 2021. However, COVID-19 related delays in onboarding new staff and contractors subsequently contributed to delays in the FEC's efforts to complete the development phase of the eFiling platform during FY 2020. As a result, the FEC expects to begin partial implementation of the new eFiling system during FY 2021.

Campaign finance reports filed on paper remain the most costly filings for the FEC because they must be manually received and processed by FEC staff. The Commission has also taken steps to reduce this burden on the agency. Most notably, in 2000 the Commission began requesting through Legislative Recommendations that the Act be amended to make the FEC the point of entry for Senate filings. This amendment, which became law in September 2018, had the effect of subjecting Senate filers to the FEC's mandatory electronic filing rules, which require committees to file electronically if they receive contributions or make expenditures in excess of \$50,000 in a calendar year or expect to do so. In 2018, the Commission recommended legislative changes to require reports of electioneering communications to be filed electronically with the Commission, rather than on paper and to increase and index for inflation certain registration and reporting thresholds. If enacted, each of these recommendations would have an effect of further reducing the number of paper filings received by the FEC.<sup>18</sup>

#### Challenge 2: Lack of a quorum

The Commission was without a quorum of four Commissioners for approximately 11 months during FY 2020, and began FY 2021 without a quorum.<sup>19</sup> However, the President has nominated Allen Dickerson, Shana M. Broussard and Sean J. Cooksey to become FEC Commissioners, and those nominations are currently pending before the Senate.

Management agrees that the present lack of a quorum presents challenges for agency staff and managers. In the agency's Enterprise Risk Profile, management has listed the potential lack of quorum as a very high risk since FY 2018.

While the Act requires an affirmative vote by four Commissioners to make decisions in many areas, including regulations, advisory opinions, audit matters and enforcement, the Commission remains open for business. Staff continues to further the agency's vital mission of administering the nation's campaign finance laws.

---

<sup>17</sup> Available at <https://fec.gov/about/reports-about-fec/agency-operations/e-filing-study-2016/>.

<sup>18</sup> The Commission lacked the necessary quorum of Commissioners to approve Legislative Recommendations in 2019.

<sup>19</sup> The FEC began FY 2020 without a quorum. A quorum was restored on June 5, 2020, when Commissioner James E. "Trey" Trainor, III, was sworn in. The FEC again began working without a quorum on July 3, 2020, with the departure of Commissioner Caroline C. Hunter.



The requirements of the Act and Commission regulations remain in effect, and political committees and other filers must continue to disclose their campaign finance activity to the Commission on the regular [schedule](#). FEC staff remains ready to help committees and the public understand and comply with the law, process and review committee reports including issuing Requests for Additional Information, and provide public access to campaign finance data. While the Commission cannot take action on many legal matters, staff continues to litigate ongoing court cases, process new enforcement complaints and responses, conduct audits that were previously authorized by the Commission, and investigate matters previously authorized by the Commission.

Commission Directive 10, Section L sets forth the rules of procedure to be followed when the Commission has fewer than four sitting members and includes a list of matters on which the Commission may still act. These include notices of filing dates, non-filer notices, debt settlement plans, administrative terminations, and appeals under the Freedom of Information and Privacy Acts. The Commission intends to comply with the statutory requirement set forth at 52 USC §30106(d) that the Commission meet at least once each month.

During the brief period the Commission had a quorum in FY2020, the Commission closed 33 MURs, 39 ADR matters, and 206 Admin Fine matters, totaling \$842,413 in administrative fines and penalties assessed. Management continues to prioritize matters so that the Commission can quickly act on pending matters upon the resumption of quorum and is prepared for the restoration of a quorum at any time.

### Challenge 3: COVID-19 Pandemic

As noted, Senior Management moved swiftly and efficiently to implement policies and workplace flexibilities to respond to the COVID-19 pandemic. Prior to the official declaration of a pandemic, Senior Management met and held informational sessions with staff to strongly encourage employees to telework. Immediately, a management team was assembled to stay up-to-date on changing circumstances and make recommendations to the Commission. With the strong backing of Chair Hunter, Vice Chair Walther, and Commissioner Weintraub, the COVID-19 management team quickly moved to implement workplace flexibilities, including enhanced telework, maxi-flex hours and administrative leave for employees with childcare and elder care responsibilities. The COVID-19 management team holds weekly briefings with the Commission to keep them abreast of the situation and ensure they are aware of any changes to the building operating status and impacts to our employees. Management's number one priority continues to be the safety of all FEC staff. The COVID-19 management team also began a weekly update email that is sent every Friday to alert staff to upcoming events, new guidance and general reminders. The weekly update has been well received by staff and managers.

Management continues to closely monitor the situation and is pleased to report that nearly all FEC functions have been seamlessly transitioned to the telework environment and that agency performance goals are continuing to be met. Senior Management and the Commission have been holding virtual meet and greet sessions for new FEC staff and also held an all employee town hall in September. Senior Leaders are regularly holding division meetings to check on staff and hear any concerns they may raise.

The Administrative Services Division has been procuring personal protective equipment (PPE) for staff going in to the building as part of Phase I operations. ASD has also installed signage regarding social distancing and shared space guidelines throughout the building in preparation of the return of FEC staff in the future. ASD continues to communicate with building management about the status of FEC operations.

Members of the COVID-19 management team have been participating in government-wide groups including: OMB small agency group, OPM CHCO/HR Director group, General Counsel Exchange, and the CIO/CISO council.

#### Challenge 4: Lack of full-time Chief Information Officer (CIO) and General Counsel Positions

Management fully supports the Commission's ongoing efforts to fill vacant leadership positions and to ensure senior leadership roles are filled by separate individuals. The Commission specifically addressed this issue in response to questions posed by the Committee on House Administration. In its May 1, 2019, response, the Commission stated:

All of the Commissioners agree that the Commission should have separate individuals filling the senior leadership roles of Staff Director and CIO. As is true of the General Counsel position, the salary limit placed on the Staff Director by the FECA (Level IV of the Executive Schedule) means that the Staff Director supervises personnel whose positions, on the GS-15 and Senior Level pay scales, often provide higher salaries than the statutory salary for the Staff Director. The Commission has long recommended that Congress de-link the Staff Director's salary from the Executive Schedule.

When the Commission promoted our CIO to Staff Director, we allowed him to continue to serve as CIO and be compensated at that level rather than absorb a substantial pay cut in order to accept the promotion. This has allowed the Commission to maintain consistency in its most senior staff leadership.<sup>20</sup>

Because of the challenges in maintaining consistent senior leadership, the Commission unanimously adopted a Legislative Recommendation in 2018, 2017, 2016, 2015, 2014, 2013 and 2011 that urges Congress to address this situation. Specifically, the Commission recommends that Congress remove the statutory bar on the FEC's participation in the Senior Executive Service (SES) Program and remove the statutory references to the Executive Schedule in FECA with respect to the General Counsel and Staff Director, so that those two positions would be compensated under the same schedule as the Commission's other senior managers. This revision would remedy the current situation where the Commission's top managers are compensated at a lower rate than many of their direct reports, and would ensure that the Commission can retain highly qualified individuals to serve in those positions as well as enable it to remain competitive in the marketplace for Federal executives when filling the current vacancy or when further vacancies arise.

---

<sup>20</sup> <https://www.fec.gov/about/committee-on-house-administration-april-2019-questions/>

Due to a lack of quorum and in accordance with Commission Directive 10, the Commission is unable to approve the selections of GS-15 and Senior Level positions. During the brief restoration of a quorum in FY2020, the Commission approved the permanent selection of the Director of Human Resources. The Personnel Committee has approved the following positions to be filled on a permanent basis: Assistant General Counsel for Litigation and Assistant General Counsel for Enforcement. Upon resumption of quorum, management anticipates the hiring process for these and other SL and GS-15 positions to be quickly completed.

Management continues to work with the Personnel and Finance Committees for approval to post and hire qualified individuals for all of the identified positions. As the senior leadership vacancies are filled, the Personnel and Finance Committees will closely scrutinize any remaining vacancies. In light of the current federal budget conditions, prudent management requires that close examination is paid to the potential impact of each vacancy that is approved to hire. The Personnel and Finance Committees are committed to analyzing the current FEC workforce and looking ahead to fiscal years in order to avoid having to implement a reduction in force.

#### Challenge 5: Cybersecurity

The FEC secures the agency's infrastructure and prevents intrusions through a holistic cybersecurity program led by the Chief Information Security Officer (CISO). The FEC's overarching strategy to protect the security and privacy of its systems and network begins with the adoption of the National Institute of Standards and Technology (NIST) Risk Management Framework and NIST IT security control "best practices." NIST Special Publication 800-37 2 – Risk Management Framework for Information Systems and Organizations," identifies seven steps essential to the successful execution of the risk management framework (RMF):

- **Prepare** to execute the RMF from an organization- and a system-level perspective by establishing a context and priorities for managing security and privacy risk.
- **Categorize** the system and the information processed, stored, and transmitted by the system based on an analysis of the impact of loss.
- **Select** an initial set of controls for the system and tailor the controls as needed to reduce risk to an acceptable level based on an assessment of risk.
- **Implement** the controls and describe how the controls are employed within the system and its environment of operation.
- **Assess** the controls to determine if the controls are implemented correctly, operating as intended, and producing the desired outcomes with respect to satisfying the security and privacy requirements.
- **Authorize** the system or common controls based on a determination that the risk to organizational operations and assets, individuals, other organizations, and the Nation is acceptable.
- **Monitor** the system and the associated controls on an ongoing basis to include assessing control effectiveness, documenting changes to the system and environment of operation, conducting risk assessments and impact analyses, and reporting the security and privacy posture of the system.

The FEC currently employs this continuous monitoring and ongoing authorization approach to assess the risk to systems and networks and allow the authorizing official to determine whether that risk is acceptable. Three of the FEC's major systems follow the formal Authority to Operate (ATO) process: the General Support System, the FEC website and the FEC's eFiling system.

### **Robust Security Architecture**

As a result of, and in support of, the RMF, the FEC's Office of the Chief Information Officer (OCIO) continues to take steps to implement a robust security architecture. For example, in partnership with the Department of Homeland Security (DHS), Massachusetts Institute of Technology and the Pacific Northwest National Laboratory, the OCIO has collaborated with FEC stakeholders and technical experts to identify, protect, detect, and respond to the impact of known and unknown threats, continuously assessing security controls and addressing the remaining residual risks.

As identified in OIG's description of this management challenge, the FEC has proactively pursued three significant joint efforts with DHS over the past two years to better identify and remediate emerging threats to the FEC's systems and networks. In addition, the FEC maintains ongoing information security efforts, including our security operation center and the applications for continuous diagnostics and mitigation, and implementing security controls to address identified cybersecurity gaps. These efforts help to ensure that identified risks are appropriately addressed and that its cybersecurity program and security architecture will continue to safeguard the agency's infrastructure, networks, and applications against cyber threats and malicious activities.

### **Continuous Monitoring and Mitigation**

OCIO Security has worked with DHS to improve security capability by integrating with the Continuous Diagnostics and Mitigation (CDM) program. OCIO Security has also introduced the use of secure baselining standards, such as the use of DISA STIGS and Benchmarks. System hardening and secure baselining practices are being expanded in OCIO teams. The OCIO security team has developed a privileged user account agreement and a new password policy to add administrative controls to supplement the technical access controls. The addition of the new password policy and multi-factor authentication (MFA) has improved the security posture of authentication types within the FEC's information systems.

### **Cloud-First Initiative**

The FEC has also adopted a cloud first initiative for security, accessibility and recoverability. Hosting systems and data in a cloud environment allows the FEC to utilize our cloud service providers' significant resources that are dedicated to maintaining the highest level of security. In addition, by utilizing the cloud service providers' robust disaster recovery solutions, the FEC eliminates the need to maintain physical disaster recovery sites, which are costly to maintain and secure. The FEC has already completed the migration of its largest database, the campaign finance database, and its website to a cloud environment. The FEC's new website, launched in May 2017, uses FedRAMP Authorized cloud services, which provides a standardized approach to security assessment, authorization, and continuous monitoring for cloud products and services.



### **Building a Cybersecurity Culture**

At the same time, the FEC is working to build a cybersecurity culture among its employees. The first line of defense in maintaining the protection and integrity of the agency's network is the ongoing education of employees about their role in identifying and preventing malicious actors—internal or external—from compromising the FEC's systems and networks. Efforts to build a cybersecurity culture include steps to educate staff about FEC IT security policies and to ensure staff awareness of potential cybersecurity threats, such as phishing scams. The FEC promotes this cybersecurity culture in part through annual, mandatory IT security trainings and through year-round communication and notices to staff from the CISO. This year, the FEC implemented additional trainings for all staff to help staff recognize and avoid social engineering attempts.

### **Building Capacity in the Information Security Office**

The FEC has also taken steps to build capacity in its Information Security Office. In April 2019, the FEC entered into a partnership with the Partnership for Public Service to participate in the Cybersecurity Talent Initiative. This selective, cross-sector program, which provides loan forgiveness to top bachelors and masters graduates around the United States in exchange for at least two-years' service at a Federal agency, addresses the immediate cybersecurity talent deficiency faced by Federal government agencies by attracting service-minded individuals to government who might not otherwise have applied. During FY2020, the FEC completed the selection process and brought on board an individual for a two-year cybersecurity fellowship.

### Management Challenge: Addressing outstanding OIG audit recommendations

Management looks forward to continuing to work with the Office of Inspector General to close out the remaining audit recommendations. During FY 2020, significant progress was made on addressing several recommendations, particularly related to the FEC's Disaster Recovery Plan and Continuity of Operations Plans, Audit of the FEC's Office of Human Resources, Audit of the Privacy Act and Audit of the FEC Telework Program. Management would like to note that some of the remaining items are dependent on creating or updating existing FEC policies which will require a Commission vote after a quorum has been restored.

Management looks forward to continued discussions with the OIG on the remaining recommendations. Management believes these discussions will help focus attention on current processes and allow OIG to identify recommendations that align with current high-risk areas.

### Management Challenge: Address results from the annual FEVS and 2016 Root Causes of Low Employee Morale Study

The Commission understands that the success of its programs depends upon the skills and commitment of its staff. During FY 2020, management undertook several initiatives and programs to engage staff, especially during the COVID-19 pandemic.

FY 2020 saw the launch of the FEC Engagement Steering Committee. This group is led by Co-Coordination Rhiannon Magruder and Greg Baker who have been participating in a small-agency Engagement Collective through the Partnership for Public Service. The Senior Leaders received briefings on employee engagement throughout FY 2020 and have instituted several suggestions, including division Zoom calls and the employee town hall.

In collaboration with the agency's EEO Office, the Diversity and Inclusion Council was launched with the support of all Senior Leaders and the Commission. As part of the Diversity and Inclusion Council, employee resource groups will be established. Senior management has also worked to ensure that hiring panels are diverse throughout the agency.

During FY 2020 and the first quarter of FY 2021, management has continued to partner with OPM to bring in trainings for both managers and staff. The following courses were provided: Engaging & Encouraging Employees, Coaching & Mentoring for Excellence, Dealing with Poor Performance & Conduct, Supervisory Fundamentals and Leadership Skills for Non-Supervisors. Upcoming courses open to all FEC staff include Resilience in Leadership and Emotional Intelligence. Additionally, many staff members have taken part in free virtual webinars and courses through OPM and the Employee Assistance Program.

## Payment Integrity

The *Improper Payments Information Act (IPIA)* of 2002, as amended by the *Improper Payments Elimination and Recovery Act (IPERA)* of 2010, *Improper Payments Elimination and Recovery Improvement Act (IPERIA)* of 2012, and the *Payment Integrity Information Act (PIIA)* of 2019 requires agencies to review all programs and activities they administer and identify those which may be susceptible to significant improper payments.<sup>21</sup> The FEC does not have any programs or activities that are susceptible to significant improper payments and is only required to perform an improper payment risk assessment.

### Risk Assessment

In FY 2020, the FEC performed a systematic review of its program and related activities to identify processes which may be susceptible to “significant improper payments.” “Significant improper payments” are defined as gross annual improper payments (i.e., the total amount of overpayments and underpayments) in the program exceeding (1) both 1.5 percent of program outlays and \$10 million or (2) \$100 million. The review was performed for the FEC’s only program area which is to administer and enforce the *Federal Election Campaign Act*. For FY 2020, the FEC considered risk factors that may significantly increase the risk of improper payments as outlined in OMB Memorandum M-18-20, *Transmittal of Appendix C to OMB Circular No. A-123, Requirements for Payment Integrity Improvement*. Based on the systematic review performed, the FEC concluded that it is not susceptible to these risk factors and none of its program activities are susceptible to significant improper payments at or above the threshold level set by OMB.

### Recapture of Improper Payments Reporting

The FEC has determined that the risk of improper payments is low; therefore, implementing a payment recapture audit program is not applicable to the agency.

<b>IPIA (as amended by PIIA) Reporting Details</b>	<b>Agency Response</b>
Risk Assessment	Reviewed as noted above.
Statistical Sampling	Not Applicable.*
Corrective Actions	Not Applicable.*
Improper Payment Reporting	Not Applicable.*
Recapture of Improper Payments Reporting	Not Applicable.*
Accountability	Not Applicable.*
Agency information systems and other infrastructure	Not Applicable.*
Barriers	Not Applicable.*
*The FEC does not have programs or activities that are susceptible to significant improper payments.	

---

<sup>21</sup> At this time, OMB has not issued PIIA implementation guidance and agencies are advised to continue to follow Memorandum M-18-20, *Transmittal of Appendix C to OMB Circular No. A-123, Requirements for Payment Integrity Improvement* until implementation guidance is published.

## Fraud Reduction Report

*The Fraud Reduction and Data Analytics Act of 2015* (Pub. L. 114-186, 31 USC 3321) requires agencies to report on their progress in implementing financial and administrative controls to identify and assess fraud risks. In FY 2019, the FEC assessed its progress and can report that it has adequate financial and administrative controls in place to identify and assess fraud risks as well as monitor and mitigate the potential for fraud and improper payments.

The agency uses OMB Circular A-123, as revised, GAO-14-704G, *The Standards for Internal Control in the Federal Government* (the Green Book), GAO-15-593SP, *A Framework for Managing Fraud Risks in Federal Programs*, and the Association of Government Accountant's *Fraud Prevention Tool* as a guide for its fraud reduction efforts.

In FY 2017, the agency created the Senior Management Council (SMC) to monitor and manage risk to the agency achieving its operational, strategic, and compliance objectives. The SMC updates the agency Risk Profile on an annual basis, facilitates the detection and remediation of fraud risk throughout the agency, and addresses potential fraud issues during its quarterly meetings. The agency Risk Profile can be found in Section I, Management's Discussion and Analysis, under Risk Identification and Mitigation. In addition, the SMC oversees the agency's annual Internal Control Review (ICR) process which is based on GAO's Green Book. As part of the ICR, each program office conducts an evaluation of fraud risk, documents controls in place, and reports on mitigating activities.

The FEC uses a risk-based approach to design and implement controls. It has controls in place to address identified fraud risks related to payroll, procurement, information technology and security, asset safeguards, and purchase and travel cards. The agency does not issue beneficiary payments or grants.

Financial and administrative controls in place to monitor and mitigate potential fraud include documented system authorization procedures, manager oversight and approval of transactions, and separation of duties. Financial activity is tracked, monitored, and reviewed or reconciled on a periodic (monthly or quarterly) basis. The agency utilizes resources such as Treasury's Do Not Pay system, GSA's System for Award Management (SAM), and the Internal Revenue Service's Taxpayer Identification Number (TIN) Match Program to facilitate data analytics. To safeguard assets, the FEC has tracking processes in place, conducts a biannual physical inventory count, and maintains equipment in a secure location. The FEC has comprehensive controls in place to address information technology and security fraud risks to include automated system controls.

Payroll is the largest expenditure for the agency, with salaries and benefits constituting seventy (70) percent of the FEC's costs. Payroll is tested for improper payments under the *Improper Payments Elimination and Recovery Act (IPERA)*. Improper Payments Act reporting details can be found in Section III of the AFR under Other Information.

Finally, the FEC works closely with the OIG to identify and address fraud. The FEC had no reported instances of fraud in FY 2020.

## Reporting on Internal Controls Assurances

The FEC is responsible for establishing and maintaining effective internal control and financial management systems that meet the objectives of the *Federal Managers' Financial Integrity Act of 1982 (FMFIA)*, as implemented by OMB Circular A-123, revised, *Management's Responsibility for Enterprise Risk Management and Internal Control*. Internal control is an integral component of management to provide reasonable assurance that (1) programs operate effectively and efficiently, (2) financial reports are reliable, and (3) programs comply with applicable laws and regulations. The FEC conducted its evaluation of internal control in accordance with OMB Circular A-123. Based on the results of the Fiscal Year 2019 internal control review, the FEC reported no material weaknesses under the FMFIA and is able to provide an unqualified statement of assurance that the internal controls and financial management systems meet the objectives of the FMFIA.

The Annual Assurance Statement on Internal Control which was signed by the FEC Chair in accordance with OMB Circular A-123 and provided in "Section I.D: Analysis of FEC's Systems, Controls and Legal Compliance" is supported by detailed assurances from each of the FEC's assessable units.

The assessable units that participated in the internal controls review process and provided assurances were as follows:

- Office of Communications
- Office of Compliance
- Office of Equal Employment Opportunity
- Office of Management and Administration
- Office of the Chief Financial Officer
- Office of the Chief Information Officer
- Office of the General Counsel
- Office of the Inspector General

Detailed assurances from each of these assessable units were provided to the FEC's OIG and independent auditor to support the single assurance statement signed by the FEC Chair.



## Civil Monetary Penalties Adjustment for Inflation

The following is the FEC's table of Civil Monetary Penalties Adjustment for Inflation for FY 2020.

US Code	Statutory Authority; Public Law	Year of Enactment/Adjustment Other Than Pursuant to IAA	Name/Description of Penalty	Latest Annual Inflation of Adjustment	Section in Title 11 of CFR for Penalty Update Detail	Current Penalty or Penalty Formula
52 U.S.C. 30109(a)(5)(A), (6)	Federal Election Campaign Act Amendments of 1976, PL 94-283 sec. 109	1976	Violations of FECA or chapters 95 or 96 of title 26 of U S Code	Civil Monetary Penalties Annual Inflation Adjustments, 83 Fed. Reg. 66593 (Dec. 27, 2018), <a href="https://sers.fec.gov/fosers/showpdf.htm?docid=401529">https://sers.fec.gov/fosers/showpdf.htm?docid=401529</a>	111.24(a)(1)	20,288
52 U.S.C. 30109(a)(5)(B)	Federal Election Campaign Act Amendments of 1976, PL 94-283 sec. 109	1976	Knowing and willful violations of FECA or chapters 95 or 96 of title 26 of U S Code	Civil Monetary Penalties Annual Inflation Adjustments, 83 Fed. Reg. 66593 (Dec. 27, 2018), <a href="https://sers.fec.gov/fosers/showpdf.htm?docid=401529">https://sers.fec.gov/fosers/showpdf.htm?docid=401529</a>	111.24(a)(2)(i)	43,280
52 U.S.C. 30109(a)(5)(B)	Bipartisan Campaign Reform Act of 2002, PL 107-155 sec. 312(a)	2002	Knowing and willful contributions in the name of another	Civil Monetary Penalties Annual Inflation Adjustments, 83 Fed. Reg. 66593 (Dec. 27, 2018), <a href="https://sers.fec.gov/fosers/showpdf.htm?docid=401529">https://sers.fec.gov/fosers/showpdf.htm?docid=401529</a>	111.24(a)(2)(ii)	70,973
52 U.S.C. 30109(a)(12)	Federal Election Campaign Act Amendments of 1976, PL 94-283 sec. 109	1980	Making public an investigation without consent	Civil Monetary Penalties Annual Inflation Adjustments, 83 Fed. Reg. 66593 (Dec. 27, 2018), <a href="https://sers.fec.gov/fosers/showpdf.htm?docid=401529">https://sers.fec.gov/fosers/showpdf.htm?docid=401529</a>	111.24(b)	6,069
52 U.S.C. 30109(a)(12)	94-283 sec. 109	1980	Knowingly and willfully making public an investigation without consent	Civil Monetary Penalties Annual Inflation Adjustments, 83 Fed. Reg. 66593 (Dec. 27, 2018), <a href="https://sers.fec.gov/fosers/showpdf.htm?docid=401529">https://sers.fec.gov/fosers/showpdf.htm?docid=401529</a>	111.24(b)	15,173
52 U.S.C. 30109(a)(4)(C)	Treasury and General Government Appropriations Act, 2000, PL 106-58 sec. 640	2003	Late and Non- Filed Reports	Civil Monetary Penalties Annual Inflation Adjustments, 83 Fed. Reg. 66593 (Dec. 27, 2018), <a href="https://sers.fec.gov/fosers/showpdf.htm?docid=401529">https://sers.fec.gov/fosers/showpdf.htm?docid=401529</a>	111.43(a)	Penalty formula that accounts for (a) level of activity in late or non-filed report; and (b) if report was filed late, (i) the number of days late and (ii) the number of previous violations; or (c) if the report was not filed, the number of previous violations)
52 U.S.C. 30109(a)(4)(C)	Treasury and General Government Appropriations Act, 2000, PL 106-58 sec. 640	2003	Election Sensitive Late and Non-Filed Reports	Civil Monetary Penalties Annual Inflation Adjustments, 83 Fed. Reg. 66593 (Dec. 27, 2018), <a href="https://sers.fec.gov/fosers/showpdf.htm?docid=401529">https://sers.fec.gov/fosers/showpdf.htm?docid=401529</a>	111.43(b)	Penalty formula that accounts for (a) level of activity in late or non-filed report; and (b) if report was filed late, (i) the number of days late and number of previous violations; or (c) if the report was not filed, the number of previous violations)
52 U.S.C. 30109(a)(4)(C)	Treasury and General Government Appropriations Act, 2000, PL 106-58 sec. 640	2000	Late or Non-Filed Reports where Commission cannot calculate amount of activity	Civil Monetary Penalties Annual Inflation Adjustments, 83 Fed. Reg. 66593 (Dec. 27, 2018), <a href="https://sers.fec.gov/fosers/showpdf.htm?docid=401529">https://sers.fec.gov/fosers/showpdf.htm?docid=401529</a>	111.43(c)	8,135
52 U.S.C. 30109(a)(4)(C)	Treasury and General Government Appropriations Act, 2000, PL 106-58 sec. 640	2000	Late or Non-Filed 48 hour notices	Civil Monetary Penalties Annual Inflation Adjustments, 83 Fed. Reg. 66593 (Dec. 27, 2018), <a href="https://sers.fec.gov/fosers/showpdf.htm?docid=401529">https://sers.fec.gov/fosers/showpdf.htm?docid=401529</a>	111.44	Penalty formula is 149+ (.10 x amount of contribution(s) not timely reported), subject to a 25% increase for each prior violation

## APPENDIX

---

### List of Acronyms

AFR	Agency Financial Report
AO	Advisory Opinion
APR	Annual Performance Report
ASD	Administrative Services Division
CFR	Code of Federal Regulations
CSRS	Civil Service Retirement System
CY	Calendar Year
DCIA	Debt Collection Improvement Act of 1996
DOL	Department of Labor
EEO	Equal Employment Opportunity
ERM	Enterprise Risk Management
FAR	Financial Audit Report
FASAB	Federal Accounting Standards Advisory Board
FBWT	Fund Balance with Treasury
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
FERS	Federal Employees' Retirement System
FMFIA	Federal Managers' Financial Integrity Act
FRAE	Further Revised Annuity Employees
FRDAA	Fraud Reduction and Data Analytics Act
FY	Fiscal Year
GAAP	Generally Accepted Accounting Principles
GSA	General Services Administration
IG	Inspector General
IPERA	Improper Payments Elimination and Recovery Act
IPERIA	Improper Payments Elimination and Recovery Improvement Act
IPIA	Improper Payments Information Act
MD&A	Management's Discussion and Analysis
NPRM	Notices of Proposed Rulemaking
NTEU	National Treasury Employee Union
OAR	Office of Administrative Review
OCFO	Office of the Chief Financial Officer
OCIO	Office of the Chief Information Officer
OGC	Office of General Counsel
OHR	Office of Human Resources

OMB	Office of Management and Budget
OPM	Office of Personnel Management
OSD	Office of the Staff Director
P&E	Property and Equipment
PPA	Prompt Payment Act
RAD	Reports Analysis Division
RAE	Revised Annuity Employees
SBR	Statement of Budgetary Resources
SCA	Statement of Custodial Activity
SFFAS	Statement of Federal Financial Accounting Standards
SMC	Senior Management Council
SNC	Statement of Net Cost
SSAE	Statements on Standards for Attestation Engagements
TSP	Thrift Savings Plan



## **Legislative Recommendations of the Federal Election Commission 2018**

Chair Caroline C. Hunter  
Vice Chair Ellen L. Weintraub  
Commissioner Matthew S. Petersen  
Commissioner Steven T. Walther

Adopted December 13, 2018

### Table of Contents

Electronic Filing of Electioneering Communication Reports .....	1
Authority to Create Senior Executive Service Positions .....	2
Prohibit Fraudulent PAC Practices .....	5
Fraudulent Misrepresentation of Campaign Authority .....	6
Conversion of Campaign Funds.....	8
Prohibit Aiding or Abetting the Making of Contributions in Name of Another .....	9
Increase and Index for Inflation Registration and Reporting Thresholds .....	11

Increase the In-Home Event Exemption and Unreimbursed Travel Expense Exemption for Candidates and Political Parties.....	13
Permit Political Committees to Make Disbursements by Methods Other than Check .....	14
Update Citations to Reflect the Recodification of FECA.....	15
Repeal of Convention Funding Provisions Rendered Non-Operational by the Gabiella Miller Kids First Research Act .....	16



## **Electronic Filing of Electioneering Communication Reports**

*Section:* 52 U.S.C. § 30104(a)(11)(A)(i)

*Recommendation:* Congress should require reports of electioneering communications to be filed electronically with the Commission, rather than on paper.

*Explanation:* The Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, § 639, 113 Stat. 430, 476 (1999), required the Commission to make electronic filing mandatory for political committees and other persons required to file with the Commission who, in a calendar year, have, or have reason to expect to have, total contributions or total expenditures exceeding a threshold amount set by the Commission (which is currently \$50,000). In addition, many independent expenditure reports are already subject to mandatory electronic filing under 52 U.S.C. § 30104(a)(11)(A)(i). However, because electioneering communication reports are not filed by political committees, and because funds spent for electioneering communications are reported as “disbursements,” and not as “expenditures,” the mandatory electronic filing provisions do not apply to electioneering communication reports.

Compared to data from paper reports, data from electronically filed reports is received, processed and disseminated more easily and efficiently, resulting in better use of resources. Reports that are filed electronically are normally available to the public, and may be downloaded, within minutes. In contrast, the time between the receipt of a report filed through the paper filing system and its initial appearance on the Commission’s web site is 48 hours.

Electronic filings are not subject to delay due to post office processing or disruptions in the delivery of mail, such as those arising from security measures put in place after the discovery of anthrax powder and ricin in mail. Because of these security measures, the Commission’s receipt of mailed paper filings is delayed. In contrast, electronic filings are not subject to these delays.

Only entities that report more than \$50,000 of electioneering communications would be subject to mandatory electronic filing under the proposal. The current threshold selected by the Commission ensures that entities with limited financial resources can file reports on paper, which avoids the limited cost of internet access and a computer sufficient to file reports.

### *Legislative Language:*

Section 304(a)(11)(A)(i) of the Federal Election Campaign Act of 1971 (52 U.S.C. § 30104(a)(11)(A)(i)) is amended by inserting “or makes or has reason to expect to make electioneering communications” after “expenditures”.

## Authority to Create Senior Executive Service Positions

*Sections:* 5 U.S.C. § 3132(a)(1)  
52 U.S.C. § 30106(f)(1)

*Recommendation:* Congress should delete the exclusion of the Federal Election Commission from eligibility for the Senior Executive Service (SES) under the Civil Service Reform Act of 1978 (as amended by the Federal Election Campaign Act Amendments of 1979). *See* Pub. L. No. 96-187, § 203, 93 Stat. 1339, 1368 (1980), *codified at* 5 U.S.C. § 3132(a)(1)(C). Additionally, Congress should revise section 306 of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended (“FECA”), to delink the salaries of the Staff Director and the General Counsel from Level IV and Level V of the Executive Schedule.

*Explanation:* The Commission believes that these statutory changes are needed to bring the Commission’s personnel structure in line with that of other comparable federal agencies. This would ensure that the Commission is better able to compete with other government agencies in recruiting and retaining key management personnel.

Currently, the Commission is prohibited by law from creating Senior Executive Service positions within the agency. 5 U.S.C. § 3132(a)(1)(C). The Commission recommends that it be made eligible to create Senior Executive Service positions because: (1) the agency currently has several top management positions that the Commission believes would fully satisfy the criteria for SES positions set forth in 5 U.S.C. § 3132 (*e.g.*, directing the work of an organizational unit, monitoring progress toward organizational goals, etc.); and (2) the SES system would provide institutional benefits to the agency and agency employees.

As a result of the current prohibition, the Commission’s senior managers (other than the Staff Director and the General Counsel) are employed in Senior Level positions. The current Senior Level positions (the Chief Financial Officer, the Inspector General, four Deputy Staff Directors, two Deputy General Counsels, and three Associate General Counsels) oversee major programmatic areas and supervise not only staff, but other managers as well. Although these eleven top management positions are designated as Senior Level, because supervisory and executive responsibilities occupy 100% of the time of the employees filling these positions, the positions would be more appropriately designated as SES.<sup>1</sup>

The FEC’s expenses would not increase significantly if it were permitted to participate in the SES program. In 2008, legislation brought the salary ranges for Senior Level employees into parity with Senior Executive Service employees. *See* Senior Professional Performance Act of 2008, Pub. L. No. 110-372, 122 Stat. 4043 (2008). Like SES employees, Senior Level employees may now carry over 720 hours of annual leave into the next year, rather than the

---

<sup>1</sup> In fact, OPM’s guidance on the Senior Level positions indicates that the Senior Level system is generally for positions in which supervisory duties occupy less than 25% of the employee’s time. *See* <http://www.opm.gov/policy-data-oversight/senior-executive-service/scientific-senior-level-positions/> (last visited Dec. 12, 2018). OPM’s guidance does note, however, that “in a few agencies [such as the Federal Election Commission] that are statutorily exempt from inclusion in the Senior Executive Service (SES), executive positions are staffed with SL employees.”

previous Senior Level limit of 240. Nonetheless, the SES system would provide institutional benefits to the Commission and its employees by enhancing the quality and quantity of the pool of persons available to fill vacancies that may arise.

SES candidates must go through a competitive selection process in order to enter a Candidate Development Program. Completion of a Candidate Development Program by candidates within the agency ensures that a cadre of SES-approved employees is available for selection and thereby assists in good succession planning. In addition, the SES system enables agencies to hire experienced and skilled leaders from a *government-wide*, not just intra-agency, pool with relative ease and with the assurance that all such employees have met the same standards of development and experience. For example, because SES-certified applicants from outside the agency will have met all of the Executive Core Qualifications, the Commission would be able to evaluate their applications with the assurance that fundamental competencies have already been developed.

The current provision in FECA specifies that the Staff Director and General Counsel are to be paid at Level IV and Level V of the Executive Schedule, respectively. Both positions supervise personnel at the GS-15 and Senior Level pay scales, which often provide higher salaries than Levels IV and V of the Executive Schedule. The Staff Director and General Counsel have significant responsibilities and oversight duties with respect to both administrative and legal areas, as well as management over almost all agency personnel. According to recruiting specialists working with the Commission, the current limit makes attracting a strong pool of applicants to these positions more challenging. The appointment and retention of these key leaders have been identified as ongoing management and performance challenges to the Commission by the Inspector General in the 2018, 2017, 2016, 2015 and 2014 Agency Financial Reports and in previous Performance and Accountability Reports. The General Counsel's position is currently filled on an acting basis.

The Commission proposes removing the statutory references to the Executive Schedule, so that the Staff Director and General Counsel would be compensated under the same schedule as the Commission's other senior managers. This revision will remedy the current situation where the Commission's top managers are compensated at a lower rate than many of their direct reports, and will ensure that the Commission can retain highly qualified individuals to serve in those positions as well as enable it to remain competitive in the marketplace for Federal executives when filling the current vacancy or when further vacancies arise. This change will not require an increase in the Commission's appropriation request.

Accordingly, the Commission believes that the positions of Staff Director and General Counsel, as well as the current Senior Level positions within the agency, would be more appropriately categorized as SES positions. Because salary ranges for Senior Executive Service employees and Senior Level employees are in parity, as discussed above, the foregoing amendments will affect the salary expenses for only two positions: the Staff Director and the General Counsel.

*Legislative Language:*

Section 306(f)(1) of the Federal Election Campaign Act of 1971 (52 U.S.C. § 30106(f)(1)) is amended by striking the second and third sentences.

Section 3132(a)(1)(C) of Title 5, United States Code, is amended by striking “the Federal Election Commission, or”.

## **Prohibit Fraudulent PAC Practices**

*Section:* 52 U.S.C. § 30114 & 52 U.S.C. § 30124

*Recommendation:* Congress should examine potentially fraudulent fundraising and spending activities of certain political committees. These committees solicit contributions with promises of supporting candidates, but then disclose minimal or no candidate support activities while engaging in significant and continuous fundraising, which predominantly funds personal compensation for the committees' organizers. In many cases, all funds raised by this subset of political committees are provided to fundraising vendors, direct mail vendors, and consultants in whom the political committees' officers appear to have financial interests. Based on its examination, Congress should amend the Federal Election Campaign Act to address and prohibit fraudulent fundraising practices.

*Explanation:* Most political committees appropriately use vendors and consultants in support of their fundraising and political efforts, and these vendors are often compensated with significant amounts that constitute large percentages of committees' disbursements. Yet, from its examination of campaign finance disclosure reports and media accounts, the Federal Election Commission is seeing a recurring pattern of certain unauthorized political committees soliciting contributions with fundraising materials that promise to use solicited funds to support candidates, sometimes even implying that the materials originate from a named candidate for Federal office without that candidate's knowledge or permission. Then, the contributions are not used as indicated in the solicitations, but instead for significant and continuous fundraising by the committees. In some cases, 90 percent or more of their disbursements are paid to vendors in which the committees' officers have a financial interest, while 10 percent or less of their disbursements are spent on candidate-support activities, such as contributions to candidates, independent expenditures, or donations to state and local candidates.

The Commission believes that Congress should give the Commission the authority to protect contributors from committees that defraud their contributors. Congress should consider whether any political committee should be permitted to solicit contributions with false promises of supporting candidates, but then, over the course of years, deliver only support of the committee's vendors. While legal recourse against such committees might be pursuable under mail- and wire-fraud statutes or the Lanham Act, candidates and contributors who believe they have been victimized by these committees often seek the FEC's assistance. Amending FECA to address and prohibit fraudulent solicitation, including false claims of candidate endorsement and the use of the federal political committee as an artifice to defraud contributors solely to enrich committee organizers, would provide the Commission jurisdiction to consider the complaints of aggrieved candidates and contributors.

Another troubling aspect of this recurring pattern is the frequency of relationships between the individuals who established or operate the political committees and the vendors who receive a large amounts of the committees' disbursements. In some instances, the committees pay fees directly to individuals who established or operated the committees, and in other instances, the fees are paid to entities with financial relationships with those who established or operate the committee. Congress could also consider adding standards addressing payments to vendors with financial relationships with the individuals who establish or operate political committees.



## **Fraudulent Misrepresentation of Campaign Authority**

*Section:* 52 U.S.C. § 30124

*Recommendation:* Congress should revise the prohibitions on fraudulent misrepresentation of campaign authority to encompass all persons purporting to act on behalf of candidates and real or fictitious political committees and political organizations. In addition, Congress should remove the requirement that the fraudulent misrepresentation must pertain to a matter that is “damaging” to another candidate or political party.

*Explanation:* The Federal Election Campaign Act prohibits a Federal candidate or his or her agents or employees from fraudulent misrepresentation such as speaking, writing or otherwise acting on behalf of a candidate or political party committee on a “matter which is damaging to such other candidate or political party” or an employee or agent of either. *See* 52 U.S.C. § 30124(a). The Commission recommends that this prohibition be extended to any person who would disrupt a campaign by such unlawful means, rather than being limited to candidates and their agents and employees. Proving damages as a threshold matter is often difficult and unnecessarily impedes the Commission’s ability to pursue persons who employ fraud and deceit to undermine campaigns. Fraudulent solicitations of funds on behalf of a candidate or political party committee have been prohibited without any required showing of damage to the misrepresented candidate or political party committee. *See* Bipartisan Campaign Reform Act of 2002, § 309, Pub. L. No. 107-155, 116 Stat. 81, 104 (2002) (“BCRA”), *codified at* 52 U.S.C. § 30124(b).

In addition, while both subsections (a) and (b) of 52 U.S.C. § 30124 directly address fraudulent actions “on behalf of any other candidate or political party,” they do not address situations where a person falsely claims to represent another type of political committee or claims to be acting on behalf of a fictitious political organization, rather than an actual political party or a candidate. For example, the current statute does not bar fraudulent misrepresentation or solicitation on behalf of a corporate or union separate segregated fund or a non-connected political committee.

### *Legislative Language:*

Section 322 of the Federal Election Campaign Act of 1971 (52 U.S.C. § 30124) is amended:

- (1) in subsection (a), by striking “who is a candidate for Federal office or an employee or agent of such a candidate”;
- (2) in paragraph (a)(1), by striking “candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof” and inserting “candidate, political party, other real or fictitious political committee or organization, or employee or agent of any of the foregoing,”; and

- (3) in paragraph (b)(1), by striking “candidate or political party or employee or agent thereof” and inserting “candidate, political party, other real or fictitious political committee or organization, or employee or agent of any of the foregoing,”.

## Conversion of Campaign Funds

*Section:* 52 U.S.C. § 30114

*Recommendation:* Congress should amend the Federal Election Campaign Act's prohibition of the personal use of campaign funds to extend its reach to all political committees.

*Explanation:* In 2007, the Department of Justice noted, “[r]ecent years have seen a dramatic rise in the number of cases in which candidates and campaign fiduciaries steal money that has been contributed to a candidate or political committee for the purpose of electing the candidate or the candidates supported by the political committee.” See U.S. Department of Justice, *Federal Prosecution of Election Offenses*, 194-95 (7<sup>th</sup> ed. May 2007). In fact, the Commission has seen a substantial number of instances where individuals with access to the funds received by political committees have used such funds to make unauthorized disbursements to pay for their own personal expenses.

The Commission proposes to revise 52 U.S.C. § 30114(b) to address this growing problem by prohibiting the use by any person of any political committee's receipts for expenses that would exist irrespective of the political committee's political activities. Political activities would include activities in connection with a Federal election, as well as activities in furtherance of a political committee's policy or educational objectives and other legitimate committee functions and related administrative expenses. Such an amendment would provide for coherent and consistent application of FECA.

*Legislative Language:*

Section 313 of the Federal Election Campaign Act of 1971 (52 U.S.C. § 30114) is amended:

- (1) in paragraph (b)(1), by inserting “or a receipt accepted by any other political committee” after “subsection (a)”;
- (2) in paragraph (b)(2), by striking “contribution or donation” and replacing with “contribution, donation, or receipt”;
- (3) in paragraph (b)(2), by striking “campaign or individual's duties as a holder of Federal office,” and inserting “campaign, individual's duties as a holder of Federal office, or political committee's political activities,”.

## **Prohibit Aiding or Abetting the Making of Contributions in Name of Another**

*Sections:* 52 U.S.C. § 30122

*Recommendation:* Congress should amend the prohibition of making contributions in the name of another in the Federal Election Campaign Act to also prohibit directing, helping or assisting the making of a contribution in the name of another.

*Explanation:* Since its enactment in 1972, FECA has prohibited contributions in the name of another. Specifically, the statute prohibits making a contribution in the name of another person or knowingly permitting another to use one's name to effect such a contribution. Additionally, knowingly accepting a contribution made by one person in the name of another is also prohibited. 52 U.S.C. § 30122. These prohibitions promote the important and long-recognized governmental interest in fighting corruption and its appearance by ensuring accurate disclosure of the true sources and amounts of campaign contributions and preventing circumvention of FECA's contribution limits and source prohibitions. This section of FECA is one of its most frequently violated provisions. *See* U.S. Department of Justice, *Federal Prosecution of Election Offenses*, 166 (7<sup>th</sup> ed. May 2007). People attempting to violate FECA's limits on the sources and amounts of contributions often attempt to avoid detection by laundering their illegal contributions through straw donors.

In 1989, the Commission added a provision to its regulation providing that no person shall “[k]nowingly help or assist any person in making a contribution in the name of another.” 11 C.F.R. § 110.4(b)(1)(iii) (1989); *see* Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34,098, 34,104-05 (Aug. 17, 1989). The Commission promulgated section 110.4(b)(1)(iii) after a federal district court held the previous year that a defendant had violated section 30122 “by knowingly assisting in the making of contributions in the name of another.” *See FEC v. Rodriguez*, Final Order and Default Judgment, Case No. 86-687-Civ-T-10 (M.D. Fla. Oct. 28, 1988) (emphasis added). In the nearly three decades since the FEC promulgated section 110.4(b)(1)(iii), the agency has consistently and repeatedly enforced section 30122 in administrative enforcement matters against respondents who knowingly helped or assisted conduit contributions. Doing so has permitted the Commission to reach actors in schemes who initiated, instigated and significantly participated in another person's making of a contribution in the name of another. In one such enforcement proceeding, the Commission's authority to promulgate this regulation was challenged, and a federal district court agreed with the challenger and struck down the regulation. That court found that the regulation's prohibition went beyond the prohibitions in FECA, stating that legislation is therefore required to expand the reach of FECA in this way. *See FEC v. Swallow*, 304 F. Supp. 3d 1113, 1116 (D. Utah 2018). The court also issued a nationwide injunction, which makes a different court reaching a different result unlikely.

This Legislative Recommendation would incorporate the language of the Commission's stricken regulation into FECA, modified to include direct along with help or assist.

*Legislative Language:*

Section 320 of the Federal Election Campaign Act of 1971 (52 U.S.C. § 30122) is amended by adding to the end the following:

“No person shall knowingly direct, help or assist any person in making a contribution in the name of another.”



## **Increase and Index for Inflation Registration and Reporting Thresholds**

*Sections:* 52 U.S.C. §§ 30101, 30104 and 30116

*Recommendation:* Congress should increase and index for inflation certain registration and reporting thresholds in the Federal Election Campaign Act that have not been changed since the 1970s.

*Explanation:* Most of the Federal Election Campaign Act's contribution limits and registration and reporting thresholds were set in the 1970s. Because over twenty years of inflation had effectively reduced FECA's contribution limits in real dollars, the Bipartisan Campaign Reform Act of 2002 increased most of the Act's contribution limits to adjust for some of the effects of inflation. Furthermore, BCRA indexed these limits for inflation to address inflation in future. The Commission proposes extending this approach to registration and reporting thresholds, which have been effectively reduced by inflation since those thresholds were established in 1971 or 1979.

Since 1971, FECA has provided that any group of persons that receives contributions or makes expenditures in excess of \$1,000 in a calendar year must register and report as a political committee. 52 U.S.C. § 30101(4)(A). FECA also requires political committees to abide by the contribution limits and source prohibitions specified in FECA. Since 1979, FECA has provided that local political party organizations are also subject to a \$1,000 threshold for federal political committee status. 52 U.S.C. § 30101(4)(C). The Commission recommends that Congress increase these thresholds to amounts determined appropriate by Congress, and then index those amounts for inflation to prevent erosion in the future. Raising this threshold would be particularly beneficial for local and Congressional district committees of political parties. These organizations frequently breach the \$1,000 threshold. An increased threshold would permit limited spending on federal elections without triggering federal political committee status for local and Congressional district committees of political parties.

Since 1979, FECA has required persons (other than political committees) who make independent expenditures in excess of \$250 in a calendar year to report such expenditures to the Commission. 52 U.S.C. § 30104(c)(1). The Commission recommends that Congress increase this threshold to an amount determined by Congress and index this amount for inflation.

Increasing these thresholds would take into account many years of inflation and the general increase in campaign cost and ease the compliance burdens on smaller organizations and individuals. Additionally, by increasing the thresholds, Congress would exempt some individuals and small organizations that engage in only minimal spending from the Act's registration and reporting requirements. Increasing the registration and reporting thresholds to compensate for inflation would leave significant financial activity subject to regulation as intended by Congress when it enacted the FECA.

*Legislative language:*

Section 301 of the Federal Election Campaign Act of 1971 (52 U.S.C. § 30101) is amended:

- (1) in paragraph (4)(A), by striking both references to “\$1,000” and by inserting a dollar amount determined by Congress; and
- (2) in paragraph (4)(C), by striking both references to “\$5,000” and both references to “\$1,000” and by inserting dollar amounts determined by Congress.

Section 304 of the Federal Election Campaign Act of 1971 (52 U.S.C. § 30104) is amended, in paragraph (c)(1) by striking “\$250” and inserting a dollar amount determined by Congress.

Section 315(c) of the Federal Election Campaign Act of 1971 (52 U.S.C. § 30116(c)) is amended—

- (1) in paragraph (1), by inserting after subparagraph (C) the following:

“(D) In any calendar year after 2018—

(i) a threshold established by section 301(4)(A) or (4)(C) shall be increased by the percent difference determined under subparagraph (A);

(ii) each amount so increased shall remain in effect for the calendar year; and

(iii) if any amount after adjustment under clause (i) is not a multiple of \$100, such amount shall be rounded to the nearest multiple of \$100.”;

- (2) in paragraph (2)(B)(i), by deleting “and” at the end;
- (3) in paragraph (2)(B)(ii), by replacing the period at the end with “; and”; and
- (4) by inserting after paragraph (2)(B)(ii) the following:

“(iii) for purposes of section 301(4)(A) and (4)(C), calendar year 2018.”.

## **Increase the In-Home Event Exemption and Unreimbursed Travel Expense Exemption for Candidates and Political Parties**

*Section:* 52 U.S.C. § 30101(8)(B)(ii) and (iv)

*Recommendation:* Increase the in-home event exemption and unreimbursed travel expense exemption for candidates to the current contribution limit and index for inflation. Establish a separate in-home event exemption and unreimbursed travel expense exemption for each political party committee, increase the exemption to an amount deemed appropriate by Congress, and index it for inflation.

*Explanation:* Under FECA, an individual may spend up to \$1,000 per candidate, per election and up to \$2,000 per calendar year on behalf of all political committees of the same party for food, beverages, and invitations for an event held in the individual's home without making a contribution. FECA also permits an individual to spend up to \$1,000 per candidate, per election and up to \$2,000 per calendar year on behalf of all political committees of the same party for unreimbursed travel expenses on behalf of the campaign or political party without making a contribution.

When Congress created the in-home event exemption and unreimbursed travel expense exemption in 1974, it did not limit spending under these exemptions. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 102(c), 88 Stat. 1263, 1269 (1974). Congress added the current exemption limits in 1979, setting the amount for candidates as the same as the contribution limit then in effect (\$1,000 per election) and setting the amount for political parties as 40% of the contribution limit then in effect for state, district, and local parties (\$5,000 per calendar year) and 10% of the contribution limit then in effect for national parties (\$20,000). *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339 (1980). Since then, Congress has doubled the contribution limits for candidates and state, district, and local party committees, indexing both limits for inflation, as well as increased and indexed for inflation the contribution limit for national party committees.

The Commission recommends that Congress update the in-home event exemption and unreimbursed travel expense exemption on behalf of candidates to reflect the spending limit as originally intended and index these amounts for inflation (*i.e.*, one contribution limit or currently \$2,700). With respect to political parties, sharing an in-home event exemption and unreimbursed travel expense exemption among all committees of a political party imposes significant regulatory burdens on national, state, district, and local committees to keep track of such exempt spending. Therefore, the Commission further recommends that Congress grant each political party committee its own in-home event exemption and unreimbursed travel exemption as well as increasing the increase the exemption limits on behalf of political parties at an amount deemed appropriate by Congress, adjusted for inflation.

## **Permit Political Committees to Make Disbursements by Methods Other Than Check**

*Section:* 52 U.S.C. § 30102(h)(1)

*Recommendation:* Congress should delete the reference to a “check drawn on” an account at a campaign depository as the only permissible method of making political committee disbursements.

*Explanation:* The Federal Election Campaign Act requires all political committees to maintain at least one campaign depository account and to make all disbursements (other than from petty cash) “by check drawn on such accounts in accordance with this section.” See 52 U.S.C. § 30102(h)(1). Since this provision was adopted, financial payments have evolved to include credit cards, debit cards, and other well-established electronic transaction methods.<sup>2</sup> The Commission accordingly recommends deletion of FECA’s requirement that disbursements be made “by check drawn on” campaign depository accounts. The Commission recommends substituting technology-neutral language to require that committees make disbursements “from such accounts.”

*Legislative Language:*

Section 302(h)(1) of the Federal Election Campaign Act of 1971 (52 U.S.C. § 30102(h)(1)) is amended to revise the last sentence to read as follows: “No disbursements may be made (other than petty cash disbursements under paragraph (2)) by such committee except from such accounts.”.

---

<sup>2</sup> See, e.g., Fed. Reserve Sys., *2013 Federal Reserve Payments Study: Recent and Long-Term Payment Trends in the United States: 2003-2012*, at 6-8, 12 (2013), <https://www.frbervices.org/assets/news/research/2013-fed-res-paymt-study-summary-rpt.pdf> (last visited Dec. 12, 2018)(noting that “fewer checks enter the banking system as paper at all” as more checks are processed electronically); Fed. Reserve Sys., *2010 Federal Reserve Payments Study: Noncash Payment Trends in the United States: 2006-2009*, at 4 (2011), <https://www.frbervices.org/assets/news/research/2010-payments-study-summary-report.pdf> (last visited Dec. 12, 2018)(noting that electronic payments — whether made by debit card, credit card, or through automated clearinghouses — “collectively exceed three-quarters of all noncash payments” in U.S.).

## **Update Citations to Reflect the Recodification of FECA**

*Legislation:* H.R. 2832 (114<sup>th</sup> Congress)

*Explanation and Recommendation:* On September 1, 2014, a new title in the United States Code was established for codifying legislation related to Voting and Elections. The new Title 52 includes the Federal Election Campaign Act. In order to ensure that other laws accurately reflect the new location of the Federal Election Campaign Act in the United States Code, legislation is needed to conform citations to the Federal Election Campaign Act in various other laws to its current codification. In the 114<sup>th</sup> Congress, H.R. 2832 was a bill that would have provided the necessary updates. *See* H.R. 2832, 114<sup>th</sup> Cong. (2015). The bill passed the House of Representatives on September 6, 2016, by voice vote. The Senate did not act on it. Similar legislation should be enacted in order to promote public understanding and access to the Federal Election Campaign Act.



## **Repeal the Convention Funding Provisions Rendered Non-Operational by the Gabriella Miller Kids First Research Act**

*Section:* 26 U.S.C. § 9008

*Recommendation:* Congress should repeal the provisions of the Presidential Election Campaign Fund Act that allocate and govern the use of funds through the now-defunct public convention financing program.

*Explanation:* The Gabriella Miller Kids First Research Act, Pub. L. 113-94, 128 Stat. 1085 (2014) (the “Research Act”), amended the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 (the “Funding Statute”), by terminating the longstanding entitlement of national party committees to public funds to finance their presidential nominating conventions. But the Research Act did not repeal the convention financing provisions. Rather, the Research Act implemented the termination by requiring that the funds in question be transferred to a “10-Year Pediatric Research Initiative Fund” instead of to the national party committees.<sup>3</sup> See Pub. L. 113-94, § 2(a), 128 Stat. 1085 (codified at 26 U.S.C. § 9008(i)).

Prior to the Research Act, the Commission had promulgated numerous regulations implementing the Funding Statute. See 11 C.F.R. part 9008. Many of these public funding regulations no longer serve a functional purpose following the Research Act, yet the statutory provisions that they implement remain in place. These statutory and regulatory provisions, which the Research Act rendered inoperative, may confuse the public as to the state of the law. By repealing those inoperative provisions, Congress can clarify the law.

The following statutory provisions are no longer operational and should be removed:

- 26 U.S.C. § 9008(b)(3) — requires the Secretary of the Treasury to make payments to “the national committee of a major party or a minor party which elects to receive its entitlement”;
- 26 U.S.C. § 9008(c) — restricts national party committees from using funds received under the Funding Statute except for expenses incurred with respect to a presidential nominating convention or to repaying loans or otherwise restoring funds that were used to defray such expenses;
- 26 U.S.C. § 9008(d) — limits expenditures by national party committees to the amount of funds to which they are entitled under the Funding Statute, and sets out exceptions to this limitation;
- 26 U.S.C. § 9008(e) — states the date on which the national party committees may begin receiving funds;

---

<sup>3</sup> The Research Act did delete the statutory requirements for the Commission to report to Congress regarding payments to and expenses of national party committees for presidential nominating conventions. Pub. L. No. 113-94, § 2(c)(1), 128 Stat. 1085-96 (deleting 26 U.S.C. § 9009(a)(4)-(6)). The Research Act also removed statutory provisions that criminalized (1) a national party committee’s spending more than the limit established by 26 U.S.C. § 9008(d); (2) any person’s spending public convention funds on expenses other than a national party committee’s convention expenses; and (3) giving or accepting a kickback in connection with any convention expense. *Id.* § 2(c)(2) (amending 26 U.S.C. § 9012).

- 26 U.S.C. § 9008(f) — requires the Secretary of the Treasury to transfer to the Treasury any remaining funds in a national party committee’s account after the close of a nominating convention;
- 26 U.S.C. § 9008(g) — states that any major or minor party may file a statement with the Commission designating the national committee of that party; and requires the Commission, upon verifying the statement, to certify to the Secretary of the Treasury the payment amount the national party committee is entitled to;
- 26 U.S.C. § 9008(h) — grants the Commission the authority to require repayments from a national party committee that has received funds under the Funding Statute.

*Legislative Language:*

Section 9008 of the Internal Revenue Code of 1986 is amended as follows:

- (1) in subsection (b), by striking paragraph (3); and
- (2) by striking subsections (c), (d), (e), (f), (g), and (h).



441 G St. N.W.  
Washington, DC 20548

February 3, 2020

The Honorable Amy Klobuchar  
Ranking Member  
Committee on Rules and Administration  
United States Senate

## **Campaign Finance: Federal Framework, Agency Roles and Responsibilities, and Perspectives**

Campaign finance is the raising and spending of money to influence electoral campaigns at the federal, state, and local levels. The Federal Election Commission (FEC) reported that in 2017 and 2018, candidates, party committees, and political action committees (PAC) raised about \$8.6 billion and spent about \$6 billion on activities associated with federal elections.<sup>1</sup> With such large sums of money involved, concerns about limiting the potential for political corruption and providing transparency to voters, while protecting free speech, have been at the heart of campaign finance law.

The Federal Election Campaign Act of 1971 (FECA) as amended, regulates the raising and spending of campaign funds—including establishing limits and prohibitions—and requires the disclosure of certain contributions in federal elections.<sup>2</sup> Since the passage of FECA, judicial rulings have invalidated a number of the Act's provisions. For example, in 2010, court rulings struck down (1) a prohibition on corporations using their general treasuries to make independent expenditures—that is, spending for a communication that advocates for or against a clearly identified candidate and is not made in cooperation with, or at the suggestion of, a candidate or political party; and (2) limits on contributions to groups that only make independent expenditures—known as Super PACs.<sup>3</sup> While Super PACs are required to disclose the names of contributors, the original sources of some contributions may not be known, raising concerns among those arguing for transparency about the range of funding sources that may support or oppose a particular candidate's campaign. For example, a Super PAC may disclose a tax-exempt organization as a contributor, yet the donors to that organization are generally not

---

<sup>1</sup>FEC reported that this information is based on campaign finance reports filed with the FEC that cover activity from January 1, 2017 through December 31, 2018. Not all money raised in this cycle has been spent at the time of the filing deadline, accounting for the differences between the two amounts.

<sup>2</sup>52 U.S.C. §§ 30101-30145. Federal campaigns are prohibited from accepting contributions from certain types of organizations and individuals. For example, corporations and unions are banned from making contributions from their general treasuries to political campaigns of federal candidates.

<sup>3</sup>*Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), cert. denied, 562 U.S. 1003 (2010). *SpeechNow.org* appealed portions of the case to the U.S. Supreme Court, which declined to hear the case. Super PACs are also known as independent expenditure-only organizations.

publicly disclosed.<sup>4</sup>

Among other prohibitions, FECA prohibits foreign nationals from making contributions or donations of money or other things of value, or spending money in federal, state, or local elections.<sup>5</sup> Reports of foreign interference during the 2016 election, and concerns about future interference have focused attention on campaign finance and other election administration policies in the United States. At the federal level, the FEC is responsible for civil enforcement of FECA, while the Department of Justice (DOJ) is responsible for investigating and prosecuting criminal violations of the Act's provisions. Additionally, the Internal Revenue Service (IRS) is responsible for investigating and enforcing tax-exempt organizations' compliance with the applicable tax provisions related to political campaign intervention.<sup>6</sup>

You asked us to provide information on issues related to the enforcement of campaign finance law in connection with federal elections. This report provides information on three areas related to campaign finance: (1) the legal framework of campaign finance in federal elections; (2) federal agencies' roles and responsibilities, including challenges faced, if any, in enforcement efforts; and (3) the perspectives of literature and selected organizations on key aspects of the federal campaign finance framework, including the enforcement of campaign finance laws (i.e., statutes and regulations).

To address the first area on the legal framework, we reviewed relevant statutes, regulations, and court cases to understand the federal election campaign finance law governing contributions and expenditures, such as prohibitions, limits, disclosure requirements, and responsibilities for enforcement, as well as law governing tax-exempt organizations' political campaign intervention.

To address the second area on federal agencies' roles and responsibilities in administering and enforcing campaign finance laws, we reviewed information from the FEC, which is involved in interpreting and administering federal campaign finance law and investigating violations and enforcing compliance with campaign finance law in connection with federal elections. We also reviewed information from DOJ, which is responsible for investigating and prosecuting criminal violations related to campaign finance. We also reviewed information from IRS because it oversees compliance with the tax law governing allowable levels of political campaign intervention by tax-exempt organizations. More specifically, we reviewed documentation from the FEC, DOJ, and IRS related to how they implement their respective functions and strategic objectives, and the methods they use to administer or enforce campaign finance-related law and identify and address violations, including the prohibition on foreign contributions and expenditures in federal elections. These documents include policies, procedures, and guidance, as well as existing agreements between FEC and DOJ regarding enforcement of FECA. We also interviewed officials from each agency to better understand how they carry out the

---

<sup>4</sup>For example, certain social welfare organizations that are tax-exempt under 26 U.S.C. § 501(c)(4) report some donor information to the Internal Revenue Service, but that information is not subject to public disclosure. See 26 U.S.C. § 6104(b). However, after a recent court decision, if those social welfare organizations make independent expenditures, they are generally required to report certain donor information to FEC, which does publish such information on its website. *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC and Crossroads Grassroots Policy Strategy (Crossroads GPS)*, 316 F. Supp. 3d 349 (D.D.C. 2018).

<sup>5</sup>52 U.S.C. § 30121(a)(1)(A).

<sup>6</sup>According to law and IRS guidance, political campaign intervention is direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. See 26 U.S.C. § 501(c)(3).

agencies' functions with respect to campaign finance-related law, as well as to obtain their perspectives on any challenges faced in administering and enforcing the law. For example, we met with all four FEC commissioners in July 2019, as well as FEC senior officials. We describe in this report the challenges that FEC, DOJ, and IRS officials identified that were relevant to the scope of our review.

To describe how the FEC identifies potential campaign finance violations, we reviewed and analyzed enforcement data from FEC's Office of General Counsel's and Alternative Dispute Resolution Office's Law Manager System to identify the sources of FEC's enforcement actions for fiscal years 2002 through 2017.<sup>7</sup> To describe how the FEC enforces campaign finance law, we reviewed and analyzed enforcement data from the Law Manager System and the Administrative Fine Program's Disclosure Suite to identify the distribution of the FEC's enforcement activities, which represents the matters under review, ongoing and closed, matters resulting in dismissal or settlement, and administrative fines cases unchallenged and challenged for fiscal years 2002 through 2017. To identify the types of campaign finance violations that were enforced by the FEC, we reviewed and analyzed data from the Law Manager System for matters under review closed during fiscal years 2012 through 2017.<sup>8</sup> We also reviewed and analyzed data from the Law Manager System to identify how the FEC has enforced allegations of violations of the foreign national prohibition for fiscal years 2002 through 2017. To assess the reliability of FEC's enforcement data, we performed electronic data testing for obvious errors in accuracy and completeness, and queried agency officials knowledgeable about those data systems to determine the processes in place to ensure the integrity of the data. We found the data sufficiently reliable to provide information on FEC's efforts to enforce campaign finance law.

To identify the number of FECA-related charges filed in cases prosecuted by DOJ, we reviewed and analyzed case management data from DOJ's Criminal Division's Public Integrity Section and the U.S. Attorneys' Offices, which share responsibility for prosecuting campaign finance violations. For the Public Integrity Section, we reviewed and analyzed data for fiscal years 2010 through 2017.<sup>9</sup> Specifically, we obtained data from the Section on all cases that were categorized using a program code for "campaign finance" in the Automated Case Tracking System, based on the judgment of knowledgeable DOJ attorneys, as well as all cases that included criminal charges brought under FECA. To identify applicable charges, we interviewed officials from the Section and reviewed DOJ guidance on the federal prosecution of election offenses.<sup>10</sup> We developed a list of statutes with campaign finance offenses and provided the list to DOJ to ensure the list was accurate and complete. The Section extracted data from the Automated Case Tracking System for all cases that were opened under the campaign finance, wire fraud, or conspiracy statutes and any cases that were opened under the relevant program category codes for fiscal years 2010 through 2017. Further, the Section manually pulled court and internal documents (e.g. case opening and closing forms) and reviewed those documents

---

<sup>7</sup>We focused on fiscal years 2002 through 2017 because FECA's most recent significant amendment was the Bipartisan Campaign Reform Act of 2002 (BCRA). Pub. L. No. 107-155, 116 Stat. 81. In addition, fiscal year 2017 is the latest period for which we obtained complete data from the FEC.

<sup>8</sup>For the closed matters under review, we focused on fiscal years 2012 through 2017 because these data were the most complete and available at the time of this review.

<sup>9</sup>We selected the fiscal year 2010 through 2017 time frame to capture information on DOJ's campaign finance enforcement efforts across multiple presidential administrations. In addition, fiscal year 2017 was the last complete year of DOJ data available at the time of our request.

<sup>10</sup>Department of Justice, *Federal Prosecution of Election Offenses*, Eighth Edition, December 2017.



to determine which cases had accompanying statutes associated with violations of FECA provisions. We also reviewed and analyzed case management data from the Executive Office for United States Attorneys' Legal Information Office Network System, to determine the total number of charges filed for violations of FECA provisions by U.S. Attorneys' Offices for fiscal years 2015 through 2017. At the time of our review, data on FECA charges were the most complete for these three fiscal years.<sup>11</sup> We assessed the reliability of the data provided by DOJ by reviewing data system user manuals and data dictionaries, identifying inconsistencies, and working with agency officials to resolve issues or identify potential limitations. We found the data sufficiently reliable to provide information on the number of FECA charges filed in cases prosecuted by DOJ.

To describe how IRS identifies impermissible levels of political campaign intervention by tax-exempt organizations and the outcomes of the agency's enforcement efforts, we reviewed and analyzed data from IRS's Reporting Compliance Case Management System to identify the agency's sources and dispositions of closed examinations as well as the types of tax-exempt organizations examined during fiscal years 2010 through 2017.<sup>12</sup> We assessed the reliability of these data by reviewing data system user manuals and data dictionaries and querying agency officials knowledgeable about the data system to determine the processes in place to ensure the integrity of the data. We determined that the IRS data were sufficiently reliable for the purpose of providing information on IRS' efforts to enforce compliance with provisions related to political campaign intervention.

We also interviewed FEC and DOJ officials about guidance and procedures used to coordinate and document referrals of matters involving potential FECA violations between the two agencies, and assessed processes against the implementation of collaborative mechanisms<sup>13</sup> and applicable internal control guidance on documentation and organizational knowledge retention from *Standards for Internal Control in the Federal Government*.<sup>14</sup>

To address the third area related to perspectives on key aspects of the campaign finance framework, we performed a literature review of scholarly publications, government reports, and publications by nonprofits and think tanks from 2016 through 2018.<sup>15</sup> We also conducted interviews with subject-matter specialists on campaign finance issues from a nongeneralizable

---

<sup>11</sup>Effective September 1, 2014, FECA (previously codified under in the United States Code under 2 U.S.C. § 431 et seq) was consolidated with other laws governing voting and elections in the new title 52 of the United States Code. Case management data from the Executive Office for United States Attorneys did not capture charges under Title 2 with sufficient precision for our purposes; therefore we restricted our analysis to charges filed under Title 52 starting with fiscal year 2015.

<sup>12</sup>We requested data on closed examinations from IRS beginning in fiscal year 2010 because the Supreme Court and federal appeals court rulings in *Citizens United v. FEC* and *SpeechNow.org v. FEC* changed the campaign finance landscape, enabling corporations (including nonprofit corporations) to (1) use their general treasuries to make unlimited independent expenditures and electioneering communications and (2) make unlimited contributions to Super PACs. After these decisions in 2010, nonprofit corporations, such as tax-exempt social welfare organizations (501(c)(4) organizations) that are incorporated, could make independent expenditures, electioneering communications, and contribute to Super PACs. We recognize that some of the examinations closed in 2010 may include activity prior to this time frame.

<sup>13</sup>GAO, *Managing for Results: Key Consideration for Implementing Interagency Collaborative Mechanisms*, [GAO-12-1022](#) (Washington, D.C.: Sept. 27, 2012).

<sup>14</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sept. 2014).

<sup>15</sup>We reviewed literature published from calendar years 2016 through 2018. This time frame includes the 2016 U.S. Presidential election, and extends through the end of the most recent calendar year at the time of our review.

sample of research, advocacy, or practitioner organizations, selected to represent a range of views about the campaign finance framework. While the information we obtained from our literature review and interviews with specialists from selected organizations cannot be generalized or be considered representative of all views on campaign finance issues, they provided important perspectives on key aspects of the campaign finance framework, including the scope and nature of campaign finance laws, the purposes served by contribution limits, the benefits and costs of unlimited independent expenditures, and the extent to which the sources of campaign funding should be disclosed. For a more detailed discussion on our scope and methodology, see enclosure I.

We conducted this performance audit from April 2018 to February 2020 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

## **Legal Framework**

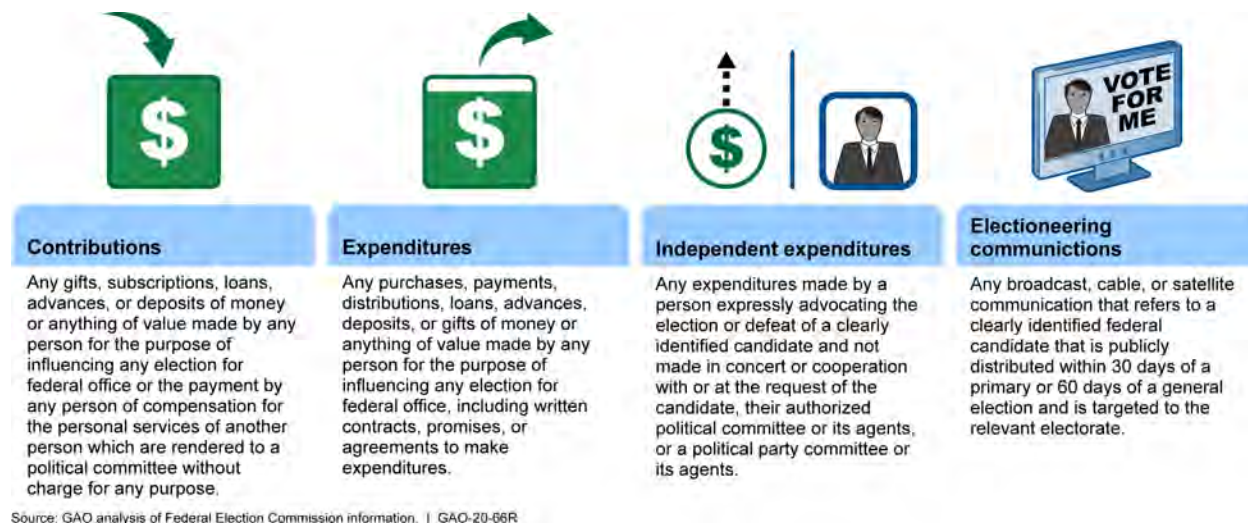
### What is campaign finance?

Campaign finance refers to the raising and spending of money to influence electoral campaigns at the federal, state, and local levels. Most spending on elections is privately financed, via individuals, political committees, and other organizations such as corporations, unions, and tax-exempt organizations.<sup>16</sup> Federal public financing is available for qualifying candidates for President of the United States during both the primaries and the general election. Consistent with FECA, the federal campaign finance-related activities subject to campaign finance laws include contributions, expenditures, independent expenditures, and electioneering communications. For example, contributions involve giving money to an entity, such as a political committee, and expenditures involve spending money directly for the purpose of influencing a federal election. There are several methods by which these activities are regulated—such as the imposition of disclosure and disclaimer requirements, setting limits on contributions to candidates' campaigns, and providing a method for public financing of Presidential elections. Figure 1 provides an overview of these regulated activities.

---

<sup>16</sup>Campaigns may not accept contributions from the general treasuries of corporations, labor organizations or national banks. See 52 U.S.C. § 30118; 11 C.F.R. § 114.2. This prohibition applies to any incorporated organization, including a nonstock corporation, a trade association, an incorporated membership organization and an incorporated cooperative. A campaign may, however, accept contributions from PACs established by corporations, labor organizations, incorporated membership organizations, trade associations, and national banks.

**Figure 1: Types of Campaign Finance-Related Activities Subject to Federal Campaign Finance Law**



### What laws address campaign finance in federal elections?

Federal campaign finance law is composed of a set of limits, restrictions, and requirements regarding the contribution and spending of money in connection with elections. FECA and its implementing regulations set forth the provisions governing this area of law and several court decisions have had a significant impact on FECA's scope.

FECA provides for both disclaimer and disclosure requirements and sets limits on how much certain individuals and organizations may contribute, as well as who may make campaign contributions. For example, FECA prohibits foreign nationals from making a contribution or donation in connection with federal, state, or local elections and from making expenditures, independent expenditures, or disbursements for electioneering communications. FECA also prohibits a person from soliciting, accepting, or receiving such a contribution or donation from a foreign national.<sup>17</sup> Since the enactment of FECA in 1971, subsequent legislation and court rulings have further shaped the campaign finance framework. For example, the Bipartisan Campaign Reform Act of 2002 (BCRA) included several provisions designed to end the use of "soft money," or money raised outside the limits and prohibitions of federal campaign finance law, and prohibited corporations and unions from using their general treasuries to fund electioneering communications.<sup>18</sup> In 2010, the U.S. Supreme Court invalidated the longstanding prohibition on corporations using their general treasuries to fund independent expenditures and

<sup>17</sup>52 U.S.C. § 30121; 11 C.F.R. § 110.20. Foreign nationals are prohibited from making any of the following: contribution or donation of money or other thing of value or an implied promise to make a contribution or donation in connection with any federal, state, or local election; contribution or donation to any committee or organization of a national, state, district, or local political party; donation to a presidential inaugural committee; disbursement for an electioneering communication; or any expenditure, independent expenditure, or disbursement in connection with a federal, state, or local election. Foreign nationals are also prohibited from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's federal or non-federal election-related activities.

<sup>18</sup>Pub. L. No. 107-155, 116 Stat. 81.

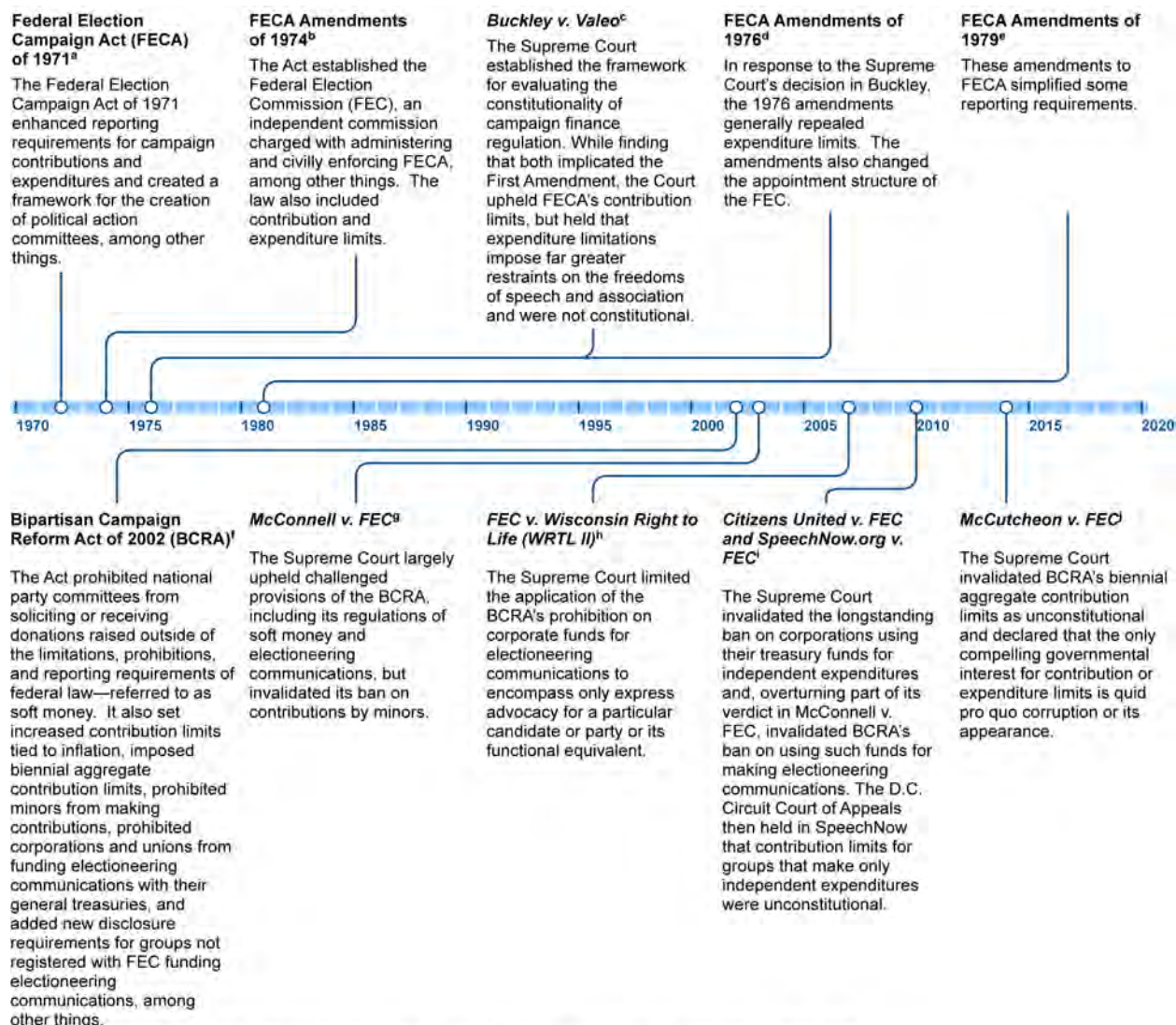
BCRA's prohibition on corporations using their general treasuries to fund electioneering communications in *Citizens United v. FEC*.<sup>19</sup> As a result, corporations may use their general treasury funds to fund independent expenditures explicitly calling for the election or defeat of federal candidates or electioneering communications, which refer to those candidates during pre-election periods, but do not necessarily explicitly call for their election or defeat. Following *Citizens United v. FEC*, the U.S. Court of Appeals for the District of Columbia Circuit determined in *SpeechNow.org v. Federal Election Commission* that contributions to PACs that make only independent expenditures could not be constitutionally limited.<sup>20</sup> As a result, these entities, known as Super PACs, may accept unlimited amounts of funds, including from corporations, unions, and individuals, to fund independent expenditures that advocate for the election or defeat of federal candidates. Figure 2 shows the significant legislation and court decisions related to campaign finance activities, since the enactment of FECA in 1971.

---

<sup>19</sup>558 U.S. 310.

<sup>20</sup>599 F.3d.

**Figure 2: Significant Campaign Finance Legislation and Court Decisions, Since Enactment of the Federal Election Campaign Act of 1971 (FECA)**



Source: GAO analysis of the Federal Election Campaign Act as amended, and court decisions related to campaign finance activities. | GAO-20-66R

<sup>a</sup>Pub. L. No. 92-225, 86 Stat. 3 (1972).

<sup>b</sup>Pub. L. No. 93-443, 88 Stat. 1263.

<sup>c</sup>424 U.S. 1 (1976).

<sup>d</sup>Pub. L. No. 94-283, 90 Stat. 475.

<sup>e</sup>Pub. L. No. 96-187, 93 Stat. 1339 (1980).

<sup>f</sup>Pub. L. No. 107-155, 116 Stat. 81.

<sup>g</sup>540 U.S. 93 (2003).

<sup>h</sup>551 U.S. 449 (2007).

<sup>i</sup>558 U.S. 310 (2010); 599 F.3d 686 (D.C. Cir. 2010) (en banc).

<sup>j</sup>572 U.S. 185 (2014).

## Who can spend and raise money in federal elections?



FECA permits individuals to make contributions, subject to certain limitations, to an unlimited number of candidates, political parties, and political action committees.<sup>21</sup> There are also various types of political committees and organizations that are permitted to make contributions to federal candidates, as well as to other committees and organizations.<sup>22</sup> Federal campaign finance law contains certain restrictions on individuals and entities that may contribute directly to federal candidates. Figure 3 shows the individuals and entities allowed to make contributions to federal candidates.

**Figure 3: Individuals, Groups, Political Committees, and Other Entities That Can Make Contributions to Federal Candidates**

Allowed		
<b>Individuals</b> An individual may make contributions to candidates and their authorized committees.	<b>Minors</b> An individual who is under 18 years old may, under certain circumstances, make contributions to candidates and political committees, subject to limitations.	<b>Certain limited liability companies</b> A limited liability company with one or more members generally is treated as a corporation if it has elected, under Internal Revenue Service (IRS) rules, to be treated as a corporation. A limited liability company with two or more members generally is treated as a partnership if it has made no choice, under IRS rules, as to its entity status. A limited liability company with one member generally is disregarded as an entity for federal income tax purposes if it has made no choice, under IRS rules, as to its entity status, and the single member is treated as directly engaging in the activities of the limited liability company.
<b>Political party committees</b> Party committees may support federal candidates in a variety of ways, including making contributions.	<b>Political action committees (PAC)</b> Separate segregated funds <sup>a</sup> and nonconnected PACs, with the exception of Super PACs, may make contributions to candidates and to their authorized committees. <sup>b</sup>	If a limited liability company is treated as a corporation, it is prohibited from making contributions to candidate committees, but it can establish a separate segregated fund. It may also give money to a Super PAC. If it is considered a partnership, it is subject to the contribution limits for partnerships. Each individual partner may make contributions subject to limitations.
<b>Indian tribes</b> In past advisory opinions and enforcement cases, the Federal Election Commission has determined that an unincorporated tribal entity can be considered a "person" under the Federal Election Campaign Act and thus subject to the various contribution prohibitions and limitations.	<b>State PACs, unregistered local party organizations and nonfederal campaign committees</b> State PACs, unregistered local party organizations and nonfederal campaign committees may, under certain circumstances, contribute to federal candidates.	Although contributions made by the partnership as a whole count proportionately against each participating partner's limit, contributions made by individual partners from their own funds do not count against the partnership's limit. If a single member limited liability company has not chosen corporate tax treatment, it may make contributions; the contributions will be attributed to the single member, not the limited liability company.
<b>Candidates</b> When candidates use or loan their personal funds for campaign purposes, they are making contributions to their campaigns. Unlike other contributions, these candidate contributions are not subject to any limits.	<b>Other authorized committees</b> A candidate's authorized committee may make a contribution of up to \$2,000 per election to the authorized committee of another federal candidate.	

Source: GAO analysis of Federal Election Commission information. | GAO-20-66R

Note: Other political committees and organizations that cannot contribute to federal candidates may raise and spend money in other ways in support of federal elections. For example, corporations and labor organizations cannot use their general treasuries to make contributions to candidates or political committees, but may establish a separate segregated fund, known as a corporate or labor PAC, among other things. Super PACs may not contribute directly to federal candidates, but they may raise unlimited funds from corporations, unions, and individuals and spend unlimited funds in the form of independent expenditures.

<sup>a</sup>Under FEC regulations, a separate segregated fund is a political committee established, administered or financially supported by a corporation or labor organization—also referred to as corporate or labor PAC. See 11 C.F.R. § 114.1(a)(2)(iii).

<sup>b</sup>A nonconnected PAC is considered any committee that conducts activities in connection with an election, but that is not a party committee, an authorized committee of any candidate for federal election, or a separate segregated fund.

<sup>21</sup>See, e.g., 52 U.S.C. § 30116 (establishing contribution limits, among other things); *McCutcheon v. FEC*, 572 U.S. 185 (2014) (holding that biennial aggregate contribution limits are unconstitutional). For a summary of the contribution limits for calendar years 2019 and 2020, see enclosure II.

<sup>22</sup>FECA generally defines political committees as any committee, club, association, or other group of persons, which receives contributions or makes expenditures aggregating in excess of \$1,000 during a calendar year. 52 U.S.C. § 30101(4). The Supreme Court held in *Buckley v. Valeo* that only organizations under the control of a federal candidate or whose major purpose is the election or defeat of federal candidates may be regulated as political committees. *Buckley v. Valeo*, 424 U.S. at 79–80.

In addition to contributions directly to federal candidates, individuals and organizations can contribute and spend money to influence elections in other ways. Figure 4 below shows in greater detail the types and flow of contributions and independent expenditures that individuals, political committees, and other organizations are allowed to make in connection with federal elections. As discussed earlier, a contribution is anything of value given, loaned or advanced to influence a federal election. In contrast, independent expenditures refer to purchases, often for political advertising, that explicitly call for the election or defeat of a clearly identified federal candidate (e.g., “vote for Smith,” “vote against Jones”), must be made independent of parties and candidates, and cannot be coordinated with candidates or parties. Some entities, like political committees, can both raise and spend money to influence federal elections.<sup>23</sup> For example, PACs may make contributions to candidates and may also make independent expenditures. In contrast, corporations and labor organizations cannot use their general treasuries to make contributions to candidates or political committees, but may spend money in other ways to influence federal elections.<sup>24</sup> They may (1) establish a separate segregated fund, known as a corporate or labor PAC; (2) make unlimited independent expenditures and electioneering communications; and (3) make unlimited contributions to Super PACs. Super PACs may not contribute directly to federal candidates, but they may raise unlimited funds from corporations, unions, and individuals and spend unlimited funds in the form of independent expenditures.

Under the Internal Revenue Code, certain tax-exempt organizations, such as social welfare organizations that are tax-exempt under section 501(c)(4) (501(c)(4) organizations) and political organizations that are tax-exempt under section 527 (527 organizations), may engage in activities to influence elections, to varying extents. An organization may engage in some political campaign intervention without losing its tax-exempt status under 501(c)(4) of the Internal Revenue Code, so long as it continues to be primarily engaged in activities that promote social welfare.<sup>25</sup> Under FECA, a 501(c)(4) organization that is incorporated is prohibited from contributing directly to federal candidates, but may raise unlimited funds and make independent expenditures, as well as make contributions to Super PACs.<sup>26</sup> Political organizations qualifying for tax-exempt status under section 527 of the Internal Revenue Code are formed and operated primarily to accept contributions or make expenditures for the purpose of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to

---

<sup>23</sup>A PAC may also distribute communications that support candidates and parties, including making independent expenditures. There are several types of federal PACs—a nonconnected PAC, which is any PAC that is not a party committee, an authorized committee of a candidate for federal election, or a separate segregated fund of a corporation or labor organization; a leadership PAC formed by a candidate or officeholder; and a separate segregated fund, which is established, administered or financially supported by a corporation or labor organization.

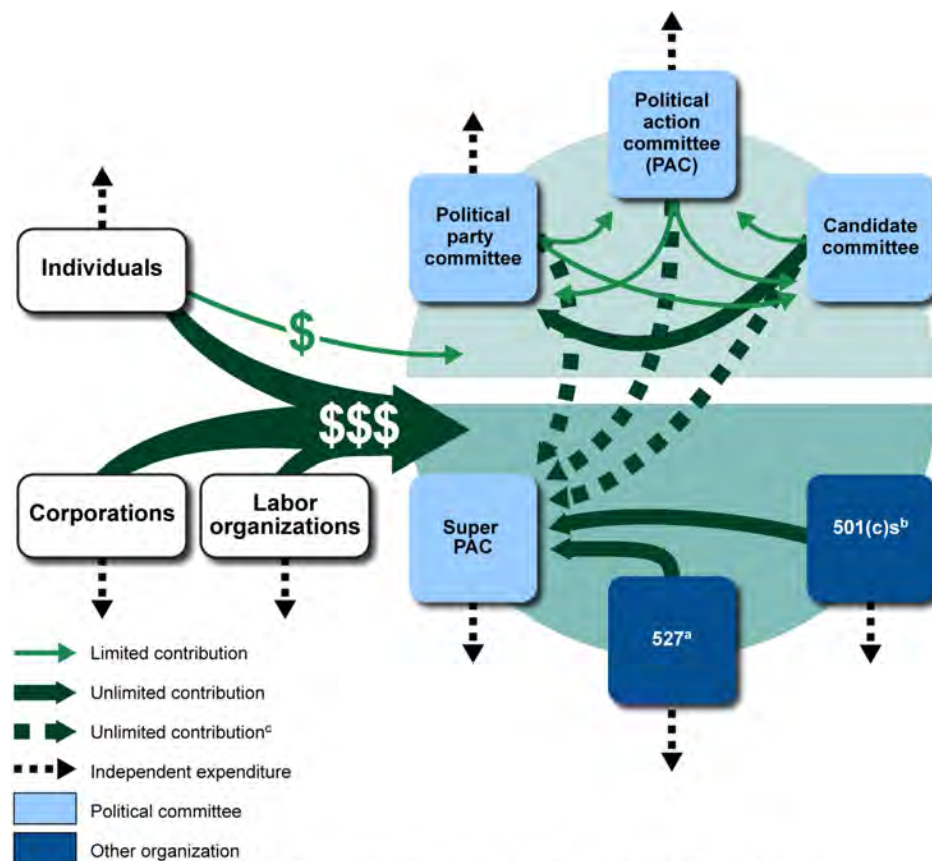
<sup>24</sup>See 52 U.S.C. § 30118.

<sup>25</sup>The Internal Revenue Code provides that a 501(c)(4) organization must be operated exclusively for the promotion of social welfare. 26 U.S.C. § 501(c)(4). IRS regulations provide that an organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. 26 C.F.R. § 1.501(c)(4)-1(a)(2). 501(c)(5) labor organizations and 501(c)(6) trade associations may also engage in limited political campaign intervention. See Rev. Rul. 2004-6. If these organizations make expenditures for a section 527(e)(2) exempt function, they may be subject to tax under 527(f). Such exempt functions include influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. 26 U.S.C. § 527(e)(2).

<sup>26</sup>See 52 U.S.C. § 30118.

any federal, state, or local public office or office in a political organization, or the election of presidential or vice presidential electors.<sup>27</sup> Some, but not all, 527 organizations are political committees regulated by the FEC,<sup>28</sup> and 527 organizations that are not political committees may engage in issue advocacy (other than electioneering communications), if it is not coordinated with campaigns. For a summary of some of the types of political committees and other organizations that are raising and spending money in support of federal elections, see enclosure III.

**Figure 4: Overview of Individuals and Selected Political Committees and Other Organizations—Types and Flow of Contributions and Expenditures Made In Connection With Federal Elections**



Source: GAO analysis of the Federal Election Commission and Internal Revenue Service information. | GAO-20-66R

<sup>a</sup>For the purpose of this figure, 527 organizations are those that are not also political committees regulated by the Federal Election Commission (FEC).

<sup>b</sup>The Internal Revenue Code contains an explicit prohibition on political campaign intervention by 501(c)(3) and (c)(29) organizations. The 501(c)(4) social welfare organizations, 501(c)(5) labor organizations, and 501(c)(6) trade associations may engage in limited political campaign intervention. See 26 U.S.C. § 501(c); 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii); Rev. Rul. 2004-6.

<sup>27</sup>26 U.S.C. § 527(e).

<sup>28</sup>Political committees that are registered with FEC and are also organized under section 527 of the Internal Revenue Code are subject to FEC reporting requirements and exempt from some IRS reporting requirements. 26 U.S.C. § 527(j)(5)(A).

<sup>c</sup>According to FEC officials while no legal provision prohibits unlimited contributions from a political party committee, PAC, or a candidate committee to a Super PAC, this is unlikely to occur because these political committees are limited to raising funds from sources permitted by the Federal Election Campaign Act of 1971 (FECA), as amended, and in amounts subject to FECA's contribution limits. In contrast, Super PACs are permitted to raise funds in unlimited amounts, including from some of the sources prohibited from contributing to political committees under FECA.

### What information are contributors and spenders required to report, and to whom?

At the federal level, political committees are required to register with the FEC and regularly file disclosure reports, generally providing information about the following: (1) contributions received; (2) expenditures made; (3) the identity of those making contributions of more than \$200 per calendar year (or election cycle in the case of a federal candidate committee) along with the date and amount of the contribution; and (4) the identity of those to whom an expenditure of more than \$200 is made per calendar year (or election cycle in the case of a federal candidate committee) along with the date, amount, and purpose of the expenditure.<sup>29</sup>

Certain organizations other than political committees that spend money on elections, such as 501(c)(4) organizations, are also subject to certain FEC reporting requirements. If these organizations make independent expenditures aggregating more than \$250 during a calendar year, they must submit a report to the FEC, which includes, among other things, for each independent expenditure (1) whether the expenditure was made independently of a campaign; (2) whether the expenditure supports or opposes a candidate; and (3) the identity of each person who made a contribution to the organization of more than \$200 when that contribution is earmarked for political purposes and intended to influence elections or for the purpose of furthering an independent expenditure.<sup>30</sup>

Organizations exempt from tax under section 501(c) or 527 of the Internal Revenue Code generally are required to report certain information to IRS. These organizations must file a Form 990-series annual information return, which includes information about revenue and expenditures.<sup>31</sup> Generally, as part of that information return, organizations are required to report names, addresses, and donation amounts for donors contributing more than \$5,000 to the organization.<sup>32</sup> Tax-exempt organizations that engage in political campaign intervention on

---

<sup>29</sup>See 52 U.S.C. § 30104(b); 11 C.F.R. § 104.3.

<sup>30</sup>See 52 U.S.C. § 30104(c); 11 C.F.R. § 109.10(e). On August 3, 2018, the U.S. District Court for the District of Columbia vacated the FEC regulation providing that such persons other than political committees need disclose only the identification of donors who gave more than \$200 annually when that donation was for the purpose of furthering *the reported* independent expenditure. *CREW v. FEC and Crossroads GPS*, 316 F. Supp. 3d 349 (D.D.C. 2018). On October 4, 2018, following the decision, FEC issued guidance stating that it will enforce the statute by requiring disclosure of donors of over \$200 annually when that donation is for the purpose of furthering *an* independent expenditure, as well as donors of over \$200 annually when that donation is earmarked for political purposes and intended to influence elections.

<sup>31</sup>26 U.S.C. § 6033(a); 26 C.F.R. § 1.6033-2.

<sup>32</sup>See 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). Such information must be reported on Schedule B (Form 990, 990-EZ, or 990-PF), Schedule of Contributors. In 2018, IRS issued Revenue Procedure 2018-38, stating that certain 501(c) organizations—including 501(c)(4) social welfare organizations, 501(c)(5) labor organizations, and 501(c)(6) trade associations, among others—are no longer required to report the names and addresses of the donors on Schedule B of the tax return, but they must continue to collect and record this information and make it available to IRS upon request, when needed for tax administration. On July 30, 2019, in *Bullock v. IRS*, a district court found the Revenue Procedure to be a legislative rule and set it aside because the Treasury Department and IRS did not follow the required notice and public comment procedures for a legislative rule before promulgating it. *Bullock v. IRS*, 401 F. Supp. 3d 1144 (D. Mont. 2019). On September 10, 2019, IRS published a proposed rule that would require only

behalf of or in opposition to candidates for public office are required to report information about their political campaign intervention and expenditures.<sup>33</sup> Section 527 organizations are also generally required to periodically file a report, which, among other things, identifies the name, address, occupation, and employer of any person that contributes, in the aggregate, \$200 or more in a calendar year and the amount and date of each contribution. The report also identifies any person to whom expenditures are made that aggregate \$500 or more in a calendar year, and the amount, date, and purpose of each expenditure.<sup>34</sup> Most of the information reported by these organizations is subject to public disclosure, including the identities of donors reported by 527 organizations.<sup>35</sup> However, identifying information about donors reported by most 501(c) organizations is not subject to public disclosure.<sup>36</sup>

### Who is prohibited from spending money in federal elections?

Under FECA, certain types of individuals and organizations are prohibited from contributing to federal candidates. For example, corporations, including incorporated 501(c)(4) organizations, and unions are prohibited from making contributions to candidates in federal elections.<sup>37</sup> However, PACs established and administered by, but legally separate from, corporations and unions may contribute to candidates, parties, and other PACs. Corporations and unions may use their general treasury funds to make uncoordinated electioneering communications, independent expenditures, or both, but this spending is not considered a contribution under FECA. Foreign national individuals and entities—including companies incorporated or having principal places of business in foreign countries—are prohibited from making contributions, donations, or expenditures (including independent expenditures and electioneering communications) in federal, state, or local elections.<sup>38</sup> FECA also prohibits federal contractors from making campaign contributions or from soliciting campaign funds.<sup>39</sup> No person may make a contribution in another person's name and no person may make a contribution in cash of more than \$100 to influence federal elections.<sup>40</sup> Figure 5 shows the individuals and organizations prohibited from contributing to campaigns in connection with federal elections.

---

501(c)(3) and 527 organizations to report the names and addresses of certain donors on their Forms 990. 501(c)(4), (5), and (6) organizations, among others, would not be required to report such information. 84 Fed. Reg. 47,447 (Sept. 10, 2019). The reporting requirement does not apply to certain section 527 political organizations. See 26 U.S.C. § 6033(g)(3).

<sup>33</sup>See 26 C.F.R. § 1.6033-2(a)(2)(ii)(k). Such information must be reported on Schedule C (Form 990 or 990-EZ), Political Campaign and Lobbying Activities.

<sup>34</sup>See 26 U.S.C. § 527(j)(3). Such information is reported on Form 8872, Political Organization Report of Contributions and Expenditures. These reporting requirements do not apply to political committees that are subject to FECA reporting requirements or with respect to any expenditure that is an independent expenditure under FECA. 26 U.S.C. § 527(j)(5)(A), (F).

<sup>35</sup>26 U.S.C. § 6104(b), (d). Donor information for 501(c)(3) private foundations that file Form 990-PF is also subject to public disclosure.

<sup>36</sup>*Id.*

<sup>37</sup>52 U.S.C. § 30118.

<sup>38</sup>52 U.S.C. § 30121; 11 C.F.R. § 110.20.

<sup>39</sup>52 U.S.C. § 30119; 11 C.F.R. § 115.2.

<sup>40</sup>52 U.S.C. §§ 30122, 30123.



**Figure 5: Federal Elections Campaign Act Prohibitions Related to Contributions from Certain Types of Individuals and Organizations**

X Prohibited			
Corporations and labor organizations		Compensation to a candidate employed by prohibited source	Foreign nationals and foreign entities
Corporations (including incorporated tax-exempt organizations), labor organizations, and national banks may not use their general treasury funds to make contributions to federal candidates. Political action committees (PAC), however, established by corporations, labor organizations, incorporated membership organizations, trade associations, and national banks may make contributions. A professional corporation is prohibited from making any contributions because contributions from corporations are unlawful. Because contributions from corporations are prohibited, a partnership or limited liability company with corporate partners or members may not attribute any portion of a contribution to the corporate partners or members. Candidates, political committees, and other persons are also prohibited from knowingly accepting or receiving any contribution from the general treasuries of corporations, labor organizations, or national banks.		Compensation paid to a candidate in excess of actual hours worked, or in consideration of work not performed, is generally considered a contribution from the employer. If the employer is a corporation, federal government contractor, or another prohibited source, the excess payment would result in a prohibited contribution under the regulations applicable to that employer.	Federal law prohibits contributions, donations, expenditures and disbursements solicited, directed, received or made directly or indirectly by or from foreign nationals in connection with any election. Similarly, because contributions from foreign nationals are prohibited, a partnership or limited liability company may not attribute any portion of a contribution to a partner who is a foreign national. Federal campaigns may not solicit or accept contributions from foreign nationals.
Federal government contractors		Contributions in the name of another	
Federal government contractors may not make contributions to federal candidates. However, federal contractors that are corporations may form PACs and make contributions. A partnership or limited liability company that is negotiating a contract with the federal government or that has not completed performance of such a contract is prohibited from making contributions. Further, any person is prohibited from knowingly soliciting any such contribution from a federal government contractor.		No person may make a contribution in the name of another person or knowingly permit their name to be used to effect such a contribution, and no person may knowingly accept a contribution made by one person in the name of another person. Accordingly, an entity that is prohibited from making contributions is prohibited from using bonuses or other methods of reimbursing employees for their contributions.	

Source: GAO analysis of Federal Election Commission information. | GAO-20-66R

FECA provides generally that any person who knowingly and willfully commits a violation of any provision of FECA that involves the making, receiving, or reporting of any contribution, donation, or expenditure aggregating \$2,000 or more during a calendar year is subject to criminal penalties. Knowing and willful violations aggregating \$2,000 or more during a calendar year are subject to a fine (up to \$100,000 for each offense by an individual and up to \$200,000 for each offense by an organization), or imprisonment for not more than 1 year, or both. Knowing and willful violations aggregating \$25,000 or more per calendar year are subject to a fine (up to \$250,000 for each offense by an individual and up to \$500,000 for each offense by an organization), or imprisoned for not more than five years, or both.<sup>41</sup> In most instances, DOJ initiates the prosecution of criminal violations of FECA, but the law also provides that the FEC may refer an apparent knowing and willful violation to the DOJ for criminal prosecution under certain circumstances. Specifically, the FEC may refer the apparent violation to the U.S. Attorney General for prosecution if there is an affirmative vote of four commissioners that there

<sup>41</sup>52 U.S.C. § 30109(d). There are different thresholds for knowing and willful violations of FECA provisions regarding campaign misrepresentations and certain coerced contributions, and a different threshold and penalty for violations regarding conduit contributions. For example, for conduit contributions, a person that knowingly and willfully commits a violation involving an amount aggregating more than \$10,000 shall be imprisoned for not more than 2 years or an amount aggregating \$25,000 or more for not more than 5 years, fined not less than 300 percent of the amount involved and not more than the greater of \$50,000 or 1,000 percent of the amount involved, or both.

is probable cause to believe that a knowing and willful violation of FECA involving a contribution or expenditure aggregating over \$2,000 during a calendar year has or is about to occur.<sup>42</sup>

## **Roles and Responsibilities of Federal Agencies and Challenges Faced**

### What federal agencies are involved in overseeing campaign finance regulations in federal elections?

At the federal level, campaign finance law is passed by Congress, and civilly enforced by the FEC, an independent regulatory agency responsible for interpreting, administering, and enforcing FECA. The FEC promulgates regulations implementing FECA's requirements and issues advisory opinions that respond to inquiries from those affected by the law. The FEC's functions involve (1) administering the public disclosure system for campaign finance activity; (2) providing information and policy guidance on campaign finance laws; (3) encouraging voluntary compliance with campaign finance laws; (4) promulgating regulations to implement FECA; and (5) enforcing the campaign finance laws through audits, investigations, and civil litigation.

DOJ is responsible for investigating and prosecuting criminal violations of FECA. One of DOJ's law enforcement priorities is election crimes—which includes enforcing campaign finance violations. DOJ's oversight in this area—led by the department's Criminal Division—is designed to ensure that the department's nationwide response to election crime matters is uniform, impartial, and effective.

IRS administers federal tax provisions related to political campaign intervention and examines organizations for compliance with such provisions. If an organization does not comply, IRS can revoke an organization's tax-exempt status or impose excise taxes, or both.<sup>43</sup>

## **Federal Election Commission**

### How is the FEC structured, and what are its operating procedures?

The FEC is an independent regulatory agency responsible for interpreting, administering, and enforcing FECA. The FEC is led by up to six commissioners<sup>44</sup> and staffed with more than 300 federal employees.<sup>45</sup> FECA specifies two statutory staff positions for the FEC—a staff director

---

<sup>42</sup>52 U.S.C. § 30109(a)(5)(C).

<sup>43</sup>In addition to the FEC, DOJ, and IRS, other federal agencies that have secondary responsibilities in the area of campaign finance. For example, the Federal Communications Commission administers and enforces civil aspects of telecommunications law regarding political advertising and candidate access.

<sup>44</sup>The FEC commissioners are appointed by the President and subject to Senate confirmation and serve six-year terms. No more than three members may be affiliated with the same political party. By statute, the Commission's chairmanship rotates every year. FECA permits FEC members to remain in office in "holdover" status, exercising full powers of the office, after their terms expire "until his or her successor has taken office as a commissioner." 52 U.S.C. § 30106(a). As of August 31, 2019, the Commission is operating without a quorum. FECA requires that at least four of six commissioners agree to undertake many of the agency's key duties. As of August 31, 2019, three of six commissioners remain in office, after the fourth remaining commissioner resigned.

<sup>45</sup>The FEC includes a statutorily mandated Office of Inspector General. 5 U.S.C. app. § 8g. The Office of Inspector General independently conducts audits, evaluations, and investigations to promote improvements in the management of FEC programs and operations.

and general counsel.<sup>46</sup> FECA also requires affirmative votes from at least four commissioners to authorize most consequential agency activity, including making, amending, or repealing rules; issuing advisory opinions; and approving enforcement actions and audits.<sup>47</sup> If there are not four affirmative votes at any stage of these processes, the Commission will not proceed to the next step of the respective process.

In FEC's efforts to enforce and administer federal campaign finance laws, the FEC relies on its internal enforcement guidance—as well as other policies and plans—to direct the core components of its enforcement process. For example, in its strategic plan for fiscal years 2018 through 2022, the FEC established one strategic goal to fairly, efficiently and effectively administer and enforce FECA and promote compliance and engage and inform the public about campaign finance data and rules, while maintaining a workforce that delivers results. The FEC has four strategic objectives: (1) to inform the public about how federal campaigns and committees are financed; (2) to promote voluntary compliance through educational outreach and to enforce campaign finance laws effectively and fairly; (3) to interpret FECA and related statutes, providing timely guidance to the public regarding the requirements of the law; and (4) to foster a culture of high performance in order to ensure that the agency accomplishes its mission efficiently and effectively.

#### What methods does the FEC use to help ensure compliance with campaign finance requirements?

Consistent with FECA, the FEC has exclusive jurisdiction over the civil enforcement of campaign finance statutes and regulations, and ensuring compliance with FECA's contribution and expenditure limits, prohibitions, and disclosure requirements in connection with federal elections.<sup>48</sup> The FEC seeks to ensure compliance with FECA and related regulations by informing the public about how federal campaigns and committees are financed, interpreting FECA and related statutes, promoting compliance through educational outreach, and enforcing campaign finance laws. For example, to inform the public about how federal campaigns and committees are financed, the FEC administers its internet-based public disclosure system for campaign finance activity, providing the public with data concerning where candidates for federal office derive their financial support.<sup>49</sup>

The FEC has statutory authority to interpret FECA through regulations and advisory opinions.<sup>50</sup> Specifically, FEC initiatives, legislative changes, judicial decisions, petitions for rulemaking, or other changes related to campaign finance law may necessitate that FEC write new regulations

---

<sup>46</sup>52 U.S.C. § 30106(f).

<sup>47</sup>52 U.S.C. § 30106(c). Advisory opinions are FEC's responses to particularized inquiries about how federal campaign finance laws apply to specific factual situations. See 52 U.S.C. § 30108; 11 C.F.R. part 112. FECA directs FEC to render a written advisory opinion in response to any person's complete written request concerning the application of FECA or FEC regulations to a specific transaction or activity of the requester. Id.; 11 C.F.R. § 112.1. An authorized agent of the requesting person may submit the advisory opinion request, but the agent shall disclose the identity of his or her principal. 11 C.F.R. § 112.1.

<sup>48</sup>FEC pursues FECA violations pursuant to 52 U.S.C. § 30109(a).

<sup>49</sup>FECA requires all federal candidates and political committees to file regular reports with the FEC. 52 U.S.C. § 30104.

<sup>50</sup>52 U.S.C. § 30107(a)(7), (8), § 30108.

or revise existing regulations.<sup>51</sup> The FEC is also tasked by FECA to help answer any person's questions about the applicability of FECA and FEC regulations to specific factual situations—referred to as advisory opinions.<sup>52</sup> According to FEC officials, in fiscal year 2017, the FEC issued 25 advisory opinions, in response to requests. FECA also provides authority for the FEC to make recommendations for legislative or other action the Commission considers appropriate and to transmit the recommendations to the President and Congress.<sup>53</sup>

According to FEC officials, due to the large number of political committees and growing number and size of financial disclosure reports filed with FEC, voluntary compliance is essential to enforcing FECA. The FEC publishes a variety of explanatory and educational materials to help filers understand campaign finance law—including campaign guides, brochures, and assistance directed at individuals, candidates, and committees via FEC's web site. To supplement written materials, the FEC answers compliance questions from the public by telephone and email. The FEC also offers opportunities for training on federal campaign finance laws, including educational materials on its YouTube channel, which includes playlists designated for candidates, parties, PACs, and individuals.

#### How does the FEC identify potential campaign finance violations?

As mentioned, the FEC has exclusive jurisdiction over the civil enforcement of federal campaign finance laws, and it maintains an enforcement program intended to ensure that campaign finance laws are fairly enforced. In exercising its enforcement authority, the Commission uses a variety of methods to investigate possible campaign finance violations, according to FEC documentation. The FEC may detect potential violations through a review of a political committee's reports by its Reports and Analysis Division or through an audit by its Audit Division, which are referred to as internal referrals.<sup>54</sup> Potential violations may also be brought to the FEC's attention through the complaint process.<sup>55</sup> This process allows any member of the public to file a sworn complaint alleging campaign finance violations and explaining the basis for the allegations.<sup>56</sup> Other government agencies (e.g., DOJ) may also refer possible violations to the FEC. In addition, any person or entity who believes it has committed a violation may bring the matter *sua sponte* (self-reported submission) to the FEC's attention. During fiscal years 2002 through 2017, a majority (71 percent, or 1,724 actions) of FEC's campaign finance enforcement actions were generated from external complaints received from members of the

---

<sup>51</sup>The FEC promulgates regulations implementing FECA which are published in Title 11 of the Code of Federal Regulations.

<sup>52</sup>52 U.S.C. § 30108.

<sup>53</sup>52 U.S.C. § 30111(a)(9).

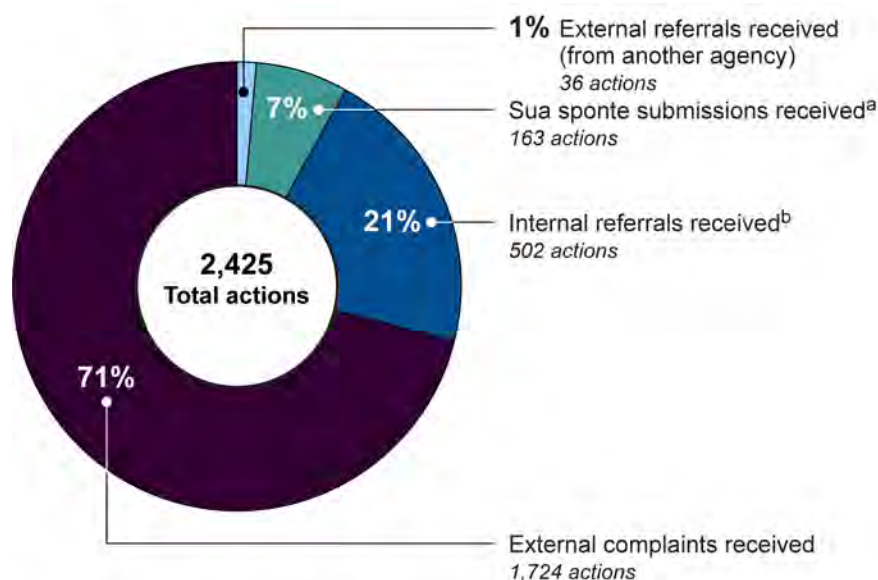
<sup>54</sup>FEC's Reports and Analysis Division reviews all federal campaign finance reports to track compliance with FECA and ensure that the public record provides a full and accurate representation of reported campaign finance activity. The Audit Division conducts audits under FECA in those cases where it appears that political committees have not met threshold requirements for substantial compliance with FECA, in addition to mandatory audits under public funding statutes. See 26 U.S.C. § 9007; 11 C.F.R. § 9007.1; 52 U.S.C. § 30111(b). The audit determines whether the committee complied with limitations, prohibitions, and disclosure requirements.

<sup>55</sup>The Office of General Counsel reviews each complaint to determine whether it states a violation within the FEC's jurisdiction and satisfies the criteria for a proper complaint. If the complaint does not meet these requirements, the office notifies the complainant of the deficiencies. Once a complaint is deemed sufficient, the office assigns it a matter under review number, acknowledges receipt of the complaint and informs the complainant that the Commission will notify him or her when the entire case is resolved.

<sup>56</sup>See 52 U.S.C. § 30109(a).

public. Figure 6 shows the sources of FEC's enforcement actions during fiscal years 2002 through 2017.

**Figure 6: Sources of Federal Election Commission (FEC) Enforcement Actions, Fiscal Years 2002 through 2017**



Source: GAO analysis of the Federal Election Commission's data. | GAO-20-66R

Note: The data presented represent the sources of the FEC's enforcement activities for fiscal years 2002 through 2017. FEC's enforcement process resolves campaign finance violations, designated as matters under review. This process may involve an investigation, conciliation (or voluntary settlement), and civil penalties.

<sup>a</sup>Sua sponte refers to self-reported submissions to the FEC.

<sup>b</sup>All cases subject to an internal referral are based on information ascertained in the normal course of carrying out FEC's supervisory responsibilities, except for external complaints received by FEC's Office of General Counsel's Enforcement Division that are referred to the Alternative Dispute Resolution Office. Internal referrals in this figure include those made by FEC's Reports and Analysis Division and Audit Division.

### How does the FEC enforce campaign finance requirements?

The FEC's enforcement process begins when a complaint or referral is made alleging that a violation of federal election campaign laws has occurred or is suspected of having occurred.<sup>57</sup> According to FEC officials, any complaint, referral, or self-reported submission received by the Commission is initially designated as inactive. A matter is activated when the Associate General Counsel for Enforcement assigns it to an Office of General Counsel Enforcement Division attorney. This assignment happens after the Office of General Counsel completes an intake process which involves notification of the respondents; receipt of responses from the

<sup>57</sup>FECA creates a statutory distinction between non-knowing and non-willful campaign finance violations involving any amount of money, which are subject to the exclusive jurisdiction of the FEC, and knowing and willful violations involving \$2,000 or more within a calendar year, which are subject to both civil enforcement proceedings by the FEC and criminal prosecution by the DOJ. See 52 U.S.C. § 30109(a), (d). Criminal prosecution under FECA can be pursued before civil and administrative remedies are exhausted.



respondents; and evaluation of the complaint and response using criteria approved by the Commission under its enforcement priority system.<sup>58</sup> Respondents have 15 days to respond to a complaint pursuant to FECA;<sup>59</sup> however, a respondent may request an extension of up to 30 days. According to FEC officials, matters are activated within an average of 50 days of the date the Office of General Counsel receives the last response from a respondent. The officials added that some matters are disposed of without being activated; these cases are either transferred to the Alternative Dispute Resolution Office<sup>60</sup> or, if the enforcement priority system rating indicates the matter does not warrant the further use of Commission resources, the Office of General Counsel generally uses a streamlined dismissal process to recommend the Commission dismiss the matter.

For all other matters, FEC's Office of General Counsel prepares a report which contains recommendations for the Commission's actions regarding the potential violations of campaign finance laws. The recommended actions may include the following: (1) find reason to believe that a violation either occurred or is about to occur; (2) find no reason to believe that a violation either occurred or is about to occur; (3) dismiss as a matter of prosecutorial discretion; or (4) dismiss with a cautionary message to the respondent regarding legal obligations under FECA or Commission regulations. The Commission reviews the Office of General Counsel's report and recommendations and determines which enforcement method to pursue, which includes traditional enforcement, alternative dispute resolution through the Alternative Dispute Resolution Office, or the Administrative Fine Program.<sup>61</sup> According to FEC officials, the agency established the Alternative Dispute Resolution Office and Administrative Fine Program processes in order to resolve issues outside the traditional enforcement process.<sup>62</sup>

More substantive enforcement cases are handled by the Office of General Counsel through the traditional enforcement pathway and are known as matters under review.<sup>63</sup> Figure 7 depicts the key steps required for matters under review routed through FEC's traditional enforcement process. Based on FEC data, the average number of days for the resolution of matters under review that were closed during each of fiscal years 2002 through 2017 ranged from 304 days to 787 days.

---

<sup>58</sup>FEC's enforcement priority system uses formal, pre-determined scoring criteria to allocate agency resources and assess whether particular matters warrant further administrative enforcement proceedings. The criteria include (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations and other developments in the law.

<sup>59</sup>11 C.F.R. § 111.6. A respondent is a person or entity who is the subject of a complaint, referral, or *sua sponte* (self-reported) submission that alleges the person or entity violated FECA, another statutory provision within the Commission's jurisdiction such as the inaugural committee foreign national provision, or an FEC regulation.

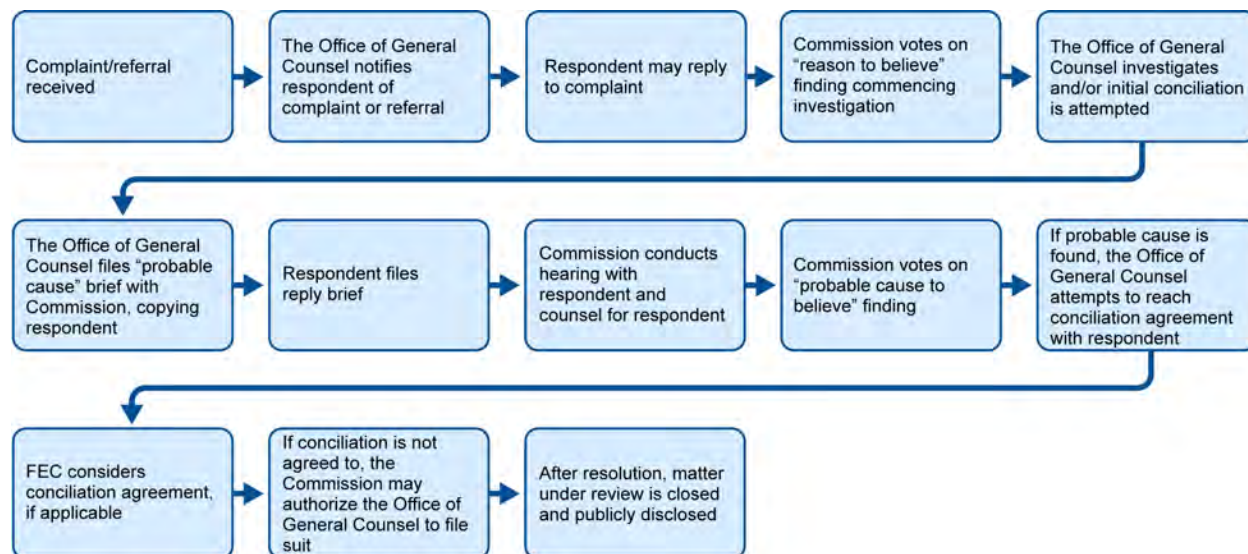
<sup>60</sup>The Alternative Dispute Resolution Office resolves less complex campaign finance violations that meet criteria approved by the Commission. The program focuses on remedial measures for candidates and political committees, such as training, internal audits, and hiring compliance staff. The Alternative Dispute Resolution Office also negotiates settlements and civil penalties.

<sup>61</sup>FEC's enforcement process resolves campaign finance violations, designated as matters under review. This process may involve an investigation, conciliation, or civil litigation. In certain circumstances, the FEC may refer matters to the Department of Justice for criminal prosecution. The Administrative Fine Program focuses on campaign finance violations involving the late submission of, or failure to, file disclosure reports. This process may also involve the assessment of monetary penalties and handles any challenges to the penalty assessments.

<sup>62</sup>The Administrative Fine Program was established in response to a provision in the Treasury and General Appropriations Act, 2000. Pub. L. No. 106–58, title VI, § 640(a), 113 Stat. 430, 476 (1999).

<sup>63</sup>Matters under review are FEC enforcement actions, initiated by a sworn complaint or by an internal referral.

**Figure 7: Major Steps Required for Matters under Review Routed through the Federal Election Commission’s (FEC) Traditional Enforcement Process**



Source: GAO analysis of the Federal Election Commission’s information. | GAO-20-66R

Note: The figure excludes some optional steps in the FEC’s matters under review process.

FEC’s traditional enforcement process ends when the Commission determines either to take no action or to reach a conciliation agreement with the respondent, at various stages of the process.<sup>64</sup> Additionally, without an affirmative vote from at least four commissioners at each of the stages of the process, there can be no substantive action. If the Commission does not successfully conciliate with a respondent, it may file a civil lawsuit in U.S. district court.<sup>65</sup> In certain circumstances, the Commission may also refer a matter to DOJ for criminal prosecution under FECA.<sup>66</sup> Enclosure IV provides an overview of FEC’s enforcement process for non-criminal campaign finance violations.<sup>67</sup>

### What types of campaign finance violations are enforced by the FEC?

For the FEC’s enforcement process, FEC data showed that the FEC closed a total of 843 matters under review, consisting of a total of 1,164 alleged violations—and representing 33 different types of alleged violations—related to the violation of campaign finance laws during

<sup>64</sup>A conciliation agreement is a voluntary settlement agreement between FEC and a respondent. FEC must attempt to enter in a conciliation agreement upon a finding of probable cause to believe, and FEC may also, at its discretion, attempt to enter in a conciliation agreement before a finding of probable cause. 52 U.S.C. § 30109(a)(4); 11 C.F.R. § 111.18. The agreement generally includes, among other things, an agreement that the respondent will cease and desist from violating the relevant provision in the future and an agreement to pay a civil penalty or take corrective actions.

<sup>65</sup>52 U.S.C. § 30109(a)(6).

<sup>66</sup>52 U.S.C. § 30109(a)(5)(C). A five-year statute of limitations applies to all campaign finance violations. 52 U.S.C. § 30145.

<sup>67</sup>Enclosure V shows the number of the campaign finance enforcement matters and cases addressed through FEC’s traditional enforcement, Alternative Dispute Resolution Office, and Alternative Fines Program processes during fiscal years 2002 through 2017.

fiscal years 2012 through 2017.<sup>68</sup> Figure 8 shows the number of matters under review closed during fiscal years 2012 through 2017, and the types of campaign violation categories addressed by the FEC in these matters under review. As shown in the figure, the top 10 violation categories represent about 89 percent (1,032) of the total alleged violations during this time period and involve violations related to reporting, other activities,<sup>69</sup> disclaimers, prohibited contributions, excessive contributions, contributions from corporations, exceeding contribution limitations, contributions made in the name of another, personal use, and soft money.<sup>70</sup>

As shown in the figure below, reporting violations represent the largest category (27 percent—315 violations) of the alleged violations, which may involve candidates, party committees, and PACs that did not adhere to FECA's campaign finance reporting requirements. For example, FECA requires all political committees to report, among other things, the total amount of receipts received during the reporting period and calendar year for categories such as contributions from political party committees, contributions from persons that are not political committees under FECA, and all loans.<sup>71</sup>

---

<sup>68</sup>For the closed matters under review, we focused on fiscal years 2012 through 2017 because these data are the most complete and available at the time of this review. In addition, some of the closed matters under review may involve one or multiple alleged violations of campaign finance laws.

<sup>69</sup>According to FEC officials, the “other” activities involve a wide variety of allegations that do not fit into other categories, such as alleged violations of the noncommercial air travel rules and rules about paycheck deductions from corporate or labor separate segregated funds.

<sup>70</sup>Soft money refers to donations to party committees raised outside of the limitations, prohibitions, and reporting requirements of federal law. In addition to individuals and political committees, soft money can also come from corporations and labor unions. Soft money may be used by party committees for “party-building activities” and issue ads; however, soft money cannot be used for advocating for a particular candidate during an election campaign. The national party committees are prohibited from receiving or spending soft money on any activity. 52 U.S.C. § 30125(a)(1).

<sup>71</sup>52 U.S.C. § 30104(b).

**Figure 8: Types of Alleged Violations for Federal Election Commission (FEC) Closed Matters under Review, Fiscal Years 2012 through 2017**



Source: GAO analysis of the Federal Election Commission's data. | GAO-20-66R

Note: Some of the violations in the remaining 23 categories involve allegations such as a candidate failed to timely file a statement of candidacy; illegal loans were made to committees, or legal loans were misreported; a committee disguised expenditures so as to hide the recipient; and a committee failed to report operating expenditures and debts.

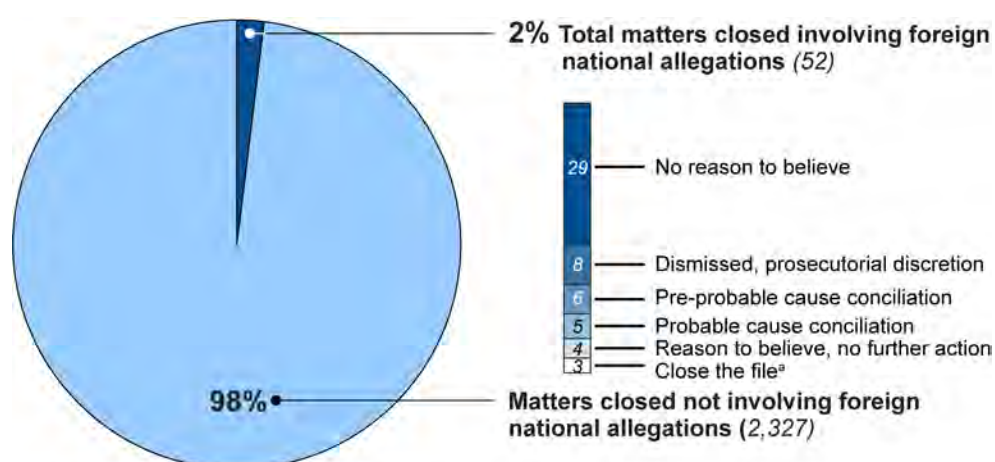
<sup>a</sup>According to FEC officials, the violations in the "other" category involve a wide variety of allegations that do not fit in other categories, such as alleged violations of the noncommercial air travel rules and rules about paycheck deductions from corporate or labor separate segregated funds.

### How has the FEC enforced the foreign national prohibition?

In 2018, the FEC, in response to language in an explanatory statement, stated in a report to congressional appropriations committees that timely resolution of any enforcement matters involving allegations of prohibited activity by foreign nationals is a priority for the FEC.<sup>72</sup> Allegations of noncompliance with the foreign national prohibition have been handled primarily as FEC traditional enforcement cases, or matters under review. As shown in figure 9, about 2 percent (52) of FEC's total matters closed during fiscal years 2002 through 2017 involved allegations of violations of the foreign national prohibition, and FEC found no reason to believe a violation occurred in over half (29) of these matters.

<sup>72</sup>The explanatory statement accompanying the Consolidated Appropriations Act, 2018, included a reporting requirement for the FEC, which stated: "Preserving the integrity of elections, and protecting them from undue foreign influence is an important function of government at all levels. Federal law, for example, prohibits foreign campaign contributions and expenditures. With that in mind, the [FEC] Chairman is directed to report to the Committees on Appropriations of the House and Senate no later than 180 days after the enactment of this Act on the Commission's role in enforcing this prohibition, including how it identifies foreign contributions to elections, and what it plans to do in the future to continue these efforts." See *Explanatory Statement*, 164 Cong. Rec. H2045, H2520 (March 22, 2018).

**Figure 9: Federal Election Commission (FEC) Matters under Review, including Allegations of Violations of The Foreign National Prohibition, Fiscal Years 2002 Through 2017**



Source: GAO analysis of the Federal Election Commission's data. | GAO-20-66R

Note: With regards to matters closed involving foreign national allegations, for some of the matters, the matters involved multiple respondents and the FEC found no reason to believe allegations with respect to some respondents, and dismissed pursuant to prosecutorial discretion allegations with respect to other respondents. Therefore, the number of matters reflected in the disposition categories (55) is greater than the total number of matters closed (52).

<sup>a</sup>At any stage of the FEC's enforcement process, the Commission may close the entire file or close it only with regard to some of the respondents.

To provide clarity and awareness of the campaign finance laws prohibiting foreign nationals' participation in elections, the Commission has issued advisory opinions in several contexts in which it has considered the foreign national prohibition. For example, as it relates to changes in nationality, the Commission has determined that when an individual's status as a foreign national changes, so does the individual's ability to make contributions in connection with any election.<sup>73</sup> The FEC is also engaged in rulemaking on potential revisions to regulations on disclaimers required for internet communications which could have implications related to the foreign national prohibition, given that disclaimers on paid advertisements are one tool to expose prohibited expenditures by foreign nationals.<sup>74</sup> FEC officials also stated that in efforts to promote voluntary compliance with federal campaign statutes and regulations, the FEC provides compliance guidance to the public, committees, other organizations, and candidates regarding the prohibition on foreign national contributions and expenditures in the context of advisory

<sup>73</sup>See Advisory Opinion 2016-16 (Gary Johnson 2012).

<sup>74</sup>In 2011, FEC published an Advanced Notice of Proposed Rulemaking related to disclaimers on certain internet communications. 76 Fed. Reg. 63,567 (Oct. 13, 2011). FEC re-opened the public comment period in 2016 and 2017. In March, 2018, FEC published a Notice of Proposed Rulemaking that, among other things, examines two alternatives for disclaimer requirements on public communications distributed over the internet. 83 Fed. Reg. 12,864 (Mar. 26, 2018). In June, 2018, FEC held a public hearing on the Notice of Proposed Rulemaking, and in June, 2019, the commissioners made two alternate proposals public as part of the agenda for an open meeting. <https://sers.fec.gov/fosers/> (reg 2011-02).



opinions, rulemaking, and informational publications on the FEC's public website.<sup>75</sup>

What challenges have FEC officials identified facing when administering and enforcing campaign finance laws?

FEC commissioners and senior FEC officials we interviewed identified to us, and in responses to the Committee on House Administration, challenges they face in administering and enforcing federal campaign finance law.<sup>76</sup> The commissioners and senior FEC officials identified challenges in such areas as (1) obtaining complete and accurate information from filings, (2) managing the docket of enforcement matters, (3) completing audits in a timely manner, and (4) addressing staffing shortages. FEC commissioners have also provided varying perspectives on the meaning of and challenges presented by deadlocked, or split, votes.

- **Obtaining complete and accurate information from filings.** FEC officials told us that one challenge they face is receiving complete and accurate information in filings—a report, notification, or statement submitted to the FEC by a candidate, committee, or other entity. Required filings include committee and candidate registration forms and committee reports of the amounts and sources of money they receive and the amounts and kinds of expenditures they make. In particular, FEC officials noted that committee and candidate registration forms sometimes include false or fictitious information, such as fictitious or satirical names of a candidate, committee, or a committee's treasurer, and that the incidence of such filings has increased since the 2016 presidential election cycle. According to FEC officials, another challenge is created when frivolous filers take the next step and file a report of activity (e.g., contributions or expenditures, sometimes in large dollar amounts). FEC officials also noted that some filings contain errors or blank fields, which officials attributed to filers sometimes being unfamiliar with form requirements. FEC officials said that frivolous and incomplete filings with fictitious or missing information can reduce the accuracy of FEC's publicly disclosed campaign finance data and can also hinder the review of filings by FEC staff.

According to FEC officials, the Commission has been taking steps toward addressing these challenges, such as adding new steps for FEC staff to verify potentially fictitious information, including sending verification letters to filers submitting potentially fictitious information, and removing unverified filings from campaign finance data. FEC officials told us the agency is also updating its electronic filing system with automated detection to prevent the submission of filings with missing or erroneous fields. They also stated they have carefully designed the forms and instructions, and provide educational offerings on the FEC website, hold conferences, teach classes, and offer webinars that include reporting guidance. The Reports Analysis Division assigns an analyst to every filing political committee, who is available to answer any questions and provide guidance on filing instructions on a one-to-one basis. According to FEC officials, if a filer's errors or omissions reach a certain threshold it will trigger a request for additional information from the Reports Analysis Division.

---

<sup>75</sup>The FEC provides general public guidance regarding the foreign national contribution ban via its website. In June 2017, FEC's brochure on foreign nationals, which provides a general primer on the foreign national prohibition, was updated and republished on the website. Other pages on FEC's website provide information on specific questions about foreign national activities. These pages discuss the definition of "foreign national," how to determine the nationality of a contributor, and how to address issues such as domestic subsidiaries of foreign corporations and the provision of substantial assistance to a foreign national making a contribution.

<sup>76</sup>FEC, "Responses to Questions from the Committee on House Administration," May 1, 2019, including attachments and exhibits, available at <https://www.fec.gov/about/committee-on-house-administration-april-2019-questions/>.

- Managing the docket of enforcement matters.** FEC officials reported that another challenge relates to managing the Office of General Counsel Enforcement Division's docket of enforcement matters, or workload.<sup>77</sup> For example, FEC officials noted that the number of matters on the enforcement docket—or pending Enforcement Division review or Commission action—was 289 matters as of May 2019 and that 45 of those matters have at least some activity that has exceeded or will exceed the statute of limitations before May 1, 2020.<sup>78</sup> An FEC commissioner referred to this as a backlog of matters. To address the backlog, FEC officials reported that they are working to increase productivity by, for example, adopting a more aggressive meeting schedule beginning in July 2019 to address matters on the enforcement docket. FEC officials also reported that the Commission prioritizes for immediate consideration any matters imperiled by an impending statute of limitations deadline, as well as matters that allege violations of the foreign national prohibition. Additionally, FEC officials reported that, in December 2018, the FEC revised two procedures to improve efficiency (1) the Reports Analysis Division review and referral procedures; and (2) the enforcement priority system's rating system, which the Office of General Counsel uses to prioritize and activate matters under review. According to FEC officials, these changes are intended to allow more low-priority matters to be handled through alternative dispute resolution, educational programs, or streamlined enforcement priority system dismissals, which would allow the Enforcement Division to focus its resources on more complex, high-priority matters under review.
- Completing audits in a timely manner.** The FEC Audit Division generally audits a political committee under two circumstances—when a committee participates in a publicly financed Presidential campaign or national party convention, or when it appears that a political committee has not met substantial compliance for reporting. The audit determines whether the committee complied with limitations, prohibitions, and disclosure requirements. FEC officials reported that audits of political committees can take a long time to complete, which can put the Commission at risk of having audit findings that cannot be pursued due to statute of limitations deadlines.<sup>79</sup> FEC officials noted that the Commission is taking steps to complete audits more quickly and that the FEC has reduced the length of time it takes to complete audits. For example, they stated that the Audit Division has implemented stricter milestones, and time-saving mechanisms, including procedures for acquiring committee records more efficiently and the development of standardized templates. According to FEC officials, the average number of months to complete an audit of political committees that are authorized by a candidate declined from 19.1 months in 2010 to 18.3 months in 2016, and the average number of months to complete an audit of political committees that are not authorized by a candidate (e.g., party committees and Super PACs) declined from 25.3 months in 2010 to 5 months in 2016.<sup>80</sup>

<sup>77</sup>According to the FEC, enforcement matters include matters under review, Reports and Analysis Division referrals, audit referrals, *sua sponte* submissions, external referrals, and other internally-generated matters.

<sup>78</sup>FEC, "Responses to Questions from the Committee on House Administration," May 1, 2019. The FEC may seek civil penalties in federal district court within the 5-year statute of limitations period (measured from the time of the violation) provided by 52 U.S.C. § 30145.

<sup>79</sup>FEC, "Responses to Questions from the Committee on House Administration," May 1, 2019.

<sup>80</sup>In addition, FEC officials told us that the Audit Division has faced challenges obtaining committee records for audits. They stated that records are not readily available at times and may require extensive efforts to acquire since, for example, political committees often have high attrition rates of paid personnel or are staffed by volunteers, which can lead to challenges in communication. The Audit Division has procedures in place to seek approval from the Commission for subpoena action if records are not provided.

- **Staffing shortages.** FEC commissioners told us that the Commission has experienced prolonged vacancies among its senior leaders, which officials attributed to salary limitations established by FECA that make it difficult to attract candidates for senior positions.<sup>81</sup> To address the salary limitations and help the FEC to recruit from a government-wide pool of experienced and skilled leaders, the Commission unanimously adopted a legislative recommendation in 7 of the last 8 years. These recommendations asked Congress to allow the FEC to participate in the Senior Executive Service and to amend FECA to remove references to the Executive Schedule in language related to salary for the General Counsel.<sup>82</sup> In October, 2019, FEC officials told us they had concerns about whether the recent departure of one of the FEC commissioners (discussed below) could present an obstacle to hiring for the remaining vacant positions, as applicants could be hesitant to apply for a position with an agency operating without a quorum of commissioners, or may think that the agency has shut down.

FEC officials also provided differing perspectives on issues related to staffing shortages below the senior leadership level. For example, according to one commissioner, within the Office of General Counsel's Enforcement Division, from 2010 through 2018 the number of full-time equivalent staff declined from 59 to 41 (about a 30 percent decrease).<sup>83</sup> The commissioner noted that during this time period, the number of enforcement matters more than tripled, contributing to the backlog in enforcement matters noted above. Another commissioner agreed that the caseload per staff member has been increasing, which can put a great deal of stress on FEC staff. Three of the four commissioners believed the FEC needed to hire more staff. The fourth commissioner told us, however, that the high workload per staff could be addressed through adopting more efficient practices, rather than hiring more staff.

Additionally, from February 2018 through August 2019, the Commission had been operating with only four of six authorized commissioners on board, which FEC officials noted had presented challenges. FECA requires a vote of a majority of the six authorized commissioners for most policy actions, and thus the Commission must have had the unanimous support of all four commissioners who were serving. One commissioner noted that this meant that any one commissioner voting against or abstaining from a vote can result in delays in Commission decisions as to whether or not to pursue an enforcement action.<sup>84</sup>

---

<sup>81</sup>52 U.S.C. § 30106(f). The FEC Office of Inspector General has reported management and performance challenges with relying on acting officials. See Federal Election Commission, Office of the Inspector General, *Inspector General Statement on the Federal Election Commission's Management and Performance Challenges - 2018* (October 2018).

<sup>82</sup>The FEC's legislative recommendation states that removing the statutory references to the Executive Schedule would allow the General Counsel to be compensated under the same pay schedule as the FEC's other senior managers. See 52 U.S.C. § 30106(f)(1). At the time of our review, FEC officials reported that the General Counsel position was filled on an acting basis since September 2016 by an experienced individual who served as Deputy General Counsel since November 2012. Under the current pay system, if the Commission were to appoint the Acting General Counsel as General Counsel, the individual would have to accept an over \$20,000 pay cut, according to FEC officials.

<sup>83</sup>FEC, "Responses to Questions from the Committee on House Administration," May 1, 2019.

<sup>84</sup>FEC, "Responses to Questions from the Committee on House Administration," May 1, 2019. FEC officials also reported in May 2019 that the two commissioner vacancies posed other logistical challenges, including that all four commissioners must be present, either physically or by telephone, for the Commission to meet, and if a commissioner is recused from a matter, the matter cannot proceed until the reason for recusal is removed or one of the vacant commissioner seats is filled.

Furthermore, as of August 31, 2019, the FEC is operating with only three commissioners, after one of the four remaining commissioners resigned. This means the FEC is operating without a quorum and, pursuant to FECA, is unable to hold hearings and vote on most actions, including issuing advisory opinions; engaging in rulemaking; initiating litigation or defending the agency in new litigation, including appeals;<sup>85</sup> voting on matters under review and other enforcement actions, including whether to initiate investigations or refer matters to other agencies; and approving audit reports.<sup>86</sup> FEC officials highlighted that the lack of a quorum prevents the FEC from fulfilling the agency's functions of rulemaking and enforcing campaign finance law. According to an official statement by one remaining commissioner, while the Commission cannot engage in substantive enforcement actions or rulemaking, FEC staff offices will continue their work answering questions; maintaining the FEC website; conducting ongoing audits; and processing complaints, disclosure reports, and other filings.<sup>87</sup> Nevertheless, according to FEC officials, when a Commission vote is required to initiate or continue an investigation or take another action, then action stops, and this is not an insignificant issue, in their view.

Additionally, on December 5, 2019, FEC officials reported that during fiscal year 2019, the FEC made four permanent senior leadership appointments, including a permanent Inspector General. According to the officials, the FEC also made permanent selections for three senior positions and approved to be filled on a permanent basis three additional senior positions. However, FEC officials stated that, due to the lack of a quorum and in accordance with FEC policy, the Commission has been unable to approve the selections of senior level positions since September 1, 2019.

FEC officials stated that while the current lack of quorum presents difficulties for the agency, the lack of quorum that the FEC faced in 2008 presented more significant challenges, specifically with regard to the larger number of candidates using public financing in 2008 than in recent elections. An affirmative vote of four commissioners is required to authorize payment to eligible candidates the amounts to which they are entitled, among other things.<sup>88</sup> The officials stated that although not many candidates apply for public financing, media reports indicate that at least one 2020 presidential candidate may seek public financing.

---

<sup>85</sup>The Commission needs four affirmative votes to initiate a civil action for injunction, declaratory, or other appropriate relief and to defend against a civil action filed in federal court under 52 U.S.C. § 30109(a)(8), which provides that any party aggrieved by an order of the Commission dismissing that party's complaint or failing to act on the party's complaint within 120 days may file a petition with the U.S. District Court for the District of Columbia. 52 U.S.C. § 30106(c). However, even without a quorum, the Commission can continue to defend previously authorized litigation.

<sup>86</sup>See 52 U.S.C. §§ 30106(c), 30111(b). The FEC previously lost its quorum in the first 6 months of 2008 when it had only two on-board commissioners after expired recess appointments and during Senate consideration of several nominations. According to the Congressional Research Service report, in late 2007, commissioners amended the FEC's rules of internal procedure to permit executing some duties if the Commission lost its four-member policymaking quorum. According to this report, revisions to FEC's Directive 10 permit the Commission to continue meeting with fewer than four members to approve general public information, such as educational guides; appoint certain staff; and approve other basic administrative and employment matters. Congressional Research Service, Federal Election Commission: Membership and Policymaking Quorum, In Brief, updated September 5, 2019 (R45160). President Trump nominated a new commissioner in September 2017 (and re-nominated the individual in January 2018 and January 2019), but the Senate has not taken up consideration of the nomination as of November 2019.

<sup>87</sup>*Statement of Commissioner Caroline C. Hunter on Departure of Vice Chairman Petersen and Loss of Quorum*, August 26, 2019, available at <https://www.fec.gov/about/leadership-and-structure/caroline-c-hunter/>.

<sup>88</sup>See 52 U.S.C. §30106(c); 26 U.S.C. § 9005.

- **Deadlocked, or split, votes.** In May 2019, FEC officials reported data on the number of matters under review that had deadlocked, or split votes, and the four, seated commissioners at the time provided varying perspectives on the meaning of and challenges presented by split votes.<sup>89</sup> The FEC defines “split votes” as most often 3-3 or 2-2 votes or any other combination that does not have four or more votes in the affirmative or negative. Specifically, FEC officials reported that of the 531 matters under review that were considered by the Commission in executive session after January 1, 2012 and that were closed as of April 1, 2019:<sup>90</sup>
  - 269 matters under review—or about 51 percent—had at least one split vote among all votes taken on the matter in executive session.<sup>91</sup> The FEC also reported these data by calendar year, and there has been an increase from calendar years 2012 through 2018 in the proportion of matters under review with at least one split vote. In calendar year 2012, 27 of 61 matters under review considered in executive session had at least one split vote. In calendar year 2018, 51 of 86 matters under review considered in executive session had at least one split vote.
  - 84 matters under review—or about 16 percent—had split votes on all votes taken in executive session.<sup>92</sup> There has also been an increase from calendar years 2012 through 2018 in the proportion of matters under review that had split votes on all votes taken during executive session. In calendar year 2012, two of 61 matters under review considered in executive session had split votes on all votes taken. In calendar year 2018, 24 of 86 matters under review considered in executive session had split votes on all votes taken.

The four commissioners at the time of our review reported varying perspectives on the meaning of and challenges presented by split votes. One commissioner reported that the high number of matters under review that have at least one split vote demonstrates that the Commission has not pursued enforcement actions against those who have violated the law. This commissioner explained that some of the commissioners had consistently voted not to take action on FEC Office of General Counsel recommendations and not to move forward on the more significant violations alleged, while approving moving forward on more minor accusations.<sup>93</sup> Another commissioner stated that split votes can sometimes be instructive in that interested individuals or parties can learn from the arguments the commissioners

---

<sup>89</sup>FEC, “Responses to Questions from the Committee on House Administration,” May 1, 2019.

<sup>90</sup>The Commission meets regularly in executive sessions that are closed to the public to discuss pending enforcement actions, litigation and other matters that, by law, must be kept confidential.

<sup>91</sup>According to FEC officials, some matters under review are subject to one vote in one executive session, while others can be considered in multiple executive sessions that might fall in different years. The data reported by calendar year include each matter under review considered by the Commission in executive session in each of the calendar years, so some matters under review appear more than once across calendar years.

<sup>92</sup>According to FEC officials, the 84 matters under review consist of matters where the votes on all substantive issues were split votes, other than votes to close the files. These 84 “all split” matters under review were also included in the aforementioned 261 matters under review with at least one split vote.

<sup>93</sup>FEC, “Responses to Questions from the Committee on House Administration,” May 1, 2019. For example, the commissioner stated that violations of the prohibition on independent groups, such as Super PACs, and candidates or their campaigns coordinating activities was difficult to prove before *Citizens United v. FEC*, and since then, the amount of campaign spending that could be illegally coordinated is even higher. This commissioner stated that some commissioners have blocked the Commission from investigating likely violations of the coordination prohibition, such as a candidate’s close family member setting up a Super PAC that benefits a candidate.

present on an issue, and then decide how to conduct themselves accordingly, in the absence of guidance.<sup>94</sup> This commissioner also noted that a proposal to have an odd number of commissioners, to avoid deadlocks, brings with it the danger that some may view the “tie-breaking” voter as having partisan motives.

The other two commissioners stated that data on deadlocked, or split votes, can be misleading and may not accurately characterize the Commission’s overall performance.<sup>95</sup> For example, they stated that focusing only on the number of “deadlocked” votes in Matters Under Review considered in executive session limits the scope of such analysis to only the most complex and controversial enforcement cases addressed by the Commission. In addition, these two commissioners stated that the Commission’s structure—where no more than three commissioners may be affiliated with the same political party, and four votes are required to take enforcement and regulatory action—was designed so that no single political party or administration can dominate the Commission’s decision making, and that disagreements among commissioners are a natural consequence of the Commission’s unique structure and mandate. These two commissioners added that the FEC is unique among federal agencies in that its core mission involves regulating political association and speech. They stated that they believe overly aggressive regulatory and enforcement actions could harm individuals’ constitutional rights, and that “true deadlocks”—in which at least four commissioners cannot ultimately agree on a way forward—reflect principled disagreements on the proper interpretation and application of the law. They added that while they do not seek to dismiss the significance of disagreements over key campaign finance issues, they believed the disagreements should not overshadow the Commission’s successes in promoting legal compliance and providing the public timely, robust access to the fundraising and spending activities of candidates, parties, and PACs.

In addition to the issues discussed above, the FEC has provided legislative recommendations to Congress seeking to clarify or amend campaign finance laws, which the FEC believes will strengthen its oversight and enforcement efforts. For example, in December 2018, the FEC submitted a recommendation for Congress to amend FECA to address the practice of PACs fraudulently soliciting contributions to support certain candidates, but subsequently disclosing minimal or no candidate support activities and using the funds primarily to pay vendors and consultants with whom the political committees’ officers appear to have financial interests.<sup>96</sup> FEC officials stated they believe that enactment of the legislative recommendations would provide the Commission with additional authority to strengthen the agency’s investigation of alleged violations of FECA and related campaign finance requirements in these areas.

What challenges have literature and selected organizations reported regarding the FEC’s administration and enforcement of campaign finance laws?

---

<sup>94</sup>FEC, “Responses to Questions from the Committee on House Administration,” May 1, 2019.

<sup>95</sup>FEC, “Responses to Questions from the Committee on House Administration,” May 1, 2019.

<sup>96</sup>In addition to PACs engaging in fraudulent behavior, FEC officials highlighted two other areas of concern for which it has developed legislative recommendations: (1) the fraudulent misrepresentation of campaign authority by individuals who are not candidates, agents of candidates, or employees of a campaign; and (2) the conversion (or theft) of campaign funds by individuals for personal use, such as paying for personal expenses that would exist irrespective of a political committee’s political activities. The FEC usually submits legislative recommendations to Congress on an annual basis; in December 2018, the FEC unanimously approved and submitted 11 legislative recommendations to Congress.



Through our literature review and interviews with subject-matter specialists on campaign finance from selected organizations, we identified challenges, and learned of varying perspectives, related to the FEC's administration and enforcement of campaign finance requirements in such areas as (1) timeliness of updating guidance and regulations; (2) enforcement of campaign finance laws; and (3) the completeness of FEC data for enforcement, research, and public transparency.<sup>97</sup>

**Timeliness of updating guidance and regulations.** Some sources identified the timeliness of FEC updates to guidance and regulations to address changes in the law and technology use as a challenge. For example, various sources noted that the FEC has not issued any new disclosure requirements for corporations since the Supreme Court's 2010 ruling in *Citizens United v. FEC*. According to one source, despite the Supreme Court's emphasis on the importance of disclosure, particularly with respect to corporate contributions, the FEC has not issued disclosure rules that take account of the increase in corporate contributions, including those from incorporated 501(c)(4) organizations. Some literature and organizations also stated that federal law and FEC regulations have not kept pace with changes in use of technology, such as the rise of political advertising on the internet, which we discuss later in this report.

**Enforcement of campaign finance laws.** Literature and organizations identified several challenges related to the FEC's enforcement of campaign finance laws, including some related to the structure of the Commission, and others related to FEC's ability to audit political committees. FECA established the FEC as a six-member body, where no more than three members from one political party may serve as commissioners, and at least four votes are required to advance rulemaking and enforcement actions.<sup>98</sup> However, some literature and organizations pointed out that increased ideological disagreements among the evenly-split Commission over the past decade have stalled or limited the FEC's ability to obtain four affirmative votes. For instance, some literature and organizations stated that the FEC's structure and ideological disagreements among commissioners have resulted in an increasing number of split, or deadlocked, votes related to rulemaking, advisory opinions, and enforcement actions.

Literature and organizations provided differing views on such deadlocks. Some literature and organizations stated that, as a result of increasing deadlocks, the total amount of fines imposed for campaign finance violations has dropped; the processing of enforcement cases has slowed; and alternative dispute resolutions have taken longer to assign. For example, according to one source, in the 8 years from 2001 through 2008, the FEC assessed an average of \$2.66 million in civil fines per year; over the next 8 years, from 2009 through 2016, the average was \$561,030 in fines per year.<sup>99</sup> As a result of fewer civil fines in recent years, the limited risk of enforcement action may not deter candidates from noncompliant activities, such as coordinating with "independent" spenders, according to one source. However, some literature we reviewed and organizations we interviewed argued that data on split or deadlocked votes can be

---

<sup>97</sup>To address questions related to perspectives on key aspects of the campaign finance framework, we performed a literature review of scholarly publications, government reports, and publications by nonprofits and think tanks from 2016 through 2018, and conducted nine interviews with subject-matter specialists on campaign finance issues from a nongeneralizable sample of research, advocacy, and practitioner organizations, selected to represent a range of views about campaign finance regulation. For a more detailed discussion of our scope and methodology, see enclosure I.

<sup>98</sup>See 52 U.S.C. § 30106.

<sup>99</sup>Potter, Trevor, "Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission's Arguable Inability to Effectively Regulate Money in American Elections," *Administrative Law Review*, Spring 2017, Vol. 69, Issue 2, p. 447-466.

misunderstood or misleading. For example, in the view of some sources, deadlocked votes may indicate that the Commission is carefully considering what the law does and does not prohibit. Similarly, some organizations stated that the Commission's structure was designed to prevent political bias and the Commission is functioning as designed.

Another enforcement challenge identified in literature we reviewed is that the FEC currently does not have the authority to conduct random audits. Audits of political committees, other than those of publicly funded presidential candidates, are only permitted for cause, that is, when the committee appears not to have met the threshold requirements for substantial compliance with FECA.<sup>100</sup> In the view of these sources, the ability to conduct random audits could serve as a deterrent for would-be violators.

**Completeness of FEC data for enforcement, research, and public transparency.** Some literature and one organization stated that FEC's campaign finance data from required filings is not always complete, specific, or consistently reported, making it difficult to analyze these data to uncover possible violations and describe various trends in campaign finance activities. For example, representatives from one organization told us that incomplete reported campaign finance data (e.g., missing addresses for contributors and independent groups) makes it difficult to discern whether there are connections among what are supposed to be independent groups, such as Super PACs and certain 501(c) organizations, and candidates' campaign committees (e.g., whether the same individual may be participating in various entities' political activities).

Additionally, some sources noted that although the FEC records certain information about campaign contributions and contributors, it is difficult for researchers to identify the number of unique individual contributors because there is no unique identifier assigned to individual contributors. For example, according to one source, some contributors may have multiple occupations or residential or business addresses. These sources stated that not having a unique identifier assigned to contributors makes it difficult for researchers to identify individual contributors and their demographic characteristics to analyze donor occupation or industry and other trends, such as the number of individuals who have made contributions, how large those contributions are, and how often or for how long donors have made contributions. In addition, representatives of one organization stated that some groups, such as some Super PACs, that wish to keep the identity of their donors anonymous intentionally file reports after the reporting deadline for an election, so contributions and expenditures are not public until after the election. The representatives stated that the reporting deadlines were established in 1976 and asked why the requirements could not be updated to require reporting on a more ongoing basis (e.g., when or shortly after the contribution or expenditure occurs) so the public has this information ahead of elections.

Although some sources identified areas for improving FEC data, several of the organizations we interviewed reported that the FEC has provided comprehensive data on contributions and expenditures that have been informative for federal oversight, the public, researchers, and political campaigns. For example, some of the organizations stated that FEC's campaign finance data assist federal agencies in detecting actions prohibited under federal law and assist the public in identifying undue influence, such as elected representatives who may be acting in the interests of their donors rather than their constituents. Representatives of some organizations also stated that the FEC publishes reported campaign finance data online in a timely manner, and FEC staff are knowledgeable about the data and responsive to questions.

---

<sup>100</sup>52 U.S.C. § 30111(b).

## Department of Justice

### How does DOJ identify, investigate, and prosecute potential campaign finance violations?

According to DOJ officials, the department and its components generally identify matters involving FECA violations through referrals from political campaigns, media reports, and during investigations related to other criminal matters (e.g., mail and wire fraud schemes) not directly involving the violation of campaign finance laws. As the primary investigative agency of the federal government, within DOJ, the Federal Bureau of Investigation (FBI) has the authority and responsibility to investigate all violations of federal law (including potential criminal violations of FECA) that are not exclusively assigned to another federal agency.<sup>101</sup>

DOJ and FEC have parallel jurisdiction over FECA violations. DOJ is responsible for prosecuting criminal violations of FECA. The FEC's exclusive jurisdiction over civil enforcement does not supplant DOJ's jurisdiction over criminal enforcement. Therefore, DOJ may bring criminal campaign finance prosecutions independent of whether the FEC formally refers a case to DOJ that it has investigated and believes involves potential criminal FECA violations. At the same time, DOJ cannot waive the FEC's jurisdiction over civil FECA violations.

In instances when an individual or organization is suspected of criminally violating FECA, DOJ's investigative and prosecutorial components must generally consult with DOJ's Public Integrity Section within the Criminal Division to<sup>102</sup>

- conduct any inquiry or preliminary investigation in a matter involving a possible campaign financing offense (including Title 18 offenses);<sup>103</sup>
- issue a subpoena or search warrant in connection with a campaign financing matter;
- present evidence involving a campaign financing matter to a grand jury;
- file a criminal charge involving a campaign financing crime; or
- present an indictment to a grand jury that charges a campaign financing crime.

The Public Integrity Section oversees the federal prosecution of campaign finance and other election crimes, and assists FBI field offices and U.S. Attorneys' Offices in the investigation and prosecution of FECA violations. This assistance includes the predating of campaign finance allegations, structuring investigations, and drafting indictments and other pleadings. The Section's attorneys also prosecute selected cases against federal, state, and local officials. According to Public Integrity Section officials, because of the complexity of the area for criminal prosecutions, U.S. Attorneys' Offices must consult the Section before beginning criminal

---

<sup>101</sup>From an investigative perspective, the FBI does not solely focus on campaign finance violations because the bureau's efforts involve a spectrum of threats with such violations falling under the broader umbrella of public corruption, according to FBI officials.

<sup>102</sup>According to DOJ officials, in most foreign money cases, the department's investigative and prosecutorial components must consult with the DOJ National Security Division.

<sup>103</sup>For example, FECA criminal violations may be prosecuted under the false statements statute, 18 U.S.C. § 1001, and the false records statute, 18 U.S.C. § 1519.

investigations or prosecutions of campaign finance activities.<sup>104</sup> In addition, according to these officials, the Section has discretion to require more or fewer consults or particular investigative steps, as well as discretion on charging decisions, depending on the circumstances.

#### What are the outcomes of DOJ investigations and prosecutions?

Federal campaign finance violations are subject to three types of enforcement—(1) criminal prosecution by DOJ as felonies either under FECA; federal criminal statutes addressing fraud, obstruction, and false statements;<sup>105</sup> or Title 26 of the U.S. Code;<sup>106</sup> (2) criminal prosecution by DOJ as misdemeanors under FECA; and (3) civil enforcement by the FEC.<sup>107</sup> FECA's criminal penalties apply to violations involving the making, receiving, or reporting of a contribution, donation, or expenditure.<sup>108</sup> DOJ's guidance for federal prosecution of election offenses lays out the following elements that constitute a criminal violation of FECA, and associated penalties:<sup>109</sup>

- **Aggregate value.** For most FECA offenses to be eligible for criminal penalties, the contributions or expenditures at issue must aggregate to \$2,000 or more in a calendar year.
- **Intent.** FECA violations become potential crimes when they are committed knowingly and willfully by offenders who acted with knowledge that some part of their course of conduct was against the law. According to DOJ guidance, while this is at times a difficult element to satisfy, examples of evidence that has been used to prove knowing and willful violations include an attempt to disguise or conceal financial activity regulated by FECA and proof that the offender is active in political fundraising and is personally well-versed in federal campaign financing laws.
- **Applicable penalties.** Violations aggregating \$2,000 or more during a calendar year are misdemeanors and subject to a fine (up to \$100,000 for each offense by an individual and up to \$200,000 for each offense by an organization), or imprisonment for not more than 1 year, or both. Violations aggregating \$25,000 or more per calendar year are felonies and subject to a fine (up to \$250,000 for each offense by an individual and up to \$500,000 for each offense by an organization), or imprisoned for not more than five years, or both.<sup>110</sup>

---

<sup>104</sup>Justice Manual 9-85.210.

<sup>105</sup>18 U.S.C. § 1341 (frauds and swindles); 18 U.S.C. § 371 (conspiracy to commit offense or to defraud U.S.); 18 U.S.C. § 1343 (fraud by wire, radio, or television); 18 U.S.C. § 1519 (destruction, alteration, or falsification of records in federal investigations and bankruptcy); and 18 U.S.C. § 1001 (statements or entries generally).

<sup>106</sup>In addition to criminal violations of the tax code, DOJ has enforcement authority over criminal violations involving publicly funded presidential campaigns. See 26 U.S.C. ch. 95 (Presidential Election Campaign Fund), ch. 96 (Presidential Primary Matching Payment Account). According to DOJ officials, Title 26 tax offenses are overseen by the department's Tax Division.

<sup>107</sup>FECA creates a statutory distinction between non-knowing and non-willful violations involving any amount, which are subject to the exclusive jurisdiction of the FEC, and knowing and willful violations involving \$2,000 or more within a calendar year, which are subject to both civil enforcement proceedings by the FEC and criminal prosecution by DOJ. 52 U.S.C. § 30109. Criminal prosecution under FECA can be pursued before civil and administrative remedies are exhausted.

<sup>108</sup>52 U.S.C. § 30109(d).

<sup>109</sup>Department of Justice, *Federal Prosecution of Election Offenses*, Eighth Edition, December 2017.

<sup>110</sup>There are different thresholds for knowing and willful violations of FECA provisions regarding campaign misrepresentations and certain coerced contributions, and a different threshold and penalty for violations regarding

If an alleged action involving campaign finance was intended to disrupt and impede the function of the FEC or other federal agency, DOJ also may pursue the matter as a conspiracy to defraud the United States.<sup>111</sup> Additionally, DOJ may charge false statements made in records of a federal political entity, such as a political committee, or in reports to the FEC.<sup>112</sup> According to DOJ guidance, the federal mail and wire fraud statutes, which criminalize the use of the mail or interstate wires to further a scheme or artifice to defraud, can provide an additional basis for prosecuting conduct that also violates FECA.<sup>113</sup> Further, DOJ guidance states that conduct in violation of state campaign finance laws, although not subject to FECA's provisions, may violate other federal laws, like the mail and wire fraud statutes. Federal prosecutors may consider these statutes when evaluating possible charges for unlawful campaign finance conduct.

During fiscal years 2010 through 2017,<sup>114</sup> DOJ filed 23 FECA-related charges in cases prosecuted by the Public Integrity Section.<sup>115</sup> Additionally, DOJ filed 10 FECA-related charges in cases prosecuted by U.S. Attorneys during fiscal years 2015 through 2017. These charges included statutes such as 52 U.S.C. § 30122 (contributions in the name of another prohibited), 52 U.S.C. § 30116 (limitation on contributions and expenditures) and 52 U.S.C. § 30121 (contributions and donations by foreign nationals).<sup>116</sup>

#### How has DOJ enforced the foreign national prohibition?

According to FBI officials, the underlying investigation for campaign finance-related matters can be similar to other types of financial-related investigations. These officials stated that campaign finance violations can occur by the same mechanisms used in financial fraud, despite differing motives and actors. Officials from the Executive Office for U.S. Attorneys and the FBI stated that, given the strict prohibition on foreign money in campaigns at all levels, foreign nationals may use different mechanisms to conceal funding—which generally focus on funneling the foreign money through a U.S. citizen or entity that can make a legal contribution. The FBI's Foreign Influence Task Force assists the bureau in its efforts to identify and combat foreign influence operations—specifically, threats originating in foreign countries that target U.S.

---

conduit contributions. For example, for conduit contributions, a person that knowingly and willfully commits a violation involving an amount aggregating more than \$10,000 shall be imprisoned for not more than 2 years or an amount aggregating \$25,000 or more for not more than 5 years, fined not less than 300 percent of the amount involved and not more than the greater of \$50,000 or 1,000 percent of the amount involved, or both. 52 U.S.C. § 30109(d).

<sup>111</sup>18 U.S.C. § 371.

<sup>112</sup>18 U.S.C. § 1519.

<sup>113</sup>Department of Justice, *Federal Prosecution of Election Offenses*, Eighth Edition, December 2017. 18 U.S.C. §§ 1341, 1343.

<sup>114</sup>We selected the fiscal year 2010 through 2017 time frame to capture information on DOJ's campaign finance enforcement efforts across multiple presidential administrations. In addition, data for charges filed by U.S. Attorneys' Offices were the most complete for fiscal years 2015 through 2017 at the time of our review.

<sup>115</sup>A case is an activity that has resulted in the filing of a complaint, indictment, or information in court.

<sup>116</sup>FECA charges under Title 52 were previously classified under Title 2, prior to reclassification in September 2014. The total number of FECA-related charges filed by the Public Integrity Section for fiscal years 2010 through 2017 includes charges filed under both Title 2 and Title 52. Officials from the Public Integrity Section also stated that a number of campaign finance investigations and prosecutions were jointly handled by the Section and U.S. Attorney's offices, so the total number of FECA-related charges filed by the Section during fiscal years 2010 through 2017 (23), and by U.S. Attorneys during fiscal years 2015 through 2017 (10) includes charges that were jointly filed by both DOJ components during these time periods.

democratic institutions with a specific focus on the U.S. electoral process.<sup>117</sup> FBI officials stated that the Foreign Influence Task Force is aware of federal campaign finance laws and, as appropriate, disseminates information regarding potential violations to the appropriate FBI field offices, which then consult with the Public Integrity Section, as appropriate.

What challenges have DOJ officials identified facing when investigating and prosecuting potential campaign finance violations?

DOJ officials identified several challenges related to investigating and prosecuting potential campaign finance violations, such as identifying violations; establishing improper coordination between campaigns and independent expenditure-only groups; identifying donors to tax-exempt groups for law enforcement purposes; and proving criminal intent.

- **Identifying violations.** DOJ officials stated that identifying campaign finance violations is difficult because they are often concealed. For example, they stated that in a typical fraud case, the result of the fraud is clearly visible where the criminal conduct is reported by the victims. In campaign finance cases, the violations may not be readily apparent because, if the concealment is successful, there is no complaining victim or public awareness. According to DOJ officials, most campaign finance offenses involve false reporting by political committees to the FEC. For example, in certain cases, referred to as conduit contribution violations, the goal of the offender is to contribute in another individual's name to hide one's identity or exceed contribution limits. An individual may contribute his or her money through 50 friends or associates, who may or may not be knowing accomplices. According to DOJ officials, if the individual is successful, a campaign committee receiving these contributions does not know that one individual has contributed money in 50 other individuals' names, and reports the names of the 50 contributors. If a knowing friend or associate does not complain to the FEC or DOJ, nothing appears to be unusual about those contributions in the view of the FEC, the campaign, the public, or DOJ.
- **Coordination between campaigns and independent expenditure-only groups, such as Super PACs.** DOJ officials have stated that bringing criminal charges for potential coordination between campaigns and independent expenditure-only groups is another challenge. The officials explained that these cases require a cooperating witness who is an insider at the given campaign or Super PAC, for example. The officials stated that those witnesses are often involved in the offense and are therefore unlikely to come forward. In 2013 testimony, the then Acting Assistant Attorney General for DOJ's Criminal Division stated that DOJ faced significant challenges in seeking to establish, in a criminal case, improper coordination between a Super PAC and a campaign or official.<sup>118</sup> Specifically, she stated that the FEC had been unable to reach agreement or declined to take administrative action, such as through advisory opinions, regulations, and matters under review, in several instances of possible coordination. Examples of such instances include: a candidate's mother running a Super PAC expressly supporting the candidacy; sharing of office facilities

---

<sup>117</sup>The Foreign Influence Task Force is structured as a multi-division task force, including representation from FBI's Criminal Investigative Division's Public Corruption Unit and its Public Corruption and Civil Rights Intelligence Unit. The Public Corruption Unit is generally responsible for managing any investigations involving FECA, and personnel in the Public Corruption and Civil Rights Intelligence Unit analyze national trends in election crimes to include campaign finance violations.

<sup>118</sup>Statement of Mythili Raman, Acting Assistant Attorney General, DOJ Criminal Division, before the Subcommittee on Crime and Terrorism, Committee on the Judiciary, U.S. Senate, at a hearing entitled, "Current Issues in Campaign Finance Law Enforcement," presented April 9, 2013.



by political committees and firms providing services to candidates; and candidates themselves soliciting contributions to the supposedly independent committees, among other instances. She explained that, as a result, it would be rare that the evidence could give rise to proof beyond a reasonable doubt of a criminal intent to illegally coordinate through contribution to, or expenditures by, a Super PAC. DOJ officials we interviewed explained that because there is not a consensus position from the FEC on these, and other, factual scenarios, they stated that proving willful intent in such cases can be difficult.

- **Identifying donors to tax-exempt groups for law enforcement purposes.** A senior DOJ official stated that campaign finance cases are usually about finding the source of the money involved in potential violations and, for potential coordination violations, identifying who is coordinating donations. This official stated that while criminal investigators can readily identify donors to political committees in public filings to the FEC, criminal investigators face challenges with identifying the original source of funds in cases involving certain 501(c) groups that make independent expenditures. Certain classes of 501(c) organizations, such as 501(c)(4) social welfare organizations, 501(c)(5) labor organizations, and 501(c)(6) trade associations, are required to report their donors to IRS as part of their information returns;<sup>119</sup> however, the names and addresses of those donors are not subject to public disclosure,<sup>120</sup> and DOJ officials stated that the department cannot obtain donor information reported to IRS without a court order.<sup>121</sup> They stated that this makes it difficult to establish a case as a coordination crime or foreign contribution crime.<sup>122</sup> In 2013, the then Acting Assistant Attorney General identified similar challenges in her testimony before Congress. She stated that because disclosure of donors by these classes of 501(c) organizations occurs only through tax returns, it is possible for one of these organizations—one that is created during an election year and spend millions of dollars engaging in campaign activities—to ultimately disclose its donors and activities to the IRS for the first

---

<sup>119</sup>IRS regulations provide that organizations required to file an annual information return generally must provide the names and addresses of persons who contribute \$5,000 or more during the taxable year. 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). In 2018, IRS issued Revenue Procedure 2018-38, stating that certain 501(c) organizations—including 501(c)(4) social welfare organizations, 501(c)(5) labor organizations, and 501(c)(6) trade associations among others—are no longer required to report the names and addresses of the donors on Schedule B of the tax return, but they must continue to collect and record this information and make it available to IRS upon request, when needed for tax administration. On July 30, 2019, in *Bullock v. IRS*, a district court set aside this IRS Revenue Procedure. The court found the Revenue Procedure to be a legislative rule and set it aside because the Treasury Department and IRS did not follow the required notice and public comment procedures for a legislative rule before promulgating it. *Bullock v. IRS*, 401 F. Supp. 3d 1144 (D. Mont. 2019). On September 10, 2019, IRS published a proposed rule that would require only 501(c)(3) and 527 organizations to report the names and addresses of certain donors on their Forms 990. 501(c)(4), (5), and (6) organizations, among others, would not be required to report such information. 84 Fed. Reg. 47,447 (Sept. 10, 2019).

<sup>120</sup>26 U.S.C. § 6104(b), (d).

<sup>121</sup>See 26 U.S.C. § 6103(i).

<sup>122</sup>For example, according to DOJ officials, for coordination crimes, one piece of evidence that would suggest coordination is if members of an official campaign are contributing to tax-exempt entities that are making purportedly uncoordinated independent expenditures. Without information on the identity of donors to these entities, DOJ officials cannot establish the circumstantial link that someone from the campaign is funding tax-exempt organizations. Additionally, without DOJ knowing the identity of donors to certain tax-exempt organizations, it is difficult to establish whether the donors are foreign nationals, or whether foreign money is being passed through domestic conduits.

time a year or more after the election. This makes it difficult for DOJ investigators to obtain information in a timely manner.<sup>123</sup>

- **Proving criminal intent.** According to DOJ officials, proving intent in campaign finance cases is the most difficult element, where criminal violations of FECA require proof that the violation was committed knowingly and willfully. DOJ officials stated that a specific issue that can make campaign finance violations difficult to prosecute is that people may be genuinely unaware of the rules, and what may appear to be a knowing violation may in fact be a lack of knowledge or information.

What challenges have literature and selected organizations reported regarding DOJ's investigation and prosecution of campaign finance laws?

Our literature review and interviews identified challenges facing DOJ in its efforts to investigate and prosecute campaign finance violations similar to those identified by DOJ officials. For example, similar to what we heard from DOJ officials, one source reported that prosecuting violations of federal campaign finance laws is challenging because criminal violations require proof that the violation was committed knowingly and willfully. Additionally, some sources reported that a lack of requirements for disclosing information about the sources of money for organizations, such as 501(c)(4) organizations or limited liability companies who contribute to political committees, limits DOJ's ability to detect and prosecute prohibited contributions and expenditures, including those from foreign entities.

**Coordination between FEC and DOJ**

To what extent, if any, do the FEC and DOJ have guidance and policies to coordinate their efforts to enforce campaign finance violations?

Both DOJ and the FEC have established guidance and policies which address how to coordinate their respective activities to enforce campaign finance violations. For example, FEC's enforcement manual<sup>124</sup> and other policies<sup>125</sup> outline the Commission's relationship with DOJ in the enforcement of FECA, including when to refer potential criminal violations to DOJ,<sup>126</sup> and procedures for processing requests for information and records submitted by DOJ. Further, DOJ's Public Integrity Section has issued internal guidance to assist federal prosecutors in handling federal election offenses, including campaign finance violations.<sup>127</sup> The guidance identifies DOJ's recommended practices for coordinating with the FEC in addressing campaign

---

<sup>123</sup>According to DOJ officials, the DOJ Tax Division determines which cases to pursue or refer to the U.S. Attorneys' Offices involving tax-exempt organizations and formally oversees any tax-focused offenses charged under Title 26 or otherwise.

<sup>124</sup>Office of General Counsel Enforcement Manual, Federal Election Commission, June 2013. FEC officials stated that the enforcement manual has not been approved by the Commission; however, FEC continues to use the manual as supplemental guidance in its enforcement efforts.

<sup>125</sup>FEC Memorandum, *Request for Records or Information from Federal, State, and Local Government Entities*, June 14, 2012.

<sup>126</sup>52 U.S.C. § 30109(c). FECA states that whenever the Commission refers a violation to DOJ, the DOJ shall report to the Commission any action taken by DOJ regarding the violation. During calendar years 2002 through 2017, FEC referred a total of six matters to DOJ for possible criminal investigation and prosecution, according to FEC data.

<sup>127</sup>Department of Justice, *Federal Prosecution of Election Offenses*, Eighth Edition, December 2017.

finance violations, including identifying an FEC resource that has been helpful in developing DOJ's campaign finance cases and specifying that inquiries to the FEC should be routed through the Public Integrity Section. The guidance also notes that such practices have led to the development of good relationships between DOJ and FEC personnel, assisted prosecutors and agents in quickly obtaining the information they need from the FEC, and reduced confusion between the agencies—increasing the likelihood of a positive response from the Commission.<sup>128</sup>

While these coordination activities are viewed positively by DOJ and FEC officials, some of the agencies' coordination activities are not reflected in the jointly signed Memorandum of Understanding (MOU)—entered into in 1977—which sets forth general guidelines for referring potential FECA violations to each other, as well as outlining their respective law enforcement jurisdictions and responsibilities.<sup>129</sup> For example, one of the FEC commissioners stated in follow-up responses to a congressional hearing that some coordination activities are not addressed by the MOU.<sup>130</sup> These activities include determining whether it is possible or advisable for DOJ to share investigative information with the FEC, the timing of certain investigative steps (e.g. the taking of depositions), whether to grant immunity to alleged violators, and whether to consider a global settlement.<sup>131</sup> FEC and DOJ officials stated that such activities are sometimes “ad hoc” and occur on a case-by-case basis since they are not documented in the MOU or other documents.

In addition, DOJ's guidance for prosecuting federal election offenses states that the MOU “no longer reflects current congressional intent or Department policy.”<sup>132</sup> DOJ officials told us that the department abrogated the MOU following the enactment of BCRA. As a result, officials said DOJ no longer considers the agreement to be binding policy, though they continue to follow the “spirit” of the agreement in coordinating with the FEC. FEC officials, however, stated that they consider the MOU to be in effect and that it is the current guidance used to coordinate the two agencies' enforcement efforts regarding violations of campaign finance laws. The MOU has not been updated since 1977, and while the FEC and DOJ made efforts to update the MOU in 2003, 2007, and 2012, the agencies were not able to agree on proposed revisions.

DOJ and FEC officials provided differing perspectives on the need to update the MOU or develop or update other guidance addressing coordination between the two agencies. For example, in July 2019, the FEC commissioners told us that they did not identify a need to update the MOU because, in their view, the current MOU meets the agency's enforcement needs. They also noted that there are a limited number of staff from both agencies who coordinate with each other and understand how that coordination should work. However, DOJ

---

<sup>128</sup>During calendar years 2002 through 2017, DOJ referred a total of 15 matters to FEC for possible civil enforcement, according to FEC data.

<sup>129</sup>Under 52 U.S.C. 30109(a)(5)(C), if the Commission “determines that there is probable cause to believe that a knowing and willful violation has occurred, the Commission may refer such apparent violation to the Attorney General of the United States.” Pursuant to that statute, in 1977, the Commission and the DOJ entered into a MOU. 43 Fed. Reg. 5441 (Feb. 8, 1978). The MOU is not intended to confer any procedural or substantive rights on any person in any manner before DOJ, FEC, or any court or federal agency.

<sup>130</sup>This information reflects the written responses provided by the FEC to the U.S. Senate Committee on Rules and Administration, *Hearing on Nominations to the Federal Election Commission and Responses to Post-Hearing Questions*, July 6, 2007.

<sup>131</sup>A global settlement is where there are multiple parties or multiple cases and all the parties reach a settlement that fully and completely resolves all outstanding disputes.

<sup>132</sup>*Federal Prosecution of Election Offenses*, page 170.

officials stated that an updated MOU would have a positive effect, reflecting the good cooperation and working relationship between the two agencies.

We have previously reported that the implementation of collaborative mechanisms can help agencies achieve their joint objectives.<sup>133</sup> FEC and DOJ leadership could benefit from engaging such a mechanism in the form of an updated MOU, or a written agreement. Written agreements can also incorporate any consensus reached among the agencies regarding their coordination activity's leadership, accountability, roles and responsibilities, or resources.

Further, *Standards for Internal Controls in the Federal Government* states that periodic review of policies, procedures, and related control activities should occur to determine their continued relevance and effectiveness in achieving identified objectives or addressing related risks. In addition, documentation provides a means to retain organizational knowledge and mitigate the risk of having that knowledge limited to a few personnel.<sup>134</sup> Although DOJ and FEC officials noted that coordination between the two agencies works well, they provided varying perspectives on the need to document their coordination mechanisms. While the limited number of staff that coordinate between FEC and DOJ indicate that they are working together, without documentation of those mechanisms consistent with internal control standards, the agencies risk having knowledge limited just to those few personnel who could change positions or leave the agencies, taking that knowledge with them. Reviewing and updating, as appropriate, coordination practices between the FEC and DOJ, to include the MOU or other guidance, could help the agencies ensure that written guidance reflects current practices between the agencies and better ensure that coordination between FEC and DOJ occurs consistently and effectively when enforcing campaign finance law.

### **Internal Revenue Service**

#### **How does the IRS identify non-compliant tax-exempt organizations, and what are the outcomes of the agency's enforcement actions?**

According to IRS documents, within the IRS's Tax Exempt and Government Entities Division, Exempt Organizations is the function with oversight responsibility for organizations seeking exempt status and it also examines exempt organizations' operations and information returns, including the Form 990-series returns. The IRS may conduct an examination to ensure that (1) the organization is organized and operates in accordance with its exempt purpose(s); (2) the organization's information return is complete, correct, and contains all public information required; and (3) if the organization is liable for other taxes, the organization has paid the correct amount of tax. According to IRS officials, during an examination, potential noncompliance related to political campaign intervention is evaluated using a facts and circumstances analysis. If the IRS determines noncompliance, the IRS may revoke the organization's tax-exempt status or assess excise taxes for certain types of violations. In addition, in certain circumstances, the IRS can request the Department of Justice to bring an action to enjoin political expenditures by a 501(c)(3) organization under the Internal Revenue Code.<sup>135</sup>

---

<sup>133</sup>GAO, *Managing for Results: Key Consideration for Implementing Interagency Collaborative Mechanisms*, [GAO-12-1022](#) (Washington, D.C.: Sept. 27, 2012).

<sup>134</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sept. 2014).

<sup>135</sup>26 U.S.C. § 7409(a).

According to IRS officials, the agency identifies returns for potential examinations of tax-exempt organizations' violations of the standard for political campaign intervention<sup>136</sup> through sources such as data-driven analytics, referrals, and compliance strategies.<sup>137</sup> The officials added that determining the permissible level of political campaign intervention depends on the organization's tax-exempt status. For example, under the Internal Revenue Code, 501(c)(3) organizations are subject to a strict prohibition against political campaign intervention, where they may not participate in or intervene in any political campaign on behalf of or in opposition to any candidate for public office.<sup>138</sup> These organizations may participate in nonpartisan activities that do not support or oppose candidates. In contrast, a 501(c)(4) organization may engage in some political campaign intervention, so long as it continues to be primarily engaged in activities that promote social welfare.<sup>139</sup> (See enclosure VI for some of the types of tax-exempt organizations and rules for political campaign intervention).

During fiscal years 2010 through 2017, the IRS conducted and closed 226 examinations related to tax-exempt organizations' non-compliant political campaign intervention.<sup>140</sup> A majority (97 percent—219 examinations) of these examinations were identified through the IRS's data-driven analytics efforts (57 percent—129 examinations) and referrals (40 percent—90 examinations) from other entities (e.g., other federal agencies) and 91 percent (205 examinations) focused on 501(c)(3) organizations. In addition, during this period, a majority of the examinations did not result in the IRS revoking or terminating an organization's exempt status, or imposing an excise tax for an organization's political campaign intervention. For example, IRS reported that for 127 (56 percent) of the 226 examinations conducted, an organization was issued a written advisory and there was no change to the organization's tax-exempt status.<sup>141</sup> For 77 (34 percent) of the 226 examinations conducted by the IRS there was no change to an organization's exempt status or tax liability, and there were no issues for which a written advisory was warranted.<sup>142</sup>

---

<sup>136</sup>Political campaign intervention includes any and all activities that favor or oppose one or more candidates for public office. See, e.g., 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).

<sup>137</sup>Based on IRS documents, data-driven analytics use data, models, and queries to identify information returns (Form 990) for potential noncompliance. Different weights are assigned to basic information return characteristics. The weights are added together to obtain a composite score for each return, which are then ranked in numerical sequence; the higher the score the greater probability of an issue warranting examination. Referrals are complaints of exempt organizations' noncompliance made by third parties, including the public and other parts of IRS. Compliance strategies, approved by the agency's Tax Exempt and Government Entities Division's Compliance Governance Board, identify, prioritize and allocate resources to address issues that are considered to be priorities within the division's filing population.

<sup>138</sup>See 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(3)-1(b)(3)(ii).

<sup>139</sup>See 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).

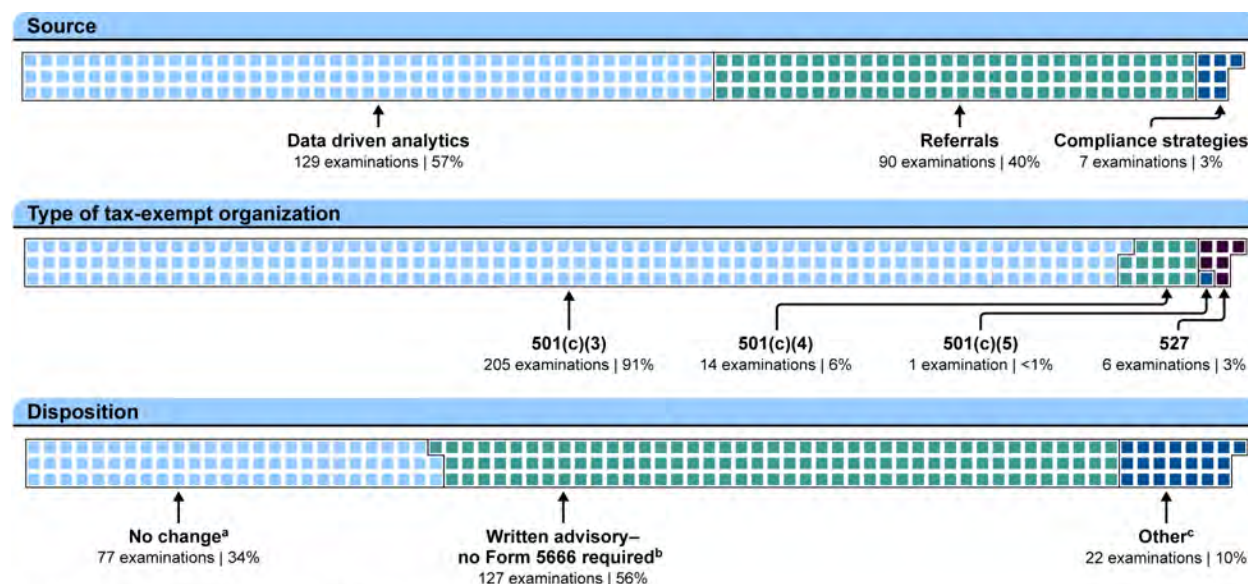
<sup>140</sup>Based on IRS guidance, the objectives of an examination are to ensure that the organization is organized and operated in accordance with its exempt purpose(s); IRS Form 990 (Return of Organization Exempt From Income Tax) is complete, correct, and contains all public information required; and if the organization is liable for other taxes, the organization has paid the correct amount of tax.

<sup>141</sup>Generally, a written advisory is appropriate when there are: (1) some aspect of an organization's activities or operations, if enlarged or ongoing, may jeopardize the organization's exempt status, such as a proposed expansion of an unrelated business income producing activity that could become a primary purpose for an Internal Revenue Code 501(c)(3) organization; (2) changes to tax addressed in separate reports; (3) tax change issues that are below tolerances; (4) identified delinquencies, imposition of penalties, and whether reasonable cause was established; or (5) other compliance issues (not including status or tax change issues) which are appropriate to call to the attention of the organization. Internal Revenue Manual, 4.75.15.4(3).

<sup>142</sup>We requested data on closed examinations from IRS beginning in fiscal year 2010 because the Supreme Court and federal appeals court rulings in *Citizens United v. FEC* and *SpeechNow.org v. FEC* changed the campaign

Figure 10 provides a more detailed description of the sources and dispositions of the closed examinations as well as the types of tax-exempt organizations examined during fiscal years 2010 through 2017.

**Figure 10: Internal Revenue Service (IRS) Closed Examinations, Tax-Exempt Organizations' Compliance (In Connection with Political Campaign Intervention), Fiscal Years 2010 through 2017**



Source: GAO analysis of Internal Revenue Service data. | GAO-20-66R

<sup>a</sup>The “No change” code is used to close an examination with no changes or adjustments (all significant return information is complete and correct) or when unable to complete a church examination within the two-year period provided by 26 U.S.C. § 7611(c)(1)(A).

<sup>b</sup>The “Written advisory—no Form 5666 required” code is used to close examinations that issue written advisories. Advisories can include reference to secured delinquent returns, changes to related returns, miscellaneous civil penalties imposed and non-compliant issues of the organization. Form 5666 is the Tax Exempt Government Entities Referral Information Report.

<sup>c</sup>The “other” category includes: (1) Delinquent Return Secured, (2) Delinquent Related Return Secured, (3) Change to Related Return, (4) Revocation – Agreed, (5) Written Advisory-Form 5666 Required, (6) Regulatory/Revenue, (7) Unagreed Protest to Appeals, (8) Unagreed – Without Protest, (9) Termination, (10) Unagreed Revocation – Without Protest.

### What is IRS’s role in enforcing FECA’s foreign national prohibition?

According to IRS officials, the IRS administers and enforces federal tax law and it plays no role in enforcing FECA’s foreign national prohibition.<sup>143</sup> IRS officials added that examiners do not review the national origin of sources of donations reported by a tax-exempt organization on the

finance landscape, enabling corporations (including nonprofit corporations) to (1) use their general treasuries to make unlimited independent expenditures and electioneering communications and (2) make unlimited contributions to Super PACs. After these decisions in 2010, corporations, such as tax-exempt social welfare organizations (501(c)(4) organizations) that are incorporated, could make independent expenditures, electioneering communications, and contribute to Super PACs. We recognize that some of the examinations closed in 2010 may include activity prior to this time frame.

<sup>143</sup>Federal tax law does not prohibit foreign donations to tax-exempt organizations.



agency's IRS Form 990-series (Return of Organization Exempt From Income Tax) and do not assess an organization's compliance with FECA provisions during audits.

What challenges have IRS officials identified facing when administering and enforcing requirements related to tax-exempt organizations and political campaign intervention?

IRS officials we interviewed identified facing various challenges when administering and enforcing requirements related to tax-exempt organizations and political campaign intervention. These officials noted questions related to the clarity of certain aspects of statute and regulation governing tax-exempt organizations and political campaign intervention. Specifically, they identified challenges related to obtaining complete, timely, and accurate information and navigating statutes and regulations in monitoring compliance, as discussed below.

- **Obtaining complete and accurate information.** According to IRS officials, some tax-exempt organizations are not forthcoming or complete in reporting information on their information returns, but this is a challenge they stated they face from filers in general (e.g., individuals not reporting their full income) and is not specific to tax-exempt organizations. IRS officials also told us that the information return for tax-exempt organizations, or Form 990, is fairly detailed, and accurate completion of the form by filers partly depends on how completely the filing organization understands the terms and questions in the form. For example, the organization should understand the difference between “lobbying” (attempting to influence legislation) and “political campaign activities” (directly or indirectly participating in, or intervening in, any political campaign on behalf of or in opposition to any candidate for public office). IRS officials told us that incomplete and inaccurate information reported on information returns presents a challenge because, in general, tax administration consists of obtaining information from filers. It is a voluntary compliance system, and filers not fully or accurately reporting information (e.g., the full amount of political campaign activity expenditures) limits the IRS’s ability to carry out its basic functions. To help address filers’ confusion or misunderstanding of certain terms on the form 990, IRS officials stated that they provide education about political campaign intervention on the IRS website.
- **Navigating statutes and regulations in monitoring compliance.** IRS officials told us that applying certain aspects of statutes and regulations can be challenging in their efforts to monitor exempt organizations’ compliance with requirements related to political campaign intervention. For example, they explained that, when determining whether an organization should maintain exempt status under Internal Revenue Code sections 501(c)(3) and 501(c)(4)-(6), IRS examiners apply the law to the facts and circumstances of each case and conduct a qualitative analysis using a set of specified factors to do so.<sup>144</sup> According to IRS officials, the IRS has published a number of revenue rulings on what is political campaign intervention, most recently Revenue Ruling 2007-41.<sup>145</sup> However, some IRS officials told us

---

<sup>144</sup>For example, according to IRS guidance relevant to 501(c)(3) organizations, during this facts and circumstances analysis, IRS examiners are to consider a variety of factors to determine whether an organization’s communications are considered political campaign intervention, including whether the communication identifies a candidate for public office, expresses approval or disapproval for one or more candidates’ positions or actions, is delivered close in time to an election, makes reference to voting or an election, and the communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue, among other factors. See IRS Revenue Ruling 2007-41, Situations 14-16.

<sup>145</sup>IRS Revenue Ruling 2007-41 provides 21 examples illustrating the application of the facts and circumstances analysis to different factual situations relevant to 501(c)(3) organizations (Revenue Ruling 2007-41). According to IRS officials, IRS generally applies the same facts and circumstances analysis in the context of 501(c)(4) organizations. See, e.g., Revenue Ruling 2004-6.

that existing guidance is not sufficiently clear about what constitutes political campaign intervention (e.g., examining a 501(c)(3) organization engaging in issue advocacy near the time of an election may be particularly challenging, as that advocacy can be very close to advocating for a specific candidate).<sup>146</sup>

Additionally, as discussed above, a 501(c)(4) organization may engage in some political campaign intervention as long as it continues to be primarily engaged in activities that promote the social welfare. However, some IRS officials stated that no clear and concise guidance exists regarding the extent to which organizations (other than 501(c)(3) organizations) can participate in political campaign intervention. Furthermore, IRS officials stated that a prohibition in recent appropriations acts limits the IRS's ability to develop or issue new guidance or regulations related to the standard for determining whether an organization is operated exclusively for the promotion of social welfare.<sup>147</sup> IRS officials stated that additional clarification of the law and the ability to issue new regulations and guidance could aid in their efforts to review organizations' compliance with this section of the code.

According to IRS officials, the overarching challenge is that in the absence of "bright line" rules regarding what constitutes political campaign intervention (currently a facts and circumstances analysis), or the extent to which organizations (other than 501(c)(3) organizations) can participate in political campaign intervention, there will always be challenges in applying the law to a particular set of facts.

What challenges have literature and selected organizations reported related to the IRS's administration and enforcement of requirements for tax-exempt organizations and political campaign intervention?

Literature we reviewed and organizations we interviewed identified challenges related to the IRS's administration and enforcement of requirements related to tax-exempt organizations and political campaign intervention in areas such as IRS guidance and enforcement efforts.

---

<sup>146</sup>Section 501(c)(3) organizations are prohibited from participating in, or intervening in, any political campaign on behalf of or in opposition to any candidate for public office. In addition, an organization will not qualify under § 501(c)(3) if more than an insubstantial part of its activities is not in furtherance of an exempt purpose. See 26 C.F.R. § 1.501(c)(3)-1(c)(1). Such exempt purposes are religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals. 26 U.S.C. § 501(c)(3).

<sup>147</sup>In 2013, the Treasury Department and IRS proposed a regulation regarding 501(c)(4) organizations, more clearly defining activities that do not further the social welfare. The proposed rule would have replaced the language in the existing regulation – "participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" – with a new term – "candidate-related political activity" – and defined the term with examples of activities that would be considered "candidate-related political activity." In this notice, IRS also requested comments from the public regarding the standard under current regulations that considers a tax-exempt social welfare organization to be operated exclusively for the social welfare if it is "primarily" engaged in activities that promote the common good and general welfare of the people of the community. 78 Fed. Reg. 71,535 (Nov. 29, 2013). IRS officials stated that the agency received over 100,000 public comments on the proposed regulation. However, recent appropriations acts have prohibited IRS from issuing, revising, or finalizing any new regulations or other guidance related to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of 501(c)(4) of the Internal Revenue Code of 1986 (including the proposed regulations published at 78 Fed. Reg. 71,535 (Nov. 29, 2013)). See, e.g., Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. C., title I, § 122, 133 Stat. 2317, 2444 (2019).

**IRS guidance.** Literature we reviewed and organizations we interviewed identified challenges related to IRS’s guidance regarding tax-exempt organizations and political campaign intervention. For example, some literature and organizations noted that it can be challenging for tax-exempt organizations to understand and navigate tax law related to political campaign intervention. These sources noted that the IRS has published guidance materials that have helped inform and clarify requirements for organizations—such as continuing professional education training materials and its 2007 revenue ruling on 501(c)(3) organizations and political campaign intervention—but additional materials could aid organizations’ understanding.<sup>148</sup> In particular, these sources identified the need for more updated guidance on how to consider or define political campaign intervention for 501(c)(3) and 501(c)(4) organizations and on internet communications for tax-exempt organizations, such as what could be considered an issue ad or a political campaign ad.

- For example, with regard to 501(c)(3) organizations, according to some sources, the IRS has not, in its guidance, clarified what constitutes political campaign intervention, which is prohibited for 501(c)(3) organizations, and issue advocacy, which is generally allowed for such organizations. These sources noted that this lack of clarity has caused some confusion for 501(c)(3) organizations attempting to comply with the law. For example, a 501(c)(3) organization that promotes helping the homeless may engage in issue advocacy by encouraging its supporters to fight homelessness and to consider this issue when deciding how to vote. However, the 501(c)(3) organization risks entering into political campaign intervention if it is seen as supporting a particular party or candidate, which may jeopardize its status as a charitable organization under 501(c)(3).<sup>149</sup>
- Some literature and organizations also noted that it can be challenging for organizations to understand IRS guidance regarding the extent to which 501(c)(4) organizations can participate in political campaign intervention because the IRS has not clearly defined aspects of this guidance. More specifically, as mentioned above, under the Internal Revenue Code, organizations that operate “exclusively for the promotion of social welfare” are eligible for 501(c)(4) tax-exempt status. Some literature noted that a Treasury Department regulation regarding 501(c)(4) organizations defines “exclusively” in a lenient manner, by stating that a 501(c)(4) organization may engage in political campaign intervention as long as the organization continues to be primarily engaged in activities that promote the social welfare.<sup>150</sup> In addition, according to some sources, the IRS has not clearly defined what it means to be “primarily engaged” in social welfare activities or, as IRS officials stated above, the extent to which organizations (other than 501(c)(3) organizations) can participate in political campaign intervention.

---

<sup>148</sup>IRS Revenue Ruling 2007-41.

<sup>149</sup>As noted earlier, IRS issued Revenue Ruling 2007-41 which is intended to help 501(c)(3) organizations distinguish issue advocacy from political campaign intervention, among other things. The guidance includes 21 examples illustrating the application of the facts and circumstances analysis to different factual situations. Rev. Rul. 2007-41. However, representatives of one organization stated that applying IRS’s guidance can be difficult for nonprofits. They stated that advocacy is a spectrum, and it can be difficult for organizations to figure out where the lines are between issue advocacy and political campaign intervention. They stated that navigating complex campaign finance and related internal revenue statutes, regulations, and guidance to ensure nonprofits are not in violation may require hiring lawyers and accountants that smaller, grassroots nonprofits often cannot afford. In their view, this can deter smaller nonprofits’ advocacy and engagement in the democratic process.

<sup>150</sup>26 C.F.R. § 1.501(c)(4)-1(a)(2)(i). According to IRS officials, the regulatory interpretation of “exclusively” as “primarily” originates from *Better Business Bureau v. United States*, 326 U.S. 279 (1945). See *Contracting Plumbers v. United States*, 488 F.2d 684 (2d Cir. 1973); *Commissioner v. Lake Forest*, 305 F.2d 814 (4th Cir. 1962).

**IRS enforcement efforts.** Some sources identified challenges in IRS's enforcement efforts, particularly related to (1) regulating tax-exempt organizations described in section 501(c) that engage in political campaign intervention; (2) examining exempt organizations to determine whether they are violating regulations; and (3) revoking exempt status of organizations that primarily engage in political campaign intervention. For example, according to some sources, in recent years IRS has conducted more limited enforcement on tax-exempt organizations that engage in political campaign intervention because of prior questions about how IRS was selecting and reviewing certain organizations' exempt status applications based on the organization's name, among other things.<sup>151</sup>

In addition, representatives of organizations we met with held varying views on the role they believed the IRS should have in regulating exempt organizations' political campaign intervention. Some stated that the IRS should not regulate exempt organizations' political campaign intervention because it is not its mission, and the IRS does not have the subject matter expertise and it would be a misuse of its resources to take on responsibility for overseeing such requirements. Some stated that IRS's attempts to address various issues related to tax-exempt organizations' political campaign intervention through proposed rules are issues that should be left for Congress to handle.<sup>152</sup> However, representatives of another organization stated that IRS should continue to have a role in regulating the political campaign intervention of tax-exempt organizations because many of the groups spending money during campaigns, particularly 501(c)(4) and 501(c)(6) organizations, are registered with the IRS, not the FEC, and without an IRS role in regulating them, their political campaign intervention would be mostly unregulated.

### **Perspectives of Literature and Selected Organizations on Key Aspects of the Federal Campaign Finance Framework**

We obtained perspectives from literature and selected organizations on key aspects of the campaign finance framework, including the scope and nature of campaign finance laws; how the framework has addressed developments in technology and foreign influence in elections; the purposes served by contribution limits and how these limits are enforced; the benefits and costs of unlimited independent expenditures; and the extent to which the sources of campaign funding should be disclosed. To obtain the perspectives, we conducted a literature review of scholarly publications, government reports, and publications by nonprofits and think tanks from 2016 through 2018, and conducted interviews with subject-matter specialists on campaign finance

---

<sup>151</sup>In 2013, The Treasury Inspector General for Tax Administration reported that IRS used inappropriate criteria that identified for review certain organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention. Specifically, the report found that ineffective management 1) allowed inappropriate criteria to be developed and stay in place for more than 18 months, 2) resulted in substantial delays in processing certain applications, and 3) allowed unnecessary information requests to be issued. The report made nine recommendations to address these issues. Treasury Inspector General for Tax Administration (TIGTA), *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, May 14, 2013, Reference Number: 2013-10-053. In a follow-up audit, TIGTA found that the IRS had taken significant actions to eliminate the selection of potential political cases based on names and policy positions, expedite processing of 501(c)(4) applications, and eliminate unnecessary information requests. TIGTA, *Status of Actions Taken to Improve the Processing of Tax-Exempt Applications Involving Political Campaign Intervention*, March 27, 2015, Reference Number 2015-10-025.

<sup>152</sup>As discussed above, in 2013, IRS proposed a regulation regarding 501(c)(4) organizations and activities that do not further the social welfare. 78 Fed. Reg. 71,535 (Nov. 29, 2013). In subsequent years, appropriations acts have prohibited IRS from issuing, revising, or finalizing any new regulations or other guidance in this area. See, e.g., Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. C, title I, § 122,133 Stat. 2317, 2444 (2019).

issues from a nongeneralizable sample of research, advocacy, and practitioner organizations, selected to represent a range of views about the campaign finance framework.<sup>153</sup> The literature and organizations provided a range of perspectives about these aspects of the campaign finance framework, presented below.

What are the perspectives of literature and selected organizations regarding the scope and nature of campaign finance laws?

Literature and organizations reported various perspectives on the scope and nature of the current campaign finance statutory and regulatory framework. The campaign finance framework rests on two major laws enacted in 1974 and 2002, and Supreme Court and lower court rulings that have invalidated portions of those laws in intervening years. The FEC has further interpreted these laws through rulemaking, advisory opinions, and enforcement actions. Given these developments, literature and organizations reported a range of perspectives regarding (1) federal statutes and regulations on campaign finance requirements; (2) how campaign finance statutes and regulations address changes in technology; and (3) how campaign finance statutes and regulations address prohibited foreign influence in U.S. elections, which we discuss below.

**Perspectives on federal campaign finance statutes and regulations.** The literature we reviewed and organizations we interviewed presented various perspectives on federal campaign finance statutes and regulations. For example, some literature and organizations stated that campaign finance and related tax statutes and regulations are overly complex, and some definitions of activities within the campaign finance framework—such as political campaign intervention, major purpose, and coordination—are vague and need to be clarified or simplified. As one example, some literature we reviewed and organizations we interviewed stated that the FEC’s definitions for determining whether an organization is a political committee are not clear, which can contribute to confusion for organizations, such as tax-exempt organizations, as to whether or not they are a political committee that should register with the FEC. FECA defines a political committee as any committee, club, association, or other group of persons which receives contributions or makes expenditures in excess of \$1,000 in a calendar year.<sup>154</sup> Additionally, the Supreme Court held in *Buckley v. Valeo* that only organizations under the control of a federal candidate or whose major purpose is the election or defeat of federal candidates may be regulated as political committees.<sup>155</sup> However, according to some literature and organizations we interviewed, neither federal law nor the FEC have clearly defined how to measure an organization’s major purpose.<sup>156</sup>

One article noted that because the FEC has not defined a numerical threshold of expenditures for determining an organization’s major purpose, some practitioners have interpreted the

---

<sup>153</sup>We reviewed literature published from calendar years 2016 through 2018. This time frame includes the 2016 U.S. Presidential election, and extends through the end of the most recent calendar year at the time of our review. For a more detailed discussion of our scope and methodology, see enclosure I.

<sup>154</sup>52 U.S.C. § 30101(4). Under FECA, political committees must raise and spend money in accordance with contribution limits, source prohibitions, and disclosure requirements.

<sup>155</sup>*Buckley v. Valeo*, 424 U.S. at 79–80.

<sup>156</sup>FEC uses a case-by-case analysis of an organization’s conduct to determine whether it has the major purpose of engaging in federal campaign activity. FEC’s approach is described in its 2007 Supplemental Explanation and Justification on Political Committees. 72 Fed. Reg. 5,596 (Feb. 7, 2007). In 2007, the U.S. District Court for the District of Columbia held that the FEC decision to use a case-by-case approach, rather than rulemaking, to apply the major purpose test was not arbitrary and capricious. *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007).

threshold to be 49 percent, so that certain organizations, such as 501(c)(4) organizations, can spend up to 49 percent of their total expenditures on federal campaign activity without satisfying the major purpose test and becoming subject to FEC requirements for political committees. Representatives of some organizations stated that unclear FEC definitions create uncertainty regarding whether some politically active organizations, such as some 501(c)(4) organizations, should be registered as political committees and subject to FECA reporting and disclosure requirements, as discussed earlier. As noted above, in order to qualify for their tax-exempt status, 501(c)(4) organizations must satisfy a primary purpose test; they may engage in some political campaign intervention provided that they continue to be primarily engaged in activities to promote the social welfare. However, according to IRS officials and other sources, the IRS has not issued clear and concise guidance regarding the extent to which 501(c)(4) organizations can engage in political campaign intervention. Furthermore, some sources noted that some 501(c)(4) organizations have taken advantage of the vague major purpose and primary purpose criteria to avoid registering as political committees and being subject to disclosure requirements.

**Perspectives on how campaign finance statutes and regulations address changes in technology.** The literature we reviewed and organizations we interviewed presented various perspectives on how campaign finance statutes and regulations have addressed changes in the use of technology over time. According to some sources included in our review, campaign finance statutes and regulations have not kept up with the rapid expansion of campaign spending on the internet and do not regulate online political ads to the same extent as television, radio, and print ads. According to these sources, this creates disclosure and disclaimer gaps, which can exclude a large amount of campaign spending from regulation. For example, some sources highlighted that BCRA's definition of regulated electioneering communications applies to "broadcast, cable, or satellite communications," but not to internet communications.<sup>157</sup> As a result, some sources stated that voters do not have information about the sponsors of many internet communications that refer to a candidate, which could help voters identify whether communications are real, or potential sources of disinformation.<sup>158</sup> Some literature, on the other hand, noted that, while expanding the definition of electioneering communications to include internet communications would be helpful, it would not provide transparency on ads that do not mention a candidate's name. Some sources discussed other proposals that have been put forward to provide more information about sponsors of internet ads, for example proposed legislation that would require that technology companies maintain a "political file" (or public, searchable database) of online ads, as television and radio broadcasters are required to do. Currently, contracts for television ad purchases are made public through the Federal Communication Commission, but contracts for internet ad purchases are not. Representatives of one organization stated that while legislation that specifically regulates online political communications has not been enacted, many of the FEC's rules that apply to broadcast media are not statutorily confined and therefore could be updated to apply to new media.

---

<sup>157</sup>52 U.S.C. § 30104(f)(3)(A)(i).

<sup>158</sup>Although the definition of electioneering communications does not include internet communications, certain internet communications, such as those that meet the definition of public communication, are subject to disclaimer requirements. As discussed later in this report, the definition of public communication includes communications that are placed for a fee on another person's website. See 11 C.F.R. § 100.26. FEC regulations also require that all internet websites of political committees available to the general public include disclaimers. 11 C.F.R. § 110.11(a). See also Advisory Opinion 2017-12 (Take Back Action Fund) (finding that the 501(c)(4) organization that requested the advisory opinion was required to include disclaimers on paid Facebook image and video advertising that expressly advocated election or defeat of clearly identified federal candidates).



According to some sources, current FEC regulations also do not sufficiently address requirements for disclaimers for political communications made on the internet. For example, some sources noted that FEC regulations related to online ads only apply to ads that are “purchased for a fee,” which often excludes political communications through YouTube and other online platforms. Other sources noted that under FEC regulations, certain internet ads, such as those in games on mobile devices, may be exempted from disclaimer requirements through exceptions in the regulations referred to as the “small items” and “impracticable” exceptions for disclaimers. More specifically, these exceptions state that if the size of the ad is small (such as the length of a phrase on a bumper sticker, or a small online ad) or a disclaimer cannot be “conveniently printed” on the ad, a disclaimer is not required.<sup>159</sup> According to one article, some major internet companies have argued that their ads should not be obligated to have disclaimers because of their small size.<sup>160</sup> However, the FEC has not taken an official position on the application of these exceptions to small online ads.<sup>161</sup> Some sources also reported that FEC regulations have not considered the changing landscape of political advertising and thus have not developed requirements for things such as “native ads” (ads that match the editorial content of media or technology platforms, also known as sponsored content) or bots, which automatically generate political ads.

The FEC expanded disclaimer requirements to internet communications in 2006 by amending the definition of public communication to include paid internet advertising placed on another person’s website.<sup>162</sup> Since 2011, the FEC has sought comments on several issues related to technology and disclaimers on public communications distributed over the internet.<sup>163</sup> Most recently, on March 26, 2018, the FEC published a Notice of Proposed Rulemaking related to the definition of public communication to determine whether to include paid internet advertising placed on another person’s “internet-enabled device or application” and examining two alternatives for disclaimer requirements on public communications distributed over the internet.<sup>164</sup> The FEC has held public meetings and a public hearing to inform the rulemaking, but has not yet finalized the rule.

According to some literature and organizations, some technology companies have started to regulate online political speech through transparency requirements, such as requiring political advertisers to confirm their identity and location before purchasing ads, but varying definitions of political speech across platforms and between platforms and the FEC can cause confusion. Additionally, according to some sources, the fact that technology companies are willing to self-

---

<sup>159</sup>See 11 C.F.R. § 110.11(f).

<sup>160</sup>See Advisory Opinion 2010-19 (Google); Advisory Opinion 2011-09 (Facebook).

<sup>161</sup>The Commission has, however, stated in an advisory opinion that the 501(c)(4) organization that requested the advisory opinion “must include all of the disclaimer information specified by 52 U.S.C. § 30120(a) on its proposed Facebook Image and Video advertising.” While the Commission unanimously agreed to that conclusion, Commissioners relied upon different rationales to reach it. Advisory Opinion 2017-12 (Take Back Action Fund).

<sup>162</sup>71 Fed. Reg. 18,589 (Apr. 12, 2006).

<sup>163</sup>Specifically, in 2011, the FEC published an Advance Notice of Proposed Rulemaking related to disclaimers on certain internet communications, and re-opened the issue for public comment in 2016 and 2017. 76 Fed. Reg. 63,567 (Oct. 13, 2011). On November 2, 2016, FEC published a notice seeking comment on several technology-related proposals, including updating the term “public communication” to include communications placed for a fee on another person’s “internet-enabled device or application” in addition to communications placed for a fee on another person’s “Web site.” 81 Fed. Reg. 76,416 (Nov. 2, 2016).

<sup>164</sup>83 Fed. Reg. 12,864 (Mar. 26, 2018).

regulate does not mean that it will always be in their interest to do so, that they will do so effectively, or that it obviates the need for the federal government to take steps to regulate online campaign-related speech. For example, according to some literature, technology companies may have conflicts of interest in promoting increased transparency (i.e., requiring more transparency may negatively affect their profits), and they could be susceptible to unintentional political bias in how they regulate.

**Perspectives on how campaign finance statutes and regulations address prohibited foreign influence in U.S. elections.** The literature we reviewed and organizations we interviewed presented various perspectives on how federal campaign finance laws address prohibited foreign influence in U.S. elections. As previously mentioned, based on federal campaign finance laws, foreign nationals are prohibited from directly or indirectly making contributions or donations of money or other things of value, or making an express or implied promise to make a contribution or donation, in connection with a federal, state, or local election. FECA also prohibits a person from soliciting, accepting, or receiving such a contribution or donation from a foreign national.<sup>165</sup> According to some literature and organizations, federal campaign finance laws related to prohibited activities for foreign nationals are sometimes unclear and do not fully address the types of activities that foreign nationals may engage in to hide their influence in U.S. elections. For example, these sources stated that the federal campaign finance laws and FEC regulations have not clearly defined “other things of value” and whether certain activities—such as providing opposition research or negative information about an opposing candidate to a campaign—by foreign nationals constitute an “other thing of value.”<sup>166</sup> Some literature also stated that the FEC has not clearly defined how two exemptions—the volunteer services exemption and media exemption—may affect activities by foreign nationals.<sup>167</sup> Specifically, according to one article, the FEC has inconsistently defined the scope of volunteer services in its advisory opinions and has found an increasing range of election-related activities by foreign actors to be covered by the exemption.<sup>168</sup> Some literature

---

<sup>165</sup>52 U.S.C. § 30121; 11 C.F.R. § 110.20. Foreign nationals are prohibited from making any of the following—contribution or donation of money or other thing of value or an implied promise to make a contribution or donation in connection with any federal, state, or local election; contribution or donation to any committee or organization of a national, state, district, or local political party; donation to a presidential inaugural committee; disbursement for an electioneering communication; or any expenditure, independent expenditure, or disbursement in connection with a federal, state, or local election. Foreign nationals are also prohibited from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person’s federal or non-federal election-related activities.

<sup>166</sup>FEC regulations define a “thing of value” to include all in-kind contributions, and, unless specifically exempted, the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services is a contribution. 11 C.F.R. § 100.52(d)(1). The FEC has also issued advisory opinions and approved legal analyses in enforcement and compliance actions that further define a “thing of value.” For examples of advisory opinions and matters under review regarding FEC’s definition of a “thing of value,” see Commissioner Weintraub’s and Commissioner Hunter’s responses, dated October 18, 2019, to a request for information from Senator Klobuchar, Ranking Member of the Senate Committee on Rules and Administration.

<sup>167</sup>According to FEC regulations, the definition of contribution does not include the value of services provided without compensation by an individual who volunteers on behalf of a candidate or political committee and any costs incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, website, newspaper, magazine, or other periodical publication, unless the facility is owned or controlled by a political party, political committee, or candidate. 11 C.F.R. §§ 100.73, .74.

<sup>168</sup>For example, according to one article, in 1981, the FEC prohibited a foreign artist from donating an original work of art to a campaign fundraiser (FEC Advisory Opinion 1981-51); in 2015, the FEC, superseding the 1981 Advisory Opinion, allowed foreigners to develop website code, logos, and trademarks for a political action committee on an “ad hoc, continuous basis” given that the foreigners would use their own equipment, pay their own out-of-pocket

also noted that the FEC has not clearly defined what constitutes a “press or media entity,” especially online, and has applied the media exemption broadly, including to some foreign media entities.<sup>169</sup> Furthermore, some sources noted that although the prohibition on foreign contributions and expenditures in U.S. elections is broad, current law is not definitive regarding whether foreign actors are prohibited from engaging in issue advocacy, such as purchasing social media ads that do not expressly advocate for the election or defeat of a candidate.<sup>170</sup>

What are perspectives from literature and selected organizations on the purposes served by contribution limits and how these limits are enforced?

Literature and selected organizations reported a range of views about the purposes served by contribution limits in the current campaign finance system and their enforcement. FECA established limits on contributions to candidates and political committees. In the years since the enactment of FECA, the U.S. Court of Appeals for the District of Columbia Circuit has struck down limits on contributions received by some groups, such as Super PACs, but the courts have kept intact contribution limits for candidates, political parties, and most political committees.<sup>171</sup> Given these changing circumstances, literature and representatives of selected organizations expressed a range of views about the value and implications of contribution limits for candidates and political committees. For example, some literature and organizations reported that contribution limits help prevent corruption and its appearance by limiting the amount of money individuals and organizations can give directly to candidates and political committees. Other sources reported that contribution limits hinder individuals’ First Amendment rights to give to candidates and parties that represent their views and restrict political parties’ ability to support candidates and nominees. Additionally, some sources stated that contribution limits have not alleviated public concerns about the appearance of corruption, as demonstrated by declining confidence in political institutions. For example, one report cited a 2015 poll that found that 84 percent of Americans believe that money has too much influence in political campaigns, and 85 percent believe that politicians enact policies favorable to campaign contributors.<sup>172</sup>

Moreover, according to some sources, contribution limits force candidates and political parties to spend increasing amounts of time and resources on fundraising to compete with independent expenditure groups, which may receive and spend unlimited sums of money. As a result, one

---

expenses, would not be compensated by anyone, and would not participate in any of the PAC’s operational decisions (FEC Advisory Opinion 2014-20).

<sup>169</sup>For example, one article noted that the FEC applies a two-part test to determine whether an organization is a legitimate press entity, but the criteria do not include whether the materials are produced by trained journalists, whether the organization employs a fact-checker or employs fact-checking functions, or any other typical indicators of a legitimate media organization.

<sup>170</sup>See *Bluman v. FEC*, 800 F. Supp. 2d 281, 284, 292 (D.D.C. 2011), *aff’d* 565 U.S. 1104 (2012) (“This statute [52 U.S.C. § 30121] as we see it, does not bar foreign nationals from issue advocacy, that is, speech that does not expressly advocate the election or defeat of a specific candidate.” “They similarly express concern that Congress might bar them from issue advocacy and speaking out on issues of public policy. Our holding does not address such questions, and our holding should not be read to support such bans.”)

<sup>171</sup>See *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

<sup>172</sup>The New York Times (in a poll conducted with CBS NEWS), “Americans’ Views on Money in Politics,” June 2, 2015, <https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html>, cited in *Secret and Foreign Spending in U.S. Elections: Why America Needs the DISCLOSE Act*, Center for American Progress (July 2017).

source stated that politicians running for re-election spend less time working on substantive issues, which undermines the legislative process. In addition, some sources reported that contribution limits for candidates and political parties weaken the power of political parties by limiting how much they can raise, and encourage donors to contribute to independent expenditure groups, such as Super PACs. This can shift control of traditional party functions (such as developing the party platform, building consensus around and selecting party nominees) from political parties to Super PACs and other groups that may accept and spend significant amounts of money, such as 501(c)(4) organizations. Some literature asserted that political parties are more regulated by the FEC and accountable to voters, while Super PACs and 501(c)(4) organizations are less regulated by the FEC, and less accountable to voters; and are required to disclose less information about their original sources of funding.<sup>173</sup>

Finally, one article noted that uniform contribution limits for all Presidential and congressional elections do not recognize that candidates for President may have a need to raise more money than congressional candidates, in order to reach voters nationwide. For example, the article noted that the cost of presidential campaigns has skyrocketed in recent years, relative to increases in contribution limits. It also cited that contribution limits in presidential elections are lower than many state-level contribution limits for gubernatorial candidates.

What are perspectives of literature and selected organizations about the benefits and costs of unlimited independent expenditures?

Literature and representatives of organizations identified various perspectives on the benefits and costs of unlimited independent expenditures. For example, some literature noted that, in *Buckley v. Valeo*, the Supreme Court recognized that restrictions on campaign contributions and expenditures both have potential First Amendment implications, but that limitations on expenditures constituted "significantly more severe restrictions on protected freedom of political expression and association than do [FECA's] limitations on financial contributions."<sup>174</sup>

Additionally, some organizations stated that associations of citizens have a right to engage in political advocacy and the removal of contribution limits for groups that are able to make independent expenditures has helped foster citizens' participation in the political process.

Other literature and organizations noted that since the 2010 court decisions, spending on independent expenditures in federal elections by organizations that are allowed to accept unlimited contributions from individuals, corporations, and unions, such as Super PACs, has increased dramatically, raising debate about the role of these organizations in the political system. Some sources also noted that changes in campaign finance law have resulted in a disproportional increase in the political speech and representation of a small group of wealthy individuals and organizations through groups such as Super PACs over ordinary citizens. According to some literature, unlimited spending by certain individuals and groups distorts policy outcomes by pressuring candidates and politicians to adopt their preferred policies.

---

<sup>173</sup>For example, a Super PAC must report to the FEC the names of its donors--which may include a 501(c) organization--but does not have to report the names of the donors to the 501(c) organization.

<sup>174</sup>424 U.S. at 23. Then, in 2010, *Citizens United v. FEC* invalidated the prohibition on corporations from engaging in independent expenditures, so that corporations were able to make unlimited independent expenditures. 558 U.S. 310. *SpeechNow.org v. FEC* held that contribution limits to independent expenditures-only organizations also violate the First Amendment, allowing for the rise of Super PACs. Because Super PACs make only independent expenditures, they could accept unlimited contributions and contributions from prohibited sources for other political committees, such as corporations. 599 F.3d 686.

In addition, according to some sources, despite the Supreme Court's finding in *Buckley v. Valeo* that independent expenditures did not pose the same threat of corruption as large contributions because the "absence of prearrangement or coordination...alleviates the danger that expenditures will be given as a quid pro quo,"<sup>175</sup> concerns about coordination and the influence of independent expenditure groups on politicians' behavior remain. Specifically, the FEC has issued regulations defining coordination, including a three-pronged test to determine whether an expenditure is coordinated.<sup>176</sup> However, some literature and organizations stated that the FEC's definition of coordination between campaigns and groups that are prohibited from making contributions, such as Super PACs and corporations, is not sufficiently clear, which raises the possibility for coordination between such groups and candidates and campaigns. For example, a representative of one organization stated that regulatory language regarding coordination does not take into account the sometimes close relationship of organizations making independent expenditures to candidates.<sup>177</sup> He stated that this allows organizations making independent expenditures (e.g., Super PACs) to be run by former staff of candidates who understand what will help the candidate and make expenditures intended to help the candidate, such as funding events about more general issues that feature the candidate.<sup>178</sup>

Finally, some literature highlighted that spending on Presidential and congressional elections has significantly increased in recent years, with independent groups, such as Super PACs, outspending candidate and party committees. Some literature stated that the rising influence of outside groups relative to political parties has contributed to increased political polarization and gridlock because political parties traditionally support candidates that can connect a broad range of interests, while outside groups tend to amplify the views of more narrow and special interests.

#### What are perspectives of literature and selected organizations regarding the extent to which the sources of campaign funding should be disclosed?

Literature and selected organizations reported various perspectives about the extent to which the sources of campaign funding should be publicly disclosed. Since the 2010 *Citizens United* ruling which invalidated a restriction on corporations, including certain 501(c) organizations, from using their general treasures to make independent expenditures, there has been increased attention and debate about the extent to which sources of campaign funding should be disclosed. While some sources see increased transparency as creating a better-informed

---

<sup>175</sup>424 U.S. at 47.

<sup>176</sup>According to FEC regulations, if a communication meets the standards for the three prongs of the test, which are (1) the source of payment, (2) the subject matter of the communication (content standard), and (3) the interaction between the person paying for the communication and the candidate or political party committee (conduct standard), then the communication is considered coordinated. 11 C.F.R. § 109.21.

<sup>177</sup>FEC regulations provide that independent expenditures are expenditures by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that are not made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. 11 C.F.R. § 100.16. When a committee, group or individual pays for a communication that is coordinated with a campaign or a candidate, the communication is either an in-kind contribution or, in some limited cases, a coordinated party expenditure by a party committee.

<sup>178</sup>FEC regulations provide that, by itself, the involvement of a former staff person will not cause a communication to meet the conduct standard, which is one of the three prongs of FEC's test, discussed above, so long as that person has not been an employee or independent contractor of the candidate, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee for the previous 120 days. 11 C.F.R. § 109.21(d)(5)(i).

electorate and helping to prevent corruption, other sources see disclosure requirements as oppressive or stigmatizing to those who may support unpopular candidates or organizations. For example, some sources highlighted that FECA established, and the Supreme Court has consistently upheld, disclosure requirements in part on the grounds that knowledge of a candidate's financial supporters may be an important aspect informing voters' views of a candidate.

Some literature and organizations stated that current disclosure requirements do not provide enough information to the public regarding the original sources of funds spent in elections, such as donors to 501(c) groups; owners of limited liability companies; and foreign actors. For example, 501(c)(4) organizations have historically not had to publicly disclose the identities of their donors, except in some limited cases.<sup>179</sup> According to some sources, because these groups can accept unlimited contributions for and have been shown to spend significant amounts on election-related activity, they should be required to register with the FEC and report the sources of their funding, as do political committees. Similarly, some sources stated that source disclosure requirements should apply to organizations based on the amount of political campaign expenditures the organization makes, rather than on the basis of whether the organization is a political committee.

Some sources also highlighted that individuals and organizations, including corporations and foreign entities, that seek to keep their political donations private or anonymous may use 501(c) organizations or other organizations, such as limited liability companies, to contribute to Super PACs. These organizations can contribute unlimited sums to Super PACs. Super PACs are required to disclose the names of the 501(c) organizations or limited liability companies that contributed to them, and not the original sources of funds, such as the contributors to the 501(c) organizations or the owners of the companies. According to some sources, Super PACs frequently work together with 501(c)(4) organizations because some donors are more likely to contribute to these tax-exempt groups with less disclosure requirements than to Super PACs. Finally, some sources reported that they believed that FEC penalties against individuals or organizations that establish 501(c) organizations or limited liability companies to hide political spending have been rare or in some cases much after the fact, and thus may not deter major spenders from using these methods.

Other sources offered the view that disclosure requirements infringe on rights to free speech and privacy, and are complex and burdensome. For example, according to some sources,

---

<sup>179</sup>501(c)(4) organizations are required to report to IRS and, in some instances, to the FEC. They must file with IRS a Form 990-series annual information return for tax-exempt organizations, including information about the organization's political campaign intervention on Schedule C of the form, which may be made publicly available. Under current regulations, donors that contributed at least \$5,000 to the 501(c)(4) organization for any purpose (not only political campaign intervention) must be reported to IRS on the form's Schedule B, but identifying information about the donors is not made publicly available, pursuant to section 6104(b) of the Internal Revenue Code. Tax-exempt organizations generally are required to file the Form 990 annually, and sometimes this occurs months after an election. Certain 501(c)(4) organizations that make independent expenditures are also required to disclose the identity of certain donors to FEC. Under FECA and FEC regulations, persons other than political committees that make independent expenditures aggregating in excess of \$250 with respect to a given election in a calendar year must report certain information about those independent expenditures. On August 3, 2018, a court vacated the FEC regulation providing that persons other than political committees that make independent expenditures aggregating in excess of \$250 with respect to a given election in a calendar year need report only the identification of donors that contributed to further *the reported* independent expenditure. *CREW v. FEC and Crossroads GPS*, No. 15-0259 (D.D.C. 2018). On October 4, 2018, following the decision, FEC issued guidance stating that it will enforce the statute by requiring disclosure of donors of over \$200 annually who contribute for the purpose of furthering *an* independent expenditure, as well as donors of over \$200 annually making contributions earmarked for political purposes and intended to influence elections.



disclosure requirements can stigmatize those who may support unpopular candidates or organizations and deter them from engaging in the political process. Some organizations stated that the thresholds for reporting the names of donors (\$200) are too low and questioned the governmental and public interest in knowing the names of everyone who contributed \$200 to a political party or 501(c)(4) organization (for the purpose of furthering an independent expenditures) compared to individuals' rights to free speech and privacy.<sup>180</sup> They suggested that, as a way of protecting privacy for donors who give relatively small contributions, disclosure requirements should be indexed to inflation, much like contribution limits are.

Some literature and organizations also stated that disclosure requirements are complicated and often require attorneys to decipher them, which grassroots organizations may not be able to afford and which can limit their ability or desire to engage in the democratic process. They explained that low campaign finance monetary thresholds for triggering registration as a political committee with the FEC (\$1,000), and thus, compliance with disclosure and reporting requirements, may overly burden nonprofit groups that seek to participate in the political process.

## **Conclusion**

Although DOJ and FEC officials noted that coordination between the two agencies works well, they provided varying perspectives on the need to document their coordination mechanisms. While the limited number of staff that coordinate between FEC and DOJ indicate that they work together, without documentation of those mechanisms consistent with internal control standards, the agencies risk having knowledge limited just to those few personnel who could change positions or leave the agencies, taking that knowledge with them. Reviewing and updating, as appropriate, coordination practices between the FEC and DOJ, to include the MOU or other guidance, could help the agencies ensure that written guidance reflects current practices between the agencies and better ensure that coordination between FEC and DOJ occurs consistently and effectively when enforcing campaign finance law.

## **Recommendations for Executive Action**

We are making two recommendations to the FEC and DOJ.

- The FEC, in consultation with DOJ, should review guidance addressing coordination with DOJ, to include the MOU, and once a quorum of commissioners is in place, update that guidance as appropriate based on the review.  
(Recommendation 1)
- The Attorney General, in consultation with the FEC, should review guidance addressing coordination with the FEC, to include the MOU, and once a quorum of commissioners is in place, update that guidance as appropriate based on the review.

---

<sup>180</sup>As discussed earlier, political committees must identify any person who contributes more than \$200 during a calendar year and any person to whom an expenditure or disbursement of more than \$200 during a calendar year is made. 52 U.S.C. §30104(b). Not-political committees, such as 501(c) organizations, who make independent expenditures in an aggregate amount of more than \$250 in a calendar year must file with the FEC, disclosing whether the expenditure was made independently of the campaign, supports or opposes a candidate, and the identity of each person who made a contribution in excess of \$200 for the purpose of furthering an independent expenditure, as well as donors of over \$200 annually when that donation is earmarked for political purposes and intended to influence elections. 52 U.S.C. §30104(c).

(Recommendation 2)

Enclosure I: Scope and Methodology

Enclosure II: Contribution Limits for Calendar Years 2019 and 2020

Enclosure III: Political Committees and Organizations Spending and Raising Money in Support of Federal Elections

Enclosure IV: Overview of the Federal Election Commission's (FEC) Enforcement Process for Campaign Finance Violations

Enclosure V: The Federal Election Commission's (FEC) Campaign Finance Violation Enforcement Activities, Fiscal Years 2002 through 2017

Enclosure VI: Certain Types of Tax-Exempt Organizations and Permitted Political Activity

Enclosure VII: Comments from the Federal Election Commission

**Agency Comments**

We provided a draft of this report to the FEC, DOJ, and IRS for review and comment, and incorporated technical comments, as appropriate. DOJ indicated via email that it did not have formal written comments on the draft report. The FEC provided written comments, which are reproduced in enclosure VII and summarized below. In its comments, the FEC noted that, as recognized by our recommendation, its current composition of three commissioners leaves it with less than a quorum and currently unable to act on our recommendation. The FEC noted that once a quorum is restored, a freshly reconstituted FEC could consider our recommendation to review and update the guidance that addresses coordination between the FEC and DOJ.

- - - - -

We are sending copies of this report to the Commissioners of the FEC, the Attorney General, the Commissioner of the IRS, appropriate congressional committees and members, and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you and your staff have any questions concerning this report, please contact me at (202) 512-8777, or [gablerr@gao.gov](mailto:gablerr@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Major contributors to this report were Tom Jessor (Assistant Director), Jennifer Bryant, Colleen Candrl, Dominick Dale, Eric Hauswirth, Tracey King, Frederick Lyles, Jr., Amanda Miller, Jan Montgomery, Erin O'Brien, Maria Psara, Janet Temko-Blinder, and Jeff Tessin.



Rebecca Gambler  
Director, Homeland Security and Justice

## Enclosure I: Scope and Methodology

This report provides information on three areas related to campaign finance: (1) the legal framework of campaign finance in federal elections; (2) federal agencies' roles and responsibilities, including challenges faced, if any, in enforcement efforts; and (3) the perspectives of selected organizations and literature on key aspects of the federal campaign finance framework, including the enforcement of campaign finance laws (i.e., statutes and regulations).

To address questions on the legal framework, we reviewed relevant statutes, regulations, and court cases to understand the federal election campaign finance laws governing contributions, expenditures, prohibitions, disclosures, and responsibilities for enforcement, as well as rules governing tax-exempt organizations' political campaign intervention.

To address questions on federal agencies' roles and responsibilities in administering and enforcing campaign finance law, we selected the Federal Election Commission (FEC) for review because it is substantially involved in interpreting and administering federal campaign finance law and investigating violations and enforcing compliance with campaign finance requirements in connection with federal elections. We also reviewed information from the Department of Justice (DOJ), which is responsible for investigating and prosecuting criminal violations related to campaign finance. We reviewed information from the Internal Revenue Service (IRS) because it oversees compliance with the tax code governing allowable levels of political campaign intervention by tax-exempt organizations. We reviewed documentation from the FEC, DOJ and IRS related to how they implement their respective functions and strategic objectives, and the methods they use to administer or enforce campaign finance-related laws and identify and address violations, including the prohibition on foreign contributions and expenditures in federal elections. These documents include policies, procedures, and guidance, and existing agreements between FEC and DOJ regarding enforcement of the Federal Election Campaign Act of 1971 (FECA), as amended. We also interviewed officials from each agency to better understand how they carry out the agencies' functions with respect to campaign finance laws, as well as to obtain their perspectives on any challenges faced in administering and enforcing the laws. For example, we met with all four FEC commissioners in July 2019, as well as senior FEC officials. We describe in this report the challenges that FEC, DOJ, and IRS officials identified that were relevant to the scope of our review.

To describe how the FEC identifies potential campaign finance violations, we reviewed and analyzed enforcement data from the FEC's Office of General Counsel's and Alternative Dispute Resolution Office's Law Manager System to identify the sources of FEC's enforcement actions for fiscal years 2002 through 2017.<sup>181</sup> To describe how the FEC enforces campaign finance requirements, we reviewed and analyzed enforcement data from the Law Manager System and the Administrative Fine Program's Disclosure Suite to identify the distribution of the FEC's enforcement activities, which represents the matters under review ongoing and closed, matters resulting in dismissal or settlement, and administrative fines cases unchallenged and challenged for fiscal years 2002 through 2017. To identify the types of campaign finance violations that were enforced by the FEC, we reviewed and analyzed data from the Law Manager System for

---

<sup>181</sup>We focused on fiscal years 2002 through 2017 because FECA's most recent significant amendment was the Bipartisan Campaign Reform Act of 2002 (BCRA). Pub. L. No. 107-155, 116 Stat. 81. In addition, fiscal year 2017 is the latest period for which we obtained complete data from the FEC.

matters under review closed during fiscal years 2012 through 2017.<sup>182</sup> We also reviewed and analyzed data from the Law Manager System to identify how the FEC has enforced allegations of violations of the foreign national prohibition for fiscal years 2002 through 2017. To assess the reliability of FEC's enforcement data, we performed electronic data testing for obvious errors in accuracy and completeness and queried agency officials knowledgeable about those data systems to determine the processes in place to ensure the integrity of the data. We found the data sufficiently reliable to provide information on FEC's efforts to enforce campaign finance law.

To identify the number of FECA-related charges filed in cases prosecuted by DOJ, we reviewed and analyzed case management data from DOJ's Criminal Division's Public Integrity Section and the U.S. Attorneys' Offices, which share responsibility for prosecuting campaign finance violations. For the Public Integrity Section, we reviewed and analyzed data for fiscal years 2010 through 2017.<sup>183</sup> Specifically, we obtained data from the Section on all cases that were categorized using a program code for "campaign finance" in the Automated Case Tracking System, based on the judgment of knowledgeable DOJ attorneys, as well as all cases that included criminal charges brought under FECA. To identify applicable charges, we interviewed officials from the Section and reviewed DOJ guidance on the federal prosecution of election offenses.<sup>184</sup> We developed a list of statutes with campaign finance offenses and provided the list to DOJ to ensure the list was accurate and complete. The Section extracted data from the Automated Case Tracking System for all cases that were opened under the campaign finance, wire fraud, or conspiracy statutes and any cases that were opened under the relevant program category codes for fiscal years 2010 through 2017. The Section manually pulled court and internal documents (e.g. case opening and closing forms) and reviewed those documents to determine which cases had accompanying charges associated with violations of FECA provisions. We also reviewed and analyzed case management data from the Executive Office for United States Attorneys' Legal Information Office Network System, to determine the total number of charges filed for violations of FECA provisions by U.S. Attorneys' Offices for fiscal years 2015 through 2017. At the time of our review, data on FECA charges were the most complete for these three fiscal years.<sup>185</sup> We assessed the reliability of the data provided by DOJ by reviewing data system user manuals and data dictionaries, identifying inconsistencies, and working with agency officials to resolve issues or identify potential limitations. We found the data sufficiently reliable to provide information on the number of FECA charges filed in cases prosecuted by DOJ.

To describe how IRS identifies impermissible levels of political campaign intervention by tax-exempt organizations and the outcomes of the agency's enforcement efforts, we reviewed and analyzed compliance data from IRS's Reporting Compliance Case Management System to

---

<sup>182</sup>For the closed matters under review, we focused on fiscal years 2012 through 2017 because these data were the most complete and available at the time of this review.

<sup>183</sup>We selected the fiscal year 2010 through 2017 time frame to capture information on DOJ's campaign finance enforcement efforts across multiple presidential administrations. In addition, fiscal year 2017 was the last complete year of DOJ data available at the time of our request.

<sup>184</sup>Department of Justice, *Federal Prosecution of Election Offenses*, Eighth Edition, December 2017.

<sup>185</sup>Effective September 1, 2014, FECA (previously codified under in the U.S. Code under 2 U.S.C. § 431 et seq) was consolidated with other laws governing voting and elections in the new Title 52 of the U.S. Code. Case management data from the Executive Office for United States Attorneys did not capture charges under Title 2 with sufficient precision for our purposes; therefore we restricted our analysis to charges filed under Title 52 starting with fiscal year 2015.

identify the agency's sources and dispositions of closed examinations as well as the types of tax-exempt organizations examined during fiscal years 2010 through 2017.<sup>186</sup> We assessed the reliability of these data by reviewing data system user manuals and data dictionaries and querying agency officials knowledgeable about the data system to determine the processes in place to ensure the integrity of the data. We determined that the IRS data were sufficiently reliable for the purpose of providing information on IRS's efforts to enforce compliance with provisions related to political campaign intervention.

We also interviewed FEC and DOJ officials about guidance and procedures used to coordinate and document referrals of matters involving potential FECA violations between the two agencies, and assessed processes against the implementation of collaborative mechanisms<sup>187</sup> and applicable internal control guidance on documentation and organizational knowledge retention from *Standards for Internal Control in the Federal Government*.<sup>188</sup>

To address questions related to perspectives on (a) challenges regarding the FEC's, DOJ's, and IRS's administration and enforcement of campaign finance laws and related tax law, and (b) key aspects of the campaign finance framework, we obtained perspectives through a literature review of publications from calendar years 2016 through 2018 and from interviews with subject-matter specialists on campaign finance issues from a nongeneralizable sample of nine research, advocacy, and practitioner organizations. To identify relevant publications, we took the following steps:

1. A GAO research librarian conducted a literature search of various research databases and platforms including ProQuest, HeinOnline, Harvard's Custom Think Tank Search Engine, PolicyFile, and WestEdge, among others, to identify scholarly and peer reviewed publications, including law journal articles; dissertations; government reports; conference papers; and publications by nonprofits and think tanks published from 2016 through 2018, a period chosen to include the 2016 U.S. Presidential election through the end of the most recent calendar year at the time of our review. We excluded books, trade journal articles (except law journal articles), and news articles from the literature review. Our search terms and formulas included "campaign finance" and related terms, such as "contribution," "expenditure," "disclosure," "prohibition," "Federal Election Commission," "Department of Justice," "Internal Revenue Service," and "foreign," among others. Multiple abstract, title and keyword searches were conducted in iterations from August 2018 through February 2019.
2. To select the publications that were relevant to our research areas of (a) challenges regarding the FEC's, DOJ's, and IRS's administration and enforcement of campaign finance laws and related tax law, and (b) key aspects of the campaign finance framework, two reviewers started by independently assessing the abstracts for each publication and, if

---

<sup>186</sup>We requested data on closed examinations from IRS beginning in fiscal year 2010 because the Supreme Court and federal appeals court rulings in *Citizens United v. FEC* and *SpeechNow.org v. FEC* changed the campaign finance landscape, enabling corporations (including nonprofit corporations) to (1) use their general treasuries to make unlimited independent expenditures and electioneering communications and (2) make unlimited contributions to Super PACs. After these decisions in 2010, nonprofit corporations, such as tax-exempt social welfare organizations (501(c)(4) organizations) that are incorporated, could make independent expenditures and electioneering communications, and contribute to Super PACs. We recognize that some of the examinations closed in 2010 may include activity prior to this time frame.

<sup>187</sup>GAO, *Managing for Results: Key Consideration for Implementing Interagency Collaborative Mechanisms*, [GAO-12-1022](#) (Washington, D.C.: Sept. 27, 2012).

<sup>188</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sept. 2014).

necessary, reviewed the full text of the publication, to determine if they met the following criteria:

- a. The publication identifies one or more challenges (i.e., problems) related to the campaign finance framework.<sup>189</sup>
- b. The article focused on campaign finance for U.S. federal elections (not state, tribal, or other countries' elections).<sup>190</sup>

Any differences in the reviewers' determinations about whether the article was relevant and should be included in the review were discussed and reconciled.

3. For the 126 publications that met the above two criteria, we reviewed the full text of the publication. We evaluated each publication using a data collection instrument. The data collection instrument captured information on the challenge(s) related to the campaign finance framework identified in each publication in the following categories, based on the scope of our review: 1) FEC oversight; 2) DOJ oversight; 3) IRS oversight; 4) other agency oversight; 5) contribution limits; 6) expenditures; 7) disclosure; 8) new technology/the internet; 9) foreign national prohibition; 10) legal critiques; and 11) other category. We further categorized the publications into sub-categories under each category, based on emerging themes from our review of abstracts and full articles, described in step 2 above. For example, under the FEC oversight category, sub-categories were identified for challenges related to FEC's regulations, FEC's enforcement, and FEC's structure. The data collection instrument was initially filled out by one GAO analyst and then verified for accuracy by another analyst. For law journal publications, a separate data collection instrument was initially filled out by one GAO analyst and then another analyst verified for accuracy a subset of the above identified challenges. One GAO analyst then reviewed each of the individual challenges recorded in the data collection instrument by category and sub-category and summarized the major themes of challenges, in a separate record of analysis. For example, the analyst sorted all the challenges that fell under the "new technology" category, reviewed them, and summarized the major themes of challenges related to "new technology."

We obtained additional perspectives through interviews with subject-matter specialists on campaign finance issues from a nongeneralizable sample of nine research, advocacy, or practitioner organizations, selected to represent a range of views about the campaign finance framework. The nine organizations included the Alliance for Justice, Bipartisan Policy Center, Campaign Finance Institute, Campaign Legal Center, Cato Institute, Center for Responsive Politics, Institute for Free Speech, Institute for Justice, and Republican National Committee.<sup>191</sup> To select the nine organizations, we first researched organizations whose mission, primary work, or a portfolio of work focused on campaign finance research or advocacy and campaign

---

<sup>189</sup>For the purposes of this review, the campaign finance "framework" includes the statutes; regulations; and agency roles, policies, and procedures related to overseeing contribution limits, expenditures, disclosure requirements, and prohibitions, including those for foreign entities, in connection with federal elections.

<sup>190</sup>We also excluded articles that did not primarily discuss campaign finance (e.g., referred to campaign finance as an example for a different issue); did not identify challenges related to the campaign finance framework (e.g., tested a hypothesis or analyzed data, but did not identify a challenge); and were outside of our scope (e.g., debated corporate personhood).

<sup>191</sup>We also attempted to obtain the perspectives of the Democratic National Committee but did not receive a response.



finance practitioners, such as national political parties and a national association representing politically active nonprofit organizations and identified a total of 21 organizations. We selected the nine organizations to interview to obtain a balanced range of perspectives on federal agencies' oversight of campaign finance laws and key aspects of the campaign finance framework, including the scope and nature of campaign finance laws, the purposes served by contribution limits, the benefits and costs of unlimited independent expenditures, and the extent to which the sources of campaign funding should be disclosed. We analyzed the information that each of the above organizations provided during interviews by the same main categories we used for the literature review. While the information we obtained from our literature review and interviews with specialists from selected organizations cannot be generalized or be considered representative of all views on campaign finance issues, they provided important perspectives on key aspects of the campaign finance framework, including the scope and nature of campaign finance laws, the purposes served by contribution limits, the benefits and costs of unlimited independent expenditures, and the extent to which the sources of campaign funding should be disclosed.

We conducted this performance audit from April 2018 to February 2020 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

## Enclosure II: Contribution Limits for Calendar Years 2019 and 2020

The Federal Election Campaign Act of 1971 (FECA), as amended, specifies the contribution limits for the amount that an individual, party, or political action committee (PAC) can contribute to a single candidate (per election) or to a party or PAC (per calendar year).<sup>192</sup> The limits on contributions to candidates apply separately to each federal election in which the candidate participates. A primary election, general election, runoff election and special election are each considered a separate election with a separate limit. Table 1 shows contribution limits for donors and recipients for calendar years 2019 and 2020.<sup>193</sup>

**Table 1: Contribution Limits for Calendar Years 2019 and 2020**

Amounts in Dollars

Donors	Recipients				
	Candidate Committee in Dollars	Political Action Committee (PAC) (Separate Segregated Fund and Nonconnected) in Dollars <sup>a</sup>	National Party Committee in Dollars	State, District, Local Party in Dollars	Additional National Party Committee Accounts in Dollars <sup>b</sup>
<b>Individual</b>	2,800 per election	5,000 per year	35,500 per year	10,000 per year (combined)	106,500 per account, per year
<b>Candidate committee</b>	2,000 per election	5,000 per year	Unlimited transfers to party committee	Unlimited transfers to party committee	
<b>PAC Multicandidate</b>	5,000 per election	5,000 per year	15,000 per year	5,000 per year (combined)	45,000 per account, per year
<b>PAC Non-multicandidate</b>	2,800 per election	5,000 per year	35,500 per year	10,000 per year, (combined)	106,500 per account, per year
<b>State, district, local party committee</b>	5,000 per election (combined)	5,000 per year (combined)	Unlimited Transfers		
<b>National party committee</b>	5,000 per election <sup>c</sup>	5,000 per year			

Source: GAO analysis of Federal Election Commission data. | GAO-20-66R

Note: These limits are indexed for inflation in odd-numbered years.

<sup>a</sup>"PAC" here refers to a committee that makes contributions to other federal political committees. Independent expenditure-only political committees (sometimes called "super PACs") may accept unlimited contributions, including from corporations and labor organizations. A nonconnected PAC is considered any committee that conducts activities in connection with an election, but that is not a party committee, an authorized committee of any candidate for federal election, or a separate segregated fund. A separate segregated fund is a political committee established, administered or financially supported by a corporation or labor organization—also referred to as corporate or labor political action committee. See 11 C.F.R. § 114.1(a)(2)(iii).

<sup>192</sup>52 U.S.C. § 30116.

<sup>193</sup>A contribution is defined as a gift, subscription, loan, advance or deposit of money or anything of value given to influence a federal election; or payment by any person of compensation for the personal services of another person if those services are rendered without charge to a political committee for any purpose. 11 C.F.R. §§ 100.52(a), .54.

<sup>b</sup>The limits in this column apply to a national party committee's accounts for: (i) the presidential nominating convention; (ii) election recounts and contests and other legal proceedings; and (iii) national party headquarters buildings. A party's national committee, Senate campaign committee and House campaign committee are each considered separate national party committees with separate limits. Only a national party committee, not the parties' national congressional campaign committees, may have an account for the presidential nominating convention.

<sup>c</sup>Additionally, a national party committee and its Senatorial campaign committee may contribute up to \$49,600 combined per campaign to each Senate candidate.

### Enclosure III: Political Committees and Organizations Spending and Raising Money in Support of Federal Elections

Federal campaign finance laws permit various types of political committees and organizations to conduct campaign finance related activities.<sup>194</sup> Some entities, like political committees, can both raise and spend money to influence federal elections. For example, political action committees (PACs) may make contributions to candidates and make independent expenditures. In contrast, corporations and labor organizations cannot use their general treasuries to make contributions to candidates or political committees, but may spend money in other ways to influence federal elections.<sup>195</sup> They may (1) establish a separate segregated fund, known as a corporate or labor PAC; (2) make unlimited independent expenditures and electioneering communications; and (3) make unlimited contributions to Super PACs.<sup>196</sup> While Super PACs may not contribute directly to federal candidates, they may raise unlimited funds from corporations, unions, and individuals and spend unlimited funds in the form of independent expenditures.

Under the Internal Revenue code, social welfare organizations that are tax-exempt under 501(c)(4) and political organizations that are tax-exempt under section 527 may engage in activities to influence elections, to varying extents. An organization may engage in some political campaign intervention, without losing its tax-exempt status under section 501(c)(4), so long as it continues to be primarily engaged in activities that promote social welfare.<sup>197</sup> Under FECA, such organizations that are incorporated are prohibited from contributing directly to federal candidates, but may raise unlimited funds and make independent expenditures, as well as make contributions to Super PACs. Political organizations qualifying for tax-exempt status under section 527 of the Internal Revenue Code are formed and operated primarily to accept contributions or make expenditures for the purpose of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of presidential or vice presidential

---

<sup>194</sup>The Federal Election Campaign Act of 1971, as amended, generally defines political committees as any committee, club, association, or other group of persons, which receives contributions or makes expenditures aggregating in excess of \$1,000 during a calendar year for the purposes of influencing any federal election. 52 U.S.C. § 30101(4). The Supreme Court held in *Buckley v. Valeo* that only organizations under the control of a federal candidate or whose major purpose is the election or defeat of federal candidates may be regulated as political committees. *Buckley v. Valeo*, 424 U.S. at 79–80.

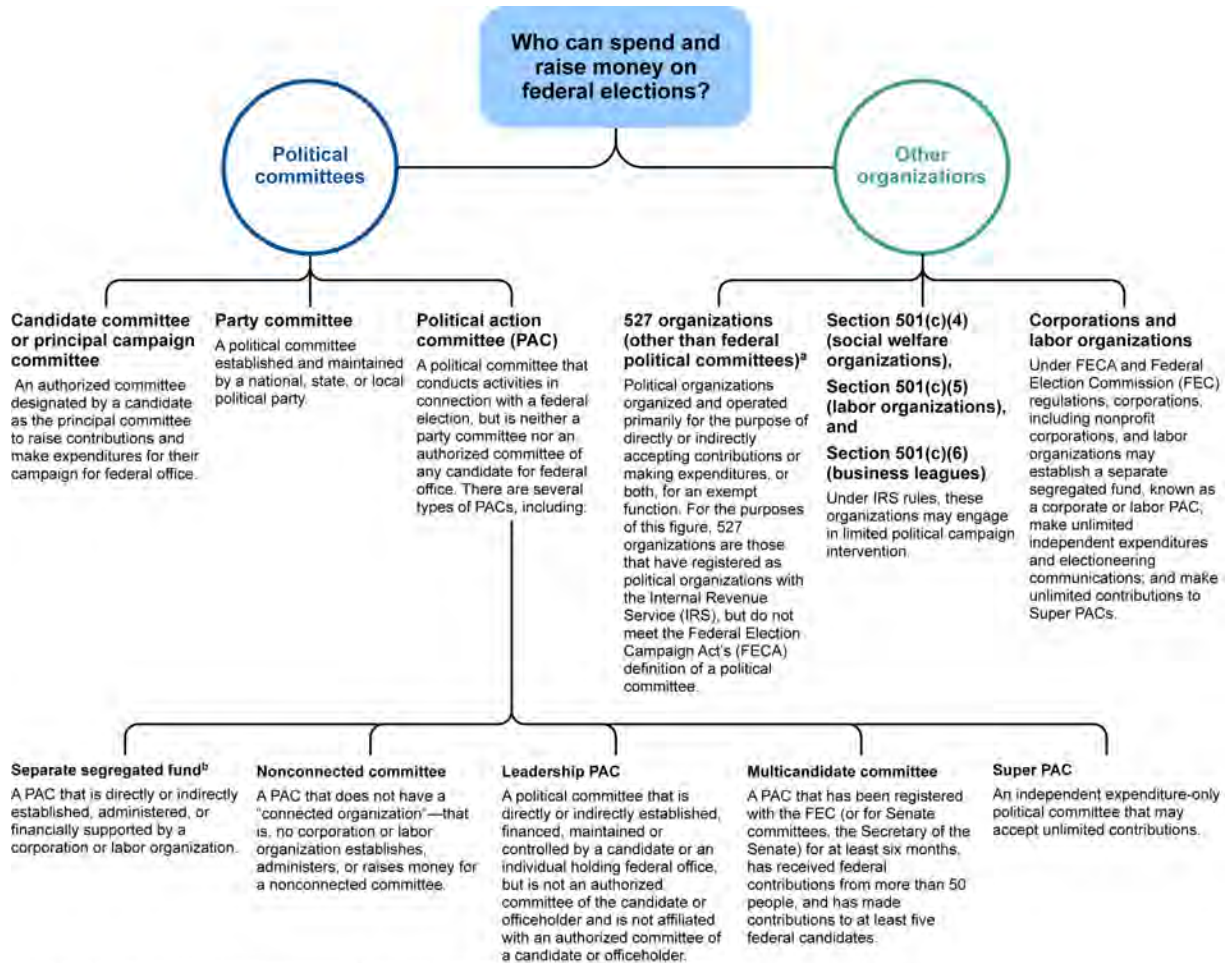
<sup>195</sup>52 U.S.C. § 30118.

<sup>196</sup>A Super PAC is a political committee that makes only independent expenditures and may solicit or accept unlimited contributions from individuals, corporations, labor organizations and other political committees.

<sup>197</sup>The Internal Revenue Code provides that a 501(c)(4) organization must be operated exclusively for the promotion of social welfare. 26 U.S.C. § 501(c)(4). IRS regulations provide that an organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community, and the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. 26 C.F.R. § 1.501(c)(4)-1(a)(2). 501(c)(5) labor organizations and 501(c)(6) trade associations may also engage in limited political campaign intervention. See Rev. Rul. 2004-6. If these organizations make expenditures for a section 527(e)(2) exempt function, they may be subject to tax under 527(f). Such exempt functions include influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. 26 U.S.C. § 527(e)(2).

electors.<sup>198</sup> Some, but not all, 527 organizations are political committees regulated by FEC.<sup>199</sup> Section 527 organizations that are not political committees may engage in issue advocacy (other than electioneering communications), if it is not coordinated with campaigns. Figure 11 identifies the types of political committees and organizations that raise and spend money in support of federal elections.

**Figure 11: Political Committees and Organizations That Raise and Spend Money in Support of Federal Elections**



Source: GAO analysis of the Federal Election Commission and Internal Revenue Service information. | GAO-20-66R

<sup>a</sup>Under section 527 the exempt function means influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. 26 U.S.C. § 527(e)(2).

<sup>b</sup>The term "financially supported" does not include contributions to the political committee, but does include the payment of establishment, administration or solicitation costs.

<sup>198</sup>26 U.S.C. § 527(e).

<sup>199</sup>Political committees that are registered with FEC and are also organized under section 527 of the Internal Revenue Code are subject to FEC reporting requirements and exempt from some IRS reporting requirements. 26 U.S.C. § 527(j)(5)(A).

## Enclosure IV: Overview of the Federal Election Commission's (FEC) Enforcement Process for Campaign Finance Violations

Under FEC regulations, the enforcement process begins when a complaint or referral is made alleging that a violation of federal campaign finance laws has occurred or is about to occur.<sup>200</sup> Respondents are notified of the filing of a complaint or referral and have an opportunity to respond in writing.<sup>201</sup> The FEC's Office of General Counsel reviews and analyzes complaints, referrals, and *sua sponte* submissions; respondents' responses to FEC notifications; and publicly available information to formulate a recommended course of action for the Commission. The Commission then reviews the Office of General Counsel's report and recommendations and the associated complaint, referral, or *sua sponte* submission and responses from respondents. The Commission can find that there is no reason to believe a violation occurred, or it may otherwise dismiss a complaint, referral or submission at any point during its consideration of the matter. If the Commission finds reason to believe a violation occurred, it is to conduct an investigation to determine if there is probable cause that a violation has occurred or may proceed—prior to a finding of probable cause—to negotiations to reach a conciliation, or voluntary settlement agreement, which may include a monetary penalty.<sup>202</sup> If the Commission finds probable cause to believe a violation occurred, it must attempt to reach a tentative conciliation agreement with the respondent,<sup>203</sup> and if the Commission fails to conciliate with a respondent, it may authorize a civil lawsuit in U.S. district court.<sup>204</sup> In certain circumstances, the Commission may also refer a matter to the Department of Justice (DOJ) for criminal prosecution under the Federal Election Campaign Act of 1971, as amended.<sup>205</sup> Figure 12 provides an overview of the FEC's enforcement process for campaign finance violations.

---

<sup>200</sup>See 11 C.F.R. §§ 111.3, .4, .8. *Office of General Counsel Enforcement Manual*, Federal Election Commission, June 2013. According to FEC officials, the enforcement manual has not been approved by the Commission as of July 2019; however, the FEC continues to use the manual as supplemental guidance in its enforcement efforts.

<sup>201</sup>11 C.F.R. §§ 111.6, .9.

<sup>202</sup>11 C.F.R. §§ 111.10, .18(d).

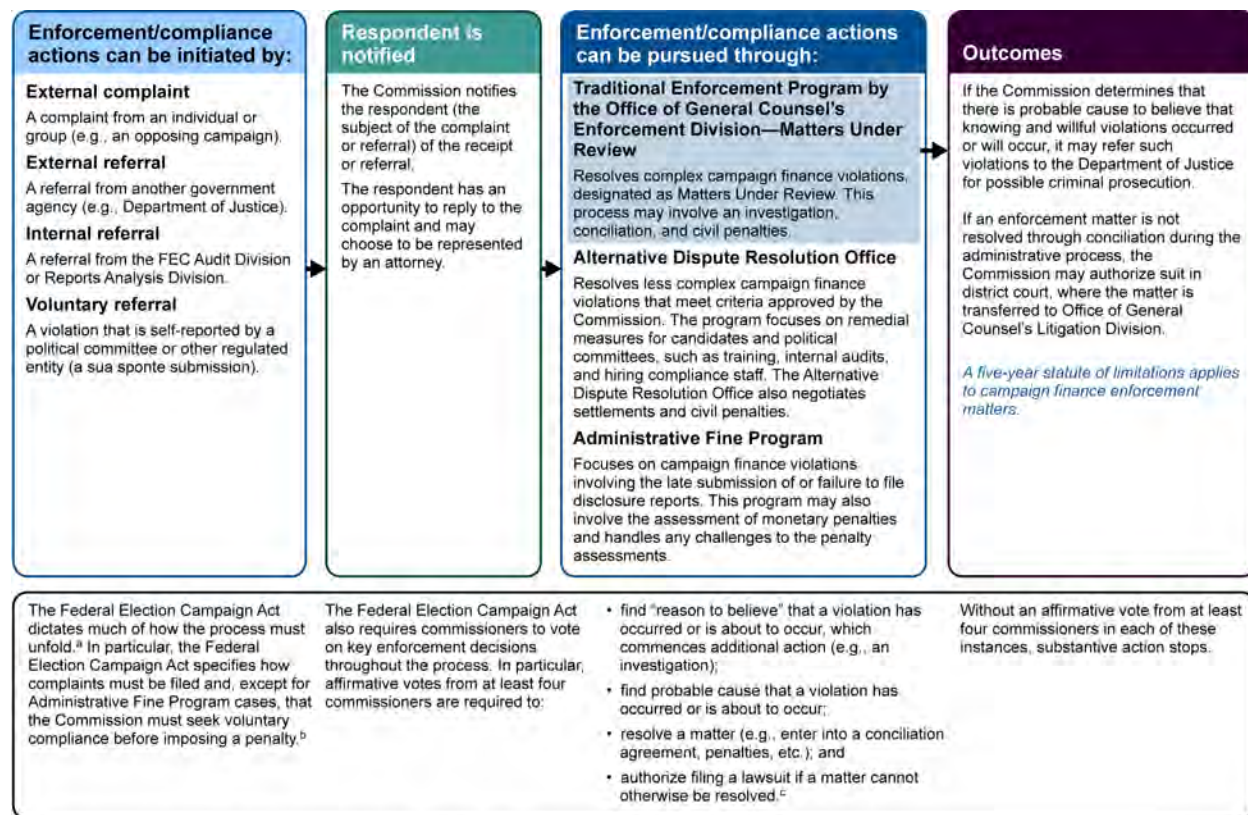
<sup>203</sup>11 C.F.R. § 111.18(a).

<sup>204</sup>11 C.F.R. § 111.19.

<sup>205</sup>Under 52 U.S.C. § 30109(a)(5)(C), if the Commission determines that there is probable cause to believe that a knowing and willful violation has occurred or is about to occur, the Commission may refer such apparent violation to the Attorney General of the United States.



**Figure 12: Overview of the Federal Election Commission’s (FEC) Enforcement Process for Campaign Finance Violations**



Source: GAO analysis of Federal Election Commission information. | GAO-20-66R

<sup>a</sup>52 U.S.C. § 30109.

<sup>b</sup>52 U.S.C. § 30109(a)(1), (4).

<sup>c</sup>52 U.S.C. § 30109(a)(2), (4)(i), (6)(A).

## **Enclosure V: The Federal Election Commission's (FEC) Campaign Finance Violation Enforcement Activities, Fiscal Years 2002 through 2017**

For the traditional enforcement process, the FEC received a total of 2,444 matters under review and closed a total of 2,379 matters under review during the time period.<sup>206</sup> On average, the traditional enforcement program received about 153 matters under review per fiscal year—ranging from 85 to 235 matters under review received annually—and closed about 149 matters under review per fiscal year—ranging from 86 to 239 matters under review closed annually. A majority of the FEC's Alternative Dispute Resolution Office's matters resulted in settlements during this period. The Alternative Dispute Resolution Office total matters consisted of 568 (79 percent) settlements and 148 (21 percent) dismissals, totaling 716 matters adjudicated.<sup>207</sup> A majority of the FEC's Administrative Fine Program's enforcement related cases were not challenged during this time period. The Administrative Fine Program's case load was comprised of 2,095 (76 percent) non-challenged cases and 662 (24 percent) challenged cases, totaling 2,757 cases.<sup>208</sup> Figure 13 shows the distribution of the FEC's enforcement activities for fiscal years 2002 through 2017.

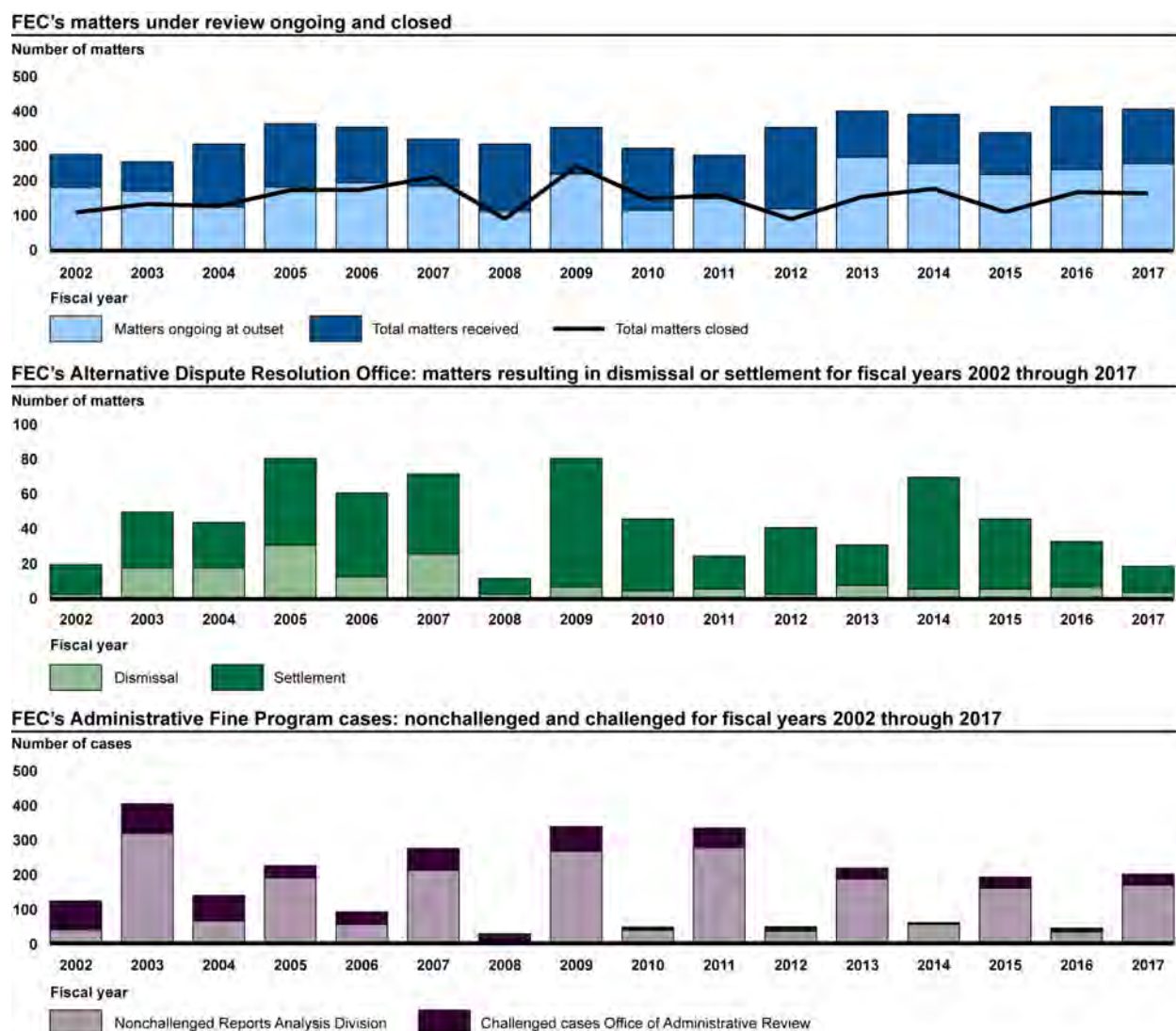
---

<sup>206</sup>FEC's traditional enforcement process resolves campaign finance violations, designated as matters under review. This process may involve an investigation, conciliation, and civil penalties.

<sup>207</sup>The category for dismissal includes matters in which the Commission approved the Alternative Dispute Resolution Office's recommendation that a matter be dismissed.

<sup>208</sup>The Commission has established procedures permitting respondents to challenge the imposition of an administrative fine based on specific defenses. Specifically, a challenge must explain the factual basis for the challenge and demonstrate at least one of the following (1) the reason to believe finding was based on factual errors, (2) the civil penalty amount was improperly calculated, or (3) the committee could not file because of unforeseen circumstances beyond its control, and when those circumstances ended, the committee filed the late report within 24 hours.

**Figure 13: The Federal Election Commission's (FEC) Enforcement Activities, Fiscal Years 2002 through 2017**



Source: GAO analysis of Federal Election Commission data. | GAO-20-66R

Note: The FEC's Reports Analysis Division and Office of Administrative Review administer the Administrative Fines Program. Under the program regulations, if the Commission finds reason to believe that a committee violated the Federal Election Campaign Act of 1971, as amended, the Commission sends a letter to the committee containing the factual and legal basis for its finding and the amount of the proposed calculated fine, among other things. 11 C.F.R. § 111.32. The Reports Analysis Division administers this part of the process. Unlike enforcement matters handled through the Office of General Counsel or the Alternative Dispute Resolution Office, the penalties assessed through the Administrative Fines Program are not subject to negotiation. As stated, the Commission has established procedures permitting respondents to challenge the imposition of an administrative fine based on specific defenses. 11 C.F.R. § 111.35. The Office of Administrative Review handles the challenge process and forwards a written recommendation to the full Commission and to the respondent. After reviewing the respondent's written response and the recommendation from the Office of Administrative Review, the Commission makes a final determination. 11 C.F.R. § 111.37.

## Enclosure VI: Certain Types of Tax-Exempt Organizations and Permitted Political Campaign Intervention

The Internal Revenue Code imposes limitations on the amount of political campaign intervention in which certain 501(c) groups may engage. For example, 501(c)(3) charitable organizations (including churches and other houses of worship) are prohibited under the Internal Revenue Code from engaging in political campaign intervention. However, these groups are permitted to take policy positions and engage in an insubstantial amount of lobbying.<sup>209</sup> Other types of 501(c) organizations—such as 501(c)(4) social welfare organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations—may engage in limited political campaign intervention.<sup>210</sup> In contrast to organizations established under section 501(c), an organization that is tax-exempt under section 527 is a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.<sup>211</sup> An exempt function is the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.<sup>212</sup> Figure 14 provides an overview of some of the types of tax-exempt organizations allowed under the Internal Revenue Code, and the type and extent of political campaign intervention these organizations may conduct without losing their tax-exempt status.

---

<sup>209</sup>26 U.S.C. §501(c)(3) refers to organizations “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition ... or for the prevention of cruelty to children or animals.” Among other things, “no substantial part” of the organization’s activities may be attempting to influence legislation, and it may “not participate in, or intervene in ... any political campaign on behalf of (or in opposition to) any candidate for public office.” *Id.*

<sup>210</sup>The Internal Revenue Code provides that a 501(c)(4) organization must be operated exclusively for the promotion of social welfare. 26 U.S.C § 501(c)(4). IRS regulations provide that an organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community, and the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. 26 C.F.R. § 1.501(c)(4)-1(a)(2). 501(c)(5) labor organizations and 501(c)(6) trade associations may also engage in limited political campaign intervention. See Rev. Rul. 2004-6.

<sup>211</sup>26 U.S.C. § 527(e)(1).

<sup>212</sup>26 U.S.C. § 527(e)(2).

**Figure 14: Select Types of Tax-Exempt Organizations and Permitted Political Campaign Intervention**

527 organization	501(c)(3) organization	501(c)(4) organization	501(c)(5) organization	501(c)(6) organization
Section 527 of the Internal Revenue Code provides for the exemption of political organizations. A 527 organization is a party, committee, association, fund, or other organization organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function. <sup>a</sup>	A 501(c)(3) organization is organized and operated exclusively for charitable, religious, educational, scientific, testing for public safety, literary or educational purposes, to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals.  Charitable organizations under section 501(c)(3) are prohibited from participating or intervening in a political campaign on behalf of or in opposition to any candidate for public office.	A 501(c)(4) organization is a civic league or organization not organized for profit but operated exclusively for the promotion of social welfare, or a local association of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.	A 501(c)(5) organization is a labor, agricultural, or horticultural organization.	A 501(c)(6) organization is a business league, chamber of commerce, real estate board, board of trade, or professional football league, which is not organized for profit.
		<p>Unlike section 501(c)(3) organizations, these organizations may engage in limited political campaign intervention. If they make expenditures for a section 527(e)(2) exempt function, they may be subject to tax under section 527(f).<sup>b</sup></p>		

Source: GAO analysis of Internal Revenue Service information. | GAO-20-66R.

<sup>a</sup>An exempt function is influencing or attempting to influence the selection, nomination, election or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. 26 U.S.C. § 527(e)(2).

<sup>b</sup>Section 527(f) of the Internal Revenue Code provides that a Section 501(c) organization is subject to tax if it spends any amount for an exempt function. The tax is imposed on the lesser of the organization's net investment income or its section 527 exempt function expenditures.



## Enclosure VII: Comments from the Federal Election Commission



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIR

January 10, 2020

Ms. Rebecca Gambler  
Director, Homeland Security and Justice  
Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Re: Draft GAO Report *Campaign Finance* (Engagement Code 102707)

Dear Ms. Gambler:

Thank you for providing the Federal Election Commission (FEC) with the opportunity to review and comment on the draft Government Accountability Office (GAO) Report on its *Campaign Finance* engagement.

The FEC thoroughly cooperated with GAO as it worked on this review, which began for the FEC with an entrance conference in July 2018. Under the supervision of the FEC Commissioners, a large team of agency staff drafted responses to more than 200 written questions from GAO and prepared more than 1,200 pages of supporting documents requested by GAO. GAO also met with all four of the then-serving FEC Commissioners in July 2019 as noted in the draft Report, in addition to meetings with many agency staff members.

GAO has prepared a lengthy Report on its Campaign Finance engagement, which provides information on three aspects of federal campaign finance: (1) the legal requirements and prohibitions that apply to campaign finance; (2) the roles and responsibilities of federal agencies in enforcing campaign finance laws; and (3) the perspectives of other organizations on the enforcement of campaign finance laws. Based on its analysis, GAO recommends that the FEC and the U.S. Department of Justice (DOJ) should review and update guidance that addresses coordination between the two agencies, once a quorum of FEC commissioners has been restored.

While the FEC has exclusive jurisdiction over *civil* enforcement of federal campaign finance laws, DOJ has jurisdiction over *criminal* enforcement of those laws. Thus, the FEC and DOJ have parallel jurisdiction over facts that present potential civil and criminal violations of FECA. The FEC and DOJ entered a Memorandum of Understanding (MOU) that, along with other guidance from both agencies, sets forth basic principles of cooperation. These principles continue to animate an ongoing collaboration between the agencies. In fact, both DOJ and FEC



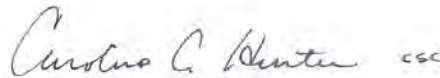
Ms. Rebecca Gambler, GAO  
January 10, 2020  
Page 2

officials noted that coordination between the two agencies works well, as stated in GAO's draft Report. This reflects the importance that current FEC Commissioners and staff place on maintaining the agency's relationship with DOJ.

As recognized by GAO's recommendation, the FEC's current composition of only three Commissioners leaves it with less than a quorum and currently unable to act on GAO's recommendation. Once a quorum is restored to the FEC by the appointment of at least one new Commissioner, a freshly reconstituted FEC can consider GAO's recommendation to review and update the guidance that addresses coordination between the FEC and DOJ.

The FEC appreciates the work of the entire GAO team on this review, particularly the efforts of Frederick T. Lyles, Analyst-in-Charge, who coordinated GAO's interaction with this agency, as well as the opportunity to comment on GAO's draft Report. If you have any questions, please contact me or Duane Pugh, the FEC's Director of Congressional, Legislative and Intergovernmental Affairs at [dpugh@fec.gov](mailto:dpugh@fec.gov) or (202) 694-1002.

On behalf of the Commission,

A handwritten signature in cursive script, reading "Caroline C. Hunter", followed by the initials "csc".

Caroline C. Hunter  
Chair

This is a work of the U.S. government and is not subject to copyright protection in the United States. The published product may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

---

## GAO's Mission

The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

---

## Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's website (<https://www.gao.gov>). Each weekday afternoon, GAO posts on its website newly released reports, testimony, and correspondence. To have GAO e-mail you a list of newly posted products, go to <https://www.gao.gov> and select "E-mail Updates."

---

## Order by Phone

The price of each GAO publication reflects GAO's actual cost of production and distribution and depends on the number of pages in the publication and whether the publication is printed in color or black and white. Pricing and ordering information is posted on GAO's website, <https://www.gao.gov/ordering.htm>.

Place orders by calling (202) 512-6000, toll free (866) 801-7077, or TDD (202) 512-2537.

Orders may be paid for using American Express, Discover Card, MasterCard, Visa, check, or money order. Call for additional information.

---

## Connect with GAO

Connect with GAO on [Facebook](#), [Flickr](#), [Twitter](#), and [YouTube](#).  
Subscribe to our [RSS Feeds](#) or [E-mail Updates](#). Listen to our [Podcasts](#).  
Visit GAO on the web at <https://www.gao.gov>.

---

## To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Website: <https://www.gao.gov/fraudnet/fraudnet.htm>

Automated answering system: (800) 424-5454 or (202) 512-7470

---

## Congressional Relations

Orice Williams Brown, Managing Director, [WilliamsO@gao.gov](mailto:WilliamsO@gao.gov), (202) 512-4400,  
U.S. Government Accountability Office, 441 G Street NW, Room 7125,  
Washington, DC 20548

---

## Public Affairs

Chuck Young, Managing Director, [youngc1@gao.gov](mailto:youngc1@gao.gov), (202) 512-4800  
U.S. Government Accountability Office, 441 G Street NW, Room 7149  
Washington, DC 20548

---

## Strategic Planning and External Liaison

James-Christian Blockwood, Managing Director, [spel@gao.gov](mailto:spel@gao.gov), (202) 512-4707  
U.S. Government Accountability Office, 441 G Street NW, Room 7814,  
Washington, DC 20548



Please Print on Recycled Paper.



FEDERAL ELECTION  
COMMISSION

ELLEN L. WEINTRAUB, CHAIR  
CAROLINE C. HUNTER, COMMISSIONER  
STEVEN T. WALTHER, COMMISSIONER

TESTIMONY BEFORE THE  
COMMITTEE ON HOUSE ADMINISTRATION

U.S. HOUSE OF REPRESENTATIVES

HEARING: *OVERSIGHT OF THE FEDERAL ELECTION COMMISSION*

SEPTEMBER 25, 2019

## Introduction

The Federal Election Commission (“FEC”) appreciates the opportunity to provide this report to the Committee on House Administration. On September 1, 2019, the FEC began working without a quorum of four Commissioners. Although certain Commission actions require an affirmative vote of four Commissioners, the FEC remains open for business, and much work continues to further the agency’s vital mission. The three currently serving Commissioners and the FEC staff look forward to continuing to work with the Committee on House Administration as it performs its oversight function.

As you know, the Federal Election Commission was established by the Federal Election Campaign Act Amendments of 1974.<sup>1</sup> Congress created the Commission to strengthen the integrity of the federal campaign finance process under the Federal Election Campaign Act.<sup>2</sup> The Commission is also responsible for administering the public funding program for Presidential campaigns under the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act.<sup>3</sup> The Federal Election Campaign Act, which is the foundation of federal campaign finance regulation, reflects Congress’s efforts to ensure that voters are fully informed about the sources of candidates’ financial support. The Act also imposes amount limitations and source prohibitions on contributions received by federal candidates, political party committees and other political committees. Public confidence in the political process depends not only on laws and regulations to ensure transparency of campaign finance, but also on the knowledge that noncompliance may lead to enforcement proceedings.

The Federal Election Commission’s mission is to protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering federal campaign finance laws. The FEC’s strategic goal of fairly, efficiently and effectively administering and enforcing the Federal Election Campaign Act encompasses four strategic objectives:

- to inform the public about how federal campaigns and committees are financed;
- to promote voluntary compliance through educational outreach and to enforce campaign finance laws effectively and fairly;
- to interpret the FECA and related statutes, providing timely guidance to the public regarding the requirements of the law; and
- to foster a culture of high performance in order to ensure that the agency accomplishes its mission efficiently and effectively.

---

<sup>1</sup> Federal Election Campaign Act Amendments of 1974, Public Law 93-443, 88 Stat. 1263 (1974).

<sup>2</sup> Federal Election Campaign Act of 1971, Public Law 92-225, 86 Stat. 3 (1972), as amended (FECA or the Act). FECA is codified at 2 U.S.C. §§ 431 to 455.

<sup>3</sup> Presidential Election Campaign Fund Act, Public Law 92-178, 85 Stat. 562 (1971), codified at 26 U.S.C. §§ 9001 to 9013; and Presidential Primary Matching Payment Account Act, Public Law 93-443, 88 Stat. 1297 (1974), codified at 26 U.S.C. §§ 9031 to 9042.

To accomplish its legislative mandate, the FEC is directed by up to six Commissioners, and the three currently serving Commissioners all appear before the Committee today. Currently, 304 employees (which includes the Commissioners) support the agency in accomplishing its mission. The Commission maintains its newly redesigned website at [www.fec.gov](http://www.fec.gov) and, in March 2018, moved to its new offices at 1050 First Street, Northeast, in Washington, D.C. The Federal Election Commission received an appropriation of \$71,250,000 for Fiscal Year (FY) 2019.

FECA requires an affirmative vote by four Commissioners to make decisions in many areas, including regulations, advisory opinions, audit matters and enforcement. Currently, documents recommending actions can be prepared for Commission consideration, but decisions must be delayed until a quorum is restored when new Members join the Commission. Nonetheless, FECA's requirements and Commission regulations remain fully in effect, and political committees and other filers must continue to disclose their campaign finance activity to the FEC on the regular schedule. Agency staff remains ready to help committees and the public understand and comply with the law, process and review committee reports, including issuing Requests for Additional Information, and provide public access to campaign finance data. While the Commission cannot take action on many legal matters, FEC's Office of General Counsel staff continues to litigate ongoing court cases, process new enforcement complaints and responses, and investigate matters previously authorized by the Commission. Furthermore, the FEC's Reports Analysis Division, Information Division, Information Technology Division, and Office of Compliance, among others, are still on the job, answering questions, maintaining our website, conducting ongoing audits, and processing and reviewing disclosure reports and other filings. Despite the lack of quorum, Commissioners expect to be occupied fully, reviewing case files and preparing for new Members to join the Commission.

FEC Directive 10, Section L sets forth the rules of procedure to be followed when the Commission has fewer than four sitting members and includes a list of matters on which the Commission may still act.<sup>4</sup> These include notices of filing dates, non-filer notices, debt settlement plans, administrative terminations, and appeals under the Freedom of Information and Privacy Acts. The Commission intends to comply with the statutory requirement set forth in section 306 of FECA that the Commission meet at least once each month.

---

<sup>4</sup> See FEC Directive No. 10, Rules of Procedure of the FEC Pursuant to 2 U.S.C. § 437c(e) (Dec. 20, 2007); available at [https://www.fec.gov/resources/cms-content/documents/directive\\_10.pdf](https://www.fec.gov/resources/cms-content/documents/directive_10.pdf).



## **I. FEC's PERFORMANCE AND OPERATIONS**

### **A. CAMPAIGN FINANCE INFORMATION**

#### **1. Engaging and Informing the Public About Campaign Finance Information**

Disclosing the sources and amounts of funds used to finance federal elections is one of the most important duties of the FEC. Full disclosure of the sources and amounts of campaign funds and fair enforcement of federal campaign finance laws allow the public to make informed decisions in the political process. Transparency requires that information is not only kept by the FEC, but also provided to the public in an easily accessible way. The campaign finance reports are accessible to the public through the FEC's website at <https://www.fec.gov/data/>. By making disclosure reports available online, the FEC provides the public with up-to-date information about the financing of federal elections and political committees' compliance with campaign finance laws.

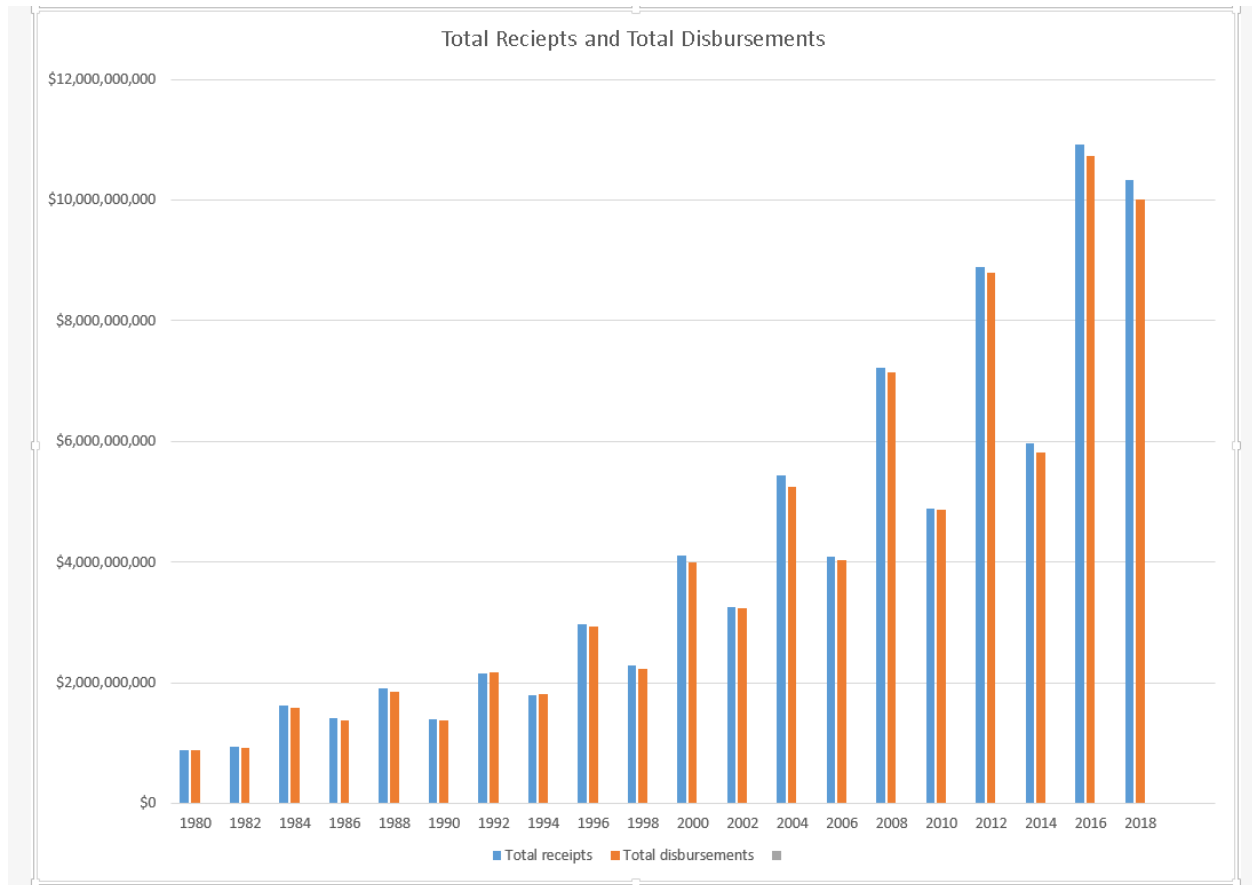
The table immediately below presents the Total Receipts and Disbursements Reported to the FEC by all entities that disclosed to the FEC over the last four completed election cycles. For each election cycle, it also includes a count of the number of transactions reported to the FEC. This count shows dramatic increases due to new fundraising and contribution sharing techniques that have resulted in voluminous reports to be processed at the FEC.

#### **Total Reported Receipts, Disbursements and Transactions**

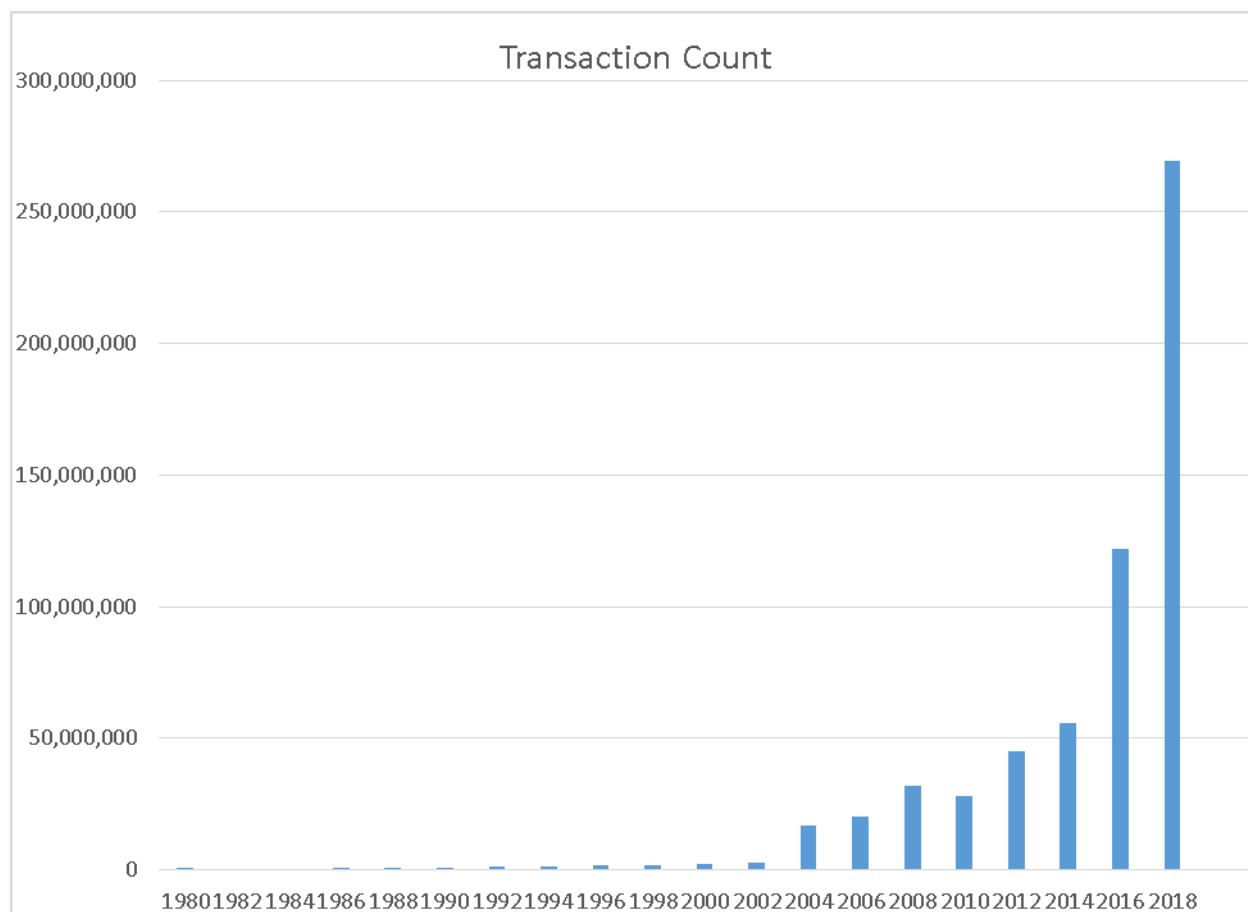
<b>Election Cycle</b>	<b>Total Receipts</b>	<b>Total Disbursements</b>	<b>Transaction Count</b>
2012	\$8,884,594,132	\$8,795,764,278	45,246,781
2014	\$5,976,582,396	\$5,815,419,284	55,976,477
2016	\$10,926,836,244	\$10,729,954,205	122,147,807
2018	\$10,333,084,467	\$10,010,442,497	269,306,129

Over the past several years, the FEC has made significant progress to modernize its IT systems and processes. These efforts include the redesign of the FEC website and the migration to a cloud environment of the FEC's campaign finance database, which contains over forty years of transaction-level campaign finance data reported to the agency. Handling the surge in transaction counts would have been extraordinarily difficult and expensive, if the database had not migrated to a cloud environment. Moreover, as a result of the migration, the FEC was able to shut down one of its four physical data centers during FY 2018 and realize reduced future costs. To continue to mitigate an anticipated steep rise in future cost, the FEC is pursuing a modernization plan now and over the next several years to continue cloud migration and improvement IT processes.

The graph below presents Total Receipts and Disbursements Reported to the FEC by all entities since 1980.



The following graph shows the recent dramatic increase in the number of transactions reported in campaign finance disclosure reports.



Transparency requires that information is not only kept by the FEC, but also provided to the public in an easily accessible way. In order to make certain that campaign finance disclosure information is quickly available and easily accessible to the public, the agency has made a number of improvements to modernize its campaign finance disclosure database and public interface. Specifically, the FEC has developed application programming interfaces (APIs) and other tools to improve access to campaign finance data.

## 2. Protecting Campaign Finance Information

Protecting information technology systems and data has never been more vital than in the current environment, particularly for the campaign finance information reported to the FEC. The Commission has taken strategic steps to implement a platform of security and privacy. FEC recognizes that perfect security is not feasible; it is a continuing process of detecting risks, process improvements and hardening defenses. For that reason, the benchmark of the FEC's approach to cybersecurity is practicability and continuous improvement. Our cybersecurity strategy outlines an approach of securing our infrastructure and preventing intrusions through a

holistic cybersecurity program led by the Chief Information Security Officer. In partnership with the United States Department of Homeland Security and cybersecurity partners, the agency continues to evaluate emerging threat vectors and focus on efforts to enhance both defenses and mitigation strategies as potential intrusion attempts occur on a regular basis.

The FEC has adopted a four pillared approach to security and privacy. The four pillars are to (1) adopt National Institute of Standards and Technology Cyber Security Framework; (2) implement a robust security architecture; (3) adopt Cloud First Initiative; and (4) build a cybersecurity culture.

#### *Adopt National Institute of Standards and Technology Cyber Security Framework*

The first pillar of the FEC's overarching strategy to protect security and privacy is to adopt the National Institute of Standards and Technology (NIST) Cyber Security Framework (CSF). The FEC is exempted from the Paperwork Reduction Act's requirement that federal agencies adhere to the NIST standards for information technology security. In FY 2014 the agency contracted with an IT security consultant to perform a comprehensive review of implementing further NIST guidelines at the FEC. During FY 2015, the Commission voted to adopt the NIST *Risk Management Framework* and NIST IT security control "best practices." Adoption of the NIST CSF was included as a strategic objective in the agency's IT Strategic Plan, FY 2017-2021. The FEC's cyber security strategy, which encompasses the NIST CSF and industry best practices, outlines an approach of securing our infrastructure and preventing intrusions through a holistic cybersecurity program.

#### *Implement a Robust Security Architecture*

The second pillar of our strategy is to implement a robust security architecture. In partnership with the Department of Homeland Security (DHS), Massachusetts Institute of Technology and the Pacific Northwest National Laboratory, the OCIO has collaborated with FEC stakeholders and technical experts to identify, protect, detect and respond to the impact of known and unknown threats, continuously assessing security controls and addressing the remaining residual risks. The FEC has also entered into an inter-agency agreement with DHS to participate in the Federal Continuous Diagnostics and Mitigation program. By partnering with DHS, the FEC is able to leverage that agency's cybersecurity resources, which would be cost prohibitive for an agency of the FEC's size to procure independently.

Following NIST guidelines and the Commission's own prioritization and resources, the first wave of projects undertaken to enhance to FEC's security architecture focused on the "protect" function to hinder threat actors from gaining access to FEC IT assets and data. The initial project included strengthening the FEC's perimeter defenses using Software Defined Perimeter and protecting users from inadvertently infecting their systems by using a robust end-point solution. The FEC has additionally implemented tools and services that:

- Detect and/or identify malicious behavior activities.
- Continuously log the entire FEC network flow, which allows OCIO staff to track and identify egress and ingress traffic.
- Identify critical, high and medium vulnerabilities to update/patch for mitigating FEC computer systems.
- Implemented email controls to filter and deliver only trusted emails.

### *Adopt Cloud First Initiative*

The third pillar of our strategy is to adopt a cloud first initiative for security, accessibility and recoverability. Hosting systems and data in a cloud environment allows the FEC to utilize our cloud service providers' significant resources that are dedicated to maintaining the highest level of security. In addition, by utilizing the cloud service providers' robust disaster recovery solutions, the FEC eliminates the need to maintain physical disaster recovery sites, which are costly to maintain and secure. The FEC has already completed the migration of its largest database, the campaign finance database, and its website to a cloud environment. The FEC's new website, launched in May 2017, uses FedRAMP Authorized cloud services, which provides a standardized approach to security assessment, authorization, and continuous monitoring for cloud products and services.

### *Build a Cybersecurity Culture*

The fourth pillar of this strategy is to build a cybersecurity culture. For this comprehensive cybersecurity strategy to be successful, the OCIO will partner with Federal agencies and industry leaders to leverage best practices for our IT workforce. The first line of defense in maintaining the protection and integrity of the agency's network is the ongoing education of employees about their role in identifying and preventing malicious activities. The Commission's main target will be recruiting and training talent with cybersecurity expertise. In April 2019, the FEC entered into a partnership with the Partnership for Public Service to participate in the Cybersecurity Talent Initiative. This selective, cross-sector program, which provides loan forgiveness to top bachelors and masters graduates around the United States in exchange for at least two-years' service at a federal agency, addresses the immediate cybersecurity talent deficiency faced by federal government agencies by attracting service-minded individuals to government who might not otherwise have applied.

## **B. PROMOTING COMPLIANCE WITH THE FEDERAL ELECTION CAMPAIGN ACT**

### **1. Encouraging Compliance Through Education**

Helping those subject to the Commission's jurisdiction understand their obligations under federal campaign finance laws is an essential component of voluntary compliance. The FEC's education and outreach programs provide information necessary for compliance with campaign finance laws and give the public the context necessary to interpret the campaign finance data filers disclose. The FEC maintains a toll-free line and public email accounts to respond to inquiries regarding campaign finance data disclosed to the public and questions about how to comply with campaign finance laws and its reporting requirements. The FEC's Public Disclosure and Media Relations Division and Congressional Affairs Office also respond to inquiries.

One way the Commission encourages voluntary compliance is by hosting conferences across the country, where Commissioners and staff explain how FECA applies to candidates, parties and political action committees. These conferences address recent changes in the law and focus on fundraising, methods of candidate support and reporting regulations.

The FEC also devotes considerable resources to ensuring that staff can provide distance learning opportunities to the general public. The Commission's website is one of the most important sources of instantly accessible information about FECA, Commission regulations, and Commission proceedings. In addition to viewing campaign finance data, anyone with Internet access can use the website to track Commission rulemakings, search advisory opinions, audits, and closed enforcement matters, view campaign finance data, and find reporting dates. The Commission places a high emphasis on providing educational materials about campaign finance laws and its requirements. Toward this end, the FEC has moved its focus away from the printing and manual distribution of its educational materials and instead looked for ways to leverage available technologies to create and disseminate dynamic and up-to-date educational materials through the website. While the Commission continues to make available printed copies of its educational brochures and publications, transitioning to primarily web-based media has allowed the agency to reduce significantly its printing and mailing costs and use of resources while at the same time encouraging new and expanded ways of communicating with the public via the website.

As part of this broad effort to improve its Internet communications and better serve the educational needs of the public, the Commission maintains its own YouTube channel, which can be found at <http://www.youtube.com/FECTube>. The YouTube channel offers a variety of instructional videos and tutorials that enable users to obtain guidance tailored to their specific activities.

The agency's educational outreach program has been significantly enhanced with the addition of an online training service that enables political committees, reporters, students and other groups to schedule live, interactive online training sessions with FEC staff. This on-demand service allows the FEC to provide tailored, distance learning presentations and training to the public in a manner that will significantly increase the availability of FEC staff to serve the public. The service also offers an efficient and effective way for alternative dispute resolution and other enforcement respondents to satisfy the terms of their agreements with the agency.

## 2. Enforcing FECA's Requirements

### *a. Enforcement and Compliance Processes*

The FEC has formed strategies for ensuring that its enforcement and compliance programs are fair, effective and timely. The Commission's statutory obligation is to administer, interpret and enforce the Federal Election Campaign Act, which serves the compelling governmental interest in deterring corruption and the appearance of corruption in financing elections. In doing so, the Commission remains mindful of the First Amendment's guarantees of freedom of speech and association, and the practical implication of its actions on the political process.



The FEC has exclusive jurisdiction over civil enforcement of federal campaign finance laws.<sup>5</sup> Commission enforcement actions, which are handled primarily by the Office of General Counsel (OGC), originate from a number of sources, including external complaints, referrals from other government agencies and matters generated by information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities. Enforcement matters are handled by OGC pursuant to the requirements of FECA. If the Commission cannot settle or conciliate a matter involving an alleged violation, the Commission may initiate civil litigation by filing and prosecuting a civil action in Federal district court to address the alleged violation. Closed enforcement matters are available via the FEC website.

To augment OGC's traditional enforcement role, the Office of Compliance manages several programs that seek to remedy alleged violations of FECA and encourage voluntary compliance. These programs include: 1) the Alternative Dispute Resolution Program, 2) the Administrative Fine Program and 3) the Audit Program. The Commission's Alternative Dispute Resolution Program is designed to resolve matters more swiftly by encouraging the settlement of less-complex enforcement matters with a streamlined process that focuses on remedial measures for candidates and political committees, such as training, internal audits and adopting compliance and internal control measures. Violations involving the late submission of, or failure to file, disclosure reports are subject to the Administrative Fine Program. This Program is administered by the Reports Analysis Division (RAD), which assess monetary penalties, and the Office of Administrative Review (OAR), which handles challenges to the penalty assessments. The Audit Program conducts "for cause" audits under the FECA in those cases where political committees have failed to meet the threshold requirements for demonstrating substantial compliance with the Act, and conducts mandatory audits under the public funding statutes. Subject to limited redactions, program review requirements approved by the Commission and used by RAD and the Audit Division are public documents.

The Office of Compliance's Reports Analysis Division (RAD) reviews an ever-increasing volume of reports to track compliance with the law and to ensure that the public record provides a full and accurate representation of reported campaign finance activity. If the FEC's review identifies an apparent violation or raises questions about the information disclosed on a report, RAD sends a request for additional information (RFAI letter) to the filer, affording an opportunity to take remedial action or correct the public record, if necessary. If the filer is able to resolve the FEC's concerns, it may avoid an enforcement action. If not, the Commission has several tools available to it, such as the Administrative Fine Program, Audit Program, the Alternative Dispute Resolution Program and the traditional enforcement program. In addition, RAD devotes a significant amount of resources assisting filers with compliance, handling phone calls on a daily basis, and electronic inquiries through a new web portal system.

The Alternative Dispute Resolution (ADR) Program was implemented in FY 2001 with the primary objective to enhance the agency's overall effectiveness through more expeditious resolution of enforcement matters with fewer resources required to process complaints and internal referrals. A case is closed when the Commission votes on the recommendation made by

---

<sup>5</sup> It consults with the U.S. Department of Justice, as appropriate, on matters involving both civil and criminal enforcement of FECA.

the ADR Office (ADRO) as to what final action should be taken. The ADRO has closed 830 matters from the inception of the program through August 31, 2019, assessing \$2,018,897.34 in civil penalties.

In response to a legislative mandate, an Administrative Fine (AF) Program was implemented in July 2000 to address late and non-filing of disclosure reports in a more efficient and effective manner. The AF Program is administered by RAD and Office of Administrative Review (OAR), which are within the Office of Compliance. Since the Administrative Fine Program's inception in July 2000 through August 31, 2019, the Commission has closed 3,278 cases and assessed fines of \$4.8 million. Most importantly, the Administrative Fine Program continues to succeed in reducing the number of late and non-filed reports, thereby increasing campaign finance transparency through the timely disclosure of campaign finance activity. The Committee on House Administration was instrumental in the bipartisan passage of a bill extending the Administrative Fine Program through reports covering 2023.

The Commission generally conducts audits when a committee appears not to have met the threshold requirements for substantial compliance. The audit determines whether the committee complied with the limitations, prohibitions and disclosure requirements of FECA. In addition, the Commission is required by law to audit Presidential campaigns that accept public funds. The Commission has completed a total of 1,036 audits since 1976, these reports are available for review on the FEC website, and searchable by election cycle, committee/candidate name and by overall finding and/or issue.

*b. Recent Enhancements to the Processes and Procedures*

In 2016, the Commission updated its policy regarding the types of enforcement case file documents that are made public on conclusion of an enforcement matter. Significant additions to the types of documents released included all General Counsel's Reports, and not just those that recommend dispositive actions; all draft Factual and Legal Analyses that are subject to a Commission vote; and agreements with respondents to toll the statute of limitations. The Commission also clarified that it would not release to the public *sua sponte* submissions, or external referrals from other agencies and law enforcement sources in cases where the Commission declines to open a Matter Under Review. In the same Federal Register notice, the Commission announced a policy of releasing a wide variety of administrative materials, including various statistics about its enforcement docket. Files of closed enforcement cases, as well as the administrative materials, can be found on the Commission's web site.

*c. Status of FEC Enforcement*

Between January 1, 2012 and September 20, 2019, the Commission closed 947 Matters Under Review (MURs) through the ordinary enforcement process described in section 309 of FECA.<sup>6</sup> It also closed an additional 32 Matters Under Review on OGC's docket by

---

<sup>6</sup> Matters Under Review are a type of administrative enforcement matter handled by the Commission's Office of General Counsel pursuant to section 309 of FECA. External complaints filed with the Commission are designated Matters Under Review (MURs) and assigned a MUR number upon receipt. MURs may be designated by

referring them to ADRO for resolution. 250 matters are currently pending at the FEC. 199 of those matters are active and 51 are inactive.

The following chart shows the election cycle that pertains to the matters currently pending at the FEC.

<b>Election Cycle</b>	<b>Active</b>	<b>Inactive</b>	<b>Total</b>
2012	1	0	1
2014	3	0	3
2016	78	6	84
2018	106	31	137
2020	11	14	25
	<b>199</b>	<b>51</b>	<b>250</b>

(As of Sept. 20, 2019)

In September 2016, the Commission directed the agency to prioritize foreign national prohibition matters. In response, the Office of General Counsel has taken a number of steps to do so. Along with cases that are statute-of-limitations imperiled when OGC receives them, foreign national prohibition cases are assigned to OGC staff attorneys before any other class of cases. OGC has also modified its Status of Enforcement reports to the Commission so that the Commission is provided with complete data on every foreign national prohibition case on a quarterly basis. Further, OGC has revised its procedures so that it may more efficiently track the progress of all foreign national prohibition matters through the enforcement process. Finally, for foreign national prohibition matters that are not resolved by tally votes, the Commission has prioritized the placement of these matters on Executive Session agendas for faster Commission consideration.

As of September 15, 2016, the Commission had 14 enforcement matters in house that included alleged violations of the foreign national prohibition. All 14 of those have been closed.<sup>7</sup>

---

the Commission itself; for instance, if the Commission determines to sever an allegation or a respondent from an existing MUR and pursue a case separately, it will open a new MUR, sever the portions of the case from the existing MUR, and transfer them to the new MUR. There are also preliminary types of enforcement matters that may also become MURs and are assigned MUR numbers if the Commission determines to “open a MUR” and pursue the matter. These case types are RAD referrals, Audit Referrals, and Pre-MURs (*sua sponte* submissions or external referrals), and other internally-generated matters.

<sup>7</sup> See FEC Report to the Committees on Appropriations on Enforcing the Foreign National Prohibition, 8-9 and n. 36 (Sept. 18, 2018), *copy enclosed and available at* [https://www.fec.gov/resources/cms-content/documents/Foreign\\_National\\_Report\\_To\\_Congress.pdf](https://www.fec.gov/resources/cms-content/documents/Foreign_National_Report_To_Congress.pdf) (“Appropriations Report”) (discussion of MUR 7035 (Australian Labor Party, *et al.*)); *id.* at 8 and n. 35 (discussion of MUR 7081 (Floridians for a Strong Middle Class)); *id.* at 9 and n.39 (discussion of MURs 6962 and 6982 (Project Veritas, *et al.*)); *id.* at 9 and n. 38 (discussion of MUR 6944 (Farias)); *id.* at 9 (discussion of MUR 6976 (City Council Committee for Johnny W. Streets, Jr.)); *id.* at 11 and n.46 (discussion of MURs 7094, 7096 and 7098 (Donald J. Trump for President, *et al.*)); MUR 7122 (Right to Rise USA), <https://www.fec.gov/data/legal/matter-under-review/7122/>; MUR 6959 (DNC and Nava), <https://www.fec.gov/data/legal/matter-under-review/6959/>; MUR 7059 (Human Rights for Vietnam PAC, *et al.*),

Subsequent to September 15, 2016, and as of September 20, 2019, the Commission received an additional 46 enforcement matters that include alleged violations of the foreign national prohibition. Of those 46, 11 have been closed<sup>8</sup> and 35 remain open. Of the remaining 35 matters, 33 are active and assigned to OGC Enforcement attorneys, while two were recently received by the Commission and are inactive.

### C. INTERPRETING AND DEVELOPING THE CAMPAIGN FINANCE LAWS

The Commission responds to questions about how the Federal Election Campaign Act applies to specific situations by issuing advisory opinions (AOs). In addition, Congressional action, judicial decisions, petitions for rulemaking, Commission initiatives, or other changes in campaign finance often necessitate that the Commission update or adopt new regulations.

The Commission has recently issued several noteworthy AOs.

In 2018 and 2019, the Commission issued several advisory opinions concerning provision of low- or no-cost cybersecurity services to candidates and political committees. The Commission concluded in each instance that provision of such services would not result in prohibited in-kind contributions and would be permissible under FECA and Commission regulations.<sup>9</sup>

Since 2017, the Commission has issued key clarifications about FECA's restrictions on personal use of campaign funds in the areas of childcare expenses, protection of the security of the personal devices of office holders, and the home security of Members of Congress. FECA and Commission regulations prohibit personal use of campaign funds, which occurs when campaign funds are used to fulfill any commitment, obligation, or expense that would exist irrespective of a candidate's campaign or an individual's duties as a federal officeholder. In each of the circumstances presented, the Commission determined that the proposed use of funds was permissible under FECA and Commission regulations and was not a prohibited personal use.<sup>10</sup>

---

<https://www.fec.gov/data/legal/matter-under-review/7059/>; MUR 6865 (Azano),  
<https://www.fec.gov/data/legal/matter-under-review/6865/>; MUR 6932 (Clinton),  
<https://www.fec.gov/data/legal/matter-under-review/6932/>.

<sup>8</sup> See Appropriations Report at 8 and n. 33 (discussion of MUR 7141 (Beverly Hills Residents and Businesses to Preserve Our City)); *id.* at 10 and n.43 (discussion of ADR 822 (Arteaga)); *id.* at 7 and n. 30 (discussion of MUR 7205 (Jill Stein for President, *et al.*)); MUR 7144 (Jacobs, *et al.*), <https://www.fec.gov/data/legal/matter-under-review/7144/>; MURs 7430, 7444 and 7445 (Unknown Respondents), <https://www.fec.gov/data/legal/matter-under-review/7430/>; MUR 7232 (Party of Regions), <https://www.fec.gov/data/legal/matter-under-review/7272/>; MUR 7314 (NRA), <https://www.fec.gov/data/legal/matter-under-review/7314/>; MUR 7414 (Doyle for Congress), <https://www.fec.gov/data/legal/matter-under-review/7414/>.

<sup>9</sup> See AO 2018-11 (Microsoft); AO 2018-12 (Defending Digital Campaigns); and AO 2019-12 (Area 1 Security).

<sup>10</sup> See AO 2019-13 (MJ for Texas); AO 2018-06 (Liuba for Congress); AO 2018-15 (Wyden); and AO 2017-07 (Sergeant at Arms).

#### D. ADMINISTERING THE PRESIDENTIAL PUBLIC FUNDING PROGRAM

The Commission's responsibilities also include administering the public funding of Presidential elections, as provided in the Presidential Primary Matching Account Act and the Presidential Election Campaign Fund Act. Through the public funding program, the federal government provides matching funds to candidates seeking their party's Presidential nomination and grants to Presidential nominees for their general election campaigns.

The program is funded by taxpayers who voluntarily check off the \$3 designation for the Presidential Election Campaign on their income tax returns. The percentage of taxpayers who check off the designation for the Presidential Election Campaign Fund continues to decline. Recent statistics from the Internal Revenue Service show the following check off rates:

Calendar Year	Percent of Tax Returns with PECF Designation
2018	3.9 %
2017	4.1 %
2016	4.4 %
2015	5.4 %

Thus far in the 2020 Presidential election cycle, no candidate has applied for matching funds for the 2020 Presidential primary elections. In 2016, two primary candidates participated in public funding programs, and their campaigns received a total of \$1.5 million in public funds.

The balance in the Presidential Election Campaign Fund as of July 31, 2019, is \$353,074,995, according to the U.S. Treasury. This amount is unusually large for this program account, due to reduced candidate participation in the Presidential public funding programs.

#### E. THE 2018 FEC LEGISLATIVE RECOMMENDATIONS

The Federal Election Campaign Act authorizes the Commission to make recommendations for legislative action. In December 2018, the Commission most recently approved 11 Legislative Recommendations. The Recommendations are:

- Electronic Filing of Electioneering Communication Reports
- Authority to Create Senior Executive Service Positions
- Prohibit Fraudulent PAC Practices
- Fraudulent Misrepresentation of Campaign Authority
- Conversion of Campaign Funds
- Prohibit Aiding or Abetting the Making of Contributions in Name of Another

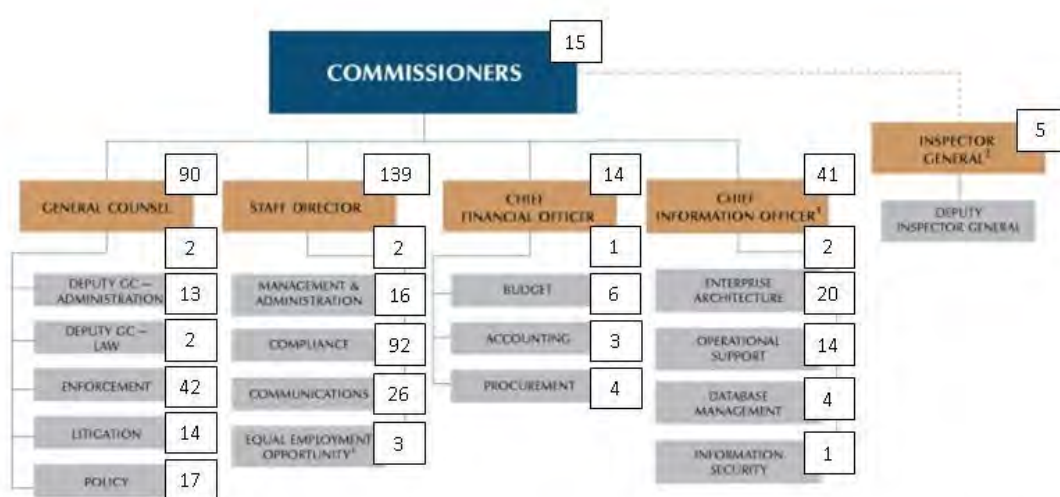
- Increase and Index for Inflation Registration and Reporting Thresholds
- Increase the In-Home Event Exemption and Unreimbursed Travel Expense Exemption for Candidates and Political Parties
- Permit Political Committees to Make Disbursements by Methods Other than Check
- Update Citations to Reflect the Recodification of FECA
- Repeal of Convention Funding Provisions Rendered Non-Operational by the Gabriella Miller Kids First Research Act

The Commission's 2018 Legislative Recommendations can be found at <http://www.fec.gov/law/legrec2018.pdf> and are also attached.

#### F. FEC's ALLOCATION OF STAFF

In order to accomplish its mission and meet the requirements of other legislation, the Federal Election Commission has arranged its employees into various mission-related or support offices. The organizational chart below depicts that arrangement and has been annotated with the number of employees in each of the organizational units.

#### FEC's Organizational Structure and Employees' Distribution 304 Employees as of September 25, 2019



<sup>1</sup> The position of Chief Information Officer normally reports directly to the Staff Director who, in turn, reports to the Commission itself. At present, however, the same individual is serving in both the position of the Staff Director and the position of the Chief Information Officer, pursuant to an authorization by the Commission and based, in part, on an advance decision from the Comptroller General. Accordingly, the organizational chart reflects both positions - the Staff Director and the Chief Information Officer - as reporting directly to the Commission.

<sup>2</sup> The Office of the Inspector General (OIG) independently conducts audits, evaluations, and investigations. OIG keeps the Commission and Congress informed regarding major developments associated with their work.

<sup>3</sup> The Director for Equal Employment Opportunity reports to the Staff Director on administrative issues but has direct reporting authority to the Commission on all EEO matters. See 29 CFR 1614.102(b)(4).

The Office of Compliance includes the Reports Analysis Division (59), the Audit Division (28), the Alternative Dispute Resolution Office (3), and the Office of Administrative



Review (1) (which reviews the challenges within the Administrative Fine Program). The Office of Communications includes the Information Division (15), the Public Disclosure and Media Relations Office (9) and Congressional Affairs (2).

In addition to the positions shown above, the Commission approved posting vacancy announcements for up to 25 additional positions: 13 in the Office of Staff Director, 10 in the Office of General Counsel and two in Office of Inspector General.<sup>11</sup>

## II. FEC's BUDGET

The chart below presents the appropriations the Federal Election Commission has received in FY 2016 through FY 2019, the amounts provided in the bills passed by the House of Representatives and pending before the Senate for FY 2020, as well as the amount the FEC requested for FY 2021 in its September 2019 submission to the Office of Management and Budget (OMB). Excluded are amounts for lease termination expenses of \$5 million and \$8 million for FYs 16 and 17, respectively. The Federal Election Campaign Act requires that, whenever the FEC submits any budget request to OMB, the Commission must concurrently transmit a copy of the budget request to Congress.

Fiscal Year	Source	Amount for Operational Budget
FY 2016	Enacted	\$71,119,000
FY 2017	Enacted	\$71,119,000
FY 2018	Enacted	\$71,250,000
FY 2019	Enacted	\$71,250,000
<i>FY 2020</i>	<i>House Bill</i>	<i>\$71,497,000</i>
<i>FY 2020</i>	<i>Senate Bill</i>	<i>\$70,537,500</i>
<i>FY 2021</i>	<i>FEC's OMB Budget Request</i>	<i>\$72,653,625</i>

The Commission is well aware of the constraints on federal spending generally, and although the FEC's appropriation is a small portion of discretionary spending, the Commission appreciates the support of its mission that Congress has shown by maintaining these appropriation levels in this budget climate.

While funding amounts for the FEC have been generally level, the Commission faces rising costs. Personnel costs rise with increased costs for benefits. Non-personnel costs increase as well, including some by contractual provision. The Commission is continually reviewing its operations and processes for opportunities to enact cost-saving measures. Over the past decade, the Commission has critically analyzed every position vacated through attrition to determine whether the agency could absorb the loss of that position by using existing staff resources. Senate electronic filing continues to permit the FEC to avoid expenses as well.

---

<sup>11</sup> These figures do not include the vacancy announcement for the fellow in the Cybersecurity Talent Initiative, described above in part I.A.2.

As discussed above, the FEC is also implementing a multi-phase plan to reduce reliance on physical servers and migrate appropriate systems and data to a cloud environment. In conjunction with the redesign of the agency's website, the FEC successfully migrated its largest database, the campaign finance database, to a cloud environment and shut down one physical data center during FY 2018. Cloud hosting offers a number of benefits for the FEC's campaign finance database and website. The agency's Internet traffic is variable, with many more visitors accessing the website during election years and near reporting deadlines. With a cloud-hosted application and database infrastructure, the FEC only needs to pay for the actual usage, rather than constantly maintaining the capacity to support peak usage, even during periods of reduced usage. Website downtime is minimized and server maintenance is managed by the cloud computing provider. During FY 2020, the FEC will conduct a study to determine how best to migrate other appropriate systems and databases to the cloud, allowing the agency to realize greater efficiency and performance in future years.

## **Conclusion**

The Commission appreciates the interest of the Committee on House Administration in the FEC. This document, together with the materials the Commission provided to the Committee in its preparation for this hearing, provide a thorough review of the Federal Election Commission. The Commissioners would be happy to respond to any questions you may have today or in further written submissions.

# FEDERAL ELECTION COMMISSION: REVIEWING POLICIES, PROCESSES AND PROCEDURES

---

## HEARING BEFORE THE SUBCOMMITTEE ON ELECTIONS OF THE COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES ONE HUNDRED TWELFTH CONGRESS FIRST SESSION

---

Held in Washington, DC, November 3, 2011

---

Printed for the use of the Committee on House Administration



Available on the Internet:  
*<http://www.gpoaccess.gov/congress/house/administration/index.html>*

---

U.S. GOVERNMENT PRINTING OFFICE

72-282

WASHINGTON : 2012

---

For sale by the Superintendent of Documents, U.S. Government Printing Office  
Internet: [bookstore.gpo.gov](http://bookstore.gpo.gov) Phone: toll free (866) 512-1800; DC area (202) 512-1800  
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON HOUSE ADMINISTRATION

DANIEL E. LUNGREN, California, *Chairman*

GREGG HARPER, Mississippi  
PHIL GINGREY, M.D., Georgia  
AARON SCHOCK, Illinois  
TODD ROKITA, Indiana  
RICHARD B. NUGENT, Florida

ROBERT A. BRADY, Pennsylvania,  
*Ranking Minority Member*  
ZOE LOFGREN, California  
CHARLES A. GONZALEZ, Texas

PROFESSIONAL STAFF

PHILIP KIKO, *Staff Director & General Counsel*  
JAMIE FLEET, *Minority Staff Director*

---

SUBCOMMITTEE ON ELECTIONS

GREGG HARPER, Mississippi, *Chairman*

AARON SCHOCK, Illinois  
RICHARD B. NUGENT, Florida  
TODD ROKITA, Indiana

CHARLES A. GONZALEZ, Texas  
ROBERT A. BRADY, Pennsylvania

## **FEDERAL ELECTION COMMISSION: REVIEW- ING POLICIES, PROCESSES AND PROCE- DURES**

---

**THURSDAY, NOVEMBER 3, 2011**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ELECTIONS,  
COMMITTEE ON HOUSE ADMINISTRATION,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 10:00 a.m., in room 1310, Longworth House Office Building, Hon. Gregg Harper (chairman of the subcommittee) presiding.

Present: Representatives Harper, Nugent, Schock, Rokita, Lungren (ex officio), and Gonzalez.

Staff Present: Phil Kiko, Staff Director and General Counsel; Peter Schalestock, Deputy General Counsel; Kimani Little, Parliamentarian; Joe Wallace, Legislative Clerk; Yael Barash, Assistant Legislative Clerk; Salley Wood, Communications Director; Bob Sensenbrenner, Elections Counsel; Karin Moore, Elections Counsel; Jamie Fleet, Minority Staff Director; Matt Defreitas, Minority Professional Staff; Khalil Abboud, Minority Elections Staff; Thomas Hicks, Minority Elections Counsel; and Matt Pinkus, Minority Professional Staff.

Mr. HARPER. I will now call to order the Committee on House Administration's Subcommittee on Elections for today's oversight hearing on reviewing the policies, processes and procedures of the Federal Election Commission. The hearing record will remain open for 5 legislative days so that members may submit any materials that they wish to be included therein. A quorum is present, so we may proceed.

I want to thank everyone for being here today. Certainly we are all busy and so, I thank you for taking this time to be here. We believe this hearing is long overdue. In fact, the last FEC oversight hearing before this Commission was in 2004. Seven years is a long time to go without an oversight hearing on an agency with such great consequence to political discourse. There has been a breakdown in this committee's oversight responsibility and it has been a bipartisan one, and it is now time for that to change.

This past summer, the committee presented the FEC with questions pertaining to agency operations, regulations and litigation. Putting partisan conflicts aside, we want to explore the practical functionality of the agency. How it works can impact political speech and overall disclosure.

It was a long list of questions. We had a great deal of catching up to do, and I appreciate the FEC's responsiveness to our inquiries. There have been some positive accomplishments, particularly in providing more due process for those dealing with the FEC. However, I found some of the answers to be troublesome and others that perhaps just led to more questions.

For instance, why is the agency continuously pursuing litigation based on legal principles that have been rejected in case after case? This constant pursuit to litigate losing cases again and again I believe is an indefensible waste of taxpayers' money.

Or, why hasn't the Commission updated regulations that are unconstitutional after a ruling by the Supreme Court in January of 2010?

Federal general elections are just 12 months away. Campaigns and independent groups are in full operation and the Commission's regulations are not up to date. How much will candidates spend figuring out what rules to follow and what to do?

And finally why, when asked by this committee, did the Commission refuse to provide a copy of several enforcement documents? Why is the Commission withholding its RAD review and referral procedures, its enforcement manual and updates and its penalty formulas? From what I understand the enforcement manual is similar to, for instance, the SEC's enforcement manual for staff investigations, the Department of Labor's manual that explains its investigative authority and procedures, the U.S. Attorney's manual outlining the Justice Department's enforcement policies, the DOJ's Antitrust Division's manual, and the U.S. Parole Commission's manual to name a few. And there are more. They are similar in that they all provide their respective staffs with guidelines and thresholds necessary to enforce compliance with Federal laws and regulations.

But there is one major difference. Theirs are public and yours are not. Instead, you deem yours as a sensitive internal document and I have to ask how you can justify that. Just this past January during the Commission meeting, Commissioner Weintraub noted that promoting transparency is essential to the Commission's mission. She said, and I quote, we don't believe in doing things in secret. And I have to ask what is the definition of secret. Unlike the FEC, other agencies rightfully make their manuals public to help those trying to comply, understand the standards and thresholds that they will be held to. Shouldn't everyone subject to your investigation penalties have those same rights? Your unwillingness to release these documents contradicts and ultimately hinders your agency's core mission. And I think it puts us in a situation of are we really going to be transparent.

It is unacceptable and I believe it needs to change, and that is why I am going to ask again. This committee is requesting that you provide us with your RAD manual, your enforcement manual with all updates and your penalty formulas for regular and administrative fines proceedings all within 10 business days. Furthermore, we request that you establish agency procedures to make all of them publicly available.

To be clear, this is the second time that we are asking and I believe it is the last time that we will ask. The third request will be



in the form of a congressional subpoena and we know we don't want to go there unless we just have to. But we will. I understand that there are policy disputes over some of the regulatory progress at the agency. But what we are talking about here today are operational failures.

What disservice is the Commission providing when it doesn't even update its regulations to reflect current law? And how can we trust an agency to enforce disclosure when it lacks disclosure?

As I mentioned, this agency's actions are of great consequence. The laws it enforces are limitations on political speech protected by the First Amendment, which is why it is imperative that they be enforced in a fair, consistent and transparent fashion.

Again, I do thank you for being here and I look forward to discussing these issues. I would like now to recognize my colleague, Congressman Gonzalez, for the purpose of providing an opening statement. Congressman Gonzalez.

Mr. GONZALEZ. Mr. Chairman, thank you very much. And good morning to one and all and welcome. I do have two serious concerns on which I hope this hearing will shine some light on. The majority's sole recommendation to the so-called supercommittee was eliminating the Election Assistance Commission and transferring some of its duties to the FEC. I am pleased that the minority members under Ranking Member Brady's leadership suggested other, more effective suggestions, but I also want to know if the FEC can handle the new responsibilities as proposed in the legislation.

The value of EAC to local election officials should by now be obvious. One Texas county will save \$100,000 per year from a single EAC suggestion. I was pleased to see articles from former FEC Commissioner von Spakovsky and from Eric Ebersole, who the majority called as an expert earlier this year, praising the EAC's report on the 2010 elections. It is not wholly clear to me whether such reports would have survived under H.R. 672 and I am certain that the reports would not have received the same priority.

Regulating campaign finance is FEC's reason for existence and requires the Commissioners' full attention. This year has seen a host of disturbing reports of financial shenanigans and I am eager to hear what the Commission is doing about them.

Let us turn first to the strange career of W Spann, LLC, which was created solely to disguise a \$1 million donation to the super PAC of former Massachusetts Governor, Mitt Romney. That donor was shamed into confessing that there were at least two other mystery million dollar donations to Mr. Romney's super PAC. Mimi Swartz in the New York Times later quoted, quote, one influential Houston Republican said of a recent Romney fundraising event, I had someone else pay for me to go because I didn't want people to know I was there. I believe that paying someone else to donate for you is illegal and with this proven disclosure loophole, how do we know that foreign nationals haven't illegally contributed too?

Nor was Mr. Romney alone in this. From Christina Wilkie we hear of teenagers maxing out their donations to the campaign of my Governor, Rick Perry. Just this week, the Milwaukee Journal Sentinel reported that Herman Cain's campaign may have received illicit contributions from two Wisconsin corporations created solely

to funnel money to him. I am not asking the Commissioners to comment on any specific allegation, but I want to know what steps are being taken to ensure that our laws are enforced and any loopholes are indeed closed.

These disturbing stories make the record setting level of obstruction and deadlock votes in the FEC all the more troubling. There has been a stunning increase in split deadlock votes at the FEC on enforcement votes. It is up more than 1,100 percent. As former FEC Chairman Trevor Potter said recently of the misguided Citizens United decision, quote, the Supreme Court upheld the disclosure requirements resoundingly. It is inaction in Washington that has given us no disclosure. The FEC is now deadlocked 3-3. Congress is deadlocked.

In the first presidential election since Citizens United and SpeechNow, a fully functioning FEC is more important than ever, as shown by these chilling words spoken a few words again. Quote, groups like ours are potentially very dangerous to the political process. We could be a menace, yes. Ten independent expenditure groups, for example, could amass this great amount of money and defeat the point of accountability in politics. We could say whatever we want to say about an opponent of a Senator Smith and the Senator wouldn't have to say anything. A group like ours could lie through its teeth and the candidate it helps will stay clean.

Those words came from Terry Dolan, National Conservative Political Action Committee founder. Commissioners and fellow members of this committee, it is up to you and to us to make sure that Mr. Dolan's menace is defamed and that proper disclosure requirements keep accountability in politics.

And, Mr. Chairman, at this time, if appropriate, I would ask for unanimous consent to enter into the record testimony in written form from Common Cause, as well as from Democracy 21.

Mr. HARPER. Without objection.

[The information follows:]



**Common Cause Testimony to the  
Subcommittee on Elections of the Committee on House Administration  
Hearing on the Federal Election Commission: Reviewing Policies, Processes and  
Procedures**

November 3, 2011

Submitted by Bob Edgar  
President and Chief Executive Officer  
Common Cause

Common Cause is a national nonpartisan advocacy organization founded in 1970 by John Gardner as a vehicle for ordinary citizens to make their voices heard in the political process. On behalf of our 300,000 members and supporters, we appreciate the opportunity to submit this testimony to this Subcommittee regarding the Federal Election Commission.

The Supreme Court's 5-4 decision in *Citizens United v. FEC* overturned decades of well-settled law and opened up the floodgates to unlimited corporate and union spending in our electoral process. In the most recent 2010 elections, over \$3.6 billion in political spending influenced the vote -- a historic high for a midterm election.<sup>1</sup> Of that sum, \$133 million funded independent expenditures and electioneering communications by groups that never disclosed the source and/or donors of their money.<sup>2</sup> With the 2012 presidential election well underway, Super PACs and other so-called independent groups have announced their plans to shatter outside spending records. For example, American Crossroads announced its goal to raise and spend \$240 million, doubling its original aspirations.<sup>3</sup> A former political operative of President Obama is leading a Super PAC that hopes to raise close to \$100 million.<sup>4</sup>

Distressingly, at precisely the time when a deluge of secret money is inundating our political system, inaction at the Federal Election Commission has resulted in a vacuum around the enforcement and administration of campaign finance laws. The 2010 midterm elections provided a mere glimpse of a new and rapidly changing campaign finance regime that is riddled with loopholes and flush with secret cash. Shadow political organizations headed by candidates' well-known political associates are exploiting weak coordination rules, directly threatening contribution limits and dismantling the confidence of the American people in their representative democracy. While an individual may lawfully contribute up to \$2,500 to a candidate per election -- those same individuals, along with corporations and unions, are now free to contribute an

<sup>1</sup> See Center for Responsive Politics, [OPENSECRETS.ORG](http://www.opensecrets.org), "The Money Behind the Elections," <http://www.opensecrets.org/bigpicture/index.php>.

<sup>2</sup> See Center for Responsive Politics, [OPENSECRETS.ORG](http://www.opensecrets.org), "2010 Outside Spending by Non-Disclosing Groups," <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U>.

<sup>3</sup> Nicholas Confessore, *Outside Groups Eclipse G.O.P. as Hub of Campaigns*, N.Y. TIMES, Oct. 29, 2011 at A1.

<sup>4</sup> Jeanne Cummings, *New Democratic Money Group to Take on Republicans*, POLITICO, Apr. 29, 2011.

unlimited amount of money to parallel but “independent” Super PACs, which are then entitled to spend an unlimited sum of money supporting or opposing candidates.

This new system gravely mocks contribution limits and is a carte blanche invitation to corruption and the appearance thereof. This new “Wild West” style of campaigning, the likes of which Americans have not witnessed since pre-Watergate, undermines the integrity of our government and severely challenges longstanding campaign finance law.

The FEC has failed to act in accordance with its mission. Three-three votes, often fragmented by party, result in deadlock and prevent the agency from acting. Although the law mandates that the FEC cannot exceed three commissioners from the same party, stalemates were not as frequent as they have become in recent years. Over the past decade, deadlocks have increased substantially,<sup>5</sup> blocking enforcement actions and causing regulatory paralysis.

The inability to administer the law materially alters the electoral playing field and keeps voters in the dark. For example, although promulgating robust disclosure rules is squarely within the FEC’s purview, nearly two years after the Supreme Court *upheld* disclosure requirements by an 8-1 vote in *Citizens United*, the FEC remains gridlocked over the issue, and the secret spending continues unabated. Three commissioners have repeatedly sought to open the already inadequate disclosure rules to public comment, only to be met with stiff opposition by the remaining three commissioners.<sup>6</sup>

There are specific action steps that could begin to address FEC dysfunction. Five of the six current commissioners have outlasted their term appointments, and yet they still remain seated on the FEC. Given the sudden influx of secret money and an FEC at its most anemic, the President must name new commissioners who will enforce the law before the crisis of confidence drags our elections even further into the shadows. The Senate must act swiftly on the nominations, and refrain from past practices of undermining the President’s authority by pressing for nominees that merely advance partisanship. When the President names new commissioners, it will restore some confidence in the system, provided that the new commissioners are demonstrably committed to the nonpartisan administration of election and campaign finance laws. Moreover, Congress must address the FEC’s cumbersome enforcement capabilities that fail to deter, on a consistently timely basis, candidates and other entities from flouting the law. An agency with a robust adjudicatory function is one possible solution to this problem.

Our democracy and its legitimacy demands transparency and accountability. The FEC is in place to guard against the corrosive influence of money in our electoral process, which destroys sound policy and drowns out the voices of American citizens. While the fundraising arms race continues unabated in a new era of unlimited secret money, now is precisely the time that commitment to our campaign finance laws is most critical.

<sup>5</sup> T.W. Farnam, *FEC Still Hasn’t Issued New Campaign Spending Rules*, WASH. POST, Mar. 25, 2011.

<sup>6</sup> Jonathan D. Salant, *U.S. Federal Election Commission Deadlocks on Greater ‘12 Donor Disclosure*, BLOOMBERG, June 15, 2011 <http://www.bloomberg.com/news/2011-06-15/u-s-federal-election-panel-considers-increased-donor-disclosure-for-2012.html>





## Testimony of Campaign Legal Center & Democracy 21

Submitted to the Committee on House  
Administration; Subcommittee on Elections

“Federal Election Commission: Reviewing  
Policies, Processes and Procedures”

November 3, 2011

Mr. Chairman, distinguished committee members, thank you for this opportunity to provide our views on the Federal Election Commission (FEC)—its policies, processes and procedures.

The Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization founded in 2002 that works in the areas of campaign finance, elections and government ethics. The Legal Center offers nonpartisan analyses of issues and represents the public interest in administrative, legislative and legal proceedings. The Legal Center also participates in generating and shaping our nation's policy debate about money in politics, disclosure, political advertising, and enforcement issues before the Congress, the FEC, the Federal Communications Commission (FCC) and the Internal Revenue Service (IRS). The Legal Center's President is Trevor Potter, former Chair of the Federal Election Commission, and our Executive Director is Gerry Hebert, former acting head of the Voting Section of the Civil Rights Division at the Department of Justice.

Democracy 21 is a nonpartisan, nonprofit organization that works to strengthen our democracy and protect against government corruption by promoting campaign finance reforms and other government integrity measures. The organization undertakes efforts to curb the role of influence-money in American politics and to provide for honest and accountable elected officeholders and public officials. Democracy 21 has played an active role in FEC matters, including frequent participation in rulemakings, advisory opinions and enforcement matters.

More than a decade ago, Democracy 21 President Fred Wertheimer convened the Project FEC Task Force, a bipartisan blue-ribbon citizen Task Force composed of some of the nation's most experienced and respected campaign finance and law enforcement experts. Trevor Potter, President of the Campaign Legal Center and former FEC Commissioner, served as a Senior Advisor to the project and a member of the Task Force. Donald Simon, general counsel to Democracy 21, served as a Senior Advisor and a principle editor of the Task Force report. In 2002, the Task Force produced a detailed report entitled *No Bark, No Bite, No Point. The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation's Campaign Finance Laws*.<sup>1</sup>

The report, at nearly 150 pages, exhaustively detailed fundamental problems with the FEC and the central role the agency had played in creating and perpetuating campaign finance problems during its first nearly-three decades in existence. Given the enormous failures of the FEC in its first three decades of existence, the Task Force called for a complete overhaul of the agency—replacing the six-member, deadlock-prone commission with completely new agency headed by a single administrator and dramatically strengthening the agency's enforcement powers.

Unfortunately, the FEC has only gotten worse—much worse—in the decade since *No Bark, No Bite, No Point* was published. Today the FEC is more dysfunctional than ever. The agency's persistent 3-3 deadlock votes on important matters—enforcement actions, advisory opinions, rulemaking proceedings—have all but nullified the FEC in recent years. As the most expensive election in this nation's history kicks into high gear, fueled by corporate and union dollars injected into the system by the Supreme Court's *Citizens United* decision, the likelihood of any meaningful campaign finance law enforcement is slim-to-none. Furthermore, because of a disclosure loophole created by the FEC in 2007 that today's Commissioners refuse to fix,

<sup>1</sup> Available at <http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7BB4BE5C24-65FA-4910-974C-759644EC0901%7D.pdf>.



American voters will have less information than ever before about the identity of wealthy donors and corporate interests spending tens and perhaps hundreds of millions of dollars to sway their votes. 2012 will be a money-in-politics wild west and corruption scandals will inevitably follow.

The Supreme Court has made the campaign finance system bad, but the FEC's failure to enforce what law remains on the books, and its creation of unnecessary loopholes that undermine the disclosure that even the Supreme Court approved of, makes a bad situation very much worse.

Consequently, Democracy 21 and the Campaign Legal Center renew our longstanding call for replacement of the FEC with a new, well-funded, independent campaign finance regulatory and enforcement agency.

### Examples of FEC Deadlock Dysfunction

#### Still No Post-Citizens United Rulemaking

In January 2010, the Supreme Court issued its landmark decision in *Citizens United*,<sup>2</sup> striking down restrictions on the use of corporate and, by extension, labor union treasury funds to influence federal elections through express advocacy political ads (e.g., "Reelect Obama," "Vote Romney"). The five-justice *Citizens United* majority assured us all that we need not worry about corruption resulting from this new unlimited corporate and union money in politics because voters would have full-disclosure of the sources of this money. In fact, eight of the Court's nine justices upheld against First Amendment challenge disclosure provisions enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA). Justice Kennedy wrote on behalf eight members of the Court:

A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.<sup>3</sup>

Apparently, the *Citizens United* Court was unaware of the fact that the FEC, in a 2007 rulemaking, had eviscerated the BCRA "electioneering communication" disclosure requirements praised by the Court as "enable[ing] the electorate to make informed decisions and give proper weight to different speakers and messages." Whereas BCRA requires every person or group that spends more than \$10,000 on "electioneering communication" to disclose the names and addresses of all contributors who gave \$1,000 or more to that person or group, the FEC took it

<sup>2</sup> *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>3</sup> *Id.* at 916 (internal citations omitted).

upon itself to gut this disclosure requirement by “instead . . . requir[ing] corporations and labor organizations to disclose only the identities of those persons who made a donation aggregating \$1,000 or more specifically for the purpose of furthering [“electioneering communication”] made by that corporation or labor organization . . . .”<sup>4</sup>

Despite the fact that Congress in BCRA required disclosure of the identity of large donors to groups running election ads, the FEC decided not to enforce that requirement and instead it only requires disclosure if the donor specifically designated the funds to be used for electioneering communication. Of course it was entirely predictable that those wishing to evade disclosure would simply refrain from designating their funds for electioneering communications and, instead, would give for no designated purpose at all. Thus, under the FEC’s rule, there is no disclosure of who funds the electioneering communications.

In short, the FEC had legalized money laundering. Consequently, donor disclosure by groups spending tens of millions of dollars on “electioneering communication” plummeted in 2010. The U.S. Chamber of Commerce, for example, spent more than \$30 million on “electioneering communication” in the 2010 elections and did not disclose its donors; similarly the American Action Network spent more than \$20 million on “electioneering communication” in the 2010 elections and did not disclose its donors.<sup>5</sup>

So what is the FEC doing about the loophole it created in federal disclosure law—a loophole that guts the disclosure required by Congress in BCRA and directly undermines the *Citizens United* Court’s assurances that voters will have the information necessary “to make informed decisions and give proper weight to different speakers and messages”?<sup>6</sup> It is doing nothing.

The FEC is so dysfunctional that it cannot muster the necessary four votes to even begin a post-*Citizens United* rulemaking to address this and other issues. Twice this year the FEC has deadlocked 3-3 on votes to approve a Notice of Proposed Rulemaking (NPRM), which is merely the first step of inviting public comment about what issues the Commission should and should not address through promulgation and/or repeal of regulations. The purpose of an NPRM is to announce publicly the full scope of issues that might be addressed by the Commission in a rulemaking proceeding, along with descriptions of various ways the Commission might address those issues.

Rather than invite public input on whether the FEC should revisit the disclosure loophole it created in 2007, Vice Chair Hunter, together with Commissioners Petersen and McGahn, have twice this year voted against approving an NPRM that contemplates amendment of the Commission’s disclosure rules, resulting in 3-3 deadlock votes with Chair Bauerly and Commissioners Walther and Weintraub.

Consequently, the donor disclosure loophole created by the FEC in 2007 will undoubtedly be exploited even more extensively in 2012. Incorporated nonprofit entities including the U.S. Chamber of Commerce, Republican-supporting Crossroads GPS, Democrat-supporting Priorities

<sup>4</sup> FEC, Electioneering Communications, Final Rule and Explanation and Justification, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).

<sup>5</sup> For more information on outside group “electioneering communication” without disclosing donors, see Center for Responsive Politics, *Outside Spending 2010*, available at <http://www.opensecrets.org/outsidespending/index.php?cycle=2010&view=A&chart=N>.

<sup>6</sup> *Citizens United v. FEC*, 130 S. Ct. at 916.



USA and many more like them, all of which are permitted to spend money on election ads as a result of *Citizens United*, will legally launder hundreds of millions of undisclosed special interest dollars into the 2012 elections while the FEC stands by idly. (Rep. Chris Van Hollen has filed a lawsuit to challenge the legality of the FEC's deficient disclosure regulations. That lawsuit is pending in the U.S. district court in Washington, DC, where the FEC is defending its loophole-creating rule.)

Another sticking point in the initiation of a post-*Citizens United* rulemaking is whether or not to invite public comment on the Commission's rules pertaining to foreign-owned domestic corporations. The Court concluded in *Citizens United* that it "need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."<sup>7</sup> This means that the federal law ban on political expenditures by foreign nationals remains in effect.<sup>8</sup> What remains unclear is whether or how a U.S.-based corporation with some degree of foreign ownership can make political expenditures now allowed by the *Citizens United* decision. For example, what percentage of foreign ownership would render a Delaware-based corporation a foreign national prohibited from making political expenditures? Three FEC Commissioners proposed including these issues in a post-*Citizens United* NPRM, while three refused to allow it.

We cannot stress strongly enough the absurdity of this predicament the FEC has created. The *Citizens United* decision has created ambiguity in numerous areas of campaign finance law and highlighted enormous deficiencies in the Commission's disclosure regulations. Yet the Commission is unable to even begin a rulemaking proceeding to address these issues. Inaction equals non-enforcement and non-enforcement is wholly unacceptable.

#### Refusal to Penalize Clear Violations of the Law

The FEC's dysfunction-by-deadlock is not limited to critical rulemakings. The FEC also frequently deadlocks on important enforcement actions. Earlier this year in *In Re Steve Fincher for Congress* (Matter Under Review (MUR) 6386), the Commission was presented with a complaint that revealed a clear violation of federal disclosure laws. A candidate admittedly misreported a \$250,000 bank loan as a loan of his personal funds to his campaign committee. All six Commissioners agreed with the Office of General Counsel's conclusion that the law had been broken. However, the Commission deadlocked 3-3 on the General Counsel's recommendation that a significant civil monetary penalty be imposed. Chair Bauerly, together with Commissioners Walther and Weintraub voted to impose the recommended civil penalty, while Vice Chair Hunter, together with Commissioners McGahn and Peterson voted against imposition of a monetary penalty for the violation. Because any Commission action requires four affirmative votes, the three Republican Commissioners blocked penalization of a clear, admitted violation of federal law.

Deadlock party-line votes on enforcement actions—with the Republican Commissioners voting to dismiss enforcement actions and the Democratic Commissioners voting to investigate and enforce the law—have become all-too-common at the FEC in recent years. Since the beginning of 2010 alone, the Commission has deadlocked on party lines in the following MURs: *In Re Aristotle International, Inc.* (MUR 5625) 3-3 vote; *In Re BASF Corporation* (MUR 6206) 3-3

<sup>7</sup> *Citizens United v. FEC*, 130 S. Ct. at 911.

<sup>8</sup> See 2 U.S.C. § 441e.

vote; *In Re Freedom's Watch, Inc.* (MUR 6002) 2-3 vote (Walther recused); *In Re John Gomez* (MUR 6320) 2-3 vote (Bauerly absent); *In Re David Schweikert for Congress* (MUR 6348) 3-3 vote; *In Re Friends of Christine O'Donnell, et al.* (MUR 6371) 3-3 vote; *In Re Yoder for Congress* (MUR 6399) 2-3 vote (Walther did not vote); *In Re Unknown Respondents* (MUR 6429) 2-3 vote (Walther did not vote).

The Commission's Vice Chair Hunter, together with Commissioners Petersen and McGahn, have basically shut down the FEC enforcement operation. Enforcement of campaign finance laws is essential to compliance. The FEC refuses to do its job because of intransigence by the Republican Commissioners. The Republican Commissioners' refusal to faithfully execute the powers of their office is not a question of disagreement over the finer points of law but, rather, is a calculated effort to impose on the agency their ideological goal of deregulation of campaign finance. Put simply, they fundamentally disagree with the laws they are sworn to uphold and enforce. And so they refuse to uphold and enforce them.

#### Recommendations for the Committee on House Administration

The FEC has convincingly demonstrated over its nearly-four decades in existence that it cannot and will not do its job. The FEC is a failed agency. We urge the committee to scrap the Commission and replace it with a new, well-funded, independent campaign finance regulatory and enforcement agency. Ten years ago, Democracy 21, the Campaign Legal Center and the Project FEC Task Force provided Congress with a blueprint for such a new agency in its report *No Bark, No Bite, No Point*. The creation of such a new agency should rest on five foundational principles:

1. The new agency with responsibility for the civil enforcement of the federal campaign finance laws should be headed by a single administrator.
2. The new agency should be independent of the executive branch.
3. The new agency should have the authority to act in a timely and effective manner, and to impose appropriate penalties on violators, including civil monetary penalties and cease-and-desist orders, subject to judicial review. A system of adjudication before administrative law judges should be incorporated into the new enforcement agency in order to achieve these goals.
4. A means should be established to help ensure that the new agency receives adequate resources to carry out its enforcement responsibilities.
5. The criminal enforcement process should be strengthened and a new limited private right of action should be established where the agency chooses not to act.

These principles are detailed in the report and served as the basis of legislation introduced in the 110<sup>th</sup> Congress.<sup>9</sup> If campaign finance laws are to accomplish their goals of preventing corruption and maintaining a well-informed electorate, it is essential to establish a new system for enforcing these laws.

<sup>9</sup> H.R. 421 (110<sup>th</sup> Cong., 1<sup>st</sup> Sess.).

Mr. GONZALEZ. Thank you. And I yield back, sir.

Mr. HARPER. Does any other member wish to be recognized for the purpose of making an opening statement? I would now like to introduce our witnesses. Commissioner Cynthia Bauerly is currently Chair of the Federal Election Commission. Previously she served as legislative director for Senator Charles Schumer and as counsel on the Senate Judiciary and Rules Committee. And we thank you for being here. Commissioner Caroline Hunter is the Vice Chair of the FEC. She has been a Commissioner at the Election Assistance Commission and has worked in the White House, the Department of Homeland Security, and as deputy counsel for the Republican National Committee. Welcome.

Commissioner Donald McGahn previously served as the head of a Washington based law practice specializing in election law. He was also general counsel to the National Republican Congressional Committee in the late 1990s, as well as counsel for the Illinois Republican Party.

Commissioner Matthew Petersen was the Republican chief counsel to the Senate Rules and Administration Committee and counsel to the Committee on House Administration. I would like to welcome Commissioner Petersen back to the committee for his first experience on the other side of the witness table at this committee.

Commissioner Steven Walther was Vice Chair of the FEC in 2008 and the Commission's Chair in 2009. Prior to serving at the FEC, Mr. Walther practiced law for 35 years at his Nevada law firm.

Commissioner Ellen Weintraub has been a member of the Commission since 2002. She has worked in private practice and was counsel to the House Ethics Committee where she was editor and chief during the creation of the House Ethics Manual. We thank you for a thankless job.

Chair and Vice Chair, Commissioners, we thank you for all of you being here today. The committee has received your written testimony. And I will recognize the chair and vice chair each for 5 minutes to present a summary of your submissions. To help you keep that time, of course you know we have a timing device near the witness table. The device will emit a green light for 4 minutes and then go to yellow with a minute to go. And at red, your time will have been over.

And we will start with the Commissioner Bauerly. And we will start and we welcome you and please proceed.

**STATEMENTS OF THE HON. CYNTHIA L. BAUERLY, CHAIR, FEDERAL ELECTION COMMISSION; AND THE HON. CAROLINE C. HUNTER, VICE CHAIR, FEDERAL ELECTION COMMISSION**

**STATEMENT OF THE HON. CYNTHIA L. BAUERLY**

Ms. BAUERLY. Thank you. Good morning, Chairman Harper, Ranking Member Gonzalez, members of the subcommittee. I am pleased to be here on behalf of the Federal Election Commission to discuss the Commission's operations and procedures. I appreciate the Subcommittee on Elections' invitation to appear and the opportunity to present a few moments of opening remarks to highlight



certain aspects of the Commission's longer written submission to you.

I would like just for a moment, if I might, to introduce Mr. Tony Herman, Mr. Alec Palmer, our statutory officers at the Commission. Mr. Herman joined us recently and Mr. Palmer was recently our permanent Staff Director. I know your staffs have met with them and we appreciate your courtesy to them.

When I was appointed to the FEC in 2008 along with the Vice Chair, Commissioners Petersen, Commissioner McGahn and Commissioner Walther who as you know had previously served a recess appointment, the Commission had lacked a quorum for approximately 6 months. When we joined Commissioner Weintraub at the Commission in July of 2008, my colleagues and I found ourselves with a significant backlog of enforcement audits and alternative dispute resolution matters waiting for us. Through a lot of hard work by everyone at the agency, particularly in the Offices of General Counsel and Compliance, we have returned to our appropriate processing times for such matters.

As you know, a good share of the Federal Election Campaign Act is aimed at disclosure of Federal campaign activity. Following cases like Citizens United and SpeechNow, many new speakers and many recent speakers have become engaged in new ways. With this additional activity, the public increasingly relies on the disclosure provided by committees through the FEC in order to effectively respond to and participate in the political debate.

Accordingly, the Commission strives to make campaign finance information readily available and useful to the public. Our Website provides disclosure of committee reports and independent expenditures and election agency communications in nearly real time as we receive that information. We have also improved the navigation of our Website to make the information easier to find.

Of course, to be useful, the information needs to be accurate as well as timely. Accordingly, the FEC devotes a considerable portion of its staff to reviewing all reports. This is not a small task. In fiscal year 2011, the FEC reports analyst reviewed over 72,000 documents filed by committees. These same analysts work very closely with committees to answer their questions, assist them with filing before the deadlines occur and to resolve problems as they arise. In the last fiscal year, they answered 14,000 phone calls from committees to offer them assistance. They also work extended hours on filing deadlines to make sure they are there when committees need them most. The Commission also works hard to provide information and training to those who file with the FEC. To better serve filers, the Commission is developing a dedicated Web page that will answer questions our communications specialists also fielded over 11,000 phone calls.

The FEC also continues to hold regional conferences so we may get out and provide education and information to those who are complying. I find that participating in these conferences is an important way for me to get to know and meet treasurers and reporting personnel for committees.

And the FEC continues to innovate in ways to reach more committees and filers with this information. For example, in order to provide more cost effective training for grass root organizations and



candidates, the FEC has instituted a series of lower cost 1-day seminars and workshops focused for a particular group or a legal issue.

In addition to disclosure and education, the Commission's major responsibilities surround the administration and interpretation of the FECA. Public confidence in our elections depends not only on transparency but on the assurance of those who participate in our Federal election system do so within the rules established by Congress. In recent years, the Commission has made significant progress in processing enforcement cases and audits more timely. For certain reporting violations, the FEC's alternative dispute resolution program and its administrative fines program has been very effective. And we appreciate this committee's work on the administrative fines program and hope that the committee will again work to extend or make permanent that program in 2013.

We anticipate a very busy election cycle in 2012 and we are prepared for it. The FEC has invested in our infrastructure at the Commission to ensure that our servers can handle both the volume and the number of reports that we expect in 2012. And of course all of this is taking place in a time of quickly changing legal landscapes. And where we can, the Commission is providing its information as soon as we can without going through the full process of a rulemaking.

Recently, the Commission issued some guidance in response to a court settlement in the *Carey v. FEC* decision. Obviously additional rulemakings will be necessary to update forms and provide full guidance, but we were able to issue specific guidance to committees who want to follow that court decision and we did the same thing following the *Citizens United* in 2010.

I see my time has expired. I look forward to answering all of your questions, and we stand ready to assist the committee in any of its future requests.

[The statement of Ms. Bauerly follows:]



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

CYNTHIA L. BAUERLY, CHAIR

OPENING STATEMENT BEFORE THE  
SUBCOMMITTEE ON ELECTIONS  
OF THE  
COMMITTEE ON HOUSE ADMINISTRATION

U.S. HOUSE OF REPRESENTATIVES

HEARING: *FEDERAL ELECTION COMMISSION;  
REVIEWING POLICIES, PROCESSES AND PROCEDURES*

NOVEMBER 3, 2011

Good afternoon Chairman Harper, Ranking Member Gonzalez, and Members of the Subcommittee. I am pleased to be here on behalf of the Federal Election Commission to discuss the Commission's operations and procedures. I appreciate the Committee's invitation to appear and to provide a few minutes of opening remarks to highlight certain aspects of the Commission's longer, written submission.

When I was appointed to the FEC in 2008, along with the Vice Chair, Commissioners Petersen, McGahn and Walther – who as you know had previously served a recess appointment – the Commission had lacked a quorum for approximately 6 months. During that time, Committees continued to file disclosure reports and FEC staff continued to receive and review those reports. Commission staff continued to provide information to committees and the public. Without a quorum, however, important aspects of the agency's operations were put on hold. Accordingly, when the quorum was reconstituted in July of 2008, my colleagues and I found ourselves with a significant backlog of Enforcement, Audit and Alternative Dispute Resolution matters waiting for us. Through a lot of hard work by everyone in the agency, particularly in the offices of the General Counsel and Compliance, we got up to speed and in the three years since, the Commission has achieved more appropriate rates of processing these types of matters. What never lagged, however, was the fine quality of work performed by the dedicated staff of the FEC.

A good share of the Federal Election Campaign Act – the primary Act the Commission is responsible for – is aimed at disclosure of federal campaign activity. Following cases like *Citizens United* and *SpeechNow*, many new speakers – and new types of speakers – became engaged in new ways. With this additional activity, the public increasingly relies on the disclosure provided by committees through the FEC to inform itself, and effectively respond to and participate in the political debate.

With that important goal in mind, the Commission strives to make campaign finance information readily available and useful to the public. Our website provides disclosure of committee reports and independent expenditures and electioneering communications in nearly real time as the information is received. We have improved the navigation of our website to make information easier to find and use. Visitors to the FEC's homepage may view Campaign

Finance Maps that provide immediate access to information regarding candidates in the 2012 Presidential and House and Senate elections. In order to meet the public's growing demand for campaign finance information *via* the website, the Commission this year invested significant resources in our website and in the capacities of our electronic filing servers. These necessary upgrades will ensure that the FEC's electronic filing system can accept both the voluminous and very large number of reports we anticipate receiving in 2012. These upgrades will also accommodate the huge spikes in web traffic seen around filing deadlines, without creating delays in disclosure.

Of course, to be useful, the information the FEC provides to the public must be accurate as well as timely. Accordingly, the FEC devotes a considerable portion of its staff to reviewing all filed reports for accuracy, completeness and compliance with the law, on a daily basis. This is not a small task. In FY 2011, the FEC reviewed over 72,000 documents. These same analysts work closely with committees to answer questions, assist with the filing process, and resolve problems as they arise. They work extended hours on filing deadlines, to be there when filing committees need them the most.

New technology enables the FEC to communicate with its many stakeholders in faster, more cost effective ways. In response to committee requests, the Reports Analysis Division has recently initiated a program by which Requests for Additional Information will be sent to committees via email, to ensure more timely notification of potential disclosure problems at a reduced cost. In addition, the Commission has established a Twitter account, providing another fast and efficient means to disseminate information. These are just some examples.

The Commission also works hard to reach out to those who file with the FEC and to provide assistance so they can comply with the law. In FY 2011, the Information Division's Communication Specialists fielded over 11,000 phone calls and Reports Analysts fielded over 14,000 calls. To better serve filers, the Commission is developing a dedicated web page that will contain answers to frequently asked questions and resource material on filing and disclosure requirements.



The FEC continues its regional conference program to assist in educating those who have reporting obligations. The feedback from these conferences is uniformly positive. I have been participating in conferences since I was appointed to the Commission and I find that they provide an important opportunity to interact with and learn from those who are treasurers or filing personnel for committees. The FEC continues to innovate to reach more committees and filers. For example, in order to provide more cost-effective trainings for grass-roots organizations and candidates, the FEC has instituted a series of lower-cost, one-day seminars and workshops focused for a particular group or on a legal issue. The FEC also offers live, interactive webinars, and trainings on YouTube and has recently published on-line an updated Campaign Guide for Congressional Candidates and Committees.

In addition to disclosure and education, the Commission's other major responsibilities surround the administration, interpretation and enforcement of the FECA. Public confidence in our elections depends not only on transparency, but on the assurance that those who participate in our federal election system do so within the rules established by Congress. In recent years, the Commission has made significant progress in processing enforcement cases and audits more timely. For certain reporting violations, the FEC's Alternative Dispute Resolution Program and its Administrative Fine Program have been very effective. The FEC appreciates that the Committee on House Administration was instrumental in securing an extension of the Administrative Fines Program in 2008, and we hope that this Committee will again act to extend or make permanent the Program in 2013.

The FEC anticipates this upcoming 2012 election cycle to be its most active one in history. And the FEC is preparing for it. Already in 2010 a record level of fundraising by congressional committees, political action committees and political party committees was reported. In addition, spending on independent expenditures by PACs, groups and individuals jumped from \$43.6 million in 2008 to \$204 million in the 2010 cycle; an increase of nearly five-fold. This increase in activity has very practical implications for our filing system and our website. The FEC's recent investments in technology and server capacity will ensure that the public will have immediate access to filings and reports of campaign activity and that the Commission can receive large and numerous filings on heavy filing dates.

All of this activity is taking place during a time in which campaign finance laws are rapidly changing. The issues are complex and there are genuine disagreements amongst my fellow Commissioners on some of these matters. Where we can, we strive to provide what information we can to filing committees even before we are able to complete a rulemaking process. For example, in response to a consent judgment entered in *Carey v. FEC*, the Commission last week released guidance for non-connected political committees looking to operate consistent with the court's decision. We took a similar approach with *Citizens United* in early 2010. While this guidance is an interim measure, it provides as much information as we can prior to the completion of the rulemaking process.

I wish that I could tell you that the Commission had completed a rulemaking to implement the decision in *Citizens United*, but it has not. But not for the lack of trying. Twice, the Commission has considered draft Notices of Proposed Rulemaking on the topic, and both times, disagreements over the proper scope of the endeavor prevented us from issuing the NPRM. Given our inability to begin a comprehensive rulemaking to address *Citizens United*, the Commission has put out for public comment two petitions for rulemaking addressing issues arising from the decision. We anticipate the Commission may be able to take action on these petitions in the next month or so. Several other rulemakings are on our plate including a rulemaking to address the *Carey* case, as well as the court rulings in *SpeechNow* and *EMILY's List*. Our current expectation is that we will be able to put an NPRM out for public comment by the end of the calendar year.

Finally, in addition to the changing legal landscape, the FEC recognizes that it must meet the challenge of providing guidance in an age of ever-evolving technological innovations. Campaigns, political committees, voters and grassroots advocates are using the Internet and mobile applications to communicate with voters and disseminate electoral information. Keeping up with this change platform by platform is not something I think the Commission can, or should, do. Rather, we should provide guidance on how to take advantage of innovations while being mindful of the requirements found in the Act and Regulations. Recently, the Commission published an Advance Notice of Proposed Rulemaking concerning disclaimers on Internet



communications, which developed out of two advisory opinion requests regarding Internet advertising by committees. The FEC invites and welcomes comments from the public on our regulations and revisions we may make to accommodate emerging technology.

In closing, I would like to recognize our agency's staff, who are directly responsible, on a daily basis, for the successful operations of the FEC. Much of the news reports and commentary on the world of campaign finance and the FEC's role in it centers on the rapidly changing nature of the law. But the devotion and the hard work of our agency staff is a constant, and they all deserve to be acknowledged for the role they play in ensuring that our country's elections are fair and transparent. I would also like to thank Commission staff, particularly Duane Pugh and Amy Pike in our Office of Congressional Affairs, who worked so hard to assist us in preparing for this hearing and in so thoroughly and thoughtfully responding to this Committee's questions.

We appreciate the opportunity to provide information to the Committee on House Administration and this Subcommittee on Elections. I am happy to answer any questions the Members may have.



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

CYNTHIA L. BAUERLY, CHAIR  
CAROLINE C. HUNTER, VICE CHAIR  
DONALD F. MCGAHN II, COMMISSIONER  
MATTHEW S. PETERSEN, COMMISSIONER  
STEVEN T. WALTHER, COMMISSIONER  
ELLEN L. WEINTRAUB, COMMISSIONER

TESTIMONY BEFORE THE  
SUBCOMMITTEE ON ELECTIONS  
OF THE  
COMMITTEE ON HOUSE ADMINISTRATION

U.S. HOUSE OF REPRESENTATIVES

HEARING: *FEDERAL ELECTION COMMISSION:  
REVIEWING POLICIES, PROCESSES AND PROCEDURES*

NOVEMBER 3, 2011

## Introduction

The Federal Election Commission appreciates this Subcommittee hearing, and welcomes the feedback from its oversight committee. The Commissioners and staff look forward to continuing to work with the Subcommittee on Elections and the Committee on House Administration as each performs its oversight function.

As you know, the Federal Election Commission was established by the *Federal Election Campaign Act Amendments of 1974*.<sup>1</sup> Congress created the Commission to strengthen the integrity of the federal campaign finance process under the *Federal Election Campaign Act*.<sup>2</sup> The Commission is also responsible for administering the public funding program for Presidential campaigns and nominating conventions under the *Presidential Election Campaign Fund Act* and the *Presidential Primary Matching Payment Account Act*.<sup>3</sup> The *Federal Election Campaign Act*, which is the foundation of federal campaign finance regulation, reflects Congress's efforts to ensure that voters are fully informed about the sources of candidates' financial support. The *Act* also imposes amount limitations and source prohibitions on contributions received by federal candidates, political party committees and other political committees. Public confidence in the political process depends not only on laws and regulations to ensure transparency of campaign finance, but also on the knowledge that noncompliance may lead to enforcement proceedings.

The Federal Election Commission's mission is to prevent corruption or the appearance of corruption in federal campaign finance by administering and enforcing federal campaign finance laws. The primary objectives of the FEC are:

- to facilitate transparency through public disclosure of campaign finance activity;
- to encourage voluntary compliance with the *Federal Election Campaign Act* by providing information and policy guidance to the public, media, political committees and election officials on the *Act* and Commission regulations and to enforce the statute through audits, investigations and civil litigation; and
- to develop the law by administering and interpreting the *Federal Election Campaign Act* as well as the *Presidential Election Campaign Fund Act* and the *Presidential Primary Matching Payment Account Act*.

To accomplish its legislative mandate, the FEC is directed by six Commissioners, all of whom appear before the Subcommittee on Elections today. Currently, 346 employees (which includes the Commissioners) support the agency in accomplishing its mission. The Commission

<sup>1</sup> *Federal Election Campaign Act Amendments of 1974*, Public Law 93-443, 88 Stat. 1263 (1974).

<sup>2</sup> *Federal Election Campaign Act of 1971*, Public Law 92-225, 86 Stat. 3 (1972), as amended (*FECA* or the *Act*). *FECA* is codified at 2 U.S.C. §§ 431 to 455.

<sup>3</sup> *Presidential Election Campaign Fund Act*, Public Law 92-178, 85 Stat. 562 (1971), codified at 26 U.S.C. §§ 9001 to 9013; and *Presidential Primary Matching Payment Account Act*, Public Law 93-443, 88 Stat. 1297 (1974), codified at 26 U.S.C. §§ 9031 to 9042.

maintains a website at [www.fec.gov](http://www.fec.gov) and its offices at 10th and E Streets, Northwest, in Washington, D.C. The Federal Election Commission received an appropriation of \$66,367,000 for Fiscal Year (FY) 2011.

## **I. FEC's PERFORMANCE AND OPERATIONS**

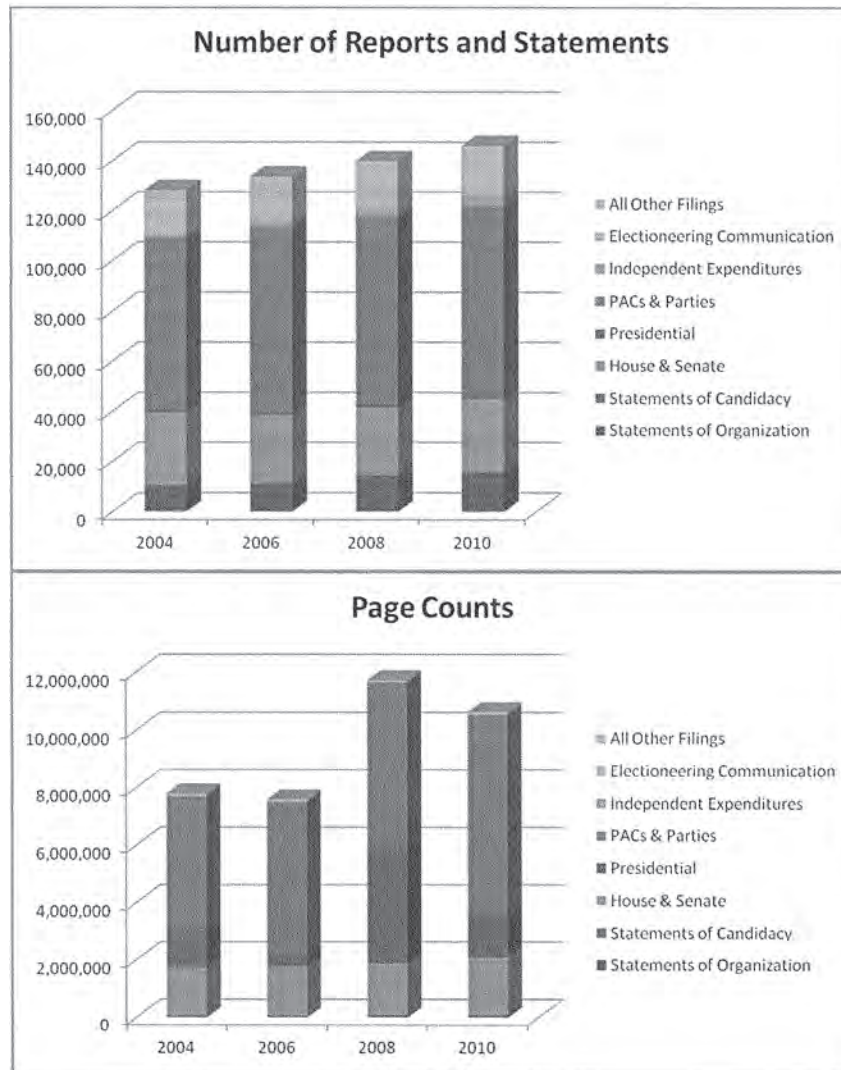
### **A. DISCLOSING CAMPAIGN FINANCE INFORMATION**

Disclosing the sources and amounts of funds used to finance federal elections is one of the most important duties of the FEC. The campaign finance reports are accessible to the public through the FEC's website at <http://www.fec.gov/disclosure.shtml>. By making disclosure reports available online, the FEC provides the public with up-to-date information about the financing of federal elections and political committees' compliance with campaign finance law. The table immediately below presents the Total Receipts and Disbursements Reported to the FEC by all entities that disclosed to the FEC over the last four completed election cycles. The number of reports filed in connection with Presidential elections and Congressional elections are presented in a graph further below, along with the number of pages in those reports.

**Total Receipts and Disbursements Reported**

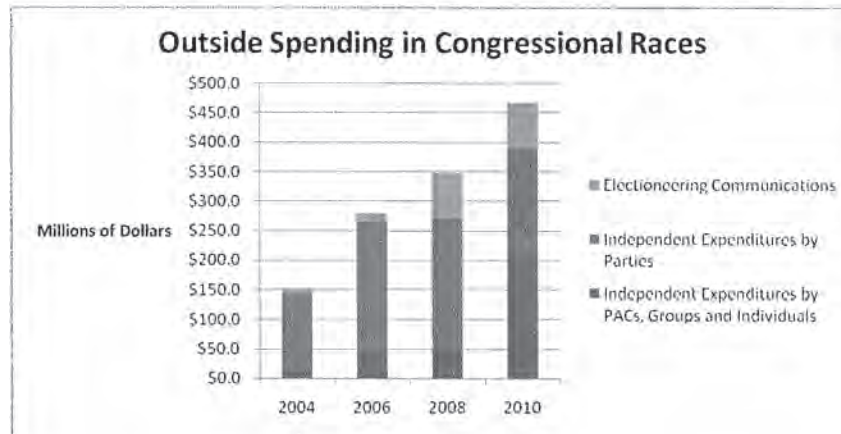
Election Cycle	Total Receipts	Total Disbursements
2004	\$5,576,832,000	\$5,482,785,000
2006	\$4,157,020,000	\$4,351,136,000
2008	\$8,383,471,000	\$8,414,847,000
2010	\$4,945,817,000	\$5,095,153,000

## Reports Filed with the FEC





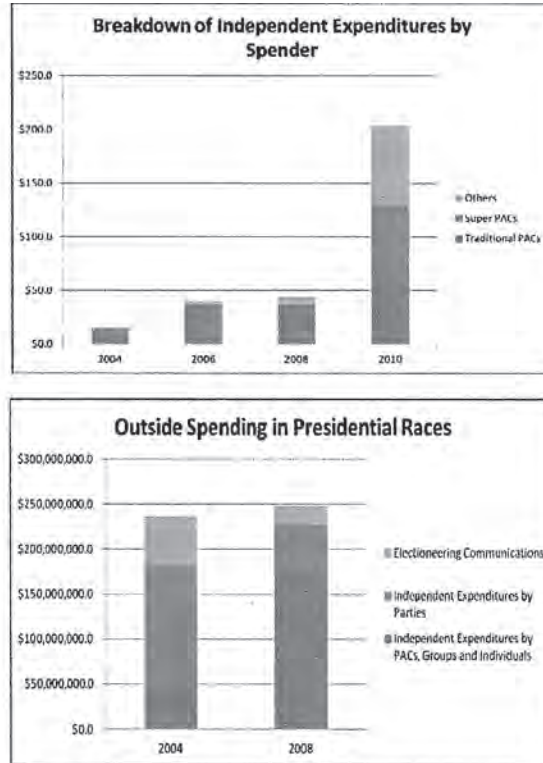
While campaign finance activity reported to the FEC has risen steadily over the past several cycles, major court decisions after the 2008 election cycle have changed the regulatory environment by removing restrictions on the use of financial resources. Notably in *Citizens United v. FEC*,<sup>4</sup> the Supreme Court held in January 2010 that corporations and unions may use their general treasury funds to pay for electioneering communications and independent expenditures. Subsequently, the U.S. Court of Appeals for the D.C. Circuit held in *SpeechNow.org v. FEC*<sup>5</sup> that certain political committees that make only independent expenditures, but do not make any contributions to federal candidates, may accept funds in unlimited amounts. These committees have come to be known as "IEOPCs" or "Super PACs." Previously, FECA imposed a \$5,000 contribution limit on contributions received by all political committees. An increase in "outside spending" (that is, spending by other than candidates and parties) in connection with Congressional races, especially in independent expenditures made by political action committees (PACs), other groups and individuals, was already apparent in the 2010 cycle. As detailed in the charts below, independent expenditures made by traditional PACs, Super PACs, and "others," which includes individuals and other groups that are not political committees, showed a more than four-fold increase between the 2008 and 2010 elections. Typically, election-related spending is lower in non-Presidential election cycles.



<sup>4</sup> *Citizens United v. FEC*, 558 U.S. \_\_\_, 130 S.Ct. 876 (Jan. 21, 2010).

<sup>5</sup> *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C.Cir. Mar. 26, 2010)(*en banc*).

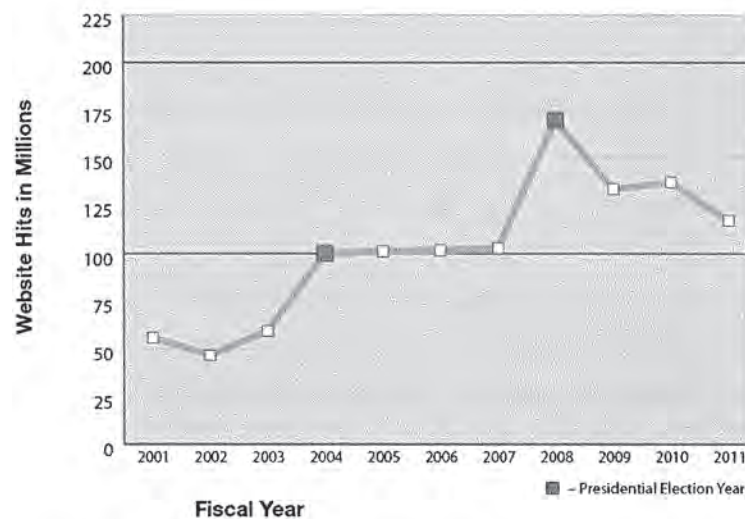




The Commission took a number of steps during FY 2011 to ensure that it will be fully successful in its mission to receive reports and make public reports filed in connection with the 2012 elections, and it has augmented its programs to help make data from these reports, and other campaign finance information, available to the public in new and more accessible formats. First, the FEC continues to make information about independent expenditures and electioneering communications available in nearly real time as the information is received. Second, the FEC has also initiated a project to provide a portal for summary presentations of information for PACs and party committees. These new presentations offer improved navigation and display data through charts, graphs and other visualizations that help provide context for the information so that users will be able to design their own data queries. Third, the Commission also expanded the federal campaign finance disclosure platform, which includes both the data catalog and the federal campaign finance maps, by adding information covering multiple election cycles. These enhancements make it easier for public visitors to [www.fec.gov](http://www.fec.gov) to view, research and understand the complex and growing universe of campaign finance information disclosed to the Commission.

In addition to the overall increase in disclosure activity, the FEC's website and electronic filing systems are also subject to "spikes" of increased use. For example, in a single week—between October 1 and October 8, 2010—individuals reported \$3.8 million and PACs reported \$15.5 million in independent expenditures. Similarly, while the FEC's website averaged 45,000 hits per day in FY 2011, on the July 15 reporting deadline the site received 108,981 hits in one day. The Commission has taken steps to ensure that it can accept both very large reports and a very large number of electronically filed reports, while accommodating spikes in web traffic without creating delays in disclosure. This year the FEC initiated a project to improve the website's performance. The Commission has also upgraded its electronic filing systems with more powerful servers to handle heavier loads and made changes to the way it allocates its processing resources to separate the receipt of reports from the initial processing of those filings. This change allows more filings to pass through the process at any one time and speeds overall processing by reducing competition for computer resources.

The public's interest in campaign finance information found on the FEC's website is illustrated in the figure below, which shows a continued high number of hits on the FEC's website by users seeking campaign finance data and other information. During FY 2011, the website received approximately 117 million hits.



In FY 2011, the FEC made 100 percent of the financial disclosure reports and statements available to the public within 48 hours of receipt by the Commission. The information on those reports and statements is then coded for entry into the FEC database. The agency's goal is to code and enter data about reported transactions for 95 percent of the reports within 30 days of

receipt. For FY 2011, the FEC was able to process 71 percent of all reports within 30 days of receipt.

In addition to making campaign finance reports available to the public, the FEC works to ensure that the information disclosed is accurate and complete. The Office of Compliance's Reports Analysis Division (RAD) reviews all filed statements and financial reports to track compliance with the law and to ensure that the public record provides a full and accurate representation of campaign finance activity. Analysts provide frequent telephone assistance to committee officials who have reporting questions or compliance problems.

If RAD identifies an error, omission, need for additional clarification or possible prohibited activity, a request for additional information (RFAI) is sent to the committee, affording the committee an opportunity to correct the public record, if necessary. If the committee is able to resolve the FEC's concerns, it may avoid further Commission action. Should the committee not address the FEC's concerns sufficiently, the FEC may initiate an audit, begin an enforcement action or utilize alternative dispute resolution (ADR) to remedy the apparent violation.

In FY 2011, RAD reviewed 72,790 out of 77,588 documents filed during FY 2011 and is well on its way to evaluating 100 percent of the documents received. As part of an ongoing effort to assist the filing community with compliance, RAD continues to offer extended phone coverage on filing due dates and has initiated a program to send RFAs via e-mail, to reduce costs and to ensure timely notification to committees.

## B. PROMOTING COMPLIANCE WITH THE *FEDERAL ELECTION CAMPAIGN ACT*

### 1. Encouraging Compliance Through Education

Helping those subject to the Commission's jurisdiction understand their obligations under federal campaign finance laws is an essential component of voluntary compliance. The FEC, through its Office of Communications, places a significant emphasis on encouraging compliance. The Office of Communications consists of the following offices:

- the Information Division,
- the Public Disclosure Division,
- the Press Office and
- the Office of Congressional Affairs.

The Commission's website is its most important source of instantly accessible information about complying with the *Federal Election Campaign Act* and Commission regulations. Political participants and the general public can use the website to search Commission rulemakings, advisory opinions, completed audits and closed enforcement matters. During FY 2011, the FEC made a number of significant enhancements to the website's search capabilities. For example, it launched a Searchable Electronic Rulemaking System that allows users to search public documents developed in the course of the Commission's rulemaking



process. The Commission also completed work on its Audit Report Search System, which provides a searchable database of audit reports approved by the Commission since 1976.

As it prepares for the 2012 elections, the FEC continues to provide comprehensive educational materials *via* the website as well, to help the regulated community better understand new regulations and requirements under the campaign finance law. For example, the Commission now provides information about changes in the law on a “Recent Developments” web page. The FEC also continues to provide enhanced and expanded instructional videos available through the site’s E-Learning center and a “Compliance Map” that provides easy access to state-by-state information detailing filing deadlines and the timeframes for certain pre-election obligations under the *Act*.

The Commission also encourages voluntary compliance through outreach programs. The FEC hosts instructional conferences and seminars in Washington, D.C., and in other cities across the country, where Commissioners and staff explain the *Act*’s requirements to candidates and political committees. These conferences specifically address recent changes in the campaign finance laws and focus on fundraising and reporting regulations. Additionally, Commission staff meets with political committees upon request and responds to telephone inquiries and written requests from those seeking information about the law and assistance in filing disclosure reports. This year, the Commission made a number of changes to its outreach program to make the program more cost effective for the agency and more affordable for candidates and committees that attend conferences and seminars. In FY 2011, the FEC held six lower-cost one-day seminars at the FEC’s offices in Washington, D.C. The FEC also held one regional conference in Minneapolis, Minnesota. All of the Commission’s conferences and seminars have been consistently highly rated by attendee evaluations. In FY 2012, regional conferences will be held in San Diego, California and Miami, Florida, and five one-day seminars will be held at the FEC. Many Committee staff members have previously participated in these educational events, and that opportunity for the exchange of ideas is always welcome.

The Commission has also taken steps in the past year to augment its educational outreach programs to provide more cost-effective access to information. For example, the Commission has launched a YouTube channel and E-Learning page to allow the public the convenience of participating in trainings without the costs of travel. The agency has also initiated a program to provide live, interactive webinars to provide additional distance learning opportunities to the public.

## 2. Enforcing *FECA*’s Requirements

### a. *Enforcement and Compliance Processes*

The Commission’s statutory obligation is to administer, interpret and enforce the *Federal Election Campaign Act*, which serves the compelling governmental interest in deterring corruption and the appearance of corruption in financing elections. In doing so, the Commission must remain mindful of the First Amendment’s guarantees of freedom of speech and association, and the practical implication of its actions on the political process.

The FEC has exclusive jurisdiction over civil enforcement of federal campaign finance laws and consults with the U.S. Department of Justice, as appropriate, on matters involving both civil and criminal enforcement of the *Act*. Commission enforcement actions, which are handled primarily by the Office of General Counsel (OGC), originate from a number of sources, including external complaints, referrals from other government agencies and internal referrals from the Audit or Reports Analysis Divisions.

To augment OGC's traditional enforcement role, the Office of Compliance manages several programs that seek to remedy alleged violations of the *Act* and encourage voluntary compliance. These programs include:

- the Alternative Dispute Resolution Program,
- the Administrative Fine Program and
- the Audit Division.

The Commission's Alternative Dispute Resolution Program is designed to resolve matters swiftly by encouraging the settlement of less-complex enforcement matters using a streamlined process that focuses on remedial measures for candidates and political committees, such as training, internal audits and hiring compliance staff. Violations involving the late submission of, or failure to file, disclosure reports are subject to the Administrative Fine Program. Under this program, the Commission assesses monetary penalties and considers challenges to the penalty assessments. Finally, the Audit Division conducts mandatory audits under the public funding statutes and performs "for cause" audits under the *Federal Election Campaign Act* in those cases where political committees do not appear to be in substantial compliance with the *Act*.

If the Commission cannot settle or conciliate a matter involving an alleged violation of the federal campaign finance statutes, the Commission may initiate civil litigation, and will file and prosecute a civil action in federal district court to address the alleged violation. Depending on the size and complexity of the lawsuit, such cases may be resolved quickly or may require a significant amount of resources for several years.

#### *b. Recent Enhancements to the Processes and Procedures*

In recent years, the Commission focused significant attention on formalizing existing practices and ensuring that enforcement and compliance procedures are fair, efficient and transparent. Most significantly, the Commission has revised its procedures to permit respondents to request a hearing prior to a probable cause determination in enforcement proceedings.<sup>6</sup> In addition, the Commission has established an agency procedure to define formally the scope of documents that will be provided to respondents at certain stages in enforcement proceedings in order to ensure that respondents are given relevant information ascertained by the Commission during an investigation.<sup>7</sup> Additional improvements include: providing additional notice and opportunity to request to respond to new facts and arguments in probable cause briefing; placing

<sup>6</sup> In October 2009, the Commission revised these procedures. FEC, *Amendment of Agency Procedures for Probable Cause Hearings*, 74 Fed. Reg. 55443 (Oct. 28, 2009) revising FEC, *Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64919 (Nov. 19, 2007).

<sup>7</sup> FEC, *Agency Procedure for Disclosure of Documents and Information in the Enforcement Process*, 76 Fed. Reg. 34986 (June 15, 2011).



First General Counsel's Reports on the public record; publishing an *Enforcement Guidebook* that explains the enforcement process; and providing notice and an opportunity to be heard to non-complaint generated respondents.<sup>8</sup>

The Commission has also added procedures to the audit process. In July 2009, the Commission revised its audit procedures to permit audited committees to request to appear before the Commission prior to issuance of a Final Audit Report.<sup>9</sup> In August 2011, the Commission made permanent a program that allows committees to have legal questions considered by the Commission earlier in the review and audit processes.<sup>10</sup> In April 2011, the Commission revised its Directive on Processing Audit Reports to help achieve a greater degree of consistency, both in process and result, in the final audit reports issued by the Commission.<sup>11</sup>

c. *Compliance and Enforcement Results for Fiscal Year 2011*

For FY 2011, the Commission processed 145 enforcement cases in an average of 10.1 months, which included \$527,125 in negotiated civil penalties. The Commission closed 129 of these cases (or 89%) within 15 months. The Commission is currently pursuing five lawsuits that it initiated and that arise from enforcement actions. One of these cases is in active litigation, and the other four are cases in which final judgment has been entered and the Commission is seeking to collect civil penalties. The Commission is presently defending four lawsuits that challenge its disposition of enforcement actions, including one seeking review of an administrative fine.

During FY 2011, the Commission's ADR Office processed 25 cases to closure and negotiated \$43,950 in civil penalties. The Commission met its 155-day processing benchmark in 84 percent of ADR cases, exceeding the goal of meeting this benchmark in 75 percent of cases.

The Administrative Fine Program is administered by the Commission's Office of Administrative Review (OAR) and Reports Analysis Division. For FY 2011, RAD processed 100 percent of the reason to believe recommendations within 60 days of the subject report's due date. During FY 2011, OAR reviewed 60 challenges submitted by committees in response to an RTB finding or civil money penalty. OAR reviewed 100 percent of these challenges within 60 days of receipt.

Since the Administrative Fine Program's inception in July 2000 through September 30, 2011, the Commission has closed 2,350 cases and assessed fines of \$4.1 million. Most

<sup>8</sup> FEC, *Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel* (forthcoming), available at [http://www.fec.gov/agenda/2011/mtegdoc\\_1153a.pdf](http://www.fec.gov/agenda/2011/mtegdoc_1153a.pdf); FEC, *Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record*, 74 Fed. Reg. 66132 (Dec. 14, 2009); FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* (Dec. 2009), available at [http://www.fec.gov/em/respondent\\_guide.pdf](http://www.fec.gov/em/respondent_guide.pdf); FEC, *Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters*, 74 Fed. Reg. 38617 (Aug. 4, 2009).

<sup>9</sup> FEC, *Procedural Rules for Audit Hearings*, 74 Fed. Reg. 33140 (July 10, 2009).

<sup>10</sup> FEC, *Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission*, 76 Fed. Reg. 45798 (Aug. 1, 2011).

<sup>11</sup> FEC, *Directive on Processing Audit Reports*, Dir. No. 70 (April 26, 2011), available at [http://www.fec.gov/directives/directive\\_70.pdf](http://www.fec.gov/directives/directive_70.pdf).



importantly, the Administrative Fine Program continues to succeed in reducing the number of late and non-filed reports, thereby increasing campaign finance transparency through the timely disclosure of campaign finance activity. The Committee on House Administration was instrumental in the bipartisan passage of a bill extending the Administrative Fine Program through reports covering 2013. The Commission urges the Committee to make this cost-effective, successful program permanent.

As discussed above, the Commission recently adopted procedures that provide additional opportunities for audited committees to respond to potential findings, as well as more opportunities for the Commission to review audit reports prior to approval. The most significant of the changes provides audited committees an opportunity to request a hearing before the Commission prior to final approval of the audit report. The performance measures related to audits have not been revised to reflect these changes the audit report processing system. The Commission will continue to review the effect these procedures have on performance measures related to audits.

In FY 2011, the Commission approved 22 audit reports of non-Presidential committees. Five of the audits with findings were completed within an average of ten months. The average processing time of the 19 audits with findings was approximately 25 months. Two audits with no findings were completed within an average of 90 days. The average processing time for the three audits with no findings was 143 days. Of the 14 Presidential audits related to the 2008 election cycle, 11 were completed by the end of FY 2011.

### C. INTERPRETING AND DEVELOPING THE CAMPAIGN FINANCE LAWS

The Commission responds to questions from the various persons about how the *Federal Election Campaign Act* applies to specific situations by issuing advisory opinions (AOs). In addition, Congressional action, judicial decisions, petitions for rulemaking, Commission initiatives, or other changes in campaign finance often necessitate that the Commission update or adopt new regulations.

The Commission issued several AOs addressing the implications of the *Citizens United*, *SpeechNow.org*, and *EMILY's List v. FEC* decisions.<sup>12</sup> During FY 2011, the Commission completed within the deadlines 100% of the 28 AOs considered.<sup>13</sup> The Commission completed work on two 20-day AO request and three 30-day AO requests during FY 2011. While *FECA* provides for 20-day and 60-day AOs, the Commission also issues AOs within 30 days for time-sensitive, highly significant AO requests.

During FY 2011, the Commission did not issue any final regulations. Two interpretive rules of existing Commission regulations were issued in FY 2011: one on electronic contribution

<sup>12</sup> *EMILY's List v. FEC*, 581 F.3d 1 (2009). The Advisory Opinions were AO 2011-12 (MajorityPAC); AO 2011-11 (Colbert); AO 2010-10 (Commonsense Ten) and AO 2010-09 (Club for Growth).

<sup>13</sup> Four 60-day advisory opinions and one 20-day advisory opinion had extended deadlines, and the remainder were completed within the statutory deadlines of 20 or 60 days or the 30-day deadline under the Commission's initiative.

redesignations and the other on reporting independent expenditures.<sup>14</sup> The Commission has continued to work on a number of significant rulemaking projects during FY 2011, including rulemakings to comply with the court decisions in *Citizens United*, *SpeechNow.org*, *EMILY's List*, and *Carey v. FEC*.<sup>15</sup> In this regard, the Commission published two Notices of Availability of petitions for rulemaking submitted separately by Representative Chris Van Hollen, which concerns reporting independent expenditures, and the James Madison Center for Freedom of Speech, which concerns the *Citizens United v. FEC* decision.<sup>16</sup> Comments have been received on both notices. In addition, the Commission issued additional guidance for issues related to *Carey v. FEC*, and the *SpeechNow.org* and *EMILY's List* cases.<sup>17</sup> Recently, the Commission approved an Advance Notice of Proposed Rulemaking regarding disclaimers appearing on Internet ads.<sup>18</sup> Lastly, together with the Office of Government Ethics, the Commission recently completed final rules on standards of conduct for FEC Commissioners and employees.

#### D. ADMINISTERING THE PRESIDENTIAL PUBLIC FUNDING PROGRAM

The Commission's responsibilities also include administering the public funding of Presidential elections, as provided in the *Presidential Primary Matching Account Act* and the *Presidential Election Campaign Fund Act*. Through the public funding program, the federal government provides: (i) matching funds to candidates seeking their party's Presidential nomination, (ii) grants to Presidential nominating conventions and (iii) grants to Presidential nominees for their general election campaigns.

The program is funded by taxpayers who voluntarily check off the S3 designation for the Presidential Election Campaign on their income tax returns. The percentage of taxpayers who check off the designation for the Presidential Election Campaign Fund continues to decline. Recent statistics from the Internal Revenue Service show the following check off rates:

Calendar Year	Percent of Tax Returns with PECF Designation
2007	8.28 %
2008	7.38 %
2009	7.28 %
2010	6.59 %

<sup>14</sup> FEC, *Interpretive Rule Regarding Electronic Contributor Redesignations*, 76 Fed. Reg. 16233 (Mar. 23, 2011) and FEC, *Interpretive Rule on When Certain Independent Expenditures Are "Publicly Disseminated" for Reporting Purposes*, 76 Fed. Reg. 61254 (Oct. 4, 2011).

<sup>15</sup> *Carey v. FEC*, Civ. No. 11-259-RMC (D.D.C. Aug. 19, 2011).

<sup>16</sup> FEC, *Rulemaking Petition: Independent Expenditure Reporting*, 76 Fed. Reg. 36000 (June 21, 2011); FEC, *Rulemaking Petition: Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations*, 76 Fed. Reg. 36001 (June 21, 2011).

<sup>17</sup> FEC, *Statement on Carey v. FEC, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account* (forthcoming), available at: <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

<sup>18</sup> FEC, *Internet Communication Disclaimers* (forthcoming), available at: [http://www.fec.gov/agenda/2011/mtgdoc\\_1158a.pdf](http://www.fec.gov/agenda/2011/mtgdoc_1158a.pdf).

Thus far in the 2012 Presidential election cycle, no candidate has yet applied for matching funds for the 2012 Presidential primary elections. The 2012 general election grant for the major party committee candidates is estimated to be \$91,604,607. The Republican National Committee and Democratic National Committee were each paid \$17,689,800 in public funds for their 2012 Presidential Nominating Conventions. (The payments were made to the Committees on July 1 and September 22, 2011, respectively. Additional payments based on final inflation adjustments of approximately \$600,000 for each convention are scheduled for early 2012.)

The balance in the Presidential Election Campaign Fund as of September 30, 2011, is \$197,139,691, according to the U.S. Treasury. This amount is unusually large for this program account, due to reduced candidate participation in the Presidential public funding programs in the 2008 election cycle. With this level of funding at this point in this cycle, a temporary shortfall of public funding that has occurred in prior election cycles is not going to be an issue in the 2012 Presidential election cycle.

In 2008, eight primary candidates participated in public funding programs, and their campaigns received \$22 million of public funds. The two major Presidential nominating conventions received a net amount of \$30 million. (The Republican National Convention returned \$3.8 million of the \$16.8 million it received due to the cancellation of one night of its convention.) Senator McCain's Presidential campaign received \$84 million in public funds for the 2008 general election campaign.

#### E. THE 2011 FEC LEGISLATIVE RECOMMENDATIONS

The *Federal Election Campaign Act* authorizes the Commission to make recommendations for legislative action. On March 16, 2011, the Commission approved four Legislative Recommendations for 2011. The Recommendations are:

- Electronic Filing of Senate Reports
- Fraudulent Misrepresentation of Campaign Authority
- Conversion of Campaign Funds
- Pay Levels for the Staff Director and General Counsel and Authority to Create Senior Executive Service Positions

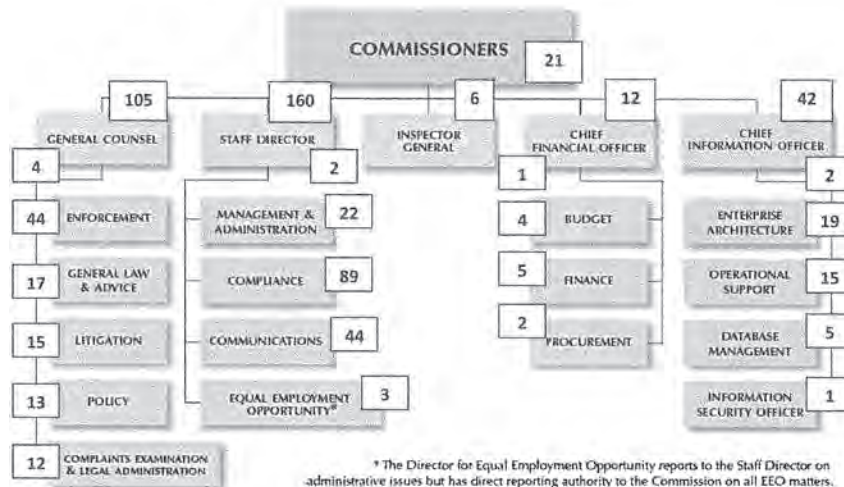
The Commission's 2011 Legislative Recommendations can be found at <http://www.fec.gov/law/legrec2011.pdf> and are also attached.

#### F. FEC's ALLOCATION OF STAFF

In order to accomplish its mission and meet the requirements of other legislation, the Federal Election Commission has arranged its employees into various mission-related or support offices. The organizational chart below depicts that arrangement and has been annotated with the number of employees in each of the organizational units.



**FEC's Organizational Structure and Employees' Distribution**  
**346 Employees as of November 1, 2011**



The Office of Compliance includes the Reports Analysis Division (50), the Audit Division (34), the Alternative Dispute Resolution Office (2), and the Office of Administrative Review (1) (which conducts part of the Administrative Fine Program). The Office of Communications includes the Public Disclosure Division (23), the Information Division (14), the Press Office (5) and Congressional Affairs (2).

In addition to the positions shown above, the Commission has posted vacancy announcements for 15 additional positions: six in the Office of General Counsel, six in the Office of Staff Director, two in the Office of Chief Information Officer and one in the Office of Chief Financial Officer.

## II. FEC's BUDGET

### A. GENERAL INFORMATION

The chart below presents the appropriations the Federal Election Commission has received in FYs 2010 and 2011, the amounts provided in the bills pending before the House of Representatives and Senate for FY 2012, the amount provided in the current continuing resolution and the amount the FEC requested for FY 2013 in its September 2011 submission to the Office of Management and Budget (OMB). The *Federal Election Campaign Act* requires

that, whenever the FEC submits any budget request to OMB, the Commission must concurrently transmit a copy of the budget request to Congress.

Fiscal Year	Source	Amount
FY 2010	Enacted	\$66,500,000
FY 2011	Enacted	\$66,367,000
FY 2012	House Bill	\$66,367,000
FY 2012	Senate Bill	\$66,367,000
FY 2012	<i>Continuing Appropriations Act, 2012</i> <sup>19</sup>	\$65,369,504
FY 2013	Budget Request to OMB	\$67,998,561 <sup>20</sup>

As this chart shows, the FEC's appropriation was slightly reduced from FY 2010 to FY 2011. Both Appropriations Committees have approved level funding for FY 2012, and the FEC has requested only a two percent increase for FY 2013. The Commission is well aware of the constraints on federal spending generally, and although the FEC's appropriation is a small portion of discretionary spending, the Commission appreciates the support of its mission that Congress has shown by maintaining these appropriation levels in this climate.

While funding amounts for the FEC have been fairly level, the Commission faces rising costs. Even with salary freezes, personnel costs rise with increased costs for benefits. Non-personnel costs increase as well, including some by contractual provision. The Commission is continually reviewing its operations and processes for opportunities to enact cost-saving measures. Over the past two years, the Commission has critically analyzed every position vacated through attrition to determine whether the agency could absorb the loss of that position by using existing staff resources. Similarly, the FEC has also reduced its spending for travel and training, making difficult decisions regarding discretionary spending and operating within decreased funding levels. The agency has also modified a number of processes to reduce or eliminate the need for paper copies, saving the agency both paper and printing charges.

In FY 2012, the FEC will look to modernize key disclosure applications like FECFILE. The current FECFILE software was developed in a non-web environment and is overdue to be modernized to a web-based architecture to allow for more efficient and user-friendly filing of financial reports. The agency anticipates reducing contract support costs related to FECFILE by moving this work in-house. In addition, in 2010 the agency canceled its Employee Express

<sup>19</sup> Public Law 112-36, 125 Stat. 386 (2011).

<sup>20</sup> This was the amount of the FEC's FY 2013 Budget Request to OMB. In accordance with OMB guidance, in that request the FEC also described budgets with funding levels reduced from the FY 2012 baseline by five and ten percent, which equates to \$63,175,000 and \$59,850,000, respectively.

contract because the information available through that contract was also available to all employees through the U.S. Department of Agriculture, National Finance Center, *via* the Employee Personal Page. In 2011, the Office of General Counsel reviewed its use of both Lexis/Nexis and Westlaw and was able to reduce those costs as well. Both of these changes provided permanent, long-term savings to the agency. As part of the Commission's long-term planning efforts, it has undertaken the development of a Strategic Human Capital Management Plan and the revision of its Strategic Plan. Both of these initiatives will identify opportunities for reducing costs, streamlining procedures and improving efficiency.

## B. INFORMATION TECHNOLOGY PROJECTS

Information technology provides a critical means for the Commission to achieve its mission, and consequently the Commission devotes considerable resources to Information Technology program.<sup>21</sup> In fact, during FY 2011, approximately 45% of the FEC's non-personnel budget was spent on information technology costs. The Commission is in the midst of several multi-year initiatives, and it plans to continue these efforts for several additional years. Typically, these initiatives have three stages: research and selection of the best solution; development and testing of prototypes; and development, deployment and training of final versions of the project. While previous years investments in the various initiatives have already begun to provide benefits to the agency's Information Technology program, and therefore to the public users of that system as well, the full benefit of these investments will not be achieved until the initiatives are completed.

### 1. Data Warehouse

The FEC's data warehouse framework allows FEC staff and the public to retrieve information stored across a range of systems by providing a single source of reliable, time-oriented and subject-oriented data in an easy-to-access, flexible form. In FY 2011, the FEC team, including a technical team and subject matter experts, worked closely with a data warehouse contractor to successfully implement the data warehouse prototype. In FY 2012, the agency intends to begin taking advantage of the data warehouse infrastructure currently being implemented in the data warehouse prototype. For example, the FEC intends to replace the existing campaign finance search processes currently available on the Commission's website. The current processes are limited by the amount of data available for searches (*e.g.*, including contributions from individuals only if the amount is at least \$200, and with no ability to search committee operating expenditures) and also by narrow search criteria and an antiquated format for displaying results. These processes remained unchanged for more than a decade and thus required investments in staff time and resources for improvement.

The FEC began its data warehousing project in FY 2009. The prototype was completed in FY 2011, and implementation of the FEC data warehouse is expected to span FY 2012 to FY 2014.

<sup>21</sup> Additionally, Information Technology security is a particular concern for the Federal Election Commission due to the confidential aspects of the enforcement and compliance programs, in addition to the interest in protecting personal identification information.



## 2. Enterprise Content Management System

Following a study in FY 2009, the FEC launched an agency-wide Enterprise Content Management (ECM) system for sharing and storing documents in a way that fosters collaboration between FEC offices, maximizes efficiency and supports compliance with agency document policies and records management. Following the initial deployment with an initial user group, in FY 2010 the FEC began transitioning additional staff to its ECM system. Although the system has only been live for FEC staff for a short time, the agency has already begun to realize efficiencies in automating workflow processes through ECM. All of the agency's staff will use the ECM system by FY 2014, and the ECM system will also form the base for the initiation of Enterprise Search Capability.

## 3. Enterprise Search Capability

Agency-wide Enterprise Search Capability will allow FEC staff and the public to search multiple and disparate content sources with one query. With Enterprise Search, a user can perform searches of multiple data sources and receive results that are sorted and arranged into a useful form. In the FEC's context, this capability would permit a website user, for example, to perform a single topic search to find Commission regulations, advisory opinions, audit reports, and enforcement documents that address a particular topic, instead of requiring separate searches in each of those databases. This project was begun in FY 2011, and the first phase of implementation will begin in FY 2012. This phase focuses on Enterprise Search tool selection and the enhancement of existing website search functionalities. In the future, the agency intends to expand the Enterprise Search infrastructure to search across ECM and FEC e-mail databases as well and expects to complete this project by FY 2015.

## 4. Website Improvement

The Commission places a high priority on ensuring the effective use of technology and internal procedures to optimize its communication with the public. During FY 2011, the Commission continued to take advantage of the data catalog platform implemented during the previous year to expand the range of federal campaign finance information provided to the public through searchable, sortable and downloadable data technologies. The FEC also enhanced its data catalog and the federal campaign finance maps available on its homepage to provide data across multiple election cycles. As part of this commitment to making campaign finance information easier to access and more complete, the Commission began a project to provide a portal on the FEC website for summary presentation of PAC and party activity. The portal will offer better navigation and enhanced visual presentations of the data to help put the information into a larger context and allow users to better understand campaign finance trends. The Commission is equally committed to responding to trends in how users access information on [www.fec.gov](http://www.fec.gov). In order to serve the increasing number of people accessing the FEC website via mobile devices, the Commission has begun work to ensure that the most popular web content is formatted for mobile device users.

## 5. Server Improvements

In FY 2011, the agency also invested significant funding in improving its Information Technology infrastructure—including hardware and software. These improvements are an investment to provide the necessary support for the initiatives described above, as well as enhancing website architecture to ensure that the FEC website can handle a high volume of traffic, especially during a website traffic spike. As noted previously, the Information Technology infrastructure investments will provide the capacity to accept very large electronically filed reports and to accept a very large number of such reports, without delaying disclosure of the reported information.

### C. HUMAN CAPITAL AND STRATEGIC PLANNING INITIATIVES

In June 2009, the Office of Personnel Management (OPM) performed an evaluation of the FEC's human capital management. With new staff on board since that evaluation, the FEC developed a new approach to addressing its human capital challenges and obtained OPM's concurrence with its new approach in January 2011. Since then, the FEC has made considerable progress in implementing this plan. The Commission filled several leadership positions during the year, including the Staff Director, General Counsel and the Deputy Staff Director for Management and Administration.

As recommended in the OPM evaluation, the FEC is also drafting a Strategic Human Capital Management Plan to initiate succession planning; to ensure the agency acquires, develops and maintains the best talent; to improve Human Resources policies and procedures and to measure individual employee performance effectively. Additionally, the Commission will critically evaluate the distribution of its workforce and identify any missing skills and competencies required for effective and efficient delivery of the Commission's new strategic direction and priority initiatives.

Two-thirds of the Federal Election Commission's employees are in a collective bargaining unit and are represented by the National Treasury Employees Union (NTEU). The Commission will work cooperatively with the NTEU in developing its Strategic Human Capital Management Plan. In addition, the FEC chartered a Labor Management Forum under the authority of Executive Order 13522, *Creating Labor-Management Forums to Improve Delivery of Governmental Services*.<sup>22</sup> The Forum is intended to promote improvements in overall FEC efficiency and effectiveness, improve employee satisfaction, assist in the development of cooperative and productive labor-management relations and encourage the involvement of employees in workplace issues through their union representatives. In FY 2011, the Forum identified its members and goals, along with metric for measuring its success at meeting those goals.

<sup>22</sup> The President, *Creating Labor-Management Forums to Improve Delivery of Governmental Services*, Exec. Order 13522, 74 Fed. Reg. 66203 (Dec. 14, 2009).

The Commission has also begun developing a new Strategic Plan, as required by the *GPRA Modernization Act of 2010*.<sup>23</sup> The Commission will seek input from the Committee on House Administration on its revised Strategic Plan, along with input from other external stakeholders.

### **Conclusion**

The Commission appreciates the interest of the Subcommittee in the FEC's policies, processes and procedures. This document together with the materials the Commission provided to the Subcommittee in its preparation for this hearing provide a thorough review of the Federal Election Commission's policies, processes and procedures. The Commissioners would be happy to respond to any questions you may have today or in further written submissions.

---

<sup>23</sup> *GPRA Modernization Act of 2010*, Pub. Law 111-352, 124 Stat. 3866 (2011).

Mr. HARPER. Thank you very much. I will now recognize the vice chair, Caroline Hunter, for 5 minutes.

**STATEMENT OF THE HON. CAROLINE C. HUNTER**

Ms. HUNTER. Thank you. Chairman Harper, Ranking Member Gonzalez, members of the subcommittee, thank you for inviting me here today to speak with you about the Federal Election Commission.

Since members of the Commission last appeared before Congress several years ago, there have been significant changes in campaign finance law. Courts at all levels have stricken down laws regulating political speech, most notably in the landmark Citizens United decision. I would like to use this opportunity to supplement the agency's joint testimony by updating the subcommittee on the FEC's efforts to comply with these significant rulings. Additionally, I would like to share some updates on the new processes and procedures we have implemented at the Commission in recent years.

In Citizens United, as you know, the Supreme Court struck down the Federal Election Campaign Act's prohibition on corporations making independent expenditures in electioneering communications. In response, the FEC released a statement in February 2010 confirming it would no longer enforce the statutory provision and the agency's regulations prohibiting IEs and ECs by corporations and labor organizations. The FEC also announced it intended to initiate a rulemaking to address various other regulatory provisions implicated by the decision.

At two FEC open meetings in January and June of this year, the Commission considered an alternative draft notice of proposed rulemaking. I regret we have yet to remove the regulations related to the statutory provisions stricken by the Supreme Court; however, I anticipate the Commission may be able to initiate a formal rulemaking in the near future.

Following Citizens United, the D.C. Circuit Court held in SpeechNow that FECA's source prohibitions and amount limitations on contributions were unconstitutional as to those political committees that make only independent expenditures. In two advisory opinions, the FEC confirmed it would act in accordance with the SpeechNow decision.

Subsequently, the National Defense PAC asked the FEC for an advisory opinion confirming that as a political committee that made direct contributions to Federal candidates, it could also accept unlimited corporate funds to make independent expenditures if it establishes a separate bank account for such purposes. After the Commission deadlocked on this issue and the PAC sued the agency in *Carey v. FEC*, the District Court recently ruled in NDPAC's favor and the FEC agreed to a stipulated judgment and consent order.

As the Chair mentioned, last month the FEC issued a public statement confirming this posture applies to all similarly situated political committees. Just as the FEC was created to ensure more transparency in the political process, we believe it has also been beneficial for the agency to operate with more transparency. To that end, the Commission has implemented several new reforms over the past 3 years in the enforcement and policymaking func-



tions. On the enforcement side, we have put in place a procedure for committees that are the subject of inquiries from our Reports Analysis Division or audit proceedings to raise unsettled legal questions directly with the Commissioners. We also passed a directive allowing for RAD and the Audit Division to raise those questions on their own to the Commission. By having these Commissioners resolve these issues on the front end, we believe we can avoid lengthy proceedings that are expensive for both the committee and the Commission.

In the audit process we have also implemented hearings for committees to present oral arguments and to respond to questions from the Commissioners prior to the approval of final audit reports. Before the Reports Analysis or Audit Divisions refer matters to the office of general counsel for enforcement, we have also required the basis of such referrals to be provided to respondents and to allow them an opportunity to respond. The FECA requires respondents to be notified when a complaint from outside the agency is filed and to be given a chance to respond. And we thought it was only fair that the respondents in internally generated matters also be informed of the charges against them. On the policy side, we have also implemented a procedure whereby requesters and advisory opinions are given the opportunity to appear before the Commission to answer our questions about the issues they have presented.

The fairness and efficiency interests running through all of these procedural reforms reflect our concern that the campaign finance laws and the FEC's processes should not be unduly burdensome on those Americans who are engaged in the most basic of civic activities.

I appreciate the Chair's remarks this morning, and while we think we have made significant accomplishments in this end in response to the hearing that was held here several years ago, we do have other things we can do. And we appreciate your bringing the spotlight to the enforcement process and look forward to talking to you about that and other matters. Thank you.

[The statement of Ms. Hunter follows:]



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Statement of Caroline C. Hunter  
Vice Chair, Federal Election Commission

House Administration, Subcommittee on Elections  
Hearing on the Federal Election Commission:  
“Reviewing Policies, Processes and Procedures”  
November 3, 2011

## INTRODUCTION

Chairman Harper, Ranking Member Gonzalez, and Members of the Subcommittee: Thank you for inviting me here today to speak with you about the Federal Election Commission. Since members of the Commission last appeared before Congress several years ago, there have been significant changes in campaign finance law. Courts at all levels have stricken down laws regulating political speech, most notably in the landmark *Citizens United* Supreme Court decision.<sup>1</sup> Accordingly, I would like to use this opportunity to supplement the agency’s joint testimony by updating the Subcommittee on the FEC’s efforts to comply with *Citizens United*, as well as other significant rulings. Additionally, I would like to share some updates on the new processes and procedures we have implemented at the Commission in recent years.

## I. FEC POLICY IN LIGHT OF RECENT LEGAL DEVELOPMENTS

### A. *Citizens United* and Corporate and Labor Organization Activity

In *Citizens United*, the Supreme Court struck down the Federal Election Campaign Act’s (“FECA”) prohibition on corporations making independent expenditures (“IEs”) and electioneering communications (“ECs”).<sup>2</sup> In response to the Court’s decision, the FEC released a statement in February 2010 confirming it would no longer enforce the statutory provisions and the agency’s regulations prohibiting IEs and ECs by corporations and labor organizations.<sup>3</sup> The FEC also announced it intended to initiate a rulemaking to address various other regulatory provisions implicated by *Citizens United*.

At two FEC open meetings on January 20 and June 15 this year, the Commission considered alternative draft Notices of Proposed Rulemaking. Generally, these drafts, consistent with the FEC’s public statement last year, proposed removing the regulations prohibiting corporate and labor organization IEs and ECs. In addition, the drafts asked whether the agency should remove the prohibition against all corporate and labor organization expenditures

<sup>1</sup> *Citizens United v. FEC*, 130 S.Ct. 876 (2010).

<sup>2</sup> *Id.*

<sup>3</sup> “FEC Statement on the Supreme Court’s Decision in *Citizens United v. FEC*,” Federal Election Commission, Feb. 5, 2010, available at <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>.



(including, for example, voter registration and get-out-the-vote activities) – so long as they are not coordinated with any candidate or political party – as opposed to removing only the specific prohibitions on IEs and ECs.<sup>4</sup> The drafts also asked about certain other provisions of the FEC’s so-called “corporate facilitation” regulations. I regret we have yet to remove the regulations related to the statutory provisions stricken by the Supreme Court; however, I remain hopeful there may yet be agreement to initiate a formal rulemaking in the near future. Pending a rulemaking, the public may continue to rely on the Commission’s public statement from last year as well as the agency’s advisory opinion process to obtain guidance on specific questions that may arise.

#### B. *EMILY’s List*, *SpeechNow*, and Independent Political Spending

In 2009, the D.C. Circuit Court of Appeals invalidated the FEC’s regulations requiring entities such as *EMILY’s List*, which engaged in both independent expenditures and direct contributions to candidates, to split their administrative expenses evenly between their direct contributions accounts (which are subject to the federal source prohibitions and amount limitations) and their expenditures accounts.<sup>5</sup> In effect, to the extent such organizations engaged in more independent political activities than they did in making direct contributions, the invalidated rule required such organizations to allocate a portion of their federally regulated funds to subsidize the administrative costs for their independent spending. Notably, the D.C. Circuit held that “non-profit entities are entitled to make their expenditures – such as advertisements, get-out-the-vote efforts, and voter registration drives – out of a soft-money or general treasury account that is not subject to source and amount limits.”<sup>6</sup>

Following *Citizens United*, the D.C. Circuit expanded on its *EMILY’s List* ruling, holding in *SpeechNow* that the FECA’s source prohibitions and amount limitations on contributions to political committees were unconstitutional as to those committees that make only independent expenditures.<sup>7</sup> In two advisory opinions, the FEC confirmed it would act in accordance with the *SpeechNow* decision.<sup>8</sup>

<sup>4</sup> An expenditure is defined generally as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for federal office.” See 2 U.S.C. § 431(9)(A). An independent expenditure, in relevant part, is defined as a “communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate a candidate’s authorized committee, or their agents, or a political party committee or its agents.” See 11 C.F.R. § 100.16(a); see also 2 U.S.C. § 431(17). An electioneering communication, in relevant part, is defined generally as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office,” is “publicly distributed within 60 days before a general election” or “within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate,” and “[i]s targeted to the relevant electorate.” See 11 C.F.R. § 100.29(a); see also 2 U.S.C. § 434(f)(3)(A).

<sup>5</sup> *EMILY’s List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

<sup>6</sup> *Id.* at 16. The D.C. Circuit also suggested that if *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) were overruled, such groups could accept unlimited donations from for-profit corporations or labor organizations to their non-contributions accounts. See *id.* at 16 n.11. In *Citizens United*, the Supreme Court overruled *Austin*, 130 S.Ct. at 885.

<sup>7</sup> *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*).

<sup>8</sup> Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten).

Subsequently, the National Defense PAC asked the FEC for an advisory opinion confirming that, as a political committee that made direct contributions to federal candidates, it could also accept unlimited corporate funds to make independent expenditures if it established a separate bank account for such purposes.<sup>9</sup> After the Commission deadlocked on an affirmative response, NDPAC sued the agency in *Carey v. FEC*.<sup>10</sup> The D.C. District Court recently ruled in favor of NDPAC's motion for a preliminary injunction,<sup>11</sup> and the FEC agreed to a stipulated judgment and consent order under which it would not enforce the FECA's source prohibitions and amount limitations with respect to NDPAC's independent spending account.<sup>12</sup> Furthermore, the FEC last week issued a public statement confirming this posture applies not only to NDPAC, but to all similarly situated political committees that maintain separate bank accounts for funding direct candidate contributions and independent political activities.<sup>13</sup>

Even without rulemakings on *Citizens United*, *EMILY's List*, *SpeechNow*, and *Carey*, the public has not waited to act on these decisions. Immediately following the *Citizens United* decision, we saw roughly a four-fold increase in spending on independent expenditures reported to the FEC in the 2010 election cycle (a total of more than \$300 million), as compared with the 2008 cycle. Over that same period, independent-expenditure-only committees established pursuant to *SpeechNow* and other outside groups (including corporations, labor organizations, and non-profit organizations) outspent traditional PACs by roughly 2:1 on independent expenditures reported to the FEC. Meanwhile, spending by the political party committees remained roughly the same. For the 2011-2012 election cycle, all indications point to this trend continuing and expanding. Already, more new independent-expenditure committees have registered this cycle than in the previous cycle.

The FEC has been able to accommodate this shift in political spending on its reporting forms, but rulemakings may still be useful to clarify some questions relating to the mechanics of handling contributions, disbursements, and reporting, and also the full range of permissible activities for groups engaged in independent political spending.

The recent court decisions and rise in outside spending have also affected the Commission's enforcement docket. Already, we have received several complaints for this election cycle alleging that certain outside groups not currently registered with the FEC have triggered political committee status by virtue of their spending on independent expenditures.<sup>14</sup> These cases, which are currently pending, involve some of the more legally significant issues on our enforcement docket.

<sup>9</sup> Advisory Opinion 2010-20 (National Defense PAC).

<sup>10</sup> *Carey v. FEC*, Civ. No. 11-259 (D. D.C. filed Jan. 31, 2011).

<sup>11</sup> *Carey v. FEC*, Civ. No. 11-259, Memorandum Opinion on Motion for Preliminary Injunction (D. D.C. Jun. 14, 2011).

<sup>12</sup> *Carey v. FEC*, Civ. No. 11-259, Stipulated Order and Consent Judgment (D. D.C. Aug. 19, 2011).

<sup>13</sup> "FEC Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account," Oct. 5, 2011, available at <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

<sup>14</sup> The complainants in these matters have publicized their complaints, and thus it does not violate the confidentiality provision of 2 U.S.C. § 437g(a)(12) to describe the basis of these complaints.



## II. Agency Processes, Procedures, and Mission

Just as the Federal Election Commission was created to ensure more transparency in the political process, we believe it has also been beneficial for the agency to operate with more transparency. Not only does greater agency transparency benefit the parties who interact with the agency, but it also helps the agency operate more equitably and more efficiently. By receiving more input from interested parties in its decision-making processes, the agency benefits from more informed decision-making.

To that end, the Commission has implemented several new reforms over the past three years in its enforcement and policymaking functions. On the enforcement side, these reforms have started with the initial stages. Many of the agency's enforcement proceedings are initiated by our Reports Analysis Division ("RAD"), which reviews the reports filed by political committees, party committees, and candidate committees. If RAD notices enough discrepancies in a committee's reports, RAD may refer the committee for an audit and / or to the Office of General Counsel for enforcement. RAD also may ask committees to take corrective action by explaining themselves on the public record or suggest that committees amend their reports.

In audit proceedings, agency auditors also frequently ask committees to take various corrective actions when the interim audit is completed. However, oftentimes alleged discrepancies in a committee's reports or records will hinge on uncertain legal questions that are open for interpretation. Accordingly, we have put in place a procedure for committees that are the subject of RAD inquiries or audit proceedings to raise unsettled legal questions directly with the Commissioners. We also passed an internal directive allowing for RAD and the Audit Division to raise those questions on their own initiative to the Commission. By having the Commissioners resolve these issues on the front end, we believe we can avoid lengthy legal proceedings that are expensive for both the committees and the Commission.

In the audit process, we have also implemented hearings for committees to present oral arguments and to respond to questions from the Commissioners prior to the Commissioners' approval of final audit reports. Audits frequently involve significant issues of law as they relate to a committee's activities, and may also serve as the basis for additional enforcement proceedings. Thus, it is critically important to get the audit reports right, and allowing the Commissioners to interact directly with audited committees helps ensure that we fully understand all of the legal and factual nuances in a given audit.

Before the Reports Analysis or Audit Divisions refer matters over to the Office of General Counsel for enforcement, we have also required the basis of such referrals to be provided to respondents, and to allow them an opportunity to respond. The FECA requires respondents to be notified when a complaint from outside the agency is filed against them and to be given a chance to respond,<sup>15</sup> and we thought it was only fair that respondents in internally generated matters also be informed of the charges against them. Moreover, having a truly two-sided adversarial proceeding furthers the Commissioners' fact-finding role by allowing them to hear both sides of a matter in the earliest stages.

<sup>15</sup> See 2 U.S.C. § 437g(a)(1).

On the policy side, we have also implemented a procedure whereby requesters of advisory opinions are given an opportunity to appear before the Commission to answer our questions about the legal issues they have presented, and the facts of their proposed activities as they relate to the legal issues. Because advisory opinions set forth the Commission's interpretation of the FECA and its regulations, and any similarly situated parties are entitled to rely on those opinions,<sup>16</sup> we believe the opportunity to clarify the issues with requesters leads to more informed decision-making by the Commission.

The fairness and efficiency interests running through all of these procedural reforms reflects our concern that the campaign finance laws and the FEC's processes should not be unduly burdensome on those Americans who are engaged in the most basic of civic activities. As the Supreme Court has reminded us, in this area of the law, we must employ "minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation . . . eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal' . . . [and] give the benefit of any doubt to protecting rather than stifling speech."<sup>17</sup>

Most of the enforcement respondents who appear before the Commission tend to be inexperienced participants in the political process, or even otherwise experienced participants who nonetheless got caught up in the complexities of campaign finance law inadvertently. Moreover, we believe the agency's enforcement process is not the appropriate place for making new law or otherwise clarifying ambiguous law, and, in fact, we are prohibited by law from doing so in enforcement proceedings.<sup>18</sup>

On the subject of enforcement, there has been some discussion on trends in the Commission's civil penalties. The statute permits the agency to seek conciliation agreements with respondents involving civil penalties, but the agency itself does not have the authority to impose its own penalties other than through the ministerial administrative fines program.<sup>19</sup> Having said that, it is not a secret that our average conciliation amounts have gone down in recent years. However, simply looking at the numbers is not particularly illuminating, since they fluctuate depending on the types of cases on the enforcement docket in any given year. For example, in 2006, the average conciliation penalty was \$179,000, but that included a \$3.8 million settlement with Freddie Mac involving prohibited corporate fundraising activity.<sup>20</sup> In 2007, the average dropped to \$73,427, and then ticked back up to \$103,000 in 2008, when the current Commission was constituted. Since then, the average has dropped to five figures.

There are a number of reasons for this decline. First, as discussed before, recent court decisions have invalidated several statutory and regulatory provisions and, accordingly, respondents can no longer be found in violation of those provisions. Secondly, we have placed a

<sup>16</sup> See 2 U.S.C. § 437f.

<sup>17</sup> *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 451 (2007) (internal citations omitted).

<sup>18</sup> See 2 U.S.C. § 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title.").

<sup>19</sup> 2 U.S.C. §§ 437g(a)(4)(C) and (a)(5)(A).

<sup>20</sup> MUR 5390 (Delk).

greater emphasis on the statute's mandate that the FEC "encourage voluntary compliance,"<sup>21</sup> as opposed to seeking hefty penalties from grassroots non-profit groups and campaign committees that tend to rely on volunteers and staff who are assembled on an *ad hoc* basis.

Thank you again for the opportunity to update the Subcommittee on the FEC's policies, processes, and procedures. I am happy to answer any questions you may have.

---

<sup>21</sup> 2 U.S.C. § 437d(a)(9).

Mr. HARPER. We now have time for committee members to ask questions of the witnesses. Each member is allotted 5 minutes to question the witnesses. Obviously we have the timing device there to help us keep track of that and we will alternate between the majority and the minority. To begin with, I will recognize myself for 5 minutes, and I will start with some questions dealing with the transparency and the manuals, of course, that we are very interested in.

At a January 20, 2011 Commission meeting, Commissioner Weintraub said we don't believe in doing things in secret. Each of you please tell me if you think the FEC should release its enforcement manuals and penalty guidelines to the public. And if not, why not, and we will start with you, Commissioner Walther.

Mr. WALTHER. Thank you very much. And thank you for having us here today. I think this is a very helpful process for all of us. And it is overdue. Since I have been on the Commission, we have not had an opportunity to have an exchange like this and I think it is good for us and it is hopefully helpful. I fully support, fully support making public the RAD review policy, enforcement policy and a penalty schedule. I am completely in favor of that. I think it has been overdue.

Mr. HARPER. Thank you, sir. Commissioner Weintraub.

Ms. WEINTRAUB. Thank you, Mr. Chairman.

Mr. HARPER. And I hope I pronounced your name at least somewhat close.

Ms. WEINTRAUB. Weintraub. It isn't that hard.

Mr. HARPER. Okay. Good.

Ms. WEINTRAUB. Thank you, Mr. Chairman. And thank you for the shout-out. I appreciate your quoting me on the values of transparency. I am a firm believer in them. I actually have been advocating for years that we should disclose our penalty schedule. I think one complication is that we don't always agree on what that penalty schedule should say. We have had many debates in executive session when we are trying individual cases where Commissioners are not agreed on what the penalty levels really ought to be. I have long advocated that we ought to have a penalty schedule and that we ought to make it public. And then when the Commission departs from it, it ought to have to justify those departures in terms of mitigating and aggravating factors that would justify that departure.

I think there may be some confusion about what the enforcement manual is. The document that I think of as the enforcement manual is a large, cumbersome, rather out of date collection of memoranda that are not—a number of them have been superseded. I think it might actually be more confusing than helpful to disclose that particular document. It is not actually in its current form being actively used. It is sort of a historical document, but doesn't necessarily reflect what we are doing today.

I think that one effort that Commissioner Walther spearheaded, which is far more useful, is that we did create a description of our enforcement process and that is posted on the Website and it does go into the different stages of the process. And I think that actually is much more helpful than to put on the public record something that is outdated and not really in use.



Mr. HARPER. Thank you, Commissioner. Chair Bauerly.

Ms. BAUERLY. Thank you, Mr. Chairman. Our microphones are automatic. So forgive me. I agree with Commissioner Weintraub that the effort that we undertook a couple of years ago to put onto the Website a comprehensive guide for our enforcement process actually reflects the most current documented enforcement guide that we do have. We do as I understand have a document that hasn't been updated that existed in the Enforcement Division prior, certainly prior to my arrival at the Commission. But again just a few years ago, we did undertake a documentation of our current process so that people who are going through could understand all of the different nuances.

I also would support making our penalty guidelines public, but I do think that we would need to, again as Commissioner Weintraub pointed out, there are some disagreements over what that penalty guideline should look like. In addition, of course, the Commission is required by the statute to conciliate with people who are in the enforcement process. So of course the end result in a conciliation agreement may not be reflective of the schedule at the outset. So I think that that, unlike some other enforcement agencies who do not have the requirement to conciliate for civil penalties but could actually issue and impose a fine on someone in their process, we are differently situated in that way. So I would just want to make sure in whatever form we did that we didn't cause confusion over different penalties that were resulting in conciliation agreements because the Commission is required to conciliate under the act.

Mr. HARPER. Thank you. Vice Chair Hunter.

Ms. HUNTER. Thank you. As my colleagues have pointed out, there is some disagreement with respect to the amounts in the penalty schedule. And I think this would be a good opportunity for us to revisit the amount and take an opportunity to determine what is the best penalty for whatever violation and perhaps we could provide a range to accommodate for the conciliation portion that the Chair mentioned. In addition, I think it is important that we maintain some discretion to depart from the schedule. And I agree with Commissioner Weintraub, we should be able to explain when we do that departure. But I think we should maintain the ability to do so.

Mr. HARPER. Commissioner McGahn.

Mr. MCGAHN. Thank you. To answer your question directly, there is no reason why at least parts of the RAD manual could be public and at least part of how the penalties are done could be more public. And if I could take a minute to elaborate on what I mean, because it is a question that raises many, many issues and issues I encountered when I was first appointed to the Commission. As a practitioner who represented a number of politicians, parties, vendors, everyone perhaps members of this committee from time to time, when I was appointed to the Commission, I really wanted to see these secret books. RAD does have a manual. RAD is the Reports Analysis Division. I apologize for speaking in Beltway acronym, but I have fallen into that habit. And there are parts of it that I think are part of the enforcement processes of the Federal

Election Commission. As part of the enforcement process, I think that is something that ought to remain confidential.

There are parts that may constitute a form of secret law. If there is secret law, that ought to be public. Right now the current manual I think is a hybrid of the two. So to simply turn it over in total I think would cause some issues because I think we would be giving away some of the internal deliberative process privilege or some of the enforcement triggers.

The penalty schedule is something I have heard about before I was appointed and I wanted to see the penalty schedule and I envisioned there was this magic chart on the wall, sort of a sentencing guideline. There really isn't. It depends on the case. It depends on the history of the issue. And it depends on a number of frankly factors as to what penalty applies. The Commission has even before I was appointed to the Commission, has done quite a bit to make it a little bit more public in certain ways. For example, there is a policy for sua sponte submissions. If you know you have a problem, you can turn yourself in and this policy says you will get a discount on the penalty. What the penalty will be, what the starting point is, you really don't know, but you can get 50 percent, 75 percent. Increased activity. There is a policy on that from 2007, again before I was appointed, that talks about what the penalty would be and gives a sense of the formula.

Congress has put in the administrative fines program so you know in certain issues what the fine will be. One thing that has happened, however, is there have been cases where it just doesn't seem fair to impose that penalty on a first-time candidate or what not. The Commission through regulation has taken the position that they are somewhat handcuffed and they don't have a choice in the matter. It would be nice legislatively if we were told, yes, we do still have discretion in admin fines.

But there have been things that have made penalties public. What I think would help making public is not some magic chart because there really isn't a magic chart, but the method used to calculate some of these penalties. Is it 10 percent of the amount at issue, is it 20 percent, is it 50 percent? The counterargument that I have heard, which is somewhat persuasive, is people may think that it is a cost of doing business; and if they can predict the fine, it may encourage them to not comply. I am not sure I buy it because frankly I found most people try to comply. Certainly you are going to have some bad actors that intentionally try to funnel money to campaigns through a back door and what not. But my concern has always been the first-time candidate, the unsophisticated political player getting caught up in the processes of the FEC and they get caught up on this fine calendar chart.

And my final point with the penalties, and the Vice Chair talked about this a little bit, the idea of discretion. There are really ways to do penalties. One is on sort of a sentencing guideline mentality where everyone gets treated the same once you have decided there is a violation. But sometimes the same is not really fair. To me I think the Commission needs to maintain some discretion in what the penalties are, to look at the totality of the circumstances. Is it a first-time candidate? Is this someone who is a sophisticated player or not a sophisticated player? What is the governmental interest

in the problem? If it is corporate money to a campaign, every court in the land from the supremes on down has said the law is at its most urgent application there because it gets at the heart of corruption or the appearance thereof. If it is a one-time report from a political committee that has already disclosed the information but forgot some technicality on a subsequent report, that really shouldn't be treated the same even if it is the same dollar amount.

So that is my long-winded explanation, is I am sort of in favor of in public, but it is not as easy as just handing you a book.

Mr. HARPER. And Commissioner Petersen.

Mr. PETERSEN. I agree with what most of my colleagues here have said. I think that the method by which the Commission determines its penalties should be more transparent. And I think that this exercise as has been pointed out, there would need to be some agreement as to what those methods are. There has at times been disagreement amongst us. But whatever we did release would have to acknowledge the fact that there does need to be flexibility built into the process. And as to the issues regarding the enforcement and the RAD manual, I do think that more can be disclosed by the Commission with the understanding that there are certain parts of the process that are interwoven into our enforcement program that under the statute need to remain confidential.

Mr. HARPER. I thank you. And now I will yield to the ranking member, Mr. Gonzalez, for his questions.

Mr. GONZALEZ. Thank you very much, Mr. Chairman. Excuse me. The question will be to the chairwoman, Chair Bauerly. The ranking member of this committee wrote to you back on March first regarding the proposed bill where you basically assumed the responsibilities of the EAC, and you responded—I want to make sure—yes, it was signed by you—responded in a letter dated March 16th in which you obviously say you have looked at the bill, you could assume the additional duties, some of which were under your jurisdiction in years previous.

And you go on to say in your letter that you would determine which of the responsibilities could be assigned to current or new employees of the FEC and which would be carried out under contracts with private entities, outsourcing. Any strategy—and I will read from the letter. Any strategy to meet these new responsibilities would require additional resources.

Do you have a specific—at this time, could you tell us specifically in the way of expenses, additional expenses that would have to be met requiring additional funding for the FEC, if, in fact, it took over some of the duties?

Ms. BAUERLY. Thank you, Ranking Member Gonzalez. We have not undertaken any comprehensive—

Mr. GONZALEZ. If you could get closer to the microphone. Thank you.

Ms. BAUERLY. My apologies again. We have not undertaken a comprehensive examination of the EAC's current budget to determine what their spending versus what we—but obviously if there were—there are significant EAC responsibilities, some of which were established in its original legislation, some of which have been added over time, including in 2009, important obligations under the MOVE Act. So there are certainly important programs

at the EAC and, as I understand the legislation, would continue should the transfer to the FEC happen.

I understand the CBO has prepared an estimate based on their review of the current EAC budget. I don't have any basis with which to quibble with the CBO's estimate. I do assure the committee, were we to be charged with these responsibilities, we would of course conduct them in the most cost effective manner. But again, there certainly are significant obligations, including some contracts that exist at the EAC that I understand would need to continue given the programmatic requirements, and I believe the CBO has estimated approximately 20 individuals would be needed to accommodate some of those obligations.

Again, to the extent we could find some space within our own current personnel, we would certainly do that. But we would certainly not want to shortchange any of those important responsibilities that exist currently at the—

Mr. GONZALEZ. But you are not in a position today to say with a specific number what it would take for you in the way of additional funding so that we can determine if there are really any savings which is the objective of us proposing things to the supercommittee. I mean, you can't do that today?

Ms. BAUERLY. I cannot.

Mr. GONZALEZ. Thank you. The next question—and it really is a yes or no and maybe we can expand on it in a minute. But a couple of remarks regarding transparency and the concern this committee has on the workings of the FEC. I think it is important for the sake of trust just in government and the election process and such that what you do to the extent that can be public is transparent. But I also believe of equal or greater importance is what you are considering.

Do you have sufficient data, do you have sufficient information, are there sufficient disclosure requirements that allow you to make measured determinations as far as who is spending the money, how they are spending the money, is there a violation? I think that Commissioner McGahn said, you know, people coming in through the back door. Well, with Citizens United and such and the relaxation in my opinion based on judicial decree, we don't have to come, a lot of people don't have to come through the back door anymore. They just come through the front door. The question is can we at least figure out and identify who is coming in through the front door.

In my opinion, you don't have that information presently before you and I think it is going to require some sort of legislation. The question would be yes or no to the individuals, starting with Commissioner Walther, and that is if disclosure is important, how is it best effectuated, are current disclosure requirements sufficient to carry out the FEC's mission?

Mr. WALTHER. Thank you. I don't think—I am not too sure exactly what you meant by us getting the information. If you are suggesting that we collect information to be able to assist where the money is coming from, where we see violations, that probably would be helpful and that is something that we have not really done.

Secondly, no, the statutory and the regulatory framework does not in my opinion begin to provide the kind of transparency that we should have in the aftermath of Citizens United. The very fact that for all of these decades we have had regulation based upon the statute that we have upheld to the best of the—I think that should have been upheld to the best of our ability—is now gone. There is a huge vacuum there that raises questions that we have discussed and that Congress obviously has discussed and has been unable to reach agreement on.

But I do think that we have fallen down on what we could have done with respect to our regulations. We have had—at least prepared—two drafts amongst ourselves on what kind of information we thought would be necessary for transparency, for corporations that do not have foreign control, and to take a look at what we now have to look at to see how we can make sure that foreign investment to—in our political system—is prohibited. We need to do a lot of that. One draft is much more specific than the other, and I think the very least we could have done is to make both of those available for public comment and we have not been willing to do that yet.

Mr. GONZALEZ. And I am going to ask with the chairman's indulgence, I am just going to restrict the question to a yes or no and it is going to be whether current disclosure requirements are adequate or do we need to improve on those. And maybe we will have another go round and you will be able to again expand on your remarks. Yes or no, is it sufficient presently given Citizens United?

Ms. WEINTRAUB. No.

Ms. BAUERLY. No, I don't believe so.

Ms. HUNTER. Yes, in order to accomplish—sorry. The laws are sufficient in order to follow the mission of the agency as it is. Obviously it is at the discretion of Congress to amend the laws.

Mr. MCGAHN. Yes.

Mr. PETERSEN. Yes.

Mr. GONZALEZ. Thank you. I yield back.

Mr. HARPER. Thank you, Mr. Gonzalez. And I ask unanimous consent to allow Mr. Lungren, the chairman of the full committee, to participate in this subcommittee hearing. Without objection, it is so ordered.

At this time I will recognize the gentleman from Illinois, Mr. Schock, for questions.

Mr. SCHOCK. Thank you, Mr. Chairman. Thank you to the Commissioners for being here today. First let me state in reaction to the chairman's question and your responses that I support the chairman's request for full disclosure of this manual and while I can appreciate that each of the Commissioners may not want for their deliberations behind their decision making to be made public, let me assure you as a candidate for office who becomes a victim of your decision or at least the recipient of your decision, we want full disclosure. And as uncomfortable as that might be for you to allow the public and for every candidate for Federal office to understand that, I can assure you that our constituents make no bones about the fact that they expect us to know the rules and, quite frankly, do not understand why if in a case a Member of Congress



or a candidate for Congress would not be following the rules or would receive some kind of statement suggesting otherwise.

Second, I have a whole host of questions. So I hope that we will get a couple of rounds if possible. First I would like to find out within the FEC who decides which cases the FEC litigates.

Ms. BAUERLY. Thank you, Representative Schock. The FEC's Litigation Division makes recommendations to the Commission. If I might step back for a moment. Much of the litigation comes to us. The FEC is often the defendant in lawsuits. In terms of initiating lawsuits with respect to perhaps an enforcement action, that is the decision of the Commission.

Mr. SCHOCK. So the Commission actually votes?

Ms. BAUERLY. Yes.

Mr. SCHOCK. Based on the litigation department's recommendation?

Ms. BAUERLY. Yes.

Mr. SCHOCK. Okay. Back in 1999, the FEC adopted a policy that the Commission would enforce section 100.22(b) of its regulation in every circuit except the First and Fourth where it was found to be unconstitutional. I found that a bit puzzling. And my question is simply whether or not there should be a difference for the First Amendment rights depending on whether you live where the FEC has lost a case and what the thinking was behind your judgment on partially enforcing that section of your code.

Ms. BAUERLY. Representative Schock, I was not at the Commission at that point in time, so I cannot speak to—and actually none of us were, so we couldn't speak to the specifics of what those—that set of Commissioners were thinking. In general, Federal—

Mr. SCHOCK. Let me ask you. Is that still the Commission's position?

Ms. BAUERLY. Post the McConnell decision, that is no longer the Commission's view of that, as we indicated in our submissions to you.

Mr. SCHOCK. Okay. You stated that the Commission does not believe it is appropriate to request information beyond what is required by law. If this is the Commission's policy, I would ask why the Reports Analysis Division continues to send out requests to candidates asking for information entities are under no legal obligation to provide.

Ms. BAUERLY. The Commission seeks further information from committees through what is called the request for information, an RFAI, when reports analysts on the face of report have questions on what might appear on the face of that report in terms of a need for additional information or for some clarification. So reports are only sent where there is a legal basis to do so. And in those letters, the legal basis for seeking this information is provided in the letter sent to the committees. So we only ask for information that is required. And again RFAIs are sent where on the face of the report there seems to be some discrepancy, some mathematical error, perhaps contributor information is not provided. We ask the committees for additional information.

Mr. SCHOCK. So if you ask for additional information, I understand you are asking—I guess the follow-up question to that would



be what are the due process rates the reporting entities have when an RFAI is sent to them.

Ms. BAUERLY. If I might use—make sure I understand your question, there wouldn't be I don't think any technical due process rights that—because there are no consequences of not filing—not responding to the RFAI itself. There may be further—there may be—to the extent that if there are problems that are not able to be resolved, then perhaps there might be some additional process within the agency down the line. But the first—the first thing that will happen is the analysts and the committee may discuss any issues. If, for example, what is missing is contributor information and the committee lets our analysts know that they have used their best efforts to collect that information from their contributors, contributors simply did not want to provide it, then that is all that the Commission would require, is the best efforts to collect that type of information.

So many of these issues are resolved very easily in terms of just making sure. It may be that something got reported on a line that was incorrect. The vast majority of these letters are based on discrepancies on the face of the report that are very easily either amended or resolved in that way.

If a committee would like to ask for the Commission to get involved in a potential legal question that is raised, the Commission fairly recently adopted a procedure where it may do so. So if a committee receives a letter and it thinks that it does not have an obligation to provide that information, it may file a request with the Commission for the Commission's determination of that. It may present its arguments to the Commission in terms of what it thinks its reporting obligations might be. So it does have an opportunity to address those issues directly with the Commission.

Mr. SCHOCK. Okay. Thank you.

Mr. HARPER. I will now recognize the gentleman from Indiana, Mr. Rokita, for 5 minutes.

Mr. ROKITA. Thank you, Mr. Chairman. And I want to thank everyone for their testimony here today. I want to start off with what Commissioner McGahn was talking about where he said it was not as simple as handing over a book. I want to make sure I understand your testimony the right way. Is that because no document exists or is it because, the discretion you and Commissioner Hunter and others talked about, you can't just hand over a book of these penalties?

Mr. MCGAHN. If I could ask you a question.

Mr. ROKITA. No. It is our hearing.

Mr. MCGAHN. Which one are you talking about? Are you talking about the RAD manual, the enforcement manual or the penalties?

Mr. ROKITA. Both. Real quick.

Mr. MCGAHN. Okay. There is an enforcement manual. As others have said, it is somewhat out of date.

Mr. ROKITA. The penalties—

Mr. MCGAHN. Right. And if it was up to me, I would hand it to you right now, but I don't have it with me. And it would probably take four votes to give you the enforcement manual.

Mr. ROKITA. So you say it is not as simple as handing over?

Mr. MCGAHN. The RAD manual is the one that is not as simple as handing over because the RAD manual includes essentially—part of it is directives to the staff, that if there is an issue over a certain dollar amount, refer to the Commission, the Commission wants to see it. It doesn't mean you have broken the law. It just prioritizes what the Commission wants to see and when it wants to see it.

Mr. ROKITA. Then why is it so secretive?

Mr. MCGAHN. Well, because the dollar amounts at issue—the argument that I have heard is that the dollar amounts will let people know, well, if your mistake is less than 50 grand or 10 grand, everyone will have \$49,000 mistakes so they won't get referred. I don't really buy it. I think at the end of the day people have better things to do at their campaign headquarters than to reverse engineer their FEC reports to avoid referral.

Mr. ROKITA. I would agree with that.

Mr. MCGAHN. But there are other things in the RAD manual that I think are part of the enforcement process and you get into a situation where there is the confidentiality of a specific enforcement matter and there is also the protection that the agency has of its enforcement priorities. So right now it is all in one book.

Mr. ROKITA. Let me respond to that. I used to run an agency, both an election agency and a securities agency. So I understand the need to—as others on this panel may want to comment on. I understand the need to protect investigative material and the public policy behind that. That is different than how you intend to enforce something. And it is different for this reason. Are we going to be a country of laws or are we going to be a country of men? Meaning are we going to be consistent? Are the people in this country, including the candidates of this country, going to have a fair hearing? Discretion or not, or are we going to be a country of men where discretion can be used, over used and abused?

This is especially important when you are talking about a bureaucracy that is unelected. It is ultimately important when we are talking about the business that each of you and your staffs are in, which is protecting a free and fair election. And so I think the attitude that I am hearing from this agency as a whole, as represented by each of you, and I say this, Mr. Gonzalez, in the most bipartisan way possible, none of you are that important that you can't disclose what you are doing as a public business. And I think we all ought to get over that.

I will yield back the rest of my time and expect a second round.

Mr. HARPER. Thank you.

Mr. SCHOCK. If the chairman would yield, I just want to respond to Mr. Rokita's request for the rest of us to weigh in on this.

Mr. HARPER. Certainly.

Mr. SCHOCK. My only response would be this.

Many of you were involved with FEC election law in some form prior to coming to your Commission spot. Assuming that your Commission term expires and you go back into the private sector, you may or may not choose to go back into that profession. Why should you be privy to information on the process in which this Commission has made decisions that your peers and competitors in this industry are not privy to?

Taking us as candidates and officeholders out of this, I would suggest that it is only fair that the people who represent us and the industries that many of you were involved with prior to your Commission service be given the same information that many of you will have when your term of service is up.

Mr. HARPER. At this time I will recognize the gentleman from Florida, Mr. Nugent, for questioning.

Mr. NUGENT. Thank you, Mr. Chairman, and I do appreciate the Commission, all of your attendance here today.

I am a little troubled. My past experience has been in law enforcement for 36-plus years, and I understand protecting investigative techniques and how you go about investigations. I clearly understand that. But what I don't understand is the way you are guarding as it relates to enforcement measures or RAD or penalties. Because what I keep hearing across the board from many of you is that the enforcement manual is out of date. So I don't understand how you even operate if your enforcement manual is out of date. I don't understand that you don't have at least a penalty manual at least describing what the penalties are.

And I certainly do understand discretion, and you need to have that, particularly as you related, Mr. McGahn, as it relates to a first-time candidate. Somebody who has made a simple mistake I don't think rises to the same level. I think you need to have discretion.

So I guess I am troubled by the fact, and so what I want to hear—and I will let any member answer this. How do you—what is your plan on rectifying the fact that the manual is out of date and that there is—doesn't sound like there is a clear penalty manual at all?

Any one of you would—Mr. McGahn.

Mr. MCGAHN. I will start, I guess.

First, I want to make clear I don't want to be portrayed as an apologist for hiding documents. On the contrary, I have been, I think, one of the prime movers in much of what has been made public. I am merely articulating the arguments that I have heard in defense.

It has been the position of the Commission forever and a day that these things are secret. Same questions you are raising are the same questions I have raised. I am not sure I am convinced of the answers I have gotten, either. But as a deliberative body of six commissioners where it takes four to change what has been a long-standing practice, you know, I am a commissioner, so I have to give you the Commission long-term view.

As far as the enforcement manual, Commissioner Walther, it has already been talked about his initiative to at least make that more public and at least have a summary of how the process works I think is a good first step.

Second, my understanding is our recently hired new general counsel is looking into this to at least update it, and then from there I would certainly support making something public. You know, as the chair rattled off, DOJ, most law enforcement have some sort of prosecutor's manual.

Mr. NUGENT. Right.

Mr. MCGAHN. And even if there is—the problem ultimately is when you keep these things secret. Not only does it give people who have worked at the agency an edge, quite frankly, who then go off and do other things, but it creates a problem in the eyes of the public where you think there is maybe something secret. And even if there isn't, you feel like there is some hidden process or some hidden rule that you don't see.

Mr. NUGENT. Right.

Mr. MCGAHN. There is a lot of legal advice that goes on between the general counsel's office and the reports analysis division and the audits division when these letters go out. That is something that is not particularly public. In fact, when I asked for it as a commissioner, I had trouble getting it, because it is not the sort of thing that an agency that has been around for decades thought to keep in one place.

So we are making a lot of strides to get it together. It is just these sorts of questions hadn't been asked in years. The FEC sometimes becomes a little insular and doesn't really think about sometimes how the public views what it does. And there is a number of commissioners at this table today committed to trying to correct that, and we have gone a long way to doing that, but there is a lot more work to do.

So I don't have a good answer as to why this stuff is secret. I am just giving you the answers I have been given.

Mr. NUGENT. Okay. The chair, I believe you wanted to—

Ms. BAUERLY. I think that as Commissioner McGahn pointed out, this set of Commissioners has changed some of the processes and procedures. And, again, the enforcement guide that we did put on the Web site was an attempt to start to update some of that so that there is something that would be more useful to the public, frankly, than handing out documents that are outdated.

With respect to—your other question I think was about civil penalties. I think that there is a lot of agreement about putting out the formulas that go into it. But, again, as Commissioner McGahn pointed out earlier, there are different types of violations. Every enforcement matter looks a little bit different because there may be three or four violations in one matter and there might be one in another. And so if we were to take that step, I think we would just want to make sure that we are not creating any confusion amongst the public or those who are working on committees to ensure, and I think that can be accomplished. That would just be the caveat that we would need to make sure that we explain that, and everyone understands the parameters of what that formula would look like and that the Commission does retain the discretion in certain instances to make changes from that.

Mr. NUGENT. Thank you.

I see my time has expired.

Mr. HARPER. And I will now recognize the gentleman from California, the chair of the full committee, Mr. Lungren.

The CHAIRMAN. Thank you very much, Mr. Chairman.

Let me thank you, Mr. Chairman, for having this hearing.

Maybe one of the reasons we haven't had these issues come up as to why you should disclose or not disclose is that we haven't had an oversight hearing in this committee since 2003. Maybe if these

questions had been asked, we might have had some decisions, and we might have found out why. So I thank you for this.

I try and look at this from the standpoint of an average American who wants to run for office, and the first thing now we know is the tremendous hurdles in terms of the cost of running for office. And one of the costs is, first of all, you have got to hire an accountant; and, secondly, you have got to hire an attorney to make sure you don't run afoul of the laws. That is a burden we accept as a result of Supreme Court decisions on either corruption or the appearance of corruption and money. But if done improperly, it chills political speech and chills political participation.

It is daunting for someone who decides they want to run for office to all of a sudden say, oh, my Lord, I have to figure out what the Federal Government laws are; I have to go find out what the FEC stands for. And so I would just say to you, I think disclosure ought to be—you ought to resolve doubt in favor of disclosure as opposed to nondisclosure.

And on the idea of a manual that governs your enforcement, I do not see how you have a leg to stand on, frankly, for not disclosing. In one of the most difficult decisions you have to make as a prosecutor on the State level, that is a capital punishment case, the guidelines are set up, it is reviewed by every DA, and every DA's office in California has a manual as to how they do it. It is known to people. Now, the internal discussions on a specific case are not, but the manual with respect to how you go about making that decision as to whether you are going to seek the death penalty or not is known. It is known to everybody.

We allow murderers to know what it is they are facing. Shouldn't we allow Members or prospective Members of Congress to know what they are facing from an enforcement standpoint? I mean, I appreciate what you are saying, but can anyone give me a valid argument, not about the internal discussions with respect to a specific case but the enforcement manual, that is that component of it which is similar to the Justice Department and similar to the U.S. Department of Labor as to why you should not allow that information out.

Yes, you say to the public, and I understand that broad word, but how about to average members of the public who are thinking about the possibility of running for office and thinking about what they are going to face and thinking about how do I make sure I don't make a mistake. And one of the ways I figure that out is I look at their enforcement manual to see how they make their decision with respect to enforcement.

Can any of you help me out as to why that should not be made public as soon as possible?

Madam Chair.

Ms. BAUERLY. Mr. Chairman, if I might, I don't want to speak for my colleagues, but I think what you are hearing from us is that we agree that this should be—that information about our enforcement process should be made public, and we have taken the first step in that in putting the enforcement guide on the Web site.

I think what is also important to note is that the regulations, the statute that governs what the agency does in terms of what candidates or committees need to do in terms of their filing, of course,

is very public. This one aspect of our process has been less public in the past than it is now.

We, again, as Commissioner McGahn pointed out, we are working towards updating all of this so that we can make something public. The Commission in terms of we—the enforcement manual that I think we refer to in our submission to you is not the thing that holds the penalty guideline. The calculations for the penalties, that is a separate set of documents.

The CHAIRMAN. Well, I would hope—

Ms. BAUERLY. That is something that we—

The CHAIRMAN. Okay. I would hope that the manual that is as similar to or comparable to what the Department of Justice has and the Department of Labor has, I would hope that you would make it as transparent as they do.

Now, let me ask you about the RFAIs. In terms of the Commission, do you make those requests public or are those requests made only to the campaign of the candidate?

Ms. BAUERLY. The RFAIs that are sent to committees are also put onto the Web site.

The CHAIRMAN. So you see no problem with putting that out there and getting that information out, which could potentially taint a candidate's reputation, but, at the same time, you have difficulty making as transparent the decisionmaking rules that you use in terms of enforcement. See, I don't understand that connection.

Look, I have never been mistreated by the FEC. I have no bone to pick with you folks. Luckily, I have been able to hire good attorneys to keep me ahead of the game and to not have any problems.

But the impact of actions taken by the Commission can be very deleterious to the reputation of a candidate and his or her committee just by virtue of the fact that you have made a request. And I am not telling you don't make requests. I am just saying I hope you understand that from the standpoint of a candidate who is standing out there and all of a sudden some press guy says, hey, I know you have just had this RFAI—they don't say that—they just made this request for additional information. And you look at it and you say, gee, that is not information required by law, and all of a sudden you are already digging yourself out of a hole where you may have done nothing wrong.

So all I am saying is I hope you appreciate the tremendous impact you have on people who may be doing nothing other than trying to express their First Amendment rights in a way that allows them to at least run for office as a means of articulating their point of view. And I thank you for your work because I know you probably don't get a whole lot of people patting you on the back for your work. So thank you.

Mr. HARPER. I ask unanimous consent to enter the following documents into the record: three letters submitted by lawyers who frequently appear before the Commission describing the impact of the FEC's failure to disclose materials governing its enforcement process, an editorial from the Wall Street Journal regarding the FEC, a list of enforcement manuals made available to the public by other Federal agencies, the list of questions that this committee sent to the FEC and its written responses.



Are there any objections?  
Without objection, it is so ordered.  
[The information follows:]



1776 K STREET NW  
WASHINGTON, DC 20005  
PHONE 202.719.2000  
FAX 202.719.7049

7925 JONES BRANCH DRIVE  
MCLEAN, VA 22102  
PHONE 703.905.2800  
FAX 703.905.2820

www.wileyrein.com

October 27, 2011

Caleb P. Burns  
202.719.7451  
cburns@wileyrein.com

Congressman Gregg Harper  
Chairman Subcommittee on Elections  
Committee on House Administration  
1309 Longworth House Office Building  
Washington, D.C. 20515

Re: Federal Election Commission Oversight

Dear Chairman Harper:

I greatly appreciate the opportunity to comment in connection with the upcoming oversight hearing of the Federal Election Commission ("FEC") by the Committee on House Administration, Subcommittee on Elections. The FEC regulates "the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981). Vigilant oversight of an administrative agency with a charge that so closely impacts our political freedoms is critical and I am pleased to assist by offering these comments.

By way of background, I am a partner in the Election Law and Government Ethics group at Wiley Rein LLP. I have over a decade of experience counseling clients and representing them before the FEC in rulemaking, advisory opinion, and enforcement proceedings. The focus of my comments will be on the lack of transparency afforded to participants attempting to settle enforcement proceedings. The views expressed in these comments are mine alone and do not reflect the views of Wiley Rein LLP or any of its clients.

#### 1. FEC Enforcement Process

The FEC may initiate enforcement proceedings based on a complaint alleging a violation of the campaign finance laws or on the basis of other information the FEC obtains in the course of carrying out its regulatory duties. 2 U.S.C. § 437g(a)(1)-(2). The FEC must determine by a vote of at least four of its commissioners that there is "reason to believe" that a violation of the campaign finance laws was, or will be, committed before proceeding with an investigation. *Id.* § 437g(a)(2).

At any time during an investigation, the FEC and the respondents to the enforcement proceeding may attempt to settle the matter. 11 C.F.R. § 111.18(d). If after the investigation the FEC determines by a vote of at least four of its



Congressman Gregg Harper  
 Chairman Subcommittee on Elections  
 Committee on House Administration  
 October 27, 2011  
 Page 2

commissioners that there is "probable cause" to believe a violation was, or will be, committed, the FEC and the respondents to the proceeding are required by statute to enter into settlement discussions. 2 U.S.C. § 437g(a)(4)(A).<sup>1</sup> If the discussions are unsuccessful and do not result in a signed conciliation agreement memorializing a settlement, the FEC may vote to initiate a lawsuit against the respondents for a civil penalty and injunctive relief. *Id.* § 437g(a)(6)(A).

## 2. The Need for Greater Transparency

The vast majority of FEC enforcement proceedings conclude prior to litigation, either in dismissal or a conciliation agreement. Accordingly, the negotiation of the civil penalty in a conciliation agreement is often the de facto penalty phase of any enforcement proceeding. This negotiation can be frustrated by the FEC's lack of transparency.

When proposing an initial draft conciliation agreement, the FEC almost always includes a civil penalty that is seemingly tethered to the upper limit of what the statutory penalty scheme permits. See note 1. Prior to responding, I research the conciliation agreements in closed enforcement proceedings – publicly available pursuant to 2 U.S.C. § 437g(a)(4)(B)(ii) – to find past conciliation agreements that describe facts similar to those I am addressing. These conciliation agreements often include penalties that are far smaller than what the FEC has initially proposed. Whenever possible, I make a counter-offer that is tied to what the FEC has accepted in these past conciliation agreements and justify the counter-offer on that basis. On more than one occasion, I have been told by FEC staff that the conciliation agreements upon which I was relying are distinguishable, the FEC has an internal process to ensure consistency in civil penalties, and that process was used to

<sup>1</sup> The FEC can pursue civil penalties in a settlement of up to \$5,000 per violation or an amount equal to the contributions or expenditures that resulted in the violation. 2 U.S.C. § 437g(a)(5)(A)-(B) (these amounts can increase to \$10,000 and \$50,000 per violation or 200% and 1,000% of the contributions or expenditures depending on the nature of the violation). This statutory penalty scheme vests the FEC with wide discretion to determine the civil penalties it pursues. For example, if a campaign did not follow the proper procedures to redesignate and report one hundred campaign contributions of \$100, the FEC could demand a penalty of up to \$500,000 (\$5,000 x 100 violations) instead of \$10,000 (\$100 x 100 contributions). Alternatively, if a campaign did not include proper notices on a \$100,000 advertisement, the FEC could insist on a penalty of up to \$100,000 (\$100,000 x 1 expenditure) instead of \$5,000 (\$5,000 x 1 violation).



Congressman Gregg Harper  
 Chairman Subcommittee on Elections  
 Committee on House Administration  
 October 27, 2011  
 Page 3

determine the FEC's proposed civil penalty. When I have asked for more information about that process to better assess the FEC's claim for the proposed civil penalty, I have been denied.

The FEC's failure to provide information about its penalty calculation process creates numerous problems. First, it hampers settlement negotiations because the FEC does not provide the basis for its proposed civil penalty. With that information, a respondent might be able to agree that the FEC's proposal is fair or attempt to explain to the FEC why it is not. Without that information, a respondent is left to negotiate against something that is a complete unknown which makes meaningful settlement discussion very difficult.

Second, the civil penalty negotiations often belie the FEC's claim that the civil penalty is the result of a consistently applied process. The civil penalty is almost always negotiated down from the FEC's original proposal. If, in fact, the FEC has a consistently applied process that dictates the appropriate civil penalty, there would not be much need for negotiation. Yet, I have never participated in settlement negotiations where the final civil penalty did not change – significantly in many cases – from the FEC's original proposal.

Third, the FEC's failure to provide information about its civil penalty process erodes confidence that the FEC is enforcing the campaign finance laws fairly. The area in which the FEC regulates invariably arouses suspicion regarding political motivations.<sup>2</sup> The campaign finance laws attempt to address this issue by ensuring that no more than three FEC commissioners are from the same political party. 2 U.S.C. § 437c(a)(1). No similarly strong statutory safeguard applies to the FEC staff negotiating conciliation agreements. When the FEC staff insists on a civil penalty unlike that in any similar publicly available conciliation agreement, the FEC is inviting challenges to its impartiality and motivations.

<sup>2</sup> See, e.g., *In re: Sealed Case*, 237 F.3d 657, 668 (D.C. Cir. 2001) ("We would hope that [the FEC's] strident opposition is not politically motivated nor compelled by some vindictive desire... [T]he weakness of the FEC's position in this case invites the suspicion that its actions are externally motivated.")



Congressman Gregg Harper  
 Chairman Subcommittee on Elections  
 Committee on House Administration  
 October 27, 2011  
 Page 4

When discussing the FEC's failure to publicly explain its civil penalty process, the most frequent defense given is a general claim that this information will compromise the FEC's negotiating position and, as a result, the enforcement process. I have never understood that argument. Federal criminal defendants negotiate plea agreements by reference to the Federal Sentencing Guidelines which are not only publicly known, but are developed with input from the public. 28 U.S.C. § 994(a), (x). Far from undermining the criminal justice system, the Federal Sentencing Guidelines have provided a framework to increase efficiency and to provide certainty and fairness in criminal penalty proceedings. These same goals can be achieved in FEC enforcement proceedings if information regarding the FEC's civil penalty process were public.

\* \* \*

In recent years, the FEC has taken significant steps to increase the transparency in its enforcement proceedings and to respect the due process rights of respondents participating in those proceedings.<sup>3</sup> By making its civil penalty process publicly known, the FEC can continue to advance these important goals.

Sincerely,

Caleb P. Burns

<sup>3</sup> See, e.g., Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel, 76 Fed. Reg. 63570 (Oct. 13, 2011); Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34986 (June 15, 2011); Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 Fed. Reg. 38617 (Aug. 4, 2009).



McGuireWoods LLP  
 2001 K Street N.W.  
 Suite 400  
 Washington, DC 20006-1040  
 Phone: 202.857.1700  
 Fax: 202.857.1737  
 www.mcguirewoods.com  
 Elliot S. Berke  
 Direct: 202.829.2814

McGUIREWOODS

eberke@mcguirewoods.com  
 Direct Fax: 202.857.1737

October 31, 2011

Congressman Gregg Harper  
 Chairman  
 Congressman Charles Gonzalez  
 Ranking Member  
 Subcommittee on Elections  
 Committee on House Administration  
 1309 Longworth House Office Building  
 Washington, D.C. 20515

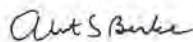
Dear Chairman Harper and Ranking Member Gonzalez:

We write to you today as the bipartisan chairs of the Political Law Group at McGuireWoods LLP in anticipation of a hearing you have noticed for November 3, 2011, in which Commissioners of the Federal Election Commission (FEC or Commission) are scheduled to appear as witnesses. The comments we discuss herein are our own and do not necessarily represent the opinion of other members of our practice group or that of our firm.

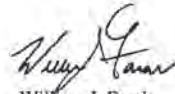
Together, we have a combined thirty years of experience in representing clients before the FEC. We have determined that the more guidance that is issued by the FEC, the greater the ability political committees have to adhere to both the letter and spirit of the Federal Election Campaign Act and the regulations promulgated thereunder.

During a hearing held by the FEC in 2009, a discussion occurred regarding the need for the Commission to make public its internal enforcement manual and guidelines. The lack of transparency that binds FEC Office of General Counsel attorneys in their negotiations and dealings does a disservice to both the FEC and respondents to enforcement proceedings. If the Department of Justice can recognize the public interest in making available its U.S. Attorneys' Manual, the FEC can most certainly do the same with respect to its enforcement guidelines. We encourage you to make this request to the Commissioners appearing before your Committee on November 3.

Sincerely,



Elliot S. Berke



William J. Farah

Atlanta | Austin | Baltimore | Brussels | Charlotte | Charlottesville | Chicago | Houston | Jacksonville | London  
 Los Angeles | New York | Norfolk | Pittsburgh | Raleigh | Richmond | Tysons Corner | Washington, D.C. | Wilmington



## COVINGTON &amp; BURLING LLP

1201 PENNSYLVANIA AVENUE NW  
WASHINGTON, DC 20004-2401  
TEL 202.662.6000  
FAX 202.662.6291  
WWW.COV.COM

BEIJING  
BRUSSELS  
LONDON  
NEW YORK  
SAN DIEGO  
SAN FRANCISCO  
SILICON VALLEY  
WASHINGTON

ROBERT A. KELNER  
TEL 202.662.6503  
FAX 202.778.6503  
RKELNER@COV.COM

October 31, 2011

Chairman Gregg Harper  
Subcommittee on Elections  
Committee on House Administration  
1309 Longworth House Office Building  
Washington, DC 20515

Re: Federal Election Commission — Reviewing Policies, Processes  
and Procedures

Dear Chairman Harper:

Thank you for the opportunity to submit comments in conjunction with the Subcommittee on Elections' November 3, 2011, hearing on the Federal Election Commission — Reviewing Policies, Processes and Procedures. This hearing is an important step toward improving the Commission's effectiveness and improving public confidence in both the Commission and the electoral process.

The comments I am submitting are my own and are not submitted on behalf of any client. Nor do my views necessarily reflect the views of any client. By way of background, I am Chairman of the Election and Political Law Practice Group of Covington & Burling LLP. Covington has one of the nation's oldest election and political law practices. We advise a wide variety of corporate and trade association clients, as well as political parties, PACs, lobbying firms, tax-exempt organizations, and individuals, concerning compliance with the federal election laws. Our election and political law clients include some of the nation's leading trade associations, financial institutions, manufacturers, and technology companies. We regularly represent clients in enforcement matters before the Federal Election Commission.

Currently, the Federal Election Commission does not publicly release the methodology that it uses to make an initial assessment of penalties in an enforcement action. The Commission's practice of maintaining secrecy around its determination of penalties adversely shapes the way that regulated persons view the enforcement process, and it discourages those persons from voluntarily disclosing compliance issues to the Commission. Making the methodology for initial penalty assessments available to the public would make the enforcement process more fair and transparent, reduce the risk of

COVINGTON &amp; BURLING LLP

Chairman Gregg Harper  
 October 31, 2011  
 Page 2

improper strategic behavior by enforcement staff during conciliation negotiations, and greatly increase the incentive for voluntary disclosure of violations to the Commission.

Other federal agencies understand this fundamental logic. A number of federal agencies currently disclose their methodologies for determining civil penalties. *See, e.g.*, Nuclear Regulatory Commission Enforcement Policy (July 14, 2011)<sup>1</sup>; 2010 Federal Sentencing Guidelines Manual (Nov. 1, 2010)<sup>2</sup>; 74 Fed. Reg. 57593 (Nov. 9, 2009) (Office of Foreign Assets Control Economic Sanctions Enforcement Guidelines)<sup>3</sup>; 15 C.F.R. Part 766 Supps. 1 & 2 (Export Administration Regulations); 47 C.F.R. § 1.80 (Federal Communications Committee Forfeiture Proceedings); Civil Money Penalties Policy, Comptroller of the Currency Administrator of National Banks, Policies & Procedures Manual 5000-7 (June 16, 1993)<sup>4</sup>.

For instance, the Environmental Protection Agency's ("EPA") website publishes a list of civil penalty policies for a number of the laws EPA administers.<sup>5</sup> One of several EPA policies that sets settlement penalties is the Public Water System Supervision Program Settlement Penalty Policy under the Safe Drinking Water Act (the "SDWA Policy").<sup>6</sup> The 14-page policy was introduced in 1994 and includes a worksheet for calculating settlement penalties. The SDWA Policy sets forth the maximum penalties allowed by statute and then discusses a two-step process for calculating penalties, which includes how to compute an "economic benefit" component and a "gravity" component. SDWA Policy at 3. The figure is then adjusted based on a number of factors, including the degree of willfulness, history of noncompliance, litigation considerations, and ability to pay. The SDWA Policy gives detailed guidance regarding how the EPA arrives at each of these figures. It also gives the EPA flexibility to reduce a penalty amount in exchange for the party completing an environmentally beneficial project. *See id.* at 12. The SDWA Policy makes clear that it applies only in settlement negotiations and that EPA will seek the statutory maximum in a

<sup>1</sup> At <http://pbadupws.nrc.gov/docs/ML0934/ML093480037.pdf>. This policy has been updated several times. Those updates are available on the NRC's website at <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html>.

<sup>2</sup> At [http://www.ussc.gov/guidelines/2010\\_guidelines/index.cfm](http://www.ussc.gov/guidelines/2010_guidelines/index.cfm).

<sup>3</sup> OFAC publishes guidance, including risk matrices, for several economic and trade sanctions online at <http://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>.

<sup>4</sup> At <http://www.occ.gov/news-issuances/bulletins/pre-1994/banking-circulars/bulletin-273a.pdf>.

<sup>5</sup> *See* <http://cfpub.epa.gov/compliance/resources/policies/civil/penalty/>. The EPA has published penalty policies for at least 18 distinct programs the agency administers.

<sup>6</sup> At <http://www.epa.gov/compliance/resources/policies/civil/sdwa/sdwapen.pdf>.

COVINGTON &amp; BURLING LLP

Chairman Gregg Harper  
 October 31, 2011  
 Page 3

litigation proceeding. The EPA reserves the right to "change this policy at any time, without prior notice, or to act at variance to this policy" and the policy "does not create any rights, implied or otherwise, in any third parties." *Id.* at 14.

The Commission should follow the example of the numerous federal agencies that publish methodologies for computing penalties. The Commission's disclosure of the criteria for assessing penalties would give the public a greater sense that the Commission is acting consistently and fairly. This will positively affect enforcement proceedings.

Under the Commission's current practice, penalties may vary widely in what appear to be similar cases. For years, practitioners have been pondering how the Commission makes an initial assessment of penalties. Yet, it remains a mystery that only those who have experience on the inside can answer. And even former insiders can only speculate, at best, based on past practices. To outsiders, there appears to be little rhyme or reason to these assessments. Sometimes penalties seem to be influenced by subjective factors, such as the size or prominence of the respondent or the respondent's reputational or political vulnerability, rather than by objective, quantifiable factors. This leads to a situation where penalties in like cases do not always appear to be consistent and creates an appearance that the Commission is treating respondents in an arbitrary and unfair manner. Conciliation proceedings are likely to progress more smoothly when respondents feel they are being treated fairly and understand how the Commission arrives at an opening settlement offer.

Publishing the Commission's methodology for assessing penalties is also likely to increase voluntary self-reporting. Currently, the incentives for regulated committees and corporations to self-disclose violations, where disclosure is not required by law, are greatly reduced. This is because a respondent cannot assess the level of the fine the Commission may impose with any reasonable amount of confidence. A potential respondent is more likely to make a *sua sponte* disclosure of a violation if the likely penalty can be assessed prior to contacting the Commission.

In 2007, the Commission adopted a voluntary disclosure policy statement, which sought to encourage voluntary disclosures of Federal Election Campaign Act ("FECA") violations by offering to reduce penalties by 25% to 75%, if certain conditions are met. *See Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions)*, 72 Fed. Reg. 16695 (Apr. 5, 2007). However, the Commission's voluntary disclosure policy is substantially undermined by the fact that the Commission refuses to make public the methodology by which it makes an initial assessment of penalties. In the absence of clear and transparent standards for determining the initial assessment, it is difficult or impossible to predict the impact of the promised 25% to 75% reduction for a voluntary disclosure. Because the Commission staff can simply adjust the initial assessment of the penalty upward to "compensate" for the effect of the 25% to 75%



COVINGTON &amp; BURLING LLP

Chairman Gregg Harper  
 October 31, 2011  
 Page 4

reduction — and can do so in a manner that is permanently shrouded from public scrutiny — the Commission's voluntary disclosure policy has had far less effect than it otherwise might have. If the Commission is free simply to ratchet up the initial assessment to offset the promised reduction, the incentive to self-disclose under the policy is rendered meaningless.

The Commission may fear that creating a formula, publicizing it, and applying it consistently will impair its ability to exercise discretion to adjust penalties in appropriate circumstances. However, the agency methodologies cited above provide for adjustments based on mitigating factors, aggravating factors, and/or other circumstances (such as ability to pay). Like these other policies, the Commission's criteria could incorporate limited adjustments or exceptions the Commission feels are needed to apply discretion, as the Commission has already done in its voluntary disclosure policy statement.

There may also be concerns that giving the public greater insight into the Commission's penalty structure will permit bad actors to calculate the likely cost of a violation in advance. This could allow so-called bad actors to simply figure the penalty into the "cost of doing business." However, the penalty structure can take such a conscious violation into account. Acting with knowing and willful intent to violate the law may trigger criminal sanctions, which is a significant deterrent.

Further, if the Commission is concerned that disclosing the civil penalties authorized in FECA would be an insufficient deterrent to unlawful behavior, then the solution is to seek statutory increases to those penalties, not to cloak the existing penalty regime under a veil of secrecy.<sup>7</sup> If the Commission needs statutory authority to stiffen penalties, the Commission should seek that authority. But the penalty regime itself must be transparent, coherent, and predictable to help ensure fundamental fairness.

It is time to lift the veil of secrecy that shrouds the process the Commission uses to determine fines that should be imposed in enforcement actions. The Commission's current approach can seem opaque and unpredictable, which undermines public confidence and empowers the Commission's critics. Cloaking the penalty process in mystery encourages the public to suspect that the Commission plucks penalties from thin air based on what the Commission thinks it can achieve, rather than based on identifiable law. While I do not believe it would be an accurate inference, the public cannot be faulted for drawing the inference that penalties are handed out in a smoke-filled room guided by politics, not law, in the face of the Commission's reluctance to explain its own

<sup>7</sup> For example, the Federal Sentencing Guidelines set forth very high, but very clear, penalties. See 2008 Federal Sentencing Guidelines Manual, *supra*.

COVINGTON & BURLING LLP

Chairman Gregg Harper  
October 31, 2011  
Page 5

procedures. The Commission could blunt some public criticism by revamping its procedures to enhance due process protections for respondents and to increase the transparency of its decision making.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'R. Kelner', written over a horizontal line.

Robert K. Kelner



### Is Another Bear Market Around the Corner?

If you have a \$500,000 portfolio, you should download the latest report by F. Ken Fisher's firm. It tells you where we think the stock market is headed and must-read report includes our latest stock market forecast, plus research and use in your portfolio right now. [Click Here to Download](#)

Dow Jones Reprints: This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers, use the Order Reprints tool at the bottom of any article or visit [www.djreprints.com](http://www.djreprints.com)

See a sample reprint in PDF format.

Order a reprint of this article now

**THE WALL STREET JOURNAL**

[WSJ.com](http://WSJ.com)

REVIEW & OUTLOOK | JULY 11, 2009

## Our Pettifogging FEC

*'Hillary: The Movie' is the Court's chance to finally fix the FEC.*

The Supreme Court sent a lovely shudder through campaign-finance scolds this month when it agreed to hear arguments in a case that could overturn election donation limits. It's about time, as the Justices will appreciate if they look at the follies at today's Federal Election Commission.

The High Court agreed to hold over until the fall any decision in a case involving "Hillary: The Movie." The FEC claimed the 90-minute 2008 anti-Clinton documentary violated campaign spending limits, which looks like a clear example of limiting political speech. The Justices invited new arguments on some of their more benighted precedents, including 2003's *McConnell v. FEC*, which carved a hole in the First Amendment.

We hope the Court revisits the entire edifice of campaign-finance law, whose absurdities are now on display at the six-member FEC, which is deadlocked on some key rulings. The delay has the campaign-finance goo-goos howling, with some calling on President Obama to boot GOP "obstructionists" whose terms have officially ended, but for whom he has yet to name replacements.

Let's hope for more delay. The cases on which the GOP Commissioners are digging in their heels aren't trivial. Consider Arjinderpal Sekhon, a self-employed medical doctor serving in the U.S. Army Reserve, who in 2006 ran as a Democrat for the House against a long-serving GOP incumbent in a heavily Republican California district. He raised less than \$200,000, had a family member serve as his treasurer and lost in a landslide.

No complaint was ever filed about Mr. Sekhon's campaign disclosure forms -- not by his opponent or any watchdog group. Yet six months after the election, the FEC found that his electronic reports were missing information. In 228 of the 230 itemized contributions, the campaign had listed "self" for both the donor's occupation and employer. The mistakes were clearly due to a software glitch, since Mr. Sekhon's first reports -- completed by hand -- were correct.



The Sekhon campaign tried to remedy this, contacting the FEC for guidance and resubmitting the forms. Yet more than a year after the election, the FEC staff recommended that the Commissioners find reason to believe the Sekhon campaign had broken the law. Because this was an FEC-generated complaint, the Sekhon campaign wasn't told of this recommendation and so couldn't defend itself. Not long after, the FEC lost its quorum, which meant Mr. Sekhon was unable to appeal.

FEC staff instead negotiated a settlement. Rather than find Mr. Sekhon guilty of one mistake, it essentially dinged him for each error and fined him, we are told, approximately \$20,000 (the records are closed to the public). Once the FEC again obtained a quorum, Commissioners were asked to vote to accept this agreement. The three Republicans refused, arguing that the case illustrated FEC "shortcomings" in "due process and civil penalty calculation," and highlighted the "unfair impact on inexperienced political participants."

They contrasted the treatment of Mr. Sekhon with Kay Hagan, a Democrat who won a North Carolina Senate seat in 2008. Ms. Hagan's campaign raised \$8.5 million. A complaint was filed that the campaign had failed to include the occupation and employer for some \$350,000 to \$500,000 of contributions (far more than Mr. Sekhon's total). Yet the Hagan campaign was allowed to respond, hired a lawyer, and the FEC dismissed the matter 5-0.

Unable to agree on Mr. Sekhon, the FEC Commissioners ultimately voted to close the case, which at least spares him from the outrageous fine. Yet Mr. Sekhon is an example of how the FEC treats far too many candidates who run afoul of its pettifogging rules. The Sekhon case has been followed by similar petty enforcement actions, and the GOP Commissioners -- Matthew Petersen, Caroline Hunter and Donald McGahn -- are refusing to agree and are calling for reforms to make the system more navigable to less wealthy or experienced candidates of either party.

The fact that the "reform" community is attacking them reveals once again that the real goal of campaign rules is to protect the professional political class. Justices, take note.

Printed in The Wall Street Journal, page A10

Copyright 2011 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones

Reprints at 1-800-843-0008 or visit

[www.djreprints.com](http://www.djreprints.com)

## **Enforcement Manuals Made Public**

### **Department of Labor**

<http://www.dol.gov/ebsa/oemmanual/>

This manual explains the investigative authority of the DOL, its relationship with other agencies, the administrative procedures and rights given to individuals under investigation, and voluntary compliance guidelines.

### **U.S. Attorneys' Manual**

[http://www.justice.gov/usao/cousa/foia\\_reading\\_room/usam/index.html](http://www.justice.gov/usao/cousa/foia_reading_room/usam/index.html)

This manual explains the authorities of the Attorney General with respect to U.S. Attorneys, the policies and guidelines for most US Attorney functions and how investigation and enforcement of violations of the law by U.S. Attorneys operate.

### **Training Materials from Office of Information Policy**

<http://www.justice.gov/oip/training-materials.html>

This material explains how the OIP trains DOJ attorneys and divisions to respond to FOIA requests.

### **OLC Staff Manual**

<http://www.justice.gov/olc/best-practices-memo.pdf>

This manual explains the process by which OLC staff should develop and publish memoranda.

### **SEC Enforcement Manual**

<http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

This almost 150 page manual explains the process from commencement of investigation through testimony on how the SEC staff should attempt to conduct investigations and work with other state and federal agencies on violations of securities law.

### **U.S. Parole Commission's Rules and Procedures Manual**

[http://www.justice.gov/uspc/rules\\_procedures/uspc-manual111507.pdf](http://www.justice.gov/uspc/rules_procedures/uspc-manual111507.pdf)

This manual explains the process and procedures the U.S. Parole Commission uses in evaluating parole requests.

### **Antitrust Division Manual**

<http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf>

This manual explains the process, tactics, and procedures used by the Antitrust division in the prosecution and trial of antitrust complaints.



US Attorneys > USAM



**United States  
Attorneys'  
Manual**

[title 1](#) Organization and Functions  
[title 2](#) Appeals  
[title 3](#) EOUSA  
[title 4](#) Civil  
[title 5](#) ENRD  
[title 6](#) Tax  
[title 7](#) Antitrust  
[title 8](#) Civil Rights  
[title 9](#) Criminal

[Resource Manuals](#)

[Index](#)

This is the current and official copy of the *United States Attorneys' Manual* (USAM). The USAM was comprehensively revised in 1997. Changes or additions since 1997 are noted at the end of affected sections.



[A](#) [B](#) [C](#) [D](#) [E](#) [F](#) [G](#) [H](#) [I](#) [J](#) [K](#) [L](#) [M](#) [N](#) [O](#) [P](#) [Q](#) [R](#) [S](#) [T](#) [U](#) [V](#) [W](#) [X](#) [Y](#) [Z](#)

**ABA STANDARDS FOR CRIMINAL JUSTICE**

[9-2.101](#) American Bar Association Standards for Criminal Justice

**ABILITY TO PAY**

see [INABILITY TO PAY](#)

**ABORTION**

[8-2.260](#) Special Litigation Section

[8-2.264](#) Freedom Of Access To Clinic Entrances Act

**ABSENCE FROM OFFICE**

[3-2.150](#) Absence from Office—Acting United States Attorney

**ABSENTEE VOTING**

[4-7.200](#) Revocation of Naturalization

[5-1.300](#) Supervision and Handling of Environment and Natural Resources Division Cases—Generally

[8-2.270](#) Voting Rights—Overview

[8-2.286](#) Voting Rights—Miscellaneous Provisions

[8-2.289](#) Preservation and Production of Voting Records, 42 U.S.C. §§ 1974 to 1974d

**ABSOLUTE IMMUNITY**

[4-2.100](#) Sovereign Immunity

[4-5.414](#) Constitutional Torts—The Immunity Defenses

**ABSTRACT OF THE JUDGMENT**

[3-10.200](#) Civil Postjudgment Financial Litigation Activity—Perfecting the Judgment

**ACCESS DEVICES**

see generally Title 9, [Chapter 49](#)

**ACCESSIBILITY**

[1-11.300](#) Department Responsibilities

[8-2.400](#) Disability Rights Section

[8-2.410](#) Disability Rights Section—ADA Enforcement

**ACCOUNTS PAYABLE (AP) TRAVEL MODULE**

[3-8.720](#) Payment for Travel Expenses



UDOL OIP FOIA Guidance and Resources Training - Mozilla Firefox

www.justice.gov/oip/foia/training/index.html

Enforcement Manual Main Page | OIGAM Home | UDOL OIP FOIA Guidance and Resources

THE COMMON LAW IS THE WILL OF *Man* ISSUED FROM THE *Life* OF THE *People*

THE UNITED STATES DEPARTMENT OF JUSTICE

HOME ABOUT AGENCIES BUSINESS RESOURCES NEWS CAREERS CONTACT

Training

General Information  
Policy Manual  
About the Office  
Special Training  
OIP Guidance  
FOIA Resources  
Court Decisions  
Training  
DOJ FOIA Regulations  
Key Dates and Reporting  
Requirements  
Records  
Making a FOIA Request to DOJ  
Finding a FOIA Contact at DOJ  
OIP FOIA  
Contact the Office

## TRAINING

OIP regularly conducts training sessions throughout the year on all aspects of the FOIA and on a wide variety of FOIA related topics. Here you will find descriptions and dates of various training seminars, meetings, and events offered by OIP, including yearly training offered in connection with the Office of Legal Education, specialized training sessions, as well as public training events, meetings, and town halls. Additionally, training materials such as slide presentations and handouts accompanying OIP most popular programs are provided below. Feel free to contact OIP if your agency is interested in specialized FOIA training.

### YEARLY TRAINING COURSES OFFERED BY OIP AND OLE

#### The Freedom of Information Act for Attorneys and Access Professionals

This two-day program is designed for attorneys, FOIA specialists, and other FOIA professionals with limited previous experience working with the FOIA who are new or soon will be working extensively with the Act. This program provides an overview of the FOIA including a discussion of the President's FOIA Memorandum and the Attorney General's FOIA Guidelines. This course also provides specialized workshops on the various FOIA exemptions and on procedural issues, as well as a discussion on proactive disclosures and the FOIA fee and fee waiver requirements.

December 5-6, 2011 (Washington, DC)  
February 28-29, 2012 (Washington, DC)  
May 8-9, 2012 (Washington, DC)  
July 17-18, 2012 (Washington, DC)  
August 14-15, 2012 (Shawnee, VA)

#### Advanced Freedom of Information Act Seminar

This seminar is designed for FOIA professionals and legal advisors of all federal agencies. It provides advanced instruction on selected topics under the FOIA, including up-to-date policy guidance and views from the FOIA requester community. This program also serves as a forum for the exchange of ideas useful in dealing with problems that commonly arise in administering the FOIA.

April 11, 2012 (Washington, DC)

#### Freedom of Information Act Administrative Forum

This program is designed for agency FOIA professionals who have several years of experience with the FOIA and are involved in the processing of FOIA requests on a daily basis. It is devoted almost entirely to administrative matters arising under the FOIA -- such matters as record-retrieval practices, multi-track queue usage, backlog management, affirmative disclosures, and automated record processing. Designed to serve also as a regular forum for the government-wide exchange of ideas and information on matters of FOIA administration, this program brings together veteran FOIA processors from throughout the government and encourages them to share their experiences in administering the FOIA.

June 6, 2012 (Washington, DC)

#### Introduction to the Freedom of Information Act

This half-day program provides a basic overview of the FOIA for agency personnel who do not specialize in access law. It is designed for those who either work with the FOIA only occasionally or need only a general familiarity with the FOIA in order to recognize and handle FOIA-related problems that may arise in other areas of agency activity.

March 14, 2012 (Washington, DC)

### GENERAL INFORMATION

#### OFFICE OF INFORMATION POLICY

LEADERSHIP  
Melanie Ann Pustay  
Director

CONTACT  
Office of Information Policy  
(202) 544-FOIA (3642)

### FOIA LIBRARY

## FOIA.GOV

### TRAINING AND OUTREACH

#### NEXT EVENTS

October 23, 2012  
FOIA Technology Working Group  
(Washington, DC)

November 5, 2012  
Training: FOIA Litigation Seminar  
(Washington, DC)

For a full list of upcoming events, visit our [Day Dates](#) page.

### OPEN GOVERNMENT

AT THE DEPARTMENT OF JUSTICE

### STAY CONNECTED

Sign up for E-MAIL Updates  
Follow us on Twitter



U.S. Department of Justice  
Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

May 16, 2005

**MEMORANDUM FOR ATTORNEYS OF THE OFFICE**

*Re: Best Practices for OLC Opinions*

By delegation, the Office of Legal Counsel exercises the Attorney General's authority under the Judiciary Act of 1789 to advise the President and executive agencies on questions of law. OLC is authorized to provide legal advice only to the Executive Branch; we do not advise Congress, the Judiciary, foreign governments, private parties, or any other person or entity outside the Executive Branch. OLC's primary function is to provide formal advice through written opinions signed by the Assistant Attorney General or (with the approval of the AAG) a Deputy Assistant Attorney General. Our Office is frequently called upon to address issues of central importance to the functioning of the federal Government, and, subject to the President's authority under the Constitution, OLC opinions are controlling on questions of law within the Executive Branch. Accordingly, it is imperative that our opinions be clear, accurate, thoroughly researched, and soundly reasoned. The value of an OLC opinion depends on the strength of its analysis. Over the years, OLC has earned a reputation for giving candid, independent, and principled advice—even when that advice may be inconsistent with the desires of policymakers. This memorandum reaffirms the longstanding principles that have guided and will continue to guide OLC attorneys in preparing the formal opinions of the Office.

**Evaluating opinion requests.** Each opinion request is assigned to a Deputy and an Attorney-Adviser, who will review the question presented and any relevant statutory materials, prior OLC opinions, and leading cases to determine preliminarily whether the question is appropriate for OLC advice and whether it appears to merit a written opinion, as distinct from informal advice. The legal question presented should be focused and concrete; OLC generally avoids undertaking a general survey of an area of law or a broad, abstract legal opinion. There also should be a practical need for the opinion; OLC particularly should avoid giving unnecessary advice where it appears that policymakers are likely to move in a different direction. A formal opinion is more likely to be necessary when the legal question is the subject of a concrete and ongoing dispute between two or more executive agencies. If we are asked to provide an opinion to an executive agency whose head does not serve at the pleasure of the President (i.e., an agency whose head is subject to a "for cause" removal restriction), our practice is to receive in writing from that agency an agreement to be bound by our opinion. As a prudential matter, OLC should avoid opining on questions likely to be at issue in pending or imminent litigation involving the United States as a party (except where there is a need to resolve a dispute within the Executive Branch over a position to be taken in litigation). Finally, the opinions of the Office should address legal questions prospectively; OLC avoids opining on the

legality of past conduct (though from time to time we may issue prospective opinions that confirm or memorialize past advice or that necessarily bear on past conduct).

***Soliciting the views of interested agencies.*** Before we proceed with an opinion, our general practice is to ask the requesting agency for a detailed memorandum setting forth the agency's own analysis of the question—in many cases, there will be preliminary discussions with the requesting agency before the formal opinion request is submitted to OLC, and the agency will be able to provide its analysis along with the opinion request. (A detailed analysis is not required when the request comes from the Counsel to the President, the Attorney General, or one of the three other Senior Management Offices of the Department of Justice.) In the case of an interagency dispute, we will ask each side to submit such a memorandum. Ordinarily, we expect the agencies on each side of a dispute to share their memoranda with the other side, or permit us to share them, so that we may have the benefit of reply comments, when necessary. When appropriate and helpful, and consistent with the confidentiality interests of the requesting agency, we will also solicit the views of other agencies not directly involved in the opinion request that have subject-matter expertise or a special interest in the question presented. For example, when the question involves the interpretation of a treaty or a matter of foreign relations, our practice is to seek the views of the State Department; when it involves the interpretation of a criminal statute, we will usually seek the views of the Justice Department's Criminal Division. We will not, however, circulate a copy of an opinion request to third-party agencies without the prior consent of the requesting agency.

***Researching, outlining, and drafting.*** An OLC opinion is the product of a careful and deliberate process. After reviewing agency submissions and relevant statutes, OLC opinions and leading cases, the Deputy and Attorney-Adviser should meet to map out a plan for researching the issues and preparing an outline and first draft of the opinion. The Deputy and Attorney-Adviser should set target deadlines for each step in the process and should meet regularly to review progress on the opinion. A thorough working outline of the opinion will help to focus the necessary research and the direction of the analysis. An early first draft often will help identify weaknesses or holes in the analysis requiring greater attention than initially anticipated. As work on the opinion progresses, it will generally be useful for the Deputy and the Attorney-Adviser to meet from time to time with the AAG to discuss the status and direction of the opinion project.

An OLC opinion should focus intensively on the central issues raised by a question of law and should, where possible, avoid addressing issues not squarely presented. On any issue involving a constitutional question, OLC's analysis should focus principally on the text of the Constitution and the historical record illuminating the original meaning of the text and should be faithful to that historical understanding. Where the question relates to the authorities of the President or other executive officers or the separation of powers between the Branches of the Government, past precedents and historical practice are often highly relevant. On questions of statutory and treaty interpretation, OLC's analysis will be guided by the text and will rely on traditional tools of construction in interpreting the text. OLC opinions should also consider and apply the past opinions of Attorneys General and this Office, which are ordinarily given great weight. The Office will not lightly depart from such past decisions, particularly where they directly address and decide a point in question. Decisions of the Supreme Court and courts of appeals directly on point often provide guiding authority and should be thoroughly addressed,



particularly where the issue is one that is likely to become the subject of litigation. Many times, however, our Office will be asked to opine on an issue of first impression or one that is unlikely to be resolved by the courts; in such instances, court decisions in relevant or analogous areas may serve as persuasive authority, depending on the strength of their analysis.

In general, we strive in our opinions for clarity and conciseness in the analysis and a balanced presentation of arguments on each side of an issue. If the opinion resolves an issue in dispute between executive agencies, we should take care to consider fully and address impartially the points raised on both sides; in doing so, it is best, to the extent practicable, to avoid ascribing particular points of view to the agencies in a way that might suggest that one side is the “winner” and one the “loser.” OLC’s interest is simply to provide the correct answer on the law, taking into account all reasonable counterarguments, whether provided by an agency or not. It is therefore often not necessary or desirable to cite or quote agencies’ views letters.

**Secondary review of draft opinions.** Before an OLC opinion is finalized it undergoes rigorous review by the Front Office within OLC and often by others outside the Office. When the primary Deputy and the Attorney-Adviser responsible for the opinion are satisfied that the draft opinion is ready for secondary review, the opinion is generally assigned to a second Deputy for a “second Deputy read.” Along with the draft opinion, the Attorney-Adviser should provide to the second Deputy copies of any key materials, including statutes, regulations, key cases, relevant prior OLC opinions, and the views memoranda received from interested agencies. Once the second Deputy read is complete and the second Deputy’s comments have been addressed, the primary Deputy should circulate the draft opinion for final review by the AAG, the remaining Deputies, and any particular attorneys within the Office with relevant expertise.

Once OLC’s internal review is complete, a draft of the opinion may be shared outside the Office. In some cases, because of time constraints, OLC may circulate a draft opinion before the internal review is complete. Our general practice is to circulate draft opinions to the Office of the Attorney General and the Office of the Deputy Attorney General for review and comment. When and as warranted, we also circulate an informational copy of the draft opinion to the Office of the Counsel to the President. In addition, in most cases, we will circulate a draft to the requesting agency (or, in cases where we are resolving a dispute between agencies, to those agencies that are parties to the dispute) for review, primarily to ensure that the opinion does not misstate the facts or the legal points of interest to the agencies. On certain occasions, where we determine it appropriate, we may circulate a draft opinion to one or more other agencies that have special expertise or interest in the subject matter of the opinion, particularly if they have offered views on the question.

**Finalizing opinions.** Once all substantive work on the opinion is complete, it must undergo a thorough cite check by our paralegal staff to ensure the accuracy of all citations and consistency with the Office’s rules of style. After all cite-checking changes have been approved and made, the final opinion should be printed on bond paper for signature. Each opinion ready for signature should include a completed opinion control sheet signed by the primary Deputy, the Attorney-Adviser, and the Deputy who did the second Deputy read. After it is signed and issued, if the opinion is unclassified, it will be loaded into our ISYS database and included in the Office’s unclassified Day Books. A separate file containing a copy of the signed opinion, the

opinion control sheet, and copies of key materials not readily available, such as the original opinion request, the views memoranda of interested agencies, and obscure sources cited in the opinion, will also be retained in our files for future reference.

**Opinion publication.** Most OLC opinions consist of confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of OLC opinions is often necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between OLC and other executive offices; in some cases, the disclosure of OLC advice also may interfere with federal law enforcement efforts. These confidentiality interests are especially great for OLC opinions relating to the President's exercise of his constitutional authorities, including his authority as Commander in Chief. It is critical to the discharge of the President's constitutional responsibilities that he and the officials under his supervision are able to receive confidential legal advice from OLC.

At the same time, many OLC opinions address issues of relevance to a broader circle of Executive Branch lawyers or agencies than just those officials directly involved in the opinion request. In some cases, the President or an affected agency may have a programmatic interest in putting other agencies, Congress, or the public on notice of the legal conclusion reached by OLC and the supporting reasoning. In addition, some OLC opinions will be of significant practical interest and benefit to lawyers outside the Executive Branch, or of broader interest to the general public, including historians. In such cases, and when consistent with the legitimate confidentiality interests of the President and the Executive Branch, it is the policy of our Office to publish OLC opinions. This publication program is in accordance with a directive from the Attorney General to OLC to publish selected opinions on an annual basis for the convenience of the Executive, Legislative, and Judicial Branches of the Government, and of the professional bar and the general public.

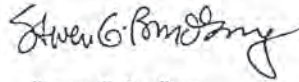
At the time an opinion is signed, the attorneys responsible for the opinion will make a preliminary recommendation as to whether it may be appropriate for eventual publication. Thereafter, on a rolling or periodic basis, each opinion issued by the Office is reviewed for possible publication by the OLC Publication Review Committee. If the Publication Review Committee decides that the opinion meets the Office's basic criteria for publication, the Committee will solicit the views of the agency or Justice Department component that requested the opinion, and any agency or component likely to be affected by its publication, as to whether the opinion is appropriate for current publication, whether its publication should be deferred, or whether it should not be published. OLC gives due weight to the publication recommendations of interested agencies and components, particularly where they raise specific concerns about programmatic or litigation interests that might be advanced or compromised by publication of the opinion. OLC also generally solicits the views of the Office of the Attorney General and the Office of the Counsel to the President on publication questions, particularly with respect to significant opinions of the Office.

After the final decision is made to publish an opinion, the opinion is rechecked and reformatted for online publication; a headnote is prepared and added to the opinion; and the opinion is posted to the Department of Justice Web site at [www.usdoj.gov/olc/opinions.htm](http://www.usdoj.gov/olc/opinions.htm). All opinions posted on the Web site are eventually published in OLC's hardcover bound volumes.



\* \* \*

Please let me know if you have any questions about the principles set forth above or any suggestions for revising or adding to the guidance provided in this memorandum.

A handwritten signature in black ink, appearing to read "Steven G. Bradbury". The signature is fluid and cursive, with the first name "Steven" and last name "Bradbury" clearly legible.

Steven G. Bradbury  
Principal Deputy Assistant Attorney General

Securities and Exchange Commission  
Division of Enforcement



Enforcement Manual

Office of Chief Counsel

*August 2, 2011*

Enforcement Manual  
Table of Contents

1. <u>Introduction</u>
1.1. <u>Purpose and Scope</u>
1.2. <u>Origin</u>
1.3. <u>Public Disclosure</u>
1.4. <u>Fundamental Considerations</u>
1.4.1. <u>Mission Statement</u>
1.4.2. <u>Updating Internal Systems</u>
1.4.3. <u>Consultation</u>
1.4.4. <u>Ethics</u>
2. <u>A Guide to Matters Under Inquiry, and the Stages of Investigations</u>
2.1. <u>General Policies and Procedures</u>
2.1.1. <u>Ranking Investigations and Allocating Resources</u>
2.1.2. <u>Quarterly Reviews of Investigations and Status Updates</u>
2.2. <u>Complaints, Tips, and Referrals</u>
2.2.1. <u>Complaints and Tips From the Public</u>
2.2.1.1. <u>Processing Tips and Complaints from the Public</u>
2.2.1.2. <u>Whistleblower Award Program</u>
2.2.2. <u>Other Referrals</u>
2.2.2.1. <u>Referrals from FinCEN or Referrals Involving Bank Secrecy Act Material</u>
2.2.2.2. <u>Referrals from the Public Company Accounting Oversight Board</u>
2.2.2.3. <u>Referrals from State Securities Regulators</u>

2.2.2.4.	<u>Referrals from Congress</u>
2.2.2.5.	<u>Referrals from Self-Regulatory Organizations</u>
2.3.	<u>Matters Under Inquiry (“MUIs”) and Investigations</u>
2.3.1.	<u>Opening a MUI</u>
2.3.2.	<u>Opening an Investigation, Converting a MUI, or Closing a MUI</u>
2.3.3.	<u>Formal Orders of Investigation</u>
2.3.4.	<u>Formal Order Process</u>
2.3.4.1.	<u>Supplementing a Formal Order</u>
2.3.4.2.	<u>Requests for a Copy of the Formal Order</u>
2.4.	<u>The Wells Process</u>
2.5.	<u>Enforcement Recommendations</u>
2.5.1.	<u>The Action Memo Process</u>
2.5.2.	<u>Commission Authorization</u>
2.5.2.1.	<u>Closed Meetings</u>
2.5.2.2.	<u>Seriatim Consideration</u>
2.5.2.3.	<u>Duty Officer Consideration</u>
2.5.3.	<u>Delegations of Commission Authority</u>
2.6.	<u>Closing an Investigation</u>
2.6.1.	<u>Policies and Procedures</u>
2.6.2.	<u>Termination Notices</u>
3.	<u>A Guide to Investigative Practices</u>
3.1.	<u>Special Considerations</u>
3.1.1.	<u>External Communications Between Senior Enforcement Officials and Persons Outside the SEC Who Are Involved in Investigations</u>
3.1.2.	<u>Statutes of Limitations and Tolling Agreements</u>

3.1.3.	<u>Investigations During Ongoing SEC Litigation</u>
3.1.4.	<u>Parallel Investigations and the State Actor Doctrine</u>
3.2.	<u>Documents and Other Materials</u>
3.2.1.	<u>Privileges and Privacy Acts</u>
3.2.2.	<u>Bluesheets</u>
3.2.3.	<u>Voluntary document requests</u>
3.2.3.1.	<u>Forms 1661 and 1662</u>
3.2.4.	<u>Document Requests to Regulated Entities</u>
3.2.5.	<u>Document Requests to the News Media</u>
3.2.6.	<u>Subpoenas for Documents</u>
3.2.6.1.	<u>Service of Subpoenas</u>
3.2.6.2.	<u>Form of Production</u>
3.2.6.2.1.	<u>Accepting Production of Copies</u>
3.2.6.2.2.	<u>Bates Stamping</u>
3.2.6.2.3.	<u>Format for Electronic Production of Documents to the SEC</u>
3.2.6.2.4.	<u>Privilege Logs</u>
3.2.6.2.5.	<u>Business Record Certifications</u>
3.2.6.2.6.	<u>Confirming Completeness of Production</u>
3.2.6.3.	<u>Forthwith Subpoenas in Investigations</u>
3.2.6.4.	<u>Maintaining Investigative Files</u>
3.2.6.4.1.	<u>Document Control</u>
3.2.6.4.1.1.	<u>Document Imaging in Investigations</u>
3.2.6.4.1.2.	<u>Electronic Files</u>
3.2.6.4.1.3	<u>Complying with Federal Rule of Civil Procedure 26(a)</u>



<u>Requirements and Preserving Evidence in Anticipation of Litigation</u>
3.2.6.4.1.4 <u>Iron Mountain</u>
3.2.6.4.2. <u>Preserving Internet Evidence</u>
3.2.6.4.3. <u>Preserving Physical Evidence</u>
3.2.6.4.3.1. <u>Preserving Audiotapes</u>
3.2.6.4.3.2. <u>Preserving Electronic Media</u>
3.3. <u>Witness Interviews and Testimony</u>
3.3.1. <u>Privileges and Privacy Acts</u>
3.3.2. <u>No Targets of Investigations</u>
3.3.3. <u>Voluntary Telephone Interviews</u>
3.3.3.1. <u>Privacy Act Warnings and Forms 1661 and 1662</u>
3.3.3.2. <u>Notetaking</u>
3.3.4. <u>Voluntary On-the-Record Testimony</u>
3.3.5. <u>Testimony Under Subpoena</u>
3.3.5.1. <u>Authority</u>
3.3.5.2. <u>Basic Procedures for Testimony Under Subpoena</u>
3.3.5.2.1. <u>Using a Background Questionnaire</u>
3.3.5.2.2. <u>Witness Right to Counsel</u>
3.3.5.2.3. <u>Going Off the Record</u>
3.3.5.2.4. <u>Transcript Availability</u>
3.3.5.2.5. <u>Review of Transcript</u>
3.3.6. <u>Special cases</u>
3.3.6.1. <u>Contacting Employees of Issuers</u>
3.3.6.2. <u>Communications with Employees of Broker-Dealers</u>
3.3.6.3. <u>Contacting Witness Residing Overseas</u>

3.3.7. <u>Proffer Agreements</u>
4. <u>Privileges and Protections</u>
4.1. <u>Assertion of Privileges</u>
4.1.1. <u>Attorney-Client Privilege</u>
4.1.1.1. <u>Multiple representations</u>
4.1.2. <u>Attorney Work Product Doctrine</u>
4.1.3. <u>The Fifth Amendment Privilege Against Self-Incrimination</u>
4.2. <u>Inadvertent Production of Privileged or Non-Responsive Documents</u>
4.2.1. <u>Purposeful Production With No Privilege Review</u>
4.3. <u>Waiver of Privilege</u>
4.3.1. <u>Confidentiality Agreements</u>
4.4. <u>Compliance with the Privacy Act of 1974</u>
4.5. <u>Compliance with the Right to Financial Privacy Act of 1978</u>
4.6. <u>Compliance with the Electronic Communications Privacy Act of 1986</u>
4.7. <u>Handling Materials from FinCEN or Other Sources Involving Bank Secrecy Act Material</u>
5. <u>Cooperation with Other Agencies and Organizations</u>
5.1. <u>Disclosure of Information and Access Requests</u>
5.2. <u>Cooperation with Criminal authorities</u>
5.2.1. <u>Parallel Investigations</u>
5.2.2. <u>Grand Jury Matters</u>
5.3. <u>Cooperation with the Food and Drug Administration</u>
5.4. <u>Cooperation with the Public Company Accounting Oversight Board</u>
5.5. <u>Coordination and Consultation with Banking Agencies</u>
5.6. <u>Informal Referrals from Enforcement</u>

5.6.1. <u>Informal Referrals to Criminal Authorities</u>
5.6.2. <u>Informal Referrals to Self-Regulatory Organizations</u>
5.6.3. <u>Informal Referrals to the Public Company Accounting Oversight Board</u>
5.6.4. <u>Informal Referrals to State Agencies</u>
5.6.5. <u>Informal Referrals to Professional Licensing Boards</u>
6. <u>Fostering Cooperation</u>
6.1. <u>Initial Considerations</u>
6.1.1. <u>Framework for Evaluating Cooperation by Individuals</u>
6.1.2. <u>Framework for Evaluating Cooperation by Companies</u>
6.2. <u>Cooperation Tools</u>
6.2.1. <u>Proffer Agreements</u>
6.2.2. <u>Cooperation Agreements</u>
6.2.3. <u>Deferred Prosecution Agreements</u>
6.2.4. <u>Non-Prosecution Agreements</u>
6.2.5. <u>Immunity Requests</u>
6.3. <u>Publicizing the Benefits of Cooperation</u>
<u>Index of Defined Terms</u>

United States Parole Commission  
Rules and Procedures Manual

TABLE OF CONTENTS

Section (§) Title

P

SUBPART A—UNITED STATES CODE PRISONERS AND PAROLEES

2.1 DEFINITIONS .....	9
2.2 ELIGIBILITY FOR PAROLE; ADULT SENTENCES .....	10
2.3 SAME: NARCOTIC ADDICT REHABILITATION ACT .....	12
2.4 SAME: YOUTH OFFENDERS AND JUVENILE DELINQUENTS .....	13
2.5 SENTENCE AGGREGATION.....	13
2.6 WITHHELD AND FORFEITED GOOD TIME.....	13
2.7 COMMITTED FINES AND RESTITUTION ORDERS .....	13
2.8 MENTAL COMPETENCY PROCEEDINGS .....	14
2.9 STUDY PRIOR TO SENTENCING.....	16
2.10 DATE SERVICE OF SENTENCE COMMENCES.....	16
2.11 APPLICATION FOR PAROLE; NOTICE OF HEARING .....	16

2.12 INITIAL HEARINGS: SETTING PRESUMPTIVE RELEASE DATES .....	18
2.13 INITIAL HEARING; PROCEDURE .....	19
2.14 SUBSEQUENT PROCEEDINGS.....	24
2.15 PETITION FOR CONSIDERATION OF PAROLE PRIOR TO DATE SET AT HEARING	27
2.16 PAROLE OF PRISONER IN STATE, LOCAL, OR TERRITORIAL INSTITUTION ...	27
2.17 ORIGINAL JURISDICTION CASES .....	28
2.18 GRANTING OF PAROLE .....	30
2.19 INFORMATION CONSIDERED.....	30
2.20 PAROLING POLICY GUIDELINES: STATEMENT OF GENERAL POLICY .....	34 6/30/10



Section (§)	Title	Page
	Guidelines Chart .....	36
	Offense Severity Index .....	37
	Chapter 1. Offenses of General Applicability .....	38
	Chapter 2. Offenses Involving the Person .....	39
	Chapter 3. Offenses Involving Property .....	42
	Chapter 4. Offenses Involving Immigration, Naturalization, and Passports .....	
47	Chapter 5. Offenses Involving Revenue .....	47
	Chapter 6. Offenses Involving Governmental Process .....	48
	Chapter 7. Offenses Involving Individual Rights .....	50
	Chapter 8. Offenses Involving Explosives and Weapons .....	51
	Chapter 9. Offenses Involving Illicit Drugs .....	52
	Chapter 10. Offenses Involving National Defense .....	60
	Chapter 11. Offenses Involving Organized Criminal Activity, Gambling, Obscenity, Sexual Exploitation of Children, Prostitution, Non-Governmental Corruption, Currency Transactions, and the Environment .....	61
	Chapter 12. Miscellaneous Offenses .....	64
	Chapter 13. General Notes and Definitions .....	65
	Salient Factor Score .....	72
	Item A .....	73
	Item B .....	76
	Item C .....	77
	Item D .....	78
	Item E .....	78
	Item F .....	79
	Special Instructions for Probation Violator This Time .....	79
	Special Instructions for Parole and Supervised Release Violator This Time .....	79
	Special Instructions for Confinement/Escape Status Violator This Time .....	80
2.21	REPAROLE CONSIDERATION GUIDELINES .....	93
2.22	COMMUNICATION WITH THE COMMISSION .....	94
2.23	DELEGATION TO HEARING EXAMINERS .....	96
2.24	REVIEW OF PANEL RECOMMENDATION BY THE REGIONAL COMMISSIONER .....	97
2.25	HEARINGS BY VIDEOCONFERENCE .....	99
2.26	APPEAL TO NATIONAL APPEALS BOARD .....	99
2.27	PETITION FOR RECONSIDERATION OF ORIGINAL JURISDICTION CASES .....	102
2.28	REOPENING OF CASES .....	103

Section (§)	Title	Page
2.29	RELEASE ON PAROLE	107
2.30	FALSE INFORMATION OR NEW CRIMINAL CONDUCT; DISCOVERY AFTER RELEASE	108
2.31	PAROLE TO DETAINERS; STATEMENT OF POLICY	109
2.32	PAROLE TO LOCAL OR IMMIGRATION DETAINERS	109
2.33	RELEASE PLANS	110
2.34	RESCISSION OF PAROLE	111
2.35	MANDATORY RELEASE IN THE ABSENCE OF PAROLE	114
2.36	RESCISSION GUIDELINES	115
2.37	DISCLOSURE OF INFORMATION CONCERNING PAROLEES; STATEMENT OF POLICY	118
2.38	COMMUNITY SUPERVISION BY UNITED STATES PROBATION OFFICERS	120
2.39	JURISDICTION OF THE COMMISSION	120
2.40	CONDITIONS OF RELEASE	120
2.41	TRAVEL APPROVAL	122
2.42	PROBATION OFFICER'S REPORTS TO COMMISSION	122
2.43	EARLY TERMINATION	123
2.44	SUMMONS TO APPEAR OR WARRANT FOR RETAKING OF PAROLEE	126
2.45	SAME; YOUTH OFFENDERS	127
2.46	EXECUTION OF WARRANT AND SERVICE OF SUMMONS	127
2.47	WARRANT PLACED AS A DETAINER AND DISPOSITIONAL REVIEW	128
2.48	REVOCATION; PRELIMINARY INTERVIEW	132
2.49	PLACE OF REVOCATION HEARING	138

Section (§)	Title	Page
2.50	REVOCATION HEARING PROCEDURE .....	140
2.51	ISSUANCE OF A SUBPOENA FOR THE APPEARANCE OF WITNESSES OR PRODUCTION OF DOCUMENTS .....	142
2.52	REVOCATION DECISIONS .....	143
2.53	MANDATORY PAROLE .....	146
2.54	REVIEWS PURSUANT TO 18 U.S.C. 4215(c) .....	147
2.55	DISCLOSURE OF FILE PRIOR TO PAROLE HEARINGS .....	147
2.56	DISCLOSURE OF PAROLE COMMISSION FILE .....	154
2.57	SPECIAL PAROLE TERMS .....	162
2.58	PRIOR ORDERS .....	163
2.59	DESIGNATION OF A COMMISSIONER TO ACT AS A HEARING EXAMINER ...	163
2.60	SUPERIOR PROGRAM ACHIEVEMENT .....	163
2.61	QUALIFICATIONS OF REPRESENTATIVES .....	166
2.62	REWARDING ASSISTANCE IN THE PROSECUTION OF OTHER OFFENDERS; CRITERIA AND GUIDELINES .....	166
2.63	QUORUM .....	167
2.64	YOUTH CORRECTIONS ACT .....	168
2.65	PAROLING POLICY FOR PRISONERS SERVING AGGREGATE U.S. AND D.C. CODE SENTENCES .....	171
2.66	REVOCATION DECISION WITHOUT HEARING .....	172
2.67	[RESERVED]	
	SUBPART B—TRANSFER TREATY PRISONERS AND PAROLEES	
2.68	PRISONERS TRANSFERRED PURSUANT TO TREATY .....	173
2.69	[RESERVED]	

Section (§)	Title	Page
SUBPART C—DISTRICT OF COLUMBIA CODE PRISONERS AND PAROLEES		
2.70	AUTHORITY AND FUNCTIONS OF THE U.S. PAROLE COMMISSION WITH RESPECT TO DISTRICT OF COLUMBIA CODE OFFENDERS .....	181
2.71	APPLICATION FOR PAROLE .....	182
2.72	HEARING PROCEDURE .....	182
2.73	PAROLE SUITABILITY CRITERIA .....	183
2.74	DECISION OF THE COMMISSION .....	184
2.75	RECONSIDERATION PROCEEDINGS .....	184
2.76	REDUCTION IN MINIMUM SENTENCE .....	185
2.77	MEDICAL PAROLE .....	187
2.78	GERIATRIC PAROLE .....	188
2.79	GOOD TIME FORFEITURE .....	189
2.80	GUIDELINES FOR D.C. CODE OFFENDERS .....	189
2.81	REPAROLE DECISIONS .....	198
2.82	EFFECTIVE DATE OF PAROLE .....	198
2.83	RELEASE PLANNING .....	199
2.84	RELEASE TO OTHER JURISDICTIONS .....	200
2.85	CONDITIONS OF RELEASE .....	201
2.86	RELEASE ON PAROLE; RESCISSION FOR MISCONDUCT .....	202
2.87	MANDATORY RELEASE .....	202
2.88	CONFIDENTIALITY OF PAROLE RECORDS .....	202
2.89	MISCELLANEOUS PROVISIONS .....	203
2.90	PRIOR ORDERS OF THE BOARD OF PAROLE .....	203



Section (§) Title	Page
2.91 SUPERVISION RESPONSIBILITY .....	203
2.92 JURISDICTION OF THE COMMISSION .....	203
2.93 TRAVEL APPROVAL .....	204
2.94 SUPERVISION REPORTS TO COMMISSION .....	204
2.95 EARLY TERMINATION FROM SUPERVISION .....	204
2.96 ORDER OF EARLY TERMINATION .....	205
2.97 WITHDRAWAL OF ORDER OF RELEASE .....	205
2.98 SUMMONS TO APPEAR OR WARRANT FOR RETAKING OF PAROLEE .....	206
2.99 EXECUTION OF WARRANT AND SERVICE OF SUMMONS .....	207
2.100 WARRANT PLACED AS DETAINER AND DISPOSITIONAL REVIEW .....	208
2.101 PROBABLE CAUSE HEARING AND DETERMINATION .....	209
2.102 PLACE OF REVOCATION HEARING .....	211
2.103 REVOCATION HEARING PROCEDURE .....	212
2.104 ISSUANCE OF SUBPOENA FOR APPEARANCE OF WITNESSES OR PRODUCTION OF DOCUMENTS .....	213
2.105 REVOCATION DECISIONS .....	214
2.106 YOUTH REHABILITATION ACT .....	215
2.107 INTERSTATE COMPACT .....	217
SUBPART D—DISTRICT OF COLUMBIA CODE SUPERVISED RELEASEES	
2.200 AUTHORITY, JURISDICTION AND FUNCTIONS OF THE U.S. PAROLE COMMISSION WITH RESPECT TO OFFENDERS SERVING TERMS OF SUPERVISED RELEASE IMPOSED BY THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA. ....	218
2.201 PERIOD OF SUPERVISED RELEASE .....	219



Section (§) Title	Page
2.202 PRERELEASE PROCEDURES .....	220
2.203 CERTIFICATE OF SUPERVISED RELEASE .....	220
2.204 CONDITIONS OF SUPERVISED RELEASE .....	220
2.205 CONFIDENTIALITY OF SUPERVISED RELEASE RECORDS .....	235
2.206 TRAVEL APPROVAL AND TRANSFERS OF SUPERVISION .....	235
2.207 SUPERVISION REPORTS TO COMMISSION .....	236
2.208 TERMINATION OF A TERM OF SUPERVISED RELEASE .....	237
2.209 ORDER OF TERMINATION .....	238
2.210 EXTENSION OF TERM .....	238
2.211 SUMMONS TO APPEAR OR WARRANT FOR RETAKING RELEASEE .....	239
2.212 EXECUTION OF WARRANT AND SERVICE OF SUMMONS .....	243
2.213 WARRANT PLACED AS DETAINER AND DISPOSITIONAL REVIEW .....	245
2.214 PROBABLE CAUSE HEARING AND DETERMINATION .....	245
2.215 PLACE OF REVOCATION HEARING .....	250
2.216 REVOCATION HEARING PROCEDURE .....	252
2.217 ISSUANCE OF SUBPOENA FOR APPEARANCE OF WITNESSES OR PRODUCTION OF DOCUMENTS .....	255
2.218 REVOCATION DECISIONS .....	257
2.219 MAXIMUM TERMS OF IMPRISONMENT AND SUPERVISED RELEASE .....	259
2.220 APPEAL .....	275
M MISCELLANEOUS PROCEDURES .....	275
(01) Aggregated/Non-Aggregated Sentences .....	275
(02) Courtesy Hearings .....	276
(03) Disqualifications of Commission Personnel .....	276

Section (§) Title	Page
(04) Standards for Prisoner Interviews .....	276
(05) Designation of Personnel Other Than Hearing Examiners to Conduct A Hearing . . .	276
(06) Court Modification of Sentences .....	277
(07) Translations .....	277
APPENDIX 1 STANDARD WORDING ON ORDERS .....	278
APPENDIX 2 TEMPORARY/SPECIAL PROCEDURES .....	287
A. Retroactivity of Certain Commission Revisions .....	287
B. Preliminary Interviews; Western District of Washington Cases .....	287
C. Rescission Considerations: Second Circuit Cases .....	288
APPENDIX 3 USE OF PAROLEES AND MANDATORY RELEASEES AS INFORMANTS .	291
APPENDIX 4 TRANSFER TREATY CASES .....	293

## INTRODUCTION

This manual contains the Commission's rules (28 C.F.R. 2.1-2.107; 2.200-2.220) as well as the notes, procedures, and appendices that clarify and supplement these rules. If there appears to be a direct conflict between any of the procedures and a rule, the rule shall control. The notes, procedures, and appendices in this manual are intended only for the guidance of Parole Commission personnel and those agencies which must coordinate their work with the Commission. The notes, procedures, and appendices do not confer legal rights and are not intended for reliance by private persons.

In some instances, it is necessary to implement procedural changes immediately. This will be accomplished by issuance of a "*Rules and Procedures Memo*" signed by the Chairman (to be subsequently ratified by the Commission). These memos are numbered in sequence according to the year issued.

## SUBPART A—UNITED STATES CODE PRISONERS AND PAROLEES

■ §2.1 DEFINITIONS.

As used in this part:

- (a) The term "Commission" refers to the U.S. Parole Commission.
- (b) The term "Commissioner" refers to members of the U.S. Parole Commission.
- (c) The term "National Appeals Board" refers to the three-member Commission sitting as a body to decide appeals taken from decisions of a Regional Commissioner, who participates as a member of the National Appeals Board. The Vice Chairman shall be Chairman of the National Appeals Board.
- (d) The term "National Commissioners" refers to the Chairman of the Commission and to the Commissioner who is not serving as the Regional Commissioner in respect to a particular case.
- (e) The term "Regional Commissioner" refers to Commissioners who are assigned to make initial decisions, pursuant to the authority delegated by these rules, in respect to prisoners and parolees in regions defined by the Commission.
- (f) The term "eligible prisoner" refers to any Federal prisoner eligible for parole pursuant to this part and includes any Federal prisoner whose parole has been revoked and who is not otherwise ineligible for parole.
- (g) The term "parolee" refers to any Federal prisoner released on parole or as if on parole pursuant to 18 U.S.C. 4164 or 4205(f). The term "mandatory release" refers to release pursuant to 18 U.S.C. 4163 and 4164.
- (h) The term "effective date of parole" refers to a parole date that has been approved following an in-person hearing held within nine months of such date, or following a pre-release record review.

# Antitrust Division Manual

U.S. Department of Justice  
Antitrust Division  
Fourth Edition  
Last Updated December 2008

## Chapter I. Organization and Functions of the Antitrust Division

A. Creation .....	<u>I-2</u>
B. Purpose .....	<u>I-2</u>
C. Organization .....	<u>I-3</u>
1. Office of the Assistant Attorney General .....	<u>I-4</u>
a. Assistant Attorney General .....	<u>I-4</u>
b. Deputy Assistant Attorneys General .....	<u>I-4</u>
c. Directors of Enforcement .....	<u>I-5</u>
2. Office of Operations .....	<u>I-5</u>
3. Washington Sections .....	<u>I-6</u>
a. Litigation I Section (Lit I) .....	<u>I-6</u>
b. Litigation II Section (Lit II) .....	<u>I-6</u>
c. Litigation III Section (Lit III) .....	<u>I-7</u>
d. National Criminal Enforcement Section (NCES) .....	<u>I-7</u>
e. Networks and Technology Enforcement Section (NET TECH) .....	<u>I-7</u>
f. Telecommunications and Media Enforcement Section (TEL) .....	<u>I-7</u>
g. Transportation, Energy, and Agriculture Section (TEA) .....	<u>I-7</u>
4. Field Offices .....	<u>I-8</u>
5. Economic Analysis Group .....	<u>I-8</u>
6. Specialized Components .....	<u>I-9</u>
a. Appellate Section .....	<u>I-9</u>
b. Foreign Commerce Section .....	<u>I-10</u>
c. Legal Policy Section .....	<u>I-10</u>
d. Executive Office and Information Systems Support Group .....	<u>I-10</u>
7. Antitrust Division Library System .....	<u>I-11</u>



## Introduction

I am pleased to introduce a new edition of the Antitrust Division Manual, the latest version of the day-to-day resource used by the attorneys, economists, and other professionals of the Division to enforce this country's antitrust laws. The revisions to the Third Edition incorporate changes in the statutes, guidelines, rules, and other documents that govern the Division and reflect the Division's current practices and procedures. This new edition is the result of countless hours of work spent by individuals throughout the Division; without them this document would not be possible.

Since 1998, when the Third Edition of the Manual was published, there have been many changes in the laws and regulations that the Division enforces and the ways that the Division enforces them. The very structure of the Division itself was reorganized, with the creation of new litigating sections in Washington, D.C. Criminal penalties for violating the Sherman Act have been raised, and the role of the Sentencing Guidelines in determining how those penalties should be applied has undergone a significant transformation. The corporate and individual leniency program for reporting criminal offenses has undergone further refinement. Civil practice has become increasingly sophisticated as economics plays a more crucial role in investigations and litigation. Amidst these changes, electronic document production and discovery have created a whole new set of challenges and opportunities for the Division, enabling more sophisticated data analysis but also creating new logistical burdens.

The Manual is an important resource for everyone at the Division, from seasoned attorneys with years of practice under their belts to new paralegals fresh out of college. The material that follows answers questions, ranging from the everyday to the arcane, that arise when conducting investigations or litigating cases. This edition of the Manual is a web-only document with improved text searching functions that allow staff efficiently to find answers to questions about Division practice and procedure. The new format also will allow the Division continually to update the Manual to reflect changes in Division practice and the law.

Many thanks to all of those at the Division whose contributions made this new edition possible. Thank you as well to those individuals whose experiences have shaped the practices and procedures described in these pages.

Thomas O. Barnett  
Assistant Attorney General  
Antitrust Division  
September 2008

## Disclaimer

This Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigative prerogatives of the Department of Justice.



FEDERAL ELECTION COMMISSION

WASHINGTON, D. C. 20463

RESPONSES TO QUESTIONS FROM THE  
COMMITTEE ON HOUSE ADMINISTRATION  
JULY 29, 2011

MANAGEMENT AND ADMINISTRATION

- 1. In March 2010, the FEC Office of Inspector General made recommendations regarding the internal control system for personal communication devices, fleet vehicles, and fleet charge cards that would produce a projected annual savings of about \$50,000. What is the status of the implementation of these recommendations? Please provide any documents related to steps taken to implement the recommendations and the current status of the implementation.*

The FEC OIG's *Final Report: Audit of the Commission's Property Management Controls* (March 2010), observed that a different service plan for personal communication devices (PCDs) offered by a different provider would save approximately \$50,000. However, the Audit Report did not recommend that the FEC change service providers or service plans. Instead, the recommendations were that:

"2i. ITD's Management Assistant should annually monitor monthly PCD usage to assess if the current plan should be adjusted to appropriately meet user needs;" and

"2j. Prior to renewing PCD services or switching service plans, the Contracting Office, in consultation with the PCD Program Office, should conduct and document analysis of service plans offered by the current provider and other potential vendors on the GSA schedule to achieve best value for the agency. Further, the Contracting Office should discuss actual plan details and agency use with the PCD program office and ensure any negotiated service options, such as free texting, are included in the quotes from potential vendors."

The recommendations to monitor monthly PCD usage and survey service plans available have been implemented. In addition to the cost of a service plan, the agency must consider all technical requirements. Among the technical requirements considered when selecting a service provider are: (i) compatibility with the FEC mail system; (ii) area coverage to include all agency travel requirements; (iii) reliability in an emergency competitive environment; and (iv) voice, data, mail, and roaming plans to suit all the mission elements of the FEC.

Each fiscal year, the contracting officer and the program contracting officer's technical representative determine which General Services Administration (GSA) schedule holder has the best value for the FEC for that fiscal year. For FY 2011, the FEC was able to obtain services that

met the FEC's technical requirements while realizing a savings of \$25,000 compared to the previous year. Based on the annual comparison of GSA schedule service providers, the same vendor was again determined to provide the best value to the agency for its PCD services.

The corrective action plan for this audit is attached.

2. *In the FY 2011 Budget Justification, the FEC discussed several initiatives involving security enhancements relating to risk assessments of operations, disaster recovery, and continuity of operations in the event of a disaster. What is the status of these enhancements? Please provide copies of the risk assessments discussed in the budget justification.*

The FEC began to develop an agency-wide Disaster Recovery Plan (DRP) in FY 2008 and completed the plan in FY 2009. This plan provides the means to reduce the risk to the agency and its systems in the event of an emergency situation, including events which affect the FEC alone, or a regional disaster. The plan provides direction for each division of the agency, and it identifies key personnel and assigns duties to those individuals in conducting agency business during the event.

In FY 2009, a back-up primary mission suite of server equipment was purchased and configured to enhance the disaster recovery and allow the FEC to continue operations of the agency if the production environment is lost. This back-up system resides in a separate data center from the production environment and ensures the continuity of operations of the FEC's primary mission systems in the event of a regional disruption.

The FEC developed its Continuity of Operations Plan (COOP) during FY 2009 and FY 2010. This plan documents the requirements and processes necessary for the FEC to perform its mission during various disaster scenarios. The COOP also identifies the minimum computer equipment and space needed to accomplish mission objectives during a period when production equipment and normal work space are not available.

In FY 2010, the FEC began implementing the requirements of Homeland Security Presidential Directive (HSPD-12). The FEC split implementation into three phases. Phase I consisted of procuring the equipment necessary to produce and issue smart cards for all FEC employees. This phase was completed in FY 2010. Phase II consists of using the smart cards as a secondary authentication device for network access. Procurement of additional smart card reading equipment has been completed, and Phase II is in a test environment and will be introduced to the agency as a whole later this fiscal year. Phase II was funded with FY 2011 funds. Phase III is the final phase of HSPD-12 implementation, which involves physical security of the work spaces. Specifically, Kastle Keys will be replaced with the HSPD-12 smart cards to gain access to the building, elevators, and stairwells during off-duty hours by authorized personnel.

The risk assessments are attached.



3. *The FEC's FY 2012 Budget Request Justification states that the agency will be implementing a strategic management system. What does the strategic management plan entail and what else will the agency be implementing in order to comply with the Government Performance Results Modernization Act of 2010? Please provide a copy of the strategic management plan and all communications relating to its implementation.*

The PowerPoint presentation entitled *An Approach for FEC Strategic Planning and Management* illustrates the FEC's strategic management framework and timeline for revising FEC's *Strategic Plan*, in compliance with GPRA Modernization Act of 2010. The Commission is currently on the first phase of implementation. In this phase, the strategic team developed the "Strengths, Weaknesses, Opportunities, and Threats (SWOT)" questions. Currently, Commission staff is conducting the SWOT analysis with focus groups, reviewing existing plans, and conducting an analysis of FEC mandates. In FY 2012, staff will kick-off a strategic leadership team that will identify the Commission's priority goals in coming years, based on the results of the phase one analysis. During FY 2012, the Commission plans to revisit Agency priorities and strategic initiatives, and will most likely redefine the FEC's performance measures to align them to the strategic plan. To make those revisions, the Commission also plans to consult with Congress, as required by GPRA and the GPRA Modernization Act, and with external stakeholders based on a communication plan that the FEC will develop.

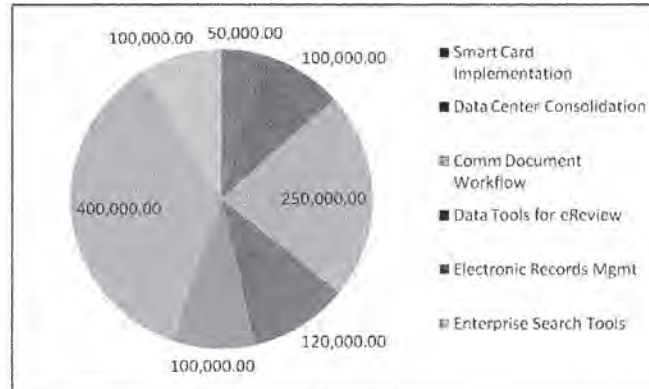
Last winter, the Commission conducted a "Request for Information (RFI)" from the vendor community in order to evaluate the need for potential additional resources for this effort.

The PowerPoint presentation, the SWOT questions, and the RFI are attached.

4. *Please describe, in detail, the allocation of funding for OCIO Support and Initiatives and provide supporting documentation.*

The attached document, entitled *2011 OCIO Projects—Budgeted Projects* provides a list of IT projects, and for each project it states a project description and benefit, the current status, and an estimate of the FY 2011 funds that will be needed for each project. These figures are as of January 1, 2011, and projects that will need funds in later fiscal years are noted. The pie chart below illustrates the allocation of funding.





To provide a process to oversee and approve expenditure of IT project funds in support of the FEC mission, in October 2009, the FEC established and chartered an IT Project Review Board (ITPRB). The board meets periodically as convened by the CIO, but at least during the budget formulation process and the drafting of the agency management plan. The members of the board, representing each office within the FEC, suggest IT initiatives required in support of their part of the mission. The projects are then prioritized by vote of the membership, approved by the Commission, and executed within the IT budget which is part of the management plan approved by the Finance Committee and the Commission. The Commission via the Finance Committee is kept apprised of the status of initiatives and additional funding needs. The board, under the leadership of the CIO, keeps a running list of the projects, their status, the funding required, and those that have been postponed for later implementation pending availability of funding. The charter of the ITPRB and the FY 2011 ITPRB results listing are attached.

5. *In June 2009, the Office of Personnel Management performed an evaluation of the FEC's human capital management. Please provide a copy of the final report supplied by OPM at the conclusion of that evaluation.*

The Office of Personnel Management's (OPM) 2009 evaluation of the FEC's human capital management is attached. In response, the FEC developed a fresh approach and strategies to address the OPM findings. The attached PowerPoint presentation, *A Proposed Human Capital Management System for FEC*, illustrates the FEC's approach to addressing its human capital challenges. The FEC consulted with OPM regarding the new approach and obtained its concurrence in January 2011. Since January, the FEC has made considerable progress in implementing this plan.

At the strategic level, the FEC is currently drafting its Human Capital strategies and plan by engaging managers and employees at all levels. The FEC's *Strategic Plan* is under revision to include Human Capital strategic initiatives. A Request for Proposal (RFP) has been released for hiring a contractor to assist FEC to analyze its workforce needs. A second RFP is being released

to acquire HR Line of Business solution. The FEC has consulted with OPM in order to identify necessary steps for obtaining OPM certification for the FEC's performance management system, in compliance with OPM Human Capital Assessment and Accountability Framework (HCAAF).

At the tactical level, the FEC is conducting an internal third party review of its employees' electronic Official Personnel Files (eOPF) to ensure accuracy and completeness of data; policies for personnel security are being developed and a tracking system is being put in place for ensuring personnel security compliances. An analysis of the HR staff is currently underway for development and implementation of a comprehensive training plan.

6. *The FEC recently began several security enhancement initiatives relating to risk assessments of operations, disaster recovery and continuity of operations in the event of a disaster. What were these initiatives? What results have they produced? Please provide all documents relevant to these initiatives.*

Please see the Response to Question 2 above.

7. *In addition to Westlaw, what other legal research tools are being used by the FEC's Office of General Counsel? Is any one tool found to be more helpful than the others? How much does each tool cost? Please provide any supporting documents for your answers.*

The Office of General Counsel primarily uses four major research tools: (i) Westlaw; (ii) Lexis/Nexis; (iii) Dun & Bradstreet; and (iv) PACER. Overall, the Agency and the Office of General Counsel rely most heavily on Westlaw. The FY 2011 yearly cost for Westlaw was \$430,542. The FY 2011 yearly cost for LexisNexis was \$42,996, which was nearly 60% lower than it was in previous fiscal years. The FY 2011 yearly cost for Dun & Bradstreet was \$24,363. The FY 2011 yearly cost for PACER was \$3,500. Invoices for these expenses are attached.

8. *The FEC's FY 2011 budget request for capitalized equipment was 88% higher than the FY 2010 request. The budget justification claims this was due to the FEC's studies on its Case Management and Data Warehouse Systems in 2008 and 2009. What were the results of the study? What within the studies supports such a dramatically higher capitalized equipment request? What is the status of implementation of the projects? Please provide copies of the studies.*

Generally, IT development projects, software development, and IT purchases over the capitalization threshold are considered capitalized equipment. The FY 2011 budget request for capitalized equipment included the implementation phase of the Case Management System (CMS) replacement project. CMS is used to track the status of enforcement, administrative fines, and ADR matters from initiation through case closure. The FEC's CMS study concluded that the current system was outdated, inefficient, no longer met the needs of the FEC, and should be brought up to date utilizing modern technology and collaborative systems available in today's

market. The cost of the CMS replacement project is reflective of a complete re-make of the CMS to include process renewal, mission custom configuration, and a completely new flow strategy. The next phase of this project has not yet been funded.

The FEC also started a Data Warehouse project study and the developmental prototype, funded out of FY 2009 and FY 2010 appropriations. The initial phase studied the need for a data warehouse to organize data, to extract data from the disclosure data base in support of data analysis, and to automate data review without slowing down operational systems. The FY 2011 request was to begin the implementation phase of the Data Warehouse project, capitalizing on the investment made in development of the prototype. The implementation is estimated to exceed \$2 million over a four-year period. The current prototype phase will be completed on September 30.

The studies are attached.

9. *What areas of the FEC's operations (including reporting, enforcement, and audit functions) are formally measured? What new metrics have been adopted since January 1, 2007, and what are the results of those metrics?*

The formal measures of FEC operations are the 17 performance measures in the *FEC Strategic Plan*, which was approved by the Commission on March 4, 2008.

The following table provides the actual results for FY 2008, FY 2009 and FY 2010, along with the targets set by the *Strategic Plan*.

PERFORMANCE MEASURE		Target	FY 2008 Actual	FY 2009 Actual	FY 2010 Actual
<b>Strategic Objective A: TRANSPARENCY</b>					
1.	Process reports within 30 days of receipt as measured quarterly	95%	91%	78%	91%
2.	Meet the statutory requirement to make reports and statements filed on paper with the FEC available to the public within 48 hours of receipt	100%	100%	100%	100%
<b>Strategic Objective B: COMPLIANCE</b>					
3.	Conduct educational conferences and host roundtable workshops on the campaign finance law each election cycle, achieving a mean satisfaction rating of 4.0 on a 5.0 scale	100%	100%	100%	100%
4.	Issue press releases summarizing completed compliance matters within two weeks of a matter being made public by the Commission	100%	22%	63%	98%



5.	Issue press releases containing summaries of campaign finance data quarterly	100%	100%	75%	75%
6.	Process enforcement cases within an average of 15 months of receipt	100%	66%	76%	75%
7.	Process cases assigned to Alternative Dispute Resolution within 155 days of a case being assigned	75%	64%	26%	64%
8.	Process reason-to-believe recommendations for the Administrative Fine Program within 60 days of the original due date of the subject untimely or unfiled report	75%	79%	84%	100%
9.	Process the challenges in the Administrative Fine Program within 60 days of a challenge being filed	75%	14%	60%	100%
10.	Conclude non-Presidential audits with findings in an average of ten months, excluding time delays beyond the Commission's control, such as subpoenas and extension requests	100%	95%	12%	60%
11.	Conclude non-Presidential audits with no findings in an average of 90 days from beginning of fieldwork	100%	100%	0%	100%
12.	Conclude Presidential audits in an average of 24 months of the election, excluding time delays beyond the Commission's control, such as subpoenas and extension requests	100%	N/A	100%	100%
<b>Strategic Objective C: DEVELOPMENT OF THE LAW</b>					
13.	Complete rulemakings within specific time frames that reflect the importance of the topics addressed, proximity to upcoming elections, and externally established deadlines	100%	50%	83%	50%
14.	Issue all advisory opinions within 60-day and 20-day statutory deadlines	100%	97%	100%	100%
15.	Issue expedited advisory opinions for time-sensitive highly significant requests within 30 days of receiving a complete request, or a shorter time when warranted	100%	60%	100%	N/A
16.	Ensure that court filings meet all deadlines and rules imposed by the Courts	100%	100%	100%	100%

17	Process public funding payments in the correct amounts and within established time frames	100%	100%	100%	N/A
----	---	------	------	------	-----

Discussion of these performance measures can be found in the FEC's *Performance and Accountability Reports (PARs)*, and copies of the FEC *PARs* for FY 2008 through FY 2010 are attached.

10. *What was the cost of the contract with Cherry, Bekaert & Holland, LLP for their followup audit of procurement and contract management issued in June 2011?*

**The Response to Question 10 has been provided by the Office of Inspector General. In accordance with the Inspector General Act of 1978, as amended, the Office of Inspector General operates as an independent unit within the Federal Election Commission.**

\$55,173.73.

11. *Explain why Regis & Associates, PC was not used again for the audit as they had been in September 2009?*

**The Office of the Inspector General provided the response to Question 11.**

Regis & Associates (Regis) was not selected to perform the follow-up audit because Regis' contract offer did not result in the best value to the government (FEC/OIG). In a full and open competition, the OIG solicited bids from audit firms and awarded the contract to the firm that offered the best overall price and technical approach. A panel of FEC OIG staff reviewed all offers and concluded that the audit firm Cherry, Bekaert & Holland presented the best value to the FEC/OIG.



12. According to the Follow-up Audit of Procurement and Contract Management:

*"The previous audit included a review of approximately \$27.6 million of various types of procurement instruments (e.g. contracts, purchase orders, blanket purchase agreements, and one specified interagency agreement) awarded/executed by the Procurement and Contracting Office in fiscal years 2006 through 2008. The follow-up audit selected approximately \$9 million of various procurement instruments awarded/executed by the FEC from June 1, 2009 through September 30, 2010 for testing."*

*Why did the most recent audit include only \$9 million of procurement instruments while the previous audit included \$27.6 million?*

**The Office of the Inspector General provided the response to Question 12.**

The purpose of the follow-up procurement audit ("recent audit") was to determine whether the FEC implemented the recommendations from the 2008 Audit of Procurement and Contract Management. The most recent audit was a follow-up to the original audit and intended to be smaller in scope than the original audit. The audit sample for the follow-up audit was designed to provide a representative number of "procurement instruments" that would provide sufficient evidence on whether the agency had addressed the previously reported weaknesses. Therefore, the auditors concluded \$9 million of procurement instruments was an appropriate amount to reach their conclusions for the follow-up audit.

13. According to the Follow-up Audit of Procurement and Contract Management, "there is a lack of a human resource contingency plan to address the risk resulting from having one full time contracting officer in the agency." Please explain what exactly the "risk" is in having one full time contracting officer in the agency.

**The Office of the Inspector General provided the response to Question 13.**

The OIG's 2008 Performance Audit of Procurement and Contract Management report noted periods of extended absence of the FEC Contracting Officer and no human capital plan to address the risk. The risk encompasses the possible extended absence of the sole FEC Contracting Officer and the lack of an experienced individual to carry-out the duties and responsibilities of the Contracting Officer, exposing the FEC to several risks. Such risks include, among others, the execution of contracts that have not been authorized, or more importantly, for which funding is not available; inadequate monitoring of contractor performance; and the acquisition of goods and services that do not fully meet the needs of the agency, thereby resulting in wasted funds. FEC management agreed with the auditors and has taken steps to address the risk, including recruitment of a Contract Specialist that is a certified acquisition professional, thereby providing the agency with another individual trained and knowledgeable in acquisition, in the event the Contracting Officer is absent.

14. *Twelve of fifteen prior recommendations remain open and a number of new recommendations regarding procurement and contract management have been added to the 2011 Audit. Please explain in detail which recommendations have remained open since the previous audit and which recommendations are new.*

The attached spreadsheet, *Response to Q14*, identifies the 12 audit findings that remain open since the previous audit and the one audit finding that is new.

15. *Additionally, please explain why the previous recommendations remain open and what is being done to resolve them.*

The attached spreadsheet, *Response to Q15*, outlines the corrective action plan that was developed to address the findings and what action has been taken.

16. *Of the fourteen findings and recommendations, management has concurred fully with 9 of the recommendations. Please describe each recommendation and explain in full how management plans to implement each recommendation.*

The attached spreadsheet, *Response to Q16*, outlines the audit recommendations and management's plan to address each recommendation.

17. *For the five additional recommendations that management did not concur with, please explain the reasoning behind each disagreement and explain any alternatives management plans to take.*

The attached spreadsheet, *Response to Q17*, outlines the audit recommendations management's plans to address the recommendations, and management's reason for not concurring.

#### Staffing

18. *What is the FEC's current pay structure for individuals other than the Staff Director and General Counsel? What are the benefits provided to employees?*

Under FECA, the Commissioners' salaries are at Executive Level IV. Other than the statutorily paid positions of Commissioner, Staff Director and General Counsel, the Commission's current pay structure consists of General Schedule and Senior Level (SL) positions. As shown on the attached *FEC Staffing Report*, currently 10 employees are in SL positions, and 335 are on the General Schedule. In addition to salary, the Commission exercises its authority under 5 C.F.R. Part 451 to grant performance, monetary, honorary, and time-off awards to its employees in appropriate circumstances.

The Commission also provides the standard array of Federal government benefits programs. FEC benefits include the Federal Employees Health Benefits Program; Dental and Vision Insurance (where employees pay all premiums); Flexible Spending Accounts; Annual, Sick and Holiday Leave; Thrift Savings Plans; Retirement; Medicare – Part A, where applicable; Federal Employees Group Life Insurance; Long Term Care Insurance Program; Recruitment, Retention, Relocation Incentives, where applicable; Transit Subsidy Benefits; Flexible Work Schedules; and Telework.

19. *Has the pay structure precluded the FEC from hiring any individuals other than the Staff Director and General Counsel? If so, please provide examples and explanations.*

Because the Commission is specifically excluded from the Senior Executive Service (SES) by statute, 5 U.S.C. § 3132(a)(1), the FEC's senior executives (*i.e.*, the Deputy Staff Directors, the Deputy and Associate General Counsels, and the Chief Financial Officer ) are in positions designated Senior Level. Since passage of the Senior Professional Performance Act of 2008, Public Law 110-372, 122 Stat. 4043 (2008), the pay for the Senior Level and the SES is in parity.

The Commission has not been precluded from filling any positions by the lack of SES eligibility. Nonetheless, the Commission is at a disadvantage when it attempts to fill its Senior Level positions because those positions are less attractive to potential applicants as Senior Level positions than they would be as SES positions. For applicants who are already in the SES and for SES certified applicants, positions in the SES program are more appealing. Additionally, with SES program eligibility, the Commission would be able to draw from a pool of applicants who are already in the Senior Executive Service. These applicants not only possess the core executive qualifications, but also are experienced and seasoned leaders. The Commission also could use the services of an OPM Qualifications Review Board to certify the executive qualifications of the selectee. The appointment and retention of these key leaders has been identified as an ongoing challenge to the Commission by the Inspector General in recent *Performance and Accountability Reports*. The Commission expects that retention and recruiting in Senior Level positions would be enhanced if the Commission were eligible to participate in the SES program.

20. *The FEC's legislative proposals suggest that the Commission be allowed to hire individuals as part of the Senior Executive Service (SES). Does the FEC currently have problems recruiting and retaining qualified individuals in senior positions? If so, please provide examples and explanations.*

Yes, as described above in Response to Question 19. Additionally, when the Commission used executive search firms to recruit for key management positions, the firm noted that although applicants were interested, many potential applicants expressed a reluctance to pursue a position that was not part of the SES program.



21. *The FEC's legislative recommendations for this year proposed allowing the Commission "to move to merit-based pay systems for top executives." How would you measure "merit" for these executives?*

The Commission's top executives, apart from Commissioners, the Staff Director and General Counsel, are currently classified in the Senior Level, and their bonuses and pay raises are based on performance. If the Commission is made eligible to create Senior Executive Service positions, it would measure merit by basing pay on performance, consistent with the Office of Personnel Management's (OPM) and the Office of Management and Budget's (OMB) merit-based pay systems for executives. To do so, it will develop an SES performance appraisal system for its executives based on OPM's SES Performance Appraisal Assessment Tool (SES-PAAT) and would seek OPM certification and OMB concurrence of its appraisal system pursuant to the Chief Human Capital Officers Act of 2002. This would require the FEC to align individual performance plans with the FEC's strategic and human capital plans.

22. *The FEC's legislative proposals suggest removing the requirement from federal statute that fraudulent misrepresentation of campaign authority be damaging to a campaign. How many individuals have not been prosecuted because of the requirement of proving damages for claiming to act under the authority of a real or fictitious campaign or political organization?*

The Commission is unable to determine how many individuals have not been subjected to Commission enforcement actions because of the requirement for proving damages for claiming to act under the authority of a real or fictitious campaign or organization. The Commission's statement in its legislative recommendation regarding the difficulties of proving damages at the threshold "reason to believe" stage was a general statement, and was not referencing particular matters. Because of the inherent nature of the activity involved in a violation of 2 U.S.C. § 441h, the Commission considers this a core violation that should be aggressively enforced, particularly given the proliferation of varying forms of electronic communication that reach large numbers of individuals with little effort and virtual anonymity. The damages requirement in the fraudulent misrepresentation portion of the statute creates the need for an additional showing not required in connection with a matter involving fraudulent solicitation of funds. Accordingly, the Commission recommended making the two portions of the statute consistent by removing the damages requirement from 2 U.S.C. § 441h(a).

23. *What are all the Commission's staff positions and their descriptions (duties, salary, expectations, etc.)?*

Attached is the FEC's *Staffing Report*, as of July 16, 2011, which lists every position title, pay plan, grade, and salary. Also attached are position descriptions explaining the duties and expectations for each of the positions listed on the *Staffing Report*.

24. *What is the status of the FEC's efforts to fill the position of Staff Director?*

The Commission will provide an answer to this question next week.

25. *Is there a policy regarding the hiring of individuals for the Office of General Counsel who have represented or been employed by candidates, political party committees, or other political committees? If so, what is that policy?*

There is no policy within the Office of General Counsel regarding hiring individuals who have represented or been employed by candidates, party committees or other political committees.

26. *How many people employed by the FEC have prior experience representing or being employed by candidates, political party committees, or other political committees?*

The Commission has not collected, maintained or surveyed this information in a systematic way. The Commission is concerned that doing so now could lead to and complicate the defense of potential complaints that the agency has discriminated for or against employees or applicants for employment on the basis of their political affiliation. See 5 U.S.C. § 2302(b)(1)(E).

27. *How many people employed by the Office of General Counsel have prior experience representing or being employed by candidates, political party committees, or other political committees?*

Please see the Response to Question 26 above.

28. *How many federal guards are employed by the FEC? How much does it cost to arm each guard?*

The contracted guards at the screening points into the building that houses the FEC and part of the Federal Emergency Management Agency (FEMA) are armed as required by GSA federal security lease standards and Federal Protective Service policy. The Commission entered into a new inter-agency agreement with the Department of Homeland Security in 2009 for armed guard services. Currently, there are three armed federal guards in the Commission lobby Monday through Friday between the hours of 6:30 AM and 6:00 PM, and one guard remains on-site from 6:00pm—through 10:30pm. These guards staff the screening point in the building's lobby. The total yearly contract to provide armed guards during these hours is \$530,000 (which includes basic security, armed guards, guard supervisor, fees, and optional additional services). FEMA pays additional funds for its share of the cost of the guards. A copy of the contract for FY 2011 is attached.



29. *After the Citizens United decision, has staff that previously dealt with those issues been reallocated? If so, to what department and why? If no, why not?*

Because no Commission staff were assigned to work exclusively on issues related to corporate independent expenditures and electioneering communications, which were at issue in *Citizens United*, no staff were reallocated as a result of the decision. As the Commission's disclosure provisions were upheld in *Citizens United*, reallocation of staff in the Reports Analysis Division was not necessary. The decision has resulted in an increase in reports filed, which in turn equates to more reports to review. The Commission anticipates this trend to continue as more Independent Expenditure PACs register and corporations and labor organizations engage in independent expenditure activity. The Commission will perform an analysis of its workforce as part of the strategic planning and Human Capital planning activities that have recently begun. In this workforce analysis, the Commission is planning to re-examine the allocation of its resources.

30. *Is there a record of how often the "Conflict Coaching" process is utilized?*

The "Conflict Coaching" program, an internal Agency program designed to enhance employee communication skills in resolving challenging issues in a positive fashion, has been utilized 12 times since its creation in January of 2011.

- *Do the two conflict coaches have other duties assigned to them as well?*

Yes, the two conflict coaches at the Agency are full time staff within the Alternative Dispute Resolution Office (ADR Office), and they provide conflict coaching as a collateral duty.

31. *How much does each "Conflict Coaching" session cost to the Commission?*

A "Conflict Coaching" session is provided as a collateral duty to Commission staff by the ADR Specialists. As such, there is no direct cost associated with each session.

32. *Has the FEC explored opportunities to "franchise" administrative functions by having another agency perform them? If so, what functions were considered, what inquiries were made, and what were the results?*

The Commission's administrative functions with respect to payroll and financial management are outsourced to the National Finance Center and General Services Administration, respectively. The Commission is currently exploring human resources lines of business as a way to provide more of an integrated human resources function. In addition, the Commission's Health Unit and Security Guards are provided through inter-agency agreements with the Departments of Health and Human Services and Homeland Security, respectively. Finally, the Government Printing Office currently assists the Commission in processing required employment security clearances.

33. *The Election Assistance Commission has come under fire for its process in hiring a general counsel. How has the FEC avoided these issues?*

With respect to all senior level and statutory positions, the Commission makes the final hiring decision with the assistance of its personnel committee, consisting of two Commissioners. The process involves multiple interviews and a multi-layered screening of candidates.

#### Reporting and Disclosure

34. *What actions prompt a campaign committee to receive a Request for Additional Information ("RFAI")?*

The Reports Analysis Division's review of reports is based on a Commission-approved internal manual that has categories of review with specific thresholds for determining when an RFAI should be sent to a campaign committee. Some of the issues that may prompt a committee to receive an RFAI include missing contributor information, mathematical discrepancies, apparent excessive or prohibited contributions, and failure to properly disclose disbursements, debts, loans, or independent expenditures.

- a. *Have RFAs been sent to PACs? If so, how many and what percentage do they represent of the total number of RFAs?*

Yes, RFAs are routinely sent to PACs, which are technically known as separate, segregated funds established by corporations or labor organizations and non-connected committees. During the 2007-2008 election cycle, 8,053 RFAs were sent to PACs. This represented 48% of the total RFAs sent. During the 2009-2010 election cycle, 6,550 RFAs were sent to PACs. This represented 45% of the total RFAs sent.

- b. *Have RFAs been sent to organizations conducting independent expenditures? If so, how many and what percentage do they represent of the total number of RFAs?*

Yes, RFAs are routinely sent to organizations making independent expenditures. During the 2007-2008 election cycle, 161 RFAs were sent to these organizations. This represented 1% of the total RFAs sent. During the 2009-2010 election cycle, 245 RFAs were sent to these organizations, which included PACs that make only independent expenditures as permitted under *SpeechNow.org v. FEC*. This represented 1.7% of the total RFAs sent.

35. *Is there a manual or handbook that instructs staff as to when an RFAI should be sent? Why is that manual or handbook not disclosed to the public? Please provide a current copy of the manual or handbook to the Committee along with your response to these questions.*

Yes, the Reports Analysis Division uses a document entitled *RAD Review and Referral Procedures*, sometimes referred to as the RAD manual, to determine when an RFAI should be sent. As stated previously, the manual contains specific thresholds which instructs staff when to send an RFAI. This manual is updated and circulated to the Commission for approval every two years and the content is based on input from both staff and Commissioners. One of the FEC's primary objectives is to facilitate transparency through public disclosure of campaign finance activity. The FEC must depend on voluntary compliance, particularly in connection with disclosure, given the volume of reported financial activity. Disclosing the internal thresholds to the public may diminish the incentive to provide full and accurate disclosure on reports filed. The RAD manual, developed pursuant to FECA, § 311(b), codified at 2 U.S.C. § 438(b), is considered a sensitive internal-use-only document.

36. *If there is not a manual or handbook that instructs staff as to when an RFAI should be sent, how are decisions made to send an RFAI?*

As stated in the answer to question 35, the RAD manual is used to determine when an RFAI should be sent.

37. *According to your 2010 PAR, electronic filing went down from 74.6% reported in 2009 to 69.4% reported in 2010. What explains this decrease in electronic filing over the past year?*

The data provided in the FEC's 2010 PAR illustrates that the total number of reports and statements filed in FY 2009 (both electronically and on paper) was 74.6 thousand, and in FY 2010 the total number of reports and statements filed was 69.4 thousand. As stated in the 2010 PAR above Figure 5, because elections occur in November, the data show an increase in the number of reports received by the FEC in odd-numbered fiscal years.

The FEC's 2010 PAR is attached.

38. *Reporting and disclosure are a major part of the FEC's work, but it is the Committee's understanding that only about ten percent of the FEC's employees work on reports and disclosure. Is that correct? If so, is it an appropriate allocation of the Commission's staff resources?*

The Commission estimates that, at a minimum, the percentage of employees who work exclusively on reporting and disclosure functions is 23 percent, including those in the Reports Analysis Division (53 employees), the Public Disclosure Division (23 employees), the Office of



Administrative Review (1 employee), and some in the Information Technology Division (4 employees). Moreover, this figure does not include those employees with a portion of responsibilities that are related to reporting and disclosure, including the Audit Division (36 employees), the Office of Alternative Dispute Resolution (2 employees), the Information Division (14 employees), and additional Information Technology Division staff (6 more employees). Finally, the staff in many other offices regularly address reporting and disclosure issues, including particularly attorneys in the Office of General Counsel.

Managers routinely evaluate workforce needs and balance priorities accordingly. The Commission will perform an analysis of its workforce as a part of the strategic planning and Human Capital planning activities that are just started. In this workforce analysis, the Commission is planning to re-examine the allocation of its resources.

39. *Does the FEC believe it is appropriate to request information from reporting entities when the entity has no legal obligation to provide the information? Please provide an explanation for your answer.*

No, the FEC does not believe it is appropriate to request information from reporting entities when the entity has no legal obligation to provide the information. Requests For Additional Information (RFAs) are sent only to those filers who appear to have discrepancies on the reports it has filed when an applicable threshold in the Commission-approved RAD manual, which is a compromise document, has been met. All RFAs specifically cite to an applicable regulation or statute at issue. Thus, an RFA is a first step in implementing and enforcing the statutory and regulatory program. Further, the RAD manual outlines certain limited circumstances for which an informational paragraph can be sent in an effort to educate filers on reporting issues; however, a response is not required. For example, an RFA will inform a filing entity if it reported a financial transaction on an incorrect line on the Detailed Summary Page of an FEC form.

40. *What safeguards are in place to ensure that RFAs are not used to discourage or suppress political speech?*

RFAs are sent to ensure clear and accurate public disclosure of campaign finance activity in compliance with the Federal Election Campaign Act's disclosure provisions. A recent innovation by the Commission permits reporting entities to pose legal questions to the Commission, and this avenue is available to any reporting entity that disagrees on a question of law related to the corrective action requested in an RFA. See FEC, *Policy Statement Establishing a Pilot Program for Requesting Consideration of Legal Questions by the Commission*, 75 Fed. Reg. 42088 (July 20, 2010). The Commission voted to make this program permanent on July 21, 2011. The RAD manual, which is a compromise document that determines when an RFA should be sent, is updated and circulated to the Commission for approval every two years. As an additional safeguard, all RFAs and Committee responses to RFAs are placed on the public record via the FEC's website.

The *Policy Statement* and the Commission's recent agenda document making the program permanent are attached.

#### Enforcement Process

41. *Past Commission legislative recommendations have suggested moving away from the "reason-to-believe" standard (for example, in 1982-96, 1999, 2001-02 and 2004-05). Do you believe that the "reason-to-believe" standard is still appropriate? Does the "reason-to-believe" standard create the appearance that the Commission has decided the merits of a matter before conducting an investigation? Please provide explanations for your answers.*

A "reason to believe" finding by itself does not establish that the law has been violated. Rather, the "reason to believe" standard requires a determination by the Commission based on a complaint or upon information ascertained in the course of its supervisory responsibilities that "there is reason to believe that a person has committed, or is about to commit, a violation of the Act." FECA, § 309(a)(2), *codified at* 2 U.S.C. § 437g(a)(2). In complaint generated matters, the Commission may not make such a finding without first providing the respondent an opportunity to demonstrate in writing that no action should be taken on the complaint. 2 U.S.C. § 437g(a)(1). Commission regulations further specify that the Commission "shall not take any action, or make any finding, against a respondent...unless it has considered such response or unless no such response has been served." 11 C.F.R. § 111.6(b). The Federal Election Campaign Act requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a precondition to opening an investigation in to the alleged violation. FECA, § 309(a)(2), *codified at* 2 U.S.C. § 437g(a)(2).

Periodically, the Commission has asked Congress to replace the "reason-to-believe" requirement with a "reason to open an investigation." *See e.g.,* Legislative Recommendations of the Federal Election Commission in 1982-1984, 1986-2002, 2004, and 2005 (links available at <http://www.fec.gov/law/feca/feca.shtml#legislation>). Congress, however, did not change the requirement.

In March 2007, the Commission adopted a *Statement of Policy* stating that:

Commission "reason to believe" findings have caused confusion in the past because they have been viewed as definitive determinations that a respondent violated the Act. In fact, "reason to believe" findings indicate only that the Commission found sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred.

*See FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007). The Commission further explained:



The Commission will find “reason to believe” in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation. . .

*Id.* at 12545. A complete copy of the *Statement of Policy* is attached. Since the adoption of the *Statement of Policy*, the Commission has not renewed its previous legislative recommendation to revise the standard from “reason to believe” to “reason to open an investigation.”

The Commission published the *Statement of Policy* in an effort to reduce that confusion and to avoid an appearance that the Commission has reached any conclusions, other than finding a sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred. However, depending upon the facts of a particular matter, Commissioners may continue to disagree with respect to the application of the reason to believe standard in that matter.

42. From January 1, 2007 to the present, how many enforcement actions were initiated by the FEC in total and how many were initiated as a result of:
- a. Complaint-generated matters?
  - b. Non-complaint generated matters?
  - c. Internal referrals?
  - d. External referrals?
  - e. Sua sponte submissions?

From January 1, 2007 through June 30, 2011, the FEC has processed a total of 674 cases. The cases are broken down by the following categories: (a) complaint-generated matters; (b) non-complaint-generated matters; (c) internal matters; (d) external referrals; and (e) *sua sponte* submissions.

	a. Complaint- Generated matters	b. Non- complaint generated matters	c. Internal referrals	d. External referrals	e. <i>Sua Sponte</i> submissions	Totals
2007	45	24	19	1	6	95
2008	175	27	14	1	12	229
2009	64	14	12	2	4	96
2010	194	9	4	1	12	220
2011	21	0	6	2	5	34
TOTALS	499	74	55	7	39	674 cases

43. *Out of the total number of enforcement actions initiated by the FEC since January 1, 2007, how many resulted in litigation?*

CY	FEC Initiated	FEC Defending	Total
2007	4	2	6
2008	0	3	3
2009	1	2	3
2010	1	3	4
2011	0	1	1
TOTALS	6	11	17

For the purposes of this question, "FEC Initiated" litigation refers to cases brought by the Commission under 2 U.S.C. § 437g(a)(6) when the Commission votes to initiate civil litigation to enforce the Federal Election Campaign Act, and "FEC Defending" litigation refers to cases brought against the Commission under 2 U.S.C. § 437g(a)(8) when an administrative complainant seeks to challenge how the Commission has handled an administrative complaint.

44. *Does the origin of an enforcement matter affect the type of enforcement action taken?*

Yes, the origin of an enforcement matter may affect the type of enforcement action taken as explained in the paragraph below. The enforcement process begins in one of four ways: (1) the filing of a complaint, (2) a referral from another government agency (3) an internal referral from the Commission's Audit Division or Reports Analysis Division, or (4) a voluntary submission made by persons or entities who believe they may have violated campaign finance laws (often referred to as a *sua sponte* submission).

Enforcement matters originating from a *sua sponte* submission are considered pursuant to a Commission policy designed to encourage individuals to bring violations of the FECA and Commission regulations to the Commission's attention and cooperate with any resulting investigation. In consideration for such self-reporting and cooperation, the Commission may do one or more of the following: take no action against particular respondents; offer a significantly lower penalty than what the Commission otherwise would have sought in a complaint-generated matter involving similar circumstances or, where appropriate, no civil penalty; offer conciliation before a finding of probable cause to believe a violation occurred, and in certain cases proceed directly to conciliation without the Commission first finding reason to believe that a violation occurred; refrain from making a formal finding that a violation was knowing and willful, even where the available information would otherwise support such a finding; proceed only as to an organization rather than as to various individual agents or, where appropriate, proceed only as to individuals rather than organizational respondents; include language in the conciliation agreement that indicates the level of cooperation provided by respondents and the remedial

action taken. See FEC, *Policy Regarding Self-Reporting of Campaign Finance Violations (Spontaneous Submissions)*, 72 Fed. Reg. 16695 (Apr. 5, 2007).

The *Policy* is attached.

45. *From January 1, 2007 to the present, how many entities or individuals that were respondents in enforcement matters elected to be represented by counsel and how many did not?*

From January 1, 2007 to the present, OGC closed a total of 674 cases, involving 2,398 respondents. Of these 2,398 respondents, 571 designated counsel and 1,827 did not designate counsel.

46. *What is the cost (both range and average) to the FEC when a matter goes into an investigation phase after a "reason-to-believe" determination?*

From January 1, 2007 through June 30, 2011, the average cost for a matter that went into the investigative phase of the enforcement process was \$48,172. The range for the data set was \$425,061, and the per-investigation cost varied from under \$1,000 to \$425,079. These sums reflect staff hours as well as costs incurred for deposition transcripts, court reporters, and travel. The staff hours portion of these expenses was calculated using the FEC's Case Management System, which multiplies the hours worked on a case by the hourly rate paid to each employee assigned to that case.

47. *What is the role of agency staff in drafting recommendations for enforcement actions?*

The staff in the Office of General Counsel drafts formal recommendations to the Commission in the form of General Counsel's Reports, or memoranda. The recommendations are explained by a factual and legal analysis contained in the document, and are sent to each Commissioner so that he or she may formally vote on the recommendations. See 11 C.F.R. §§ 111.7 and 111.8; FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12545 (Mar. 16, 2007). Subsequent to the First General Counsel's Report, the staff drafts additional reports that make recommendations appropriate for later stages of a matter: for example, a recommendation to conciliate or investigate. At the probable cause stage of the enforcement process, after reviewing Respondent's brief, the General Counsel also advises the Commission whether to proceed with probable cause by circulating a report to the Commission, which is not served on the Respondent.

The *Statement of Policy* is attached.



48. *Does the Office of General Counsel act as counsel to the Commissioners in enforcement proceedings, or does it act as prosecutor before the Commissioners as tribunal? If the answer is that OGC performs both roles, do the same attorneys act in both roles? Additionally, if the answer is that OGC performs both roles, what measures are taken to ensure that the counsel provided to the Commissioners is not influenced by the desire to zealously prosecute the same matter?*

Following procedures set forth in the statute and Commission regulations, the Office of General Counsel's Enforcement Division investigates alleged violations of the law, recommends to the Commission appropriate action to take with respect to apparent violations, and directly negotiates conciliation agreements, which may include civil penalties and other remedies, with respondents or their counsel to resolve the matter. See generally 2 U.S.C. § 437g; 11 C.F.R. Part 111 Subpart A. When the General Counsel's office makes a recommendation to the Commission, its role is to present the matter based on the facts and the law and explain its recommendation in reports to the Commission, in Commission meetings, and with individual Commissioners and their staff. Recommendations from the Office of General Counsel include whether or not to find reason to believe that a violation has occurred, whether or not to dismiss a complaint, whether or not to grant a motion, whether or not to find probable cause that a violation has occurred, whether – and on what terms – to conciliate a matter, and whether or not to authorize a civil action for relief. Regardless of the General Counsel's recommendation, the decision to proceed with enforcement lies with the Commission. If the Commission authorizes suit, the General Counsel's Litigation Division represents the Commission in the case against the Respondent.

To ensure fairness and transparency in the enforcement process, General Counsel Reports strive to: (1) set forth a clear statement of the facts and the law; (2) discuss any relevant closed or pending MURs, advisory opinions, audits, legislative history, Explanation and Justifications of Final Rules, public records, and court decisions (whether these authorities are favorable or adverse to the General Counsel's recommendation), (3) address respondents' arguments, and (4) recommend a course of action and explain the basis for that recommendation. Any report recommending that the Commission approve, accept, or reject a conciliation agreement should include the out-the-door offers and final penalty amounts of similar violations.

49. *Is the FEC's role to undertake enforcement actions to carry out the intent of Congress when it adopted the Federal Election Campaign Act and its amendments, or to carry out the statutes as interpreted by the courts? Please provide an explanation for your answer.*

The Commission's role is to enforce the statute enacted by Congress as interpreted by the courts. Under the principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), if a statute is ambiguous on a particular issue, the Commission strives to exercise its discretion in a manner that is consistent with the statute's language, its legislative history, and congressional intent.

50. *In 1999, the FEC adopted a policy by vote of the Commissioners that it would not enforce 11 CFR § 100.22(b) in the First and Fourth Circuits.*
- a) *Is that policy still in effect?*

Although the policy has not been formally withdrawn by the Commission, after the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), the policy is no longer followed. For example, Commission has pursued enforcement matters such as: MURs 5511 & 5525 (Swift Boat Veterans) (2006); MUR 5753 (League of Conservation Voters) (2006), and the Commission has been defending 11 C.F.R. § 100.22(b) in *Real Truth About Obama, Inc. v. FEC*, 2011 WL 2457730 (E.D.Va. Jun. 16, 2011), a case which arose in the Fourth Circuit. In that case, the District Court found that *McConnell* and *WRTL* effectively overruled a prior case in the Fourth Circuit that had found section 100.22(b) unconstitutional.

- b) *Are there other statutes or regulations that the FEC enforces in some jurisdictions but not others? If so, what are the statutes or regulations and what are the jurisdictions?*

No.

- c) *Is it the policy or practice of the FEC that when a court declares a statute or regulation unconstitutional, the statute or regulation remains constitutional outside the jurisdiction of that court?*

The Commission does not have a uniform practice regarding whether it considers a statutory or regulatory provision constitutional in one jurisdiction when a provision has been declared unconstitutional in another jurisdiction. The Office of General Counsel makes its recommendations on such determinations based upon several factors, such as the nature of the constitutional challenge (e.g., "facial" or "as applied"), the relief ordered by the court (e.g., declaratory ruling or order vacating a provision), the tribunal's place in the judicial hierarchy, and various venue considerations. Federal agencies retain the discretion to engage in inter-circuit nonacquiescence, as implicitly approved by the Supreme Court in *United States v. Mendoza*, 464 U.S. 154 (1984). In that case, the Court noted that estopping the government from challenging an adverse circuit court decision in other circuits would foreclose the development of circuit splits, which the Supreme Court relies on in selecting its docket.

- d) *When a regulation is declared unconstitutional, what steps does the FEC take with regard to notice to the regulated community, modification of enforcement procedures, and revision to the regulation?*

Under current practice, when a regulation is declared unconstitutional, the Commission may take a variety of steps, including seeking further judicial review. If no such further review occurs, the Commission issues a press release indicating to the public the precise provisions that it no longer intends to enforce, and its enforcement practices will then follow the guidance it has issued to the public. Depending upon the regulation and the court's opinion, the Commission may simply rely on the court's decision and cease enforcing the regulation, or it may repeal the regulation or begin a rulemaking to consider revising the regulation rather than repealing it altogether.



Under current practice, notice to the regulated community often begins with a press release, followed by other less formal means of communication, such as the Tips for Treasurers RSS feed, articles in *The Record* newsletter, and sometimes—as in the case of last year’s *Citizens United* decision—an instructional video. Depending on the scope of the affected regulation, the Commission may also send targeted e-mails to the committees most likely to be affected by the change. Additionally, explanatory notes are added to affected publications and outreach materials are updated.

51. *The FEC website lists a rulemaking petition from 2004 pertaining to MUR documents and records after close as an “ongoing project.” In light of the Commission’s adoption of procedures in December 2009 and recent additional consideration of other disclosure procedures, does the agency intend to conduct a rulemaking in response to the petition?*

The Commission issued a *Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files* in December 2003. See 68 Fed. Reg. 70426 (Dec. 18, 2003). While it may still be useful to update the regulations regarding the public release of MUR files, the Commission has determined that other rulemakings take precedence over this one and has not issued a Notice of Proposed Rulemaking regarding the documents that are made public at the close of a MUR.

The *Statement of Policy* is attached.

52. *What is the role of agency staff in conducting enforcement matters?*

Please see the Response to Question 48, above.

53. *Is there a matrix, chart, or other document identifying the penalties the FEC seeks for each type of violation? If so,*  
 a) *Why isn’t that matrix, chart, or other document disclosed to the public?*  
 b) *Please provide a current copy of the matrix, chart, or other document to the Committee along with your responses to these questions.*

The Commission maintains information that allows it to apply consistent standards when determining the civil penalty that it will seek in an individual enforcement matter. The Commission’s method of calculating penalties is not disclosed to the public out of concerns that doing so would decrease the deterrence effect. At the same time, the Commission recognizes the competing goals of transparency and the need for flexibility to consider the individual circumstances of a particular case.

The Commission’s current policy is to keep such information confidential, but it has also sought comments from the public in order to consider whether it should revisit this policy. On December 8, 2008, the Commission issued a Notice of Public Hearing and Request for Public Comment regarding the compliance and enforcement aspects of its agency procedures, see FEC,

*Agency Procedures: Notice of Public Hearing and Request for Public Comments*, 73 Fed. Reg. 74494 (Dec. 8, 2008), which requested, *inter alia*, comments on whether it should provide the public with information about how it calculates its penalties, and if it did provide such information, whether it should retain its discretion to depart from the guidelines, and whether such guidelines would minimize or eliminate negotiations over what constitutes an appropriate penalty. The Commission received written comments related to this question, and heard relevant testimony at the public hearing held on January 14 and 15, 2009. (Documents related to this hearing are located on the Commission's website. See <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>.) Most of the written comments and hearing testimony focused on the question of what, if any, information about civil penalty calculations should be published. Although several comments recommended that the Commission increase the transparency of the penalty calculation, there were varying positions on how much, and what, information the Commission should publish, including recommendations that the Commission should keep such information confidential. Since the hearing in January 2009, the Commission has considered several of the issues raised by commenters on a variety of issues raised in the 2008 Notice and has issued several new significant agency procedures, even as recently as June of this year. See e.g., FEC, *Agency Procedure for Disclosure of Documents and Information in the Enforcement Process*, 76 Fed. Reg. 34986 (June 15, 2011). Due to the importance and complexity of the considerations that need to be weighed in order to decide whether the Commission should revise its current policy of maintaining the confidentiality of the manner in which it calculates civil penalties in enforcement matters, the Commission is continuing to consider this issue. Until such time as the Commission revises its policy to make such information public, it does not maintain information regarding the civil penalties that it seeks in a manner that is appropriate for public use.

The 2008 and 2011 *Federal Register* documents are attached.

54. *When the FEC is a party to litigation, are decisions on the positions taken in court made by the staff or by the commissioners? Please provide an explanation for your answer.*

When the Commission is a party to litigation, briefs filed on its behalf are signed (usually electronically) by the General Counsel and staff who participated in their drafting. Although the briefs are not written by the Commissioners, the briefs filed by the General Counsel attempt to reflect the positions taken by the Commission as a body or by the controlling group of Commissioners in any particular matter. For example, in cases brought under 2 U.S.C. § 437g(a)(8) challenging the dismissal of an administrative complaint that resulted from a 3-3 vote by the Commission, the General Counsel defends the position of the three Commissioners who voted not to proceed with the allegations of the complaint. See *FEC v. National Republican Senatorial Comm.*, 966 F. 3d 1471, 1476 (D.C. Cir. 1992). In cases that raise issues about which the Commission has not yet taken a formal position, the Office of General Counsel consults with the Commissioners before taking a position in court. Current practice is that litigation briefs and positions are generally circulated on an informational basis, but are not formally approved by the Commission.

55. *What is the average length of time between the notification to a respondent that a Matter Under Review has been initiated, and the decision by the Commissioners that there is or is not reason to believe a violation occurred? What is the median length of time?*

Number of days from Notification to No-RTB (1/1/07-6/30/11):	
Average	257
Median	225

Number of days from Notification to RTB (1/1/07-6/30/11):	
Average	299
Median	260

56. *Does the Office of General Counsel have a manual or handbook that guides its attorneys in conducting enforcement actions? If so,*
- Why is the manual not made available to the public in the same way the Department of Justice discloses its manuals?*
  - How is the manual updated after the FEC loses a court case?*
  - Please provide a current copy of the manual to the Committee along with your responses to these questions.*

The Office of the General Counsel Enforcement Division's internal general manual was last updated in 1997, and is currently used primarily as a reference document on non-substantive questions of internal process (*e.g.* containing references and discussion of outdated forms and data systems used to perform mundane administrative functions such as saving routine correspondence).

The Office of General Counsel keeps its staff current on changes in the law, policies and procedures in a variety of methods. There is no single manual or handbook that serves this purpose. The Office of General Counsel's enforcement practice is "organic" in that it undergoes continual refinement and modification based on continual determinations by the Commission in enforcement matters and with regard to the policies applied to enforcement matters. Updates to enforcement practices and procedures are distributed to the Division staff through the issuance of emails and memoranda. Because the enforcement manual is outdated, and was intended only as an internal guide for agency staff, it is not available to the public, and it would not be appropriate to release it to the public.

In order to increase transparency by providing the public with a comprehensive resource regarding the enforcement process, the Commission has recently issued the *Guidebook for Complainants and Respondents on the FEC Enforcement Process*, which provides relevant information to the public regarding the Commission's enforcement process and can be accessed



on the Commission's website at [http://www.fec.gov/em/respondent\\_guide.pdf](http://www.fec.gov/em/respondent_guide.pdf). A copy is attached.

57. *What have the results been from the program to allow respondents to submit a request for a hearing prior to a probable cause determination in enforcement proceedings?*

From February 16, 2007 through June 30, 2011, 16 requests for hearings prior to probable cause determinations were submitted. Of these, 12 were granted. The first pilot program regarding probable cause hearings went into effect on February 16, 2007. See FEC, *Policy Statement Establishing a Pilot Program for Probable Cause Hearings*, 72 Fed. Reg. 7551 (Feb. 16, 2007), which is attached. The program was made permanent in November 2007. See FEC, *Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64919 (Nov. 19, 2007), which is attached. And then later amended in October 2009 to provide that the Commissioners may ask questions of the General Counsel and Staff Director during Probable Cause Hearings. See FEC, *Amendment of Agency Procedures for Probable Cause Hearings*, 74 Fed. Reg. 55443 (Oct. 28, 2009), which is attached. The probable cause hearings have been beneficial for the Commission to clarify complex questions of law and fact in a give-and-take format.

58. *What is the current relationship between the FEC and the Department of Justice for handling enforcement matters? What document governs that relationship? When was that document last updated? Has either the FEC or DOJ proposed to modify the document? If so, what modifications were proposed?*

The Act provides that the Commission "shall have exclusive jurisdiction with respect to the civil enforcement" of the provisions of the Act and Chapters 95 and 96 of Title 26. 2 U.S.C. § 437c(b)(1). Jurisdiction for criminal enforcement of the Act and Chapter 95 and 96 of Title 26 resides in the Department of Justice ("DOJ"). DOJ's Public Integrity Section generally handles criminal prosecutions of violations of the Act; it publishes a comprehensive "Election Crimes Manual" (current version at <http://www.usdoj.gov/criminal/pin/docs/electbook-0507.pdf>) that may be of particular use to enforcement staff who are handling cases with overlapping criminal issues. The Commission and DOJ have concurrent jurisdiction over knowing and willful violations of the FECA. 2 U.S.C. § 437g(a)(5)(C). In 1977, the Commission and the Department of Justice entered into a Memorandum of Understanding ("MOU") relating to their respective law enforcement jurisdiction and responsibilities. See 43 Fed. Reg. 5441 (1978). A copy of the MOU is attached. However, in light of statutory enhancements to DOJ's ability to prosecute FECA crimes that were contained in the 2002 Bipartisan Campaign Reform Act, the MOU has become somewhat outdated and was the subject of negotiations between DOJ and the Commission in 2003-2007. Although several draft proposals were exchanged between the agencies, those negotiations did not ultimately lead to a revised MOU, and those discussions have not yet been revived.

### Alternative Dispute Resolution

#### 59. *How effective has the ADR process been for enforcement matters?*

ADR encourages the parties to engage in interest-based negotiations—a problem-solving process to develop a solution jointly, in the compliance context. The resulting solution is specific and appropriate for the Commission and for the respondent in the administrative complaint or referral. Since the Commission established the Alternative Dispute Resolution (ADR) program in October 2000, it has evaluated the program twice to assess whether the program met its goals. A 2002 evaluation by an outside vendor determined that the adoption of an ADR program could promote increased compliance with federal election and campaign finance laws. The Commission concluded, following the 2002 evaluation of the first year of the pilot program, that ADR should be made a permanent program at the Commission. The documentation and statistics developed in 2007 covering the first five years of the Commission's ADR program demonstrated that the ADR Program successfully met its goals both by enhancing the processing of cases and expanding compliance with the federal election campaign laws. Specifically, the ADR program reduced Commission costs and processing time compared to traditional enforcement cases; increased the number of cases processed and closed; decreased cases closed without substantive action; expanded the number and type of remedial measures employed to encourage compliance; and showed a low recidivism rate among respondents participating in the ADR program.

Both evaluations of the ADR Program are attached.

- *Do the outcomes of matters resolved through ADR differ from similar enforcement matters resolved through litigation?*

The outcomes of matters resolved through ADR differ from similar enforcement matters resolved through traditional enforcement in that, while both may result in a civil penalty, the ADR agreement's primary focus is on future compliance and how the respondents can become and remain compliant with the FECA. Using interest-based negotiations, respondents and the Commission's ADR Specialists determine what remedial measures will effectively address any procedural deficiencies that could impact future compliance, and thus mitigate any negotiated civil penalty.

- *Do individuals volunteer to enter the ADR process?*

Entrance in the ADR process is voluntary and dependent on whether a case is internally referred to ADR, deemed appropriate by the ADR staff, and the participants consent to the terms of the ADR process. The ADR Office (ADRO) receives cases by referral from the Office of General Counsel, the Reports Analysis Division, the Audit Division, or by assignment from the Commission when four or more Commissioners vote to refer the case to ADR. The ADRO will conduct an initial review and evaluation to determine whether a case is appropriate for ADR. If a case is deemed appropriate, the respondents may then voluntarily commit to the terms for participation in ADR. The terms require that the respondent agrees to participate in good faith in the ADR process; set aside the statute of limitations while the case is in the ADRO; and



participate in interest-based negotiations and, if mutually agreed as appropriate, mediation. If the respondents choose not to participate in ADR, the matter is forwarded to the Office of General Counsel for further processing.

- *What is the typical profile of an individual entering into the ADR Process?*

The typical respondent in a matter referred to ADR is a political committee against whom there has been an allegation of a violation of the Federal Election Campaign Act. The Committees that participate in the process do not conform to a standard profile, but rather vary greatly in size, level of experience, and type (e.g. authorized committee, party committee, corporate and labor organization PAC, or nonconnected PAC).

- *Is there a specific type of claim that the ADR process best resolves?*

The criteria for what matters are appropriate for resolution in the ADR process are very fact specific. ADRO does not have the resources to investigate, so ADR-appropriate cases tend to be matters in which there are no unsettled issues of law or fact. The Commission is notified of every referral made to the ADRO. The objectives and goals of the ADR program are to promote compliance, expand the tools available to the Commission for resolving selected complaints, and resolve matters more quickly without using the full Commission enforcement mechanism, thus reducing costs to both the Commission and respondents.

- *How has the ADR program changed since its inception in 2001?*

The ADR program has evolved since the first cases were referred in October of 2000. Shortly after the inception of the program, the ADRO referral thresholds were added to the Reports Analysis Division's review and referral manual and the Audit Division's materiality thresholds manual. One of the most significant revisions to the process occurred in 2005 and entailed the referral of cases where committees file amended reports to disclose a considerable change in financial activity. In addition, beginning with the 2005-2006 election cycle, committees that are not in substantial compliance with the Federal Election Campaign Act, and thus could be subject to an Commission audit, may be referred to the ADR program when the Commission lacks resources to audit all eligible committees. The final agreement between the Commission and the respondent will enable the respondent to take an active part in shaping the measures necessary to become and remain compliant with the obligations under the FECA.

60. *What factors determine whether a claim will be handled through the ADR process?*

The predominant factors that determine whether a matter is appropriate for processing in ADR are that there are no disputed facts or unsettled issues of law. ADRO referral thresholds in the Reports Analysis Division's review and referral manual and the Audit Division's materiality thresholds manual determine whether a matter will be referred to the ADRO, both of which are circulated to the Commission for approval every two years and are based on input from both staff and Commissioners.

61. *What are the steps in the ADR process? What is the average time for a claim to move through each step?*

Timeline of the Negotiated Settlement Process (150-165 days)

- 1) Beginning the ADR Process – 30-45 days
  - a) Matter is referred to the ADRO
  - b) Matter is analyzed for suitability for ADR
  - c) The Commission is informed of the referral
  - d) The Respondent is advised of the referral to the ADRO
  - e) Respondent commits to participating in ADR program
- 2) Interest-based Negotiations and a draft settlement – 30-45 days
- 3) Settlement signed by respondent and returned to ADRO for submission to the Commission – 20 days
- 4) Commission approves or rejects settlement – 30 days
- 5) Appropriate documents are placed on the public record – 30 days

If a matter is recommended for dismissal, the time line is considerably shorter (within 90 days)

- 1) Beginning the ADR Process – 30 days
  - a) Matter is referred to the ADRO.
  - b) Matter is analyzed for suitability for ADR
  - c) Matter is recommended for dismissal
- 2) Commission approves or rejects the recommendation to dismiss – 30 days
- 3) Appropriate documents are placed on the public record – 30 days

62. *What is the cost (both range and average) to the FEC of a litigation-type enforcement action?*

a. *ADR?*

The current total cost of the ADR program is approximately \$241,345 annually. This figure represents the approximate salary of two full-time ADR Specialists, as discussed further in response to Question 64 below. During fiscal years 2008 through 2010, the per-case cost ranged from approximately \$500 to \$4,000. The average cost per ADR case over the three fiscal years was approximately \$1,900. These costs per case were derived by using the number of days to resolve a matter as an estimate of the cost per ADR case.

b. *Administrative Fine?*

The current total annual cost of the Administrative Fine (AF) program is approximately \$177,000 annually. This figure represents the approximate salary of two and a quarter employees, as discussed further in response to Question 64 below. During fiscal years 2008 through current date, the average overall cost of an AF case was approximately \$7,625. During

fiscal years 2008 through 2011, the yearly average AF case cost ranged from approximately \$1,309 to \$14,624. These costs per case were derived by dividing total program costs by the number of cases closed during the period. Since the program's implementation in July 2000 through July 12, 2011, 2,264 cases have been processed through the AF program and \$4 million in civil money penalties have been assessed.

63. *What are the different functions of the Alternative Dispute Resolution and Administrative Fine Programs?*

**Alternative Dispute Resolution Program**

The ADR program promotes compliance with the FECA and Commission regulations by encouraging settlements outside of the traditional enforcement or litigation processes. By expanding the tools for resolving administrative complaints and referrals, the program consists of a series of constructive and efficient procedures for resolving disputes through the mutual consent of the parties involved.

**Administrative Fine Program**

The Administrative Fine Program uses established, internal thresholds to identify committees that fail to file timely disclosure reports and then uses a published formula to assess civil money penalties following Commission approval. The program includes a written challenge process whereby committees may dispute the fine, providing supporting information and documentation prior to the Commission's final determination. Additionally, the program collects the payments for the penalties assessed and transfers uncollected penalties to the U.S. Department of Treasury for further collection efforts.

64. *What is the total cost to the FEC to run the ADR program?*

The total cost to the Commission to run the ADR program is approximately \$241,345 annually. This figure represents the approximate salary of two full-time ADR Specialists. Additional costs not reflected in this figure include benefits, training, supplies, and costs incurred in the maintenance of current computer programs used to administer the ADR program.

- *What is the total cost to the FEC to run the Administrative Fine program?*

The total cost to the Commission to run the Administrative Fine program is approximately \$177,000 annually. This figure represents the approximate salary of two and a quarter employees principally responsible for administering the program. Additional costs not reflected in this figure include benefits, training, supplies, and costs incurred in the development and maintenance of computer programs used to administer the Administrative Fine program.



65. *What efforts are taken to ensure that ADR enforcement matters (both in process and in end result) are treated in a consistent manner?*

The ADR process is consistent for every referral as to notification of the allegations, ability for respondents to provide a detailed explanation of what occurred and what they believe would be the most beneficial remedies to ensure future compliance, as well as deadlines for each step in the process. Respondents have an opportunity to negotiate for a civil penalty reduction based on actions they take to ensure future compliance. In addition, the final resolution of all matters referred to the ADR Program must be approved by the Commission. Finally, all final conciliation agreements that resolve ADR matters are publicly released in the same searchable database as other enforcement matters.

66. *During FY 2010, the ADR Office completed 45 cases including \$93,100 in civil penalties. The Commission met the 155-day processing benchmark in 64.4% of the ADR cases, falling short of its goal of meeting this benchmark in 75% of cases. The 2010 PAR attributed the shortfall to diminished staff availability. However, in response to a dramatic reduction in the volume of work assigned to the Office of Administrative Review (OAR), the FEC transferred two OAR staff members to the Reports Analysis Division (RAD), leaving one staff member in OAR. If there was a deficiency in the ADR program, why not transfer at least one of the OAR staff members to ADR instead of RAD?*

During FY 2010, the ADRO received and continues to receive support as needed for administrative and clerical tasks from the Office of Administrative Review (OAR) and the Reports Analysis Division (RAD). However, the OAR staff members that were transferred to RAD did not possess the specific skill set and expertise required to work within the ADRO. The ADRO has since added a second ADR Specialist, and during the first quarter of FY 2011 the Office reached the set performance goal of processing 75% of cases within 155 days.

- *What is the source of the 155-day benchmark?*

The 155-day benchmark was approved by the Commission, and it dates back to the inception of the ADR Program when the goal was to resolve referrals to the ADR process in approximately 5 months.

#### Administrative Fines

67. *Does the Administrative Fine process afford sufficient process to committees and candidates that have allegedly violated relevant rules and regulations? Please provide an explanation for your answer.*

Yes, the Administrative Fine (AF) program affords sufficient process to committees and candidates that have allegedly violated relevant rules and regulations. The Administrative Fine program is based on amendments to the Federal Election Campaign Act that permit the FEC to impose fines, calculated using published schedules, for violations of reporting requirements that

relate to the reporting periods that end on or before December 31, 2013. Committees in the AF program that failed to meet the reporting requirement to file or file timely a specified report are all subject to the same internal thresholds for inclusion in the program. Each committee within the program is also afforded the opportunity to challenge the Commission's reason-to-believe finding, calculated civil money penalty, or both, and once the Commission has made a final determination, may appeal the decision to the U.S. District court in which they reside or transact business.

68. *Since January 1, 2007, how many Administrative Fine cases has the FEC completed? In how many of those cases was the administrative fine contested?*

Between January 1, 2007 and July 12, 2011, the Commission completed 888 Administrative Fine cases. Of these 888 cases, 196 cases were challenged. In 167 (or 85%) of these challenges, the fine was upheld.

69. *What is the range of fines collected in the Administrative Fine program?*

Fines collected in the Administrative Fine program have ranged from \$10 to \$33,170.

70. *How is the Commission evaluating the Administrative Fine program?*

The Commission evaluates the Administrative Fine program through the circulation and voting process for each committee pursued in the program; the quarterly submission of program statistics from the Reports Analysis Division and Office of Administrative Review; and through the increase in compliance. Since the program's implementation there have been fewer reports filed late or not at all, even amidst a steady increase in the number of reports filed each election cycle. During the 2001-2002 election cycle, 47,572 reports were filed and 8.13% were filed late or not filed at all, while during the 2009-2010 election cycle, 80,121 reports were filed and 6.68% were filed late or not filed at all.

71. *What efforts are taken to ensure that Administrative Fine enforcement matters (both in process and in end result) are treated in a consistent manner?*

Each committee included in the Administrative Fine program for failure to meet the Federal Election Campaign Act's requirement to file its reports in a timely manner is subject to the same internal thresholds for inclusion in the program. For further consistency, the Administrative Fine regulations specify the calculation of the fine and uniformly afford each committee the same opportunities, processes, and timeframes described in those regulations, 11 C.F.R. §§ 111.30 through 111.46. In the challenge process, each committee is afforded the opportunity to challenge the Commission's reason-to-believe finding, civil money penalty, or both. If received timely, each challenge is reviewed by the Reviewing Officer according to the challenge guidelines outlined in 11 C.F.R. § 111.35. Whether a committee avails itself of the challenge



process or not, the Commission alone makes a final determination in each case. Finally, all Administrative Fine cases are made public once they are closed in a searchable database on the FEC website.

72. *The Committee on House Administration was instrumental in passing in a bipartisan manner an extension to the administrative fines program. The Committee also set the expiration date to coincide with a non-election year. How is the program going?*

The program continues to be successful. Since the start of the program in 2000, there has been a reduction in the incidence of noncompliance related to the timely filing of reports. This success translates into a direct increase in the transparency and timely disclosure of campaign finance activity.

- *Have there been any unforeseen problems?*

Following the implementation of the Administrative Fine program, reports timely filed and later amended to reflect a substantial increase in reported financial activity increased. It appeared that some committees would submit incomplete reports in order to file them by the prescribed deadline so as to not be placed in the Administrative Fine program, and would later amend the report to disclose substantially more transactions and activity for the period. In order to address these instances, the Reports Analysis Division's internal review and referral policy was revised to allow such matters to be referred to the Alternative Dispute Resolution Office or Office of General Counsel for further action.

- *Is it saving the FEC money?*

The program saves the Commission money in that it allows for a streamlined approach to processing cases centered on the failure to file timely disclosure reports. Prior to the program's implementation, each failure to file timely required a referral to be written by the Reports Analysis Division and formally referred to the Office of General Counsel (OGC) where only a limited number of these cases could be processed, given the other enforcement matters handled by OGC. The Administrative Fine program not only saves money from the standpoint that it frees OGC resources to focus on other, more complex, enforcement matters, but the program's creation has also substantially increased the timeliness in processing such cases while simultaneously allowing for an increase in the number of cases processed. Additionally, the increased compliance since the program's inception has reduced the Commission's potential case load.

- *What changes, if any, would you recommend?*

The Commission recommends making the Administrative Fines Program permanent prior to its expiration after the 2013 Year End Report violations are processed.

Compliance Costs

73. *The FEC has approximately 197 minutes of instructional videos on its website. What portion of those is a candidate expected to watch in order to comply with campaign finance laws?*

Candidates may choose to watch Commission educational videos, but they are not required to watch them in order to comply with the law. Several of the videos are specifically targeted to candidates (e.g., “Testing the Waters,” “Candidate Registration”) and all but perhaps two (“Corporate PAC Solicitations” and “Corporate/Labor Activity after *Citizens United*” – roughly 16 minutes, combined) have at least some relevance to candidates. However, instructional videos are only one of the tools the Commission uses to educate the public and to encourage voluntary compliance with the federal campaign finance laws. All of the information included in the educational videos—and much more—is available from other sources. For example, candidates could choose to consult the *Campaign Guide for Candidates and Committees*, on-line brochures, and FAQs, or to call or e-mail the agency with questions or to attend Commission outreach programs.

74. *What is the estimated cost for a campaign of each type to comply with FEC regulations?*
- a. *Presidential?*
  - b. *Senatorial?*
  - c. *House of Representatives?*

The information reported to the Commission does not provide an accurate basis to calculate the costs of compliance with FEC regulations. Political committees must report expenditures, but are accorded flexibility in deciding how to report the purpose of an expenditure. As long as the reported purpose is “sufficiently specific” to make the expenditure’s purpose “clear,” the political committee has met the reporting requirement in FECA. Any effort to identify campaign finance compliance expenses of campaigns would need to recognize this variety in reporting expenditure purposes. Some expenditure purposes, considered in light of the recipient’s identity, will be clearly related to complying with campaign finance legal requirements. Other reported purposes—e.g. “legal expenses” or “accounting services”—might be related to FECA compliance costs. However, such expenditures might also include unrelated costs, like other legal expenses or payroll services, along with FECA compliance costs, or these expenses might be entirely unrelated to FECA compliance. Any aggregation of FECA compliance costs based on expenditure purposes reported under FECA will be limited by the purposes the committees elected to report.

Compliance costs will vary not only with the office sought, but also with scope, size, and experience level of the campaign. While some campaigns operate with a few volunteers, others have teams of professionals paid for their work on the many aspects of compliance issues. The Commission provides free software to help with reporting, but some campaigns purchase software and consulting services to go with it.

There are typical FECA compliance costs that candidate campaign committees may face, depending on how the committees choose to run their campaigns. FECA requires candidates to organize a principal campaign committee, and it requires principal campaign committees to have a treasurer, to maintain records, and to file reports of all receipts and disbursements with the Commission.

Presidential candidates who participate in the public funding program for the general election may establish a General Election Legal and Accounting Compliance (GELAC) Fund. GELACs are special accounts maintained exclusively to pay for legal and accounting expenses related to complying with campaign finance law as well as any other laws with which the committees must comply, such as tax law, contract law, or laws regarding employee relations. Compliance expenses are not subject to the expenditure limits, so candidates have an incentive to pay these expenses with GELAC funds, but not a requirement. The table below presents the major party candidates for President who established GELACs from 2008 back to 1980, the inception of GELAC Funds. The dollar amounts for GELACs are funds spent.

Election	Candidate	Grant	GELAC Expenses	%
2008	McCain	\$84,100,000	\$24,787,897 <sup>1</sup>	29.74
2004	Bush	\$74,620,000	\$2,952,842	3.96
2004	Kerry	\$74,620,000	\$6,308,345	8.45
2000	Bush	\$67,560,000	\$3,325,166	4.92
2000	Gore	\$67,560,000	\$4,301,546	6.37
1996	Clinton	\$61,820,000	\$5,343,065	8.64
1996	Dole	\$61,820,000	\$4,981,285	8.06
1992	Bush	\$55,240,000	\$3,486,479	6.31
1992	Clinton	\$55,240,000	\$4,587,859	8.31
1988	Bush	\$46,100,000	\$4,998,842	10.84
1988	Dukakis	\$46,100,000	\$2,868,536	6.22
1984	Mondale	\$40,400,000	\$615,774	1.52
1984	Reagan	\$40,400,000	\$1,035,062	2.56
1980	Carter	\$29,440,000	\$939,702	3.19
1980	Reagan	\$29,440,000	\$1,512,152	5.14

<sup>1</sup> This amount includes \$12.3 million in loans made to the candidate's general election committee.



Presidential Election Campaign Fund75. *What are the present costs of administering the Presidential Election Campaign Fund?*

The cost for administering the Presidential Election Campaign Fund and the Presidential Primary Matching Payment Account is presently limited to an average of 25 staff hours per month by a single employee at the GS-14 pay rate. Typically, the cost per election cycle encompasses one full-time GS-14 employee and two part-time GS-5 employees who are hired for up to 75% of the cycle, for a total cost of approximately \$330,000. In past election cycles, the cost for administering and processing the matching funds for the Presidential public funding programs has been as high as \$600,000 when the Commission has hired up to six part-time employees to assist in the processing of matching funds, although this last occurred in 1996 and 2000 election cycles. In anticipation of fewer candidates accepting public funding in the 2012 Presidential cycle, the duties associated with administering the program were merged with those of an audit manager position in early 2010.

76. *How are these costs allocated?*

The Audit Division and the Office of General Counsel absorb the Commission's costs associated with administering the Presidential Election Campaign Fund and the Presidential Primary Matching Payment Account. For the 2012 Presidential cycle to date, salaries and other costs stemming from administering the Presidential public funding programs are budgeted under the Audit Division.

Audits77. *From January 1, 2007, to the present, what is the average and median amount of time for an audit to be resolved?*a. *For Presidential campaigns?*

The average amount of time for Presidential campaign audits to be resolved is 1.02 years. The median amount of time for these audits to be resolved is 0.92 years.

The calculated figures represent audits of presidential candidates for the 2008 election cycle starting from the beginning of audit fieldwork to the approval of the Final Audit Report by the Commission, as of July 25, 2011.

b. *For state parties?*

The average amount of time for state party audits to be resolved is 1.23 years. The median amount of time for state party audits to be resolved is 1.67 years.

The calculated figures represent audits of state parties during the 2008 election cycle starting from the beginning of audit fieldwork to the approval of the Final Audit Report by the Commission, as of July 25, 2011.

78. *What has been the effect of Commissioners receiving interim audit reports instead of only final audit reports?*

To clarify, Commissioners have always received both interim and final audit reports; the process changes concern whether the Commission votes on interim audit reports. Beginning with the 2008 election cycle, all interim audit reports for party committees were circulated to the Commission on a "no objection" basis, which permits an objecting Commissioner to stop delivery of the interim audit report to the audited party committee until the Commission can consider the interim audit report. Prior to that time, interim audit reports for party committees that contained no novel or complex issues were sent to the Commissioners on an informational basis at the time it was sent to the audited committee. Interim audit reports for party committees that did contain novel or complex issues were circulated to Commissioners on a "no-objection" basis.

Since this procedural change, the Audit Division has circulated eight interim audit reports for party committees to the Commission on a "no objection" basis, and has received no objections. The procedural change has not significantly impacted the processing of the interim audit reports.

79. *Has staff from the Audit division been reallocated? If so, to what department and why? If not, why not, in light of the reduced number of Presidential campaigns subject to audit of use of primary election matching funds or general election grants?*

No, staff from the Audit Division has not been reallocated. In addition to conducting audits of those committees receiving public funds (Presidential and National Convention Committees), the Audit Division also conducts audits of committees under 2 U.S.C. § 438(b) and assists the Office of General Counsel with investigations that result in audits conducted pursuant to 2 U.S.C. § 437g. The scope and complexity of section 438(b) and 437g audits currently provide the staff with an appropriate work load. As always, management will continue to evaluate and reallocate resources, as needed. Additionally, the Commission is scheduled to perform an analysis and allocation overview of its workforce as part of its upcoming Strategic and Human Capital Planning sessions.

80. *What steps are taken to ensure that Audits are conducted in a consistent matter (both in process and in end result) across various different actors?*

All audits are conducted according to a detailed, step-by-step Audit Program. The Audit Program is reviewed and approved by the Commission each election cycle. The Audit Programs for Authorized and Unauthorized (non-candidate) Committees provide detailed guidance and instruction to the Audit Division staff and is incorporated into an audit/project management



software so that audit work papers are efficiently stored and reviewed. . Any changes to the Audit Programs are highlighted at the beginning of the cycle to the Audit staff via training sessions. After each four-year election cycle, the Audit Division teams are re-organized in an effort to maximize the sharing of best practices and to assure Audit Division operating procedures are followed and applied consistently. Finally, to assure that the final audit reports are consistent among the Audit Teams, each audit report is reviewed by the audit team leads and the Office of General Counsel, and approved by the Commission. The Commission recently adopted *Directive 70* to help achieve a greater degree of consistency, both in process and result, in the final audit reports issued by the Commission.

*Directive 70* is attached.

81. *What coordination occurs between the audit division staff and the Office of General Counsel staff during an audit?*

Each audit is assigned an attorney from the General Law & Advice (GLA) staff in the Office of General Counsel. Coordination with GLA can occur at any time throughout the audit process and varies from informal guidance to a formal Legal Analysis of the Audit Report. This coordination can occur as early as when an audit is approved by the Commission. In cases of Presidential committees, there is coordination as early as a year or more before the start of the audit. In addition, the assigned attorney is present at meetings conducted with the audited committee throughout the audit process. GLA also works closely with the Audit Division when audit matters are considered in Commission meetings.

82. *Is the Office of General Counsel permitted to use information developed during an audit in the conduct of enforcement actions? Please provide an explanation for your answer.*

All Final Audit Reports, and any Audit Findings, are approved by the Commission. Pursuant to 2 U.S.C. § 437(g)(a)(2), the Commission is permitted to base its findings on "information ascertained in the normal course of carrying out its supervisory responsibilities," which include information developed through a Commission audit. Accordingly, any Commission-approved Audit finding that a Committee is in substantial non-compliance with FECA may be subject to referral to the Office of General Counsel. In that instance, the Committee is provided the referral and report and may provide a response prior to any recommendation to the Commission by the Office of General Counsel.

83. *Does the FEC disclose the formula it uses to decide when to conduct audits? If not, why not? When was the formula last changed? Please provide a current copy of the formula to the Committee along with your responses to these questions.*

The criteria used for determining whether a committee will be referred for an audit pursuant to 2 U.S.C. § 438(b) is outlined in the Reports Analysis Division *Review and Referral Policy*. The criteria were revised in the 2011-2012 version of the policy, which was approved by the

Commission on April 5, 2011. While this policy is not disclosed to the public, the FEC provides a general overview of the criteria in seminar and conference workshops, and the Reports. Analysis Division is currently working on a Frequently Asked Questions page for the FEC website which will include a general overview of the audit criteria. The general factors for determining whether a committee will be referred for an audit include the level of financial activity, timely and adequate responses to RFAs, and the vote margin (for candidate committees only), which, allows for a higher priority to be given to closer races. Disclosing the specific criteria to the public would diminish the incentive to provide full and accurate disclosure.

84. *When an audit report is completed, does the vote by the Commissioners indicate agreement to receive the audit report from the audit division, or does it indicate that the Commissioners have adopted the audit report as a statement by the Commission? Please provide an explanation for your answer.*

The final audit report issued by the Commission reflects both the conclusions of the Commission, and the legal standards enunciated by the Commission and applied to the particular circumstances presented by the audit. Although in the past the Commission had occasionally voted to receive the audit report, FEC Directive 70 established a procedural change where the audit report now becomes the report of the Commission with the affirmative vote of four or more Commissioners. Directive 70 is attached.

#### Rulemaking

85. *What is the role of agency staff in drafting proposed rulemakings?*

Attorneys in the Office of General Counsel draft proposed and final rules, and the accompanying explanatory materials, for the Commission's consideration. These documents are described in the answer to Question 87. These attorneys may draw upon the expertise of other FEC staff in performing these functions. They also handle all other aspects of the rulemaking process required by the Administrative Procedure Act and other laws.

86. *What is the FEC's appropriate response when a court determines that a Commission regulation or the statute upon which a Commission regulation is based is in violation of the Constitution? When should action in response to such a determination be complete?*

When a regulation or statutory provision is declared unconstitutional, the Commission may take a variety of steps, including seeking further judicial review. If no such further review occurs, the Commission typically issues a press release indicating to the public the precise provisions that it no longer intends to enforce, and its enforcement practices will then follow the guidance it has issued to the public.

Depending upon the provision and the court's opinion, the Commission may (a) simply cease enforcing the provision based on the court's decision; (b) repeal the provision (if it is a

regulation); (c) or begin a rulemaking to consider revising a regulation. It is difficult to determine when a response to a court determination of unconstitutionality is “complete.” For example, once the Supreme Court declares a statutory provision unconstitutional, the Commission will cease to enforce it indefinitely, regardless of whether Congress formally repeals the statute.

Regarding another example concerning a regulation, after the decision in *EMILY’s List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), the Commission issued press releases explaining the steps it was taking to comply with that decision, including the adoption of an interim rule alerting the public that the court had ordered that three regulations be vacated.<sup>2</sup> The Commission then repealed the regulations that had been invalidated. See <http://www.fec.gov/agenda/2010/mtgdoc1015.pdf>. Similarly, after the Supreme Court’s decision in *Citizens United*, the Commission issued a press release explaining to the public and regulated community how it would comply with the decision. See <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>. Among other things, the Commission told the public that it “will no longer enforce the statutory provisions or its regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications.”

As also discussed in Question 88 below, the Commission recently has issued two Notices of Availability addressing issues related to the *Citizens United* ruling, and is also preparing a Notice of Proposed Rulemaking on the issues addressed by the *EMILY’s List* and *SpeechNow.org* decisions.

87. *The FEC lists three rulemaking projects as “ongoing”: hybrid ads, standards of conduct and public disclosure of closed MUR matters. What are the steps of the FEC rulemaking process and at which step of the process are each of these projects?*

To comply with the Administrative Procedure Act and the requirements of other statutes, the Commission’s rulemakings typically consist of the following three stages:<sup>3</sup>

- a) **Notice of Proposed Rulemaking:** The Notice of Proposed Rulemaking (“NPRM”) is the document that contains the Commission’s proposed revisions to its rules introduced by a narrative that explains the changes and seeks comment from the public on the proposed rules.<sup>4</sup>
- b) **Public Comment Period and Public Hearing:** The second stage of the rulemaking process provides all interested persons with an opportunity to review the Commission’s proposed rules and to submit written comments to the Commission. Those who submit written comments may

<sup>2</sup> See <http://www.fec.gov/press/press2009/2009Dec17EmilyList.shtml>; <http://www.fec.gov/press/press2010/20100112EmilyList.shtml>.

<sup>3</sup> Some rulemakings consist of more than three stages because they begin with an Advance Notice of Proposed Rulemaking (“ANPRM”). The Commission publishes an ANPRM to solicit public comments on broad, general issues that might be addressed in a subsequent Notice of Proposed Rulemaking. An ANPRM does not contain proposed regulatory text, but may describe possible alternatives to address the issues presented for comment.

<sup>4</sup> In certain very limited situations, the Commission may omit the NPRM and public comment stages and move directly to Final Rules by issuing Interim Final Rules or Direct Final Rules.



also be given an opportunity to testify at public hearings, including answering Commission questions regarding their positions. All public comments are included in the public record. Public hearings are transcribed and also made part of the rulemaking record.

c) **Final Rules:** The last stage of the rulemaking process is the promulgation of Final Rules, together with their Explanation & Justification ("E&J"). This document also establishes the effective date for the Final Rules. Although the final language of revised rules may differ from the proposed rules in the NPRM, the Final Rules must be a logical outgrowth of the proposed rules in order for the public to have had adequate notice of, and opportunity to comment on, what the Commission is considering. The E&J is a narrative that provides the Commission's legal and policy reasoning for its final revisions to rules. The E&J summarizes the public comments and explains how the Final Rules address the commenters' concerns. It also explains how and why the Final Rules differ from the previous rules and, if appropriate, from the rules proposed in the NPRM, and may provide examples of the application of the Final Rules. The E&J serves as the basis for judicial review of the Final Rules if they are challenged in court. The Commission also sends the Final Rules and their E&J to Congress.

For the Hybrid Ads rulemaking, the Commission completed the first two stages of rulemaking by publishing an NPRM and receiving public input through written comments and conducting an oral hearing, held on July 11, 2007.

The rulemaking on standards of conduct is a joint rulemaking that the Commission is conducting concurrently with the Office of Government Ethics. The first two stages of this rulemaking have been completed. The Commission has also prepared Final Rules and an Explanation and Justification for those rules, which it will soon send to the Office of Government Ethics for review.

With respect to the rulemaking regarding public disclosure of closed MURs, the Commission issued a Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files in December 2003. While it may still be useful to update the regulations regarding the public release of MUR files, the Commission has determined that other rulemakings take precedence over this one and has not issued a Notice of Proposed Rulemaking regarding the documents that are made public at the close of a MUR.

88. *In 2010, the Commission self-reported that it completed rulemakings "within specific time frames that reflect the importance of the topics addressed, proximity to upcoming elections, and externally established deadlines" 50% of the time, as specified by the Fiscal Year 2010 Performance and Accountability Report. Why are rulemakings regularly delayed under the FEC's self-reported metric?*

There are at several reasons for delays in rulemakings. First, as explained in the answer to Question 87, the APA requires that all significant rulemakings be conducted in accordance with certain procedures under which proposed rules are published, the public is given an adequate amount of time to comment on the proposals, and then Final Rules are prepared together with a detailed Explanation and Justification for their promulgation. In conducting rulemakings, the

Commission strives to ensure that rules are not changed shortly before elections. Consequently, if a rulemaking is delayed at an early stage, it is unlikely that time can be made up later.

Second, for projects like the standards of conduct rulemaking, two agencies must review and reach agreement at each stage of the rulemaking process. Hence, a concurrent rulemaking will inherently take longer than may initially be anticipated.

Lastly, in 2010, the Commission began rulemakings to implement far-reaching judicial decisions in the *Citizens United* and *SpeechNow.org* cases. While these court opinions resolved the specific cases before the courts, there are certain significant issues that might or might not also be addressed in the *Citizens United* and *SpeechNow.org* rulemakings. The FECA specifies that the affirmative vote of four members of the six-member Commission is required to take any action regarding rulemakings. 2 U.S.C. §§ 437c(c) and 437d(a)(8). For the *Citizens United* rulemaking, the Commission has considered draft NPRMs on January 20 and June 15, 2011, but has not yet reached a four-vote majority as to the inclusion or exclusion of various issues. The Commission has also received petitions for rulemakings prompted by the *Citizens United* decision and given the absence of an NPRM, on June 15, 2011, the Commission issued notices of availability to address the specific issues raised by those petitions. See FEC, *Rulemaking Petition Independent Expenditure Reporting*, 76 Fed. Reg. 36000 (June 21, 2011); FEC, *Rulemaking Petition: Independent Expenditure and Electioneering Communications by Corporations and Labor Organizations*, 76 Fed. Reg. 36001 (June 21, 2011). Public comments to the Notices are due to the Commission by August 22, 2011. Finally, the Commission is working to issue an NPRM to address issues raised by the *SpeechNow.org* and *EMILY's List* cases, however the normal process was held in abeyance due to a lawsuit addressing one of the key issues.

89. *Can you give the Committee an update of the Internet rulemaking?*

The Commission is currently looking into beginning a new rulemaking to resolve questions that have arisen after the Commission completed its last Internet rulemaking five years ago. Although not all of the topics to be considered in this project have been determined, one likely topic is the applicability of the disclaimer requirement for political advertisements on space-limited media. The answer to Question 91 below provides more details about the advisory opinions in which this topic has been addressed.

#### Miscellaneous

90. *Does the FEC interpret its authority to administer and regulate under the Federal Election Campaign Act as exclusive? If not, where else does such authority reside?*

Yes. Pursuant to 2 U.S.C. § 437c(b), the “Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to civil enforcement of such provisions.” The FECA also gives the Commission exclusive authority to render advisory



opinions, 2 U.S.C. §§ 437d(a)(7), 437f; to make rules necessary to carry out the provisions of the Act and chapters 95 and 96 of title 26, 2 U.S.C. §§ 437d(a)(8), 438(a)(8), 26 U.S.C. §§ 9009(b), 9039(b); and with one limited exception, to initiate civil actions to enforce the Act, 2 U.S.C. § 437d(e). The Attorney General does have jurisdiction to prosecute criminal violations of the Act. *See* 28 U.S.C. § 516; 2 U.S.C. § 437g(d), and the Commission can refer a matter to the Attorney General for possible criminal prosecution under certain circumstances. 2 U.S.C. § 437g(a)(5)(C). The Commission and the Department of Justice entered into a Memorandum of Understanding that jointly outlines their respective roles in pursuing election law violations. *See* 43 Fed. Reg. 5441 (1978). In addition, when cases arising under FECA are heard by the Supreme Court, the Solicitor General normally represents the Commission before the Court. *See* *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994); 2 U.S.C. §§ 437c(f)(4) and 437d(a)(6).

91. *What criteria does the FEC use to decide when the "small item" exception from the disclosure requirement will apply? How does the Commission approach advertising media that limit the number of characters available for advertising content and disclaimers to be consistent across different advertisers and media?*

The FECA requires political committees to place statements on their general public political advertising disclosing who authorized and paid for these communications. 2 U.S.C. 441d(a). Similar statements are required when other persons make communications that publicly solicit contributions, or expressly advocate the election or defeat of clearly identified candidates, or that are electioneering communications. *Id.* The Commission's regulations at 11 CFR 110.11(f) create exceptions to the disclaimer requirement for "bumper stickers, pins, buttons, pens, and similar small item upon which the disclaimer cannot be conveniently printed." The Commission is guided by this regulation and its previous advisory opinions in determining in a specific case whether the small item exception applies.

The Commission has been asked in three different advisory opinion requests whether a particular advertising medium or advertiser that limits the number of characters available for advertising content will trigger an exception to the disclaimer requirement. Specifically, in 2002, the Commission was first asked if either the small item exception or the impracticable exception applied to wireless telephone advertisements sent by "short messaging service," where the text messages are limited to 160 characters per screen. *See* Advisory Opinion 2002-09 (Target Wireless). The Commission determined that the small item exception applied. Next, in 2010, Google requested an advisory opinion as to whether Google ads purchased by candidates and political committees qualify for the small item exception to the disclaimer requirements given that Google limits the ads to 95 characters. *See* Advisory Opinion Request 2010-19 (Google). Although the Commission could not reach a response to the questions presented by the request, the conduct is not in violation of the Act or regulations. This year, Facebook sought an advisory opinion asking if ads limited to 160 or 100 characters qualify for either the small item exception or the exception where a disclaimer is impracticable. *See* Advisory Opinion Request 2011-09 (Facebook). The Commission was unable to render an opinion by the requisite affirmative vote of at least four Commissioners, as three Commissioners believed that an exception applied, and three believed a disclaimer was required.

As noted in the answer to Question 89, in light of the interest in this developing area, the Commission is looking into beginning a rulemaking regarding disclaimers on Internet advertisements. A rulemaking may provide a means of reaching an appropriate resolution of the issue in a way that could provide consistency for different advertisers using new technology to reach their audiences.

92. *What criteria does the FEC use to decide whether to grant a request for a media exemption?*

The FECA, at 2 U.S.C. 431(9)(B)(i), creates an exemption from the term “expenditure” for any “news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication unless such facilities are owned or controlled by any political party, political committee, or candidate.” A similar exception from the term “electioneering communication” was created by BCRA for communications appearing in news stories, commentaries, or editorials distributed through the facilities of broadcasting stations. 2 U.S.C. 434(f)(3)(B)(i). By regulation, the Commission has established a parallel exception from the definition of “contribution,” and has extended the “media exemption” to cable television, web sites and Internet publications. 11 C.F.R. 100.29(c)(2), 100.73, and 100.132.

Those who wish to engage in activities coming within the scope of the media exemption need not ask the Commission to grant an exemption before proceeding with their activities. Nevertheless, those who would like a Commission determination as to whether they are media entities and whether their prospective activity will come within the exception may ask the Commission for an advisory opinion.

The Commission has historically conducted a two-step analysis to determine whether the media exemption applies, which is guided by several court opinions. See Advisory Opinion 2011-11 (Colbert) and advisory opinions cited therein. First, the Commission asks whether the entity engaging in the activity is a media entity. Second, the Commission applies the two-part analysis set out in *Readers Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires it to determine (1) whether the entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the entity is acting as a media entity in conducting the activity at issue (*i.e.* whether the media entity is acting in its “legitimate press function”). See also *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981). This latter determination, in turn, rests upon two factors: (1) whether the media entity’s materials are available to the general public, and (2) whether the materials are comparable in form to those ordinarily issued by the media entity. See *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238,251 (1986).

93. *The Commission frequently waives the rule requiring timely submission of documents for open meetings and allows consideration of documents the public and parties to advisory opinion requests or other matters have not had an opportunity to review before the meeting. This has occurred on 149 items since January 1, 2009. What is the reason for these frequent waivers? What steps will the Commission take, if any, to provide more transparency for documents considered at open meetings?*

To provide the most current information, all agenda documents (excluding meeting minutes) for open Commission meetings held from January 2009 through June 2011 were reviewed. The chart below shows the total number of agenda documents each year and the number and percentage of those that were submitted late according to the Commission's policy. Under the FEC's *Directive 17*, a document is late when it is submitted less than 7 days before the meeting.

Year	Total # of Documents on Agendas	Total # of Late Submitted Documents	% Timely	% Submitted Late
2009	98	65	34%	66%
2010	82	55	33%	67%
2011	74	48	35%	65%
TOTAL	254	168	34%	66%

For the late documents, the chart below also shows how late the documents were submitted by number of days before the Commission's public meeting.

Year	Submitted 5-6 Days Before Meeting (% of Late)	Submitted 3-4 Days Before Meeting (% of Late)	Submitted 1-2 Days Before Meeting (% of Late)	Submitted Day of Meeting (% of Late)
2009	17 (26%)	5 (8%)	26 (40%)	17 (26%)
2010	17 (31%)	2 (4%)	16 (30%)	20 (37%)
2011	14 (29%)	2 (4%)	12 (25%)	20 (42%)

It is important to bear in mind that many agenda documents are revised versions of earlier agenda documents that have already been released to the public. For example, a draft of an advisory opinion might have been submitted timely, but a subsequent revision to the draft might be submitted late. In fact, some AO drafts are revisions to reflect public comment on earlier drafts. In this light, many late agenda documents may mean that the public is getting notified late of final changes to a document, but the issues before the Commission and at least some of the proposed dispositions of the issues have already been publicly released. To examine the agenda documents with this issue in mind, the following chart presents data about primary



agenda documents, which are the first document released on an agenda item, and about supplemental documents, which are any later documents. These data show, for example, that for 2011, 59% of the primary agenda documents were timely, while 89% of the supplemental documents were late.

Year	Total # of Documents on Agendas	Primary Documents	% Timely	% Late	Supplemental Docs	% Timely	% Late
2009	98	69	41% (28)	59% (41)	29	17% (5)	83% (24)
2010	82	57	44% (25)	56% (32)	25	8% (2)	92% (23)
2011	74	37	59% (22)	41% (15)	37	11% (4)	89% (33)

- *What steps will the Commission take, if any, to provide more transparency for documents considered at open meetings*

The Commissioners and staff are increasingly focused on this issue and are making concerted efforts to increase the percentage of agenda documents that are released under the Commission's policy, particularly with respect to primary documents.

94. *When a requestor submits a request for an advisory opinion, what policies or procedures apply regarding:*
- inquiries that may be made of the requestor before considering the advisory opinion request;*
  - the time that may elapse between the original submission and consideration of the request;*
  - the scope of information that may be obtained from the requestor before considering the request; and*
  - the use that may be made of information obtained from the requestor before considering the request?*

The policies and procedures that apply to the advisory opinion process are set out at 2 U.S.C. 437f and in Commission regulations at 11 C.F.R. part 112. The Commission has also issued two Federal Register notices regarding advisory opinion policies and procedures. See FEC, *Revision to Advisory Opinion Comment Procedure*, 58 Fed. Reg. 62259 (Nov. 26, 1993); FEC, *Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures*, 74 Fed. Reg. 32160 (July 7, 2009). Lastly, a plain language description of the process for obtaining advisory opinions is posted on the Commission's website in a question and answer format. See <http://www.fec.gov/pages/brochures/ao.shtml>.

- a) Inquiries may be sent to the requestor at any point during the advisory opinion process. These inquiries may seek to clarify the question(s) the requestor is asking, or to clear up ambiguous or conflicting statements in the requestor's written submissions, or to obtain additional information necessary to the resolution of the questions presented. In addition, oral inquiries may be directed to requestors, or counsel for the requestors, if they are present at the Commission meeting during which their advisory opinions are considered. See FEC, *Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures*, 74 Fed. Reg. 32160 (July 7, 2009).
- b) Commission rules at 11 CFR 112.1(d) require the Office of General Counsel to review all advisory opinion requests within 10 calendar days from the date of receipt and to notify the requestors of any deficiencies in their requests. OGC meets this deadline 100% of the time, and usually responds to requestors in one to four days. Beginning on the date the advisory opinion request is complete, the Act directs the Commission to issue an advisory opinion within 60 days. 2 U.S.C. 437(a)(1). This time period is reduced to 20 days when a complete request is received from a Federal candidate, or his/her authorized committee if the request is submitted within 60 days before a Federal election. If the applicable deadline falls on a weekend or holiday, the deadline is moved to the next business day. 11 CFR 112.4(c). If the Commission cannot agree on an advisory opinion, the requester must be so notified within the 60- or 20-day period. 11 CFR 112.4(a). At times, the Commission expedites certain highly significant, time-sensitive requests and issues these advisory opinions within 30 days.
- c) The scope of the information that may be obtained from the requestor consists of any information the Commission may consider necessary to render an advisory opinion.
- d) Written information obtained from the requestor is made a part of the official record and placed on the Commission's website. It may be relied upon in the advisory opinion issued by the Commission. This information may also be taken into consideration by other interested persons in determining if their own transactions or activities are indistinguishable in all material aspects from those addressed in the advisory opinion such that they are entitled to rely on the opinion under 2 U.S.C. 437(f)(c)(1)(B).

95. *What efforts are taken to clarify which parts of any material issued by the FEC are prepared by career staff and which parts are prepared or approved by Commissioners?*

Materials issued by the FEC are largely produced by career staff at the direction or guidance of the Commissioners. Historically, the Commission has not specified whether certain documents are prepared by career staff or Commissioners. Exceptions include Commissioner's statements of reasons, concurring and dissenting opinions, agenda documents with a cover memorandum indicating that particular Commissioners are placing the documents on the Agenda and remarks by individual Commissioners. The Commissioners recognize the importance of this distinction in certain circumstances and continues to look at ways to make it clearer for those entities that interact with the Commission. The attached information, provided on a Division basis, further explains how materials are developed at the Commission.



The attachment includes a list of all the documents issued by the Commission in the following proceedings: Advisory Opinions, Rulemakings, the Enforcement Program in OGC, Audit, AFP, and ADR. The list also describes the process of creating each of the documents and which are approved by the Commission. Recent efforts to clarify the Commission's approval of documents written by staff include the Commission's revision of its *Directive 70*, which requires among other changes that Final Audit Reports be entitled Final Audit Report *of the Commission* to emphasize the Commission's approval of the Final Audit Report.

96. *What documents exist to define the roles of staff and Commissioners at the FEC? Please provide copies of any such documents.*

The position descriptions of Commission employees define the roles of staff.

97. *Since January 1, 2007, how many advisory opinion requests result in the commissioners considering multiple draft opinions giving conflicting opinions (e.g., one draft saying "yes" and another saying "no")? What percentage is this of the total number of advisory opinion requests considered?*

From January 1, 2007 through June 30, 2011, the Commission has considered a total of 137 advisory opinions. For 55 of these advisory opinions, or 40%, the Commission considered multiple drafts. This percentage includes all advisory opinions in which the requestor asked two or more questions where the draft opinions differed in answering at least one question but were the same, or very similar, in answering other questions. These 55 advisory opinions also include some advisory opinions in which the conclusions in different drafts were the same, but the analysis leading to those conclusions differed significantly. These 55 advisory opinions do not include preliminary drafts that were never made public.

98. *Please list all seminars held by the FEC for the public since January 1, 2007.*

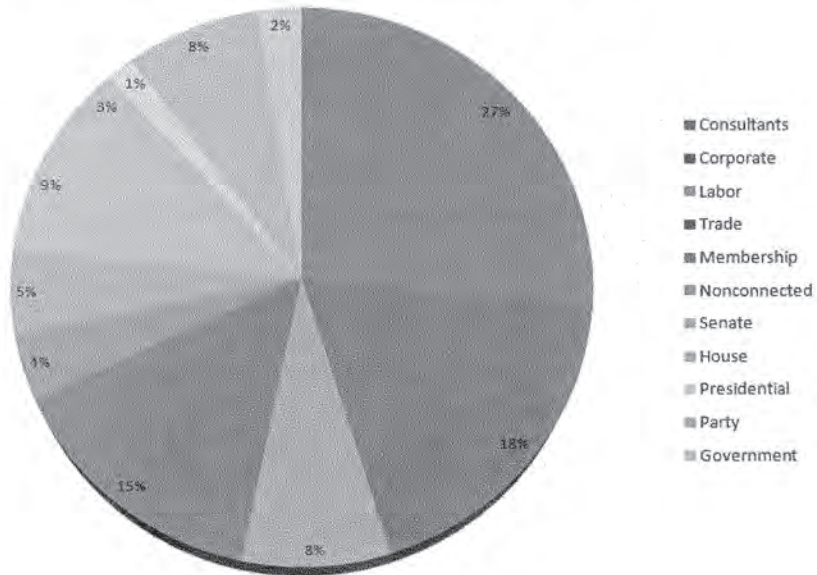
The Response to Question 100 below includes this information.

99. *Please provide a graph depicting the composition of the background of the attendees of these seminars in the following categories: Corporations, political committees, candidate committees, House campaigns, Senate campaigns, and government-affiliated individuals.*

The graph below depicts the background of those attending Commission outreach programs between January 1, 2007, and the present. Some of the categories identified in the inquiry overlap (e.g., House/Senate campaigns are a subset of candidate committees, which are themselves a type of political committee). The percentage of candidate committees can be derived by combining the adjacent Senate, House, and Presidential categories. Political

committees would include all categories except Consultants and Government, and the Consultants likely represent political committees.

### Background of FEC Outreach Attendees 2007-2011



100. For each seminar, please provide the number of attendees for each track (candidate, party, PAC).

The Commission hosts a variety of educational outreach programs, including conferences, seminars and roundtable workshops. Conferences provide the most detailed information and typically last two days; the day-long seminars are more condensed; and roundtable workshops focus on a specific topic and run about 90 minutes. The state outreach workshops held in 2007 and 2009 have been discontinued, based on ongoing cost-benefit analyses. In 2011, those analyses contributed to the decision to replace the annual Washington, DC, conferences with less expensive seminars held at Commission headquarters.

The lists below identify all of the Commission's educational outreach programs from 2007 to the present and include the total attendance for each event, as well as a breakdown of PAC, candidate, and party representatives.

2007 FEC Outreach Data		PACs	Candidates	Parties
1/17/07 – FEC Reporting and E-Filing Roundtables		98	13	5
Total Attendees:	124			
4/11/07 – FEC Using the New On-Line Advisory Opinion Search System		9	1	0
Total Attendees:	14			
4/24-25/07-DC Conference for Corporations		89	0	0
Total Attendees:	123			
5/10-1/07 – DC Conference for Candidates and Political Parties		0	51	30
Total Attendees:	103			
6/4-5/07 – DC Conference for Trade, Membership and Labor Organizations and their PACs		119	0	0
Total Attendees:	143			
6/20-21/07 – Denver, CO State Outreach Workshops for Candidates, Parties and PACs		7	9	3
Total Attendees:	27			
6/26-27/07 – Phoenix, AZ State Outreach Workshops for Candidates, Parties and PACs		12	5	7
Total Attendees:	24			
7/16-17/07 – Atlanta, GA State Outreach Workshops for Candidates, Parties and PACs		14	3	6
Total Attendees:	22			
9/26-27/07 – Seattle, WA Regional Conference for Candidates, Parties and PACs		46	14	4
Total Attendees:	82			
11/6-7/07 – St. Louis, MO Regional Conference for Candidates, Parties and PACs		45	21	10
Total Attendees:	84			

2008 FEC Outreach Data				PACs	Candidates	Parties
2/12-13/08 – Orlando, FL Regional Conference for Candidates, Parties and PACs				41	11	14
Total Attendees: 68						
3/11-12/08 – DC Conference for Corporations and their PACs				78	0	1
Total Attendees: 109						
4/2-3/08 – DC Conference for Candidates and Political Parties				1	44	21
Total Attendees: 90						
5/14/08 – FEC Seminar for Nonconnected PACs				42	2	1
Total Attendees: 64						
6/23-24/08 – DC Conference for Trade, Membership and Labor Organizations and their PACs				103	0	0
Total Attendees: 120						
8/27/08 – FEC Roundtable on Pre-Election Communications				33	0	1
Total Attendees: 42						



2009 FEC Outreach Data		PACs	Candidates	Parties
3/3-4/09 – DC Conference for Candidates and Political Parties		0	52	20
Total Attendees:	105			
4/2-3/09 – DC Conference for Corporations and their PACs		87	0	0
Total Attendees:	107			
4/29/09 – FEC Roundtable on New Lobbyist Bundling Rules		24	5	2
Total Attendees:	60			
5/21-22/09 – DC Conference for Trade, Membership and Labor Organizations and their PACs		110	0	0
Total Attendees:	120			
6/24-25/09 – Tallahassee, FL State Outreach Workshops for Candidates, Parties and PACs		5	5	16
Total Attendees:	20			
7/8/09 – FEC Reporting and E-Filing Roundtables		39	13	1
Total Attendees:	79			
7/28-29/09 – Columbus, OH State Outreach Workshops for Candidates, Parties and PACs		35	4	11
Total Attendees:	50			
8/5-6/09 – Kansas City, MO State Outreach Workshops for Candidates, Parties and PACs		7	12	11
Total Attendees:	29			
9/15-16/09 – Chicago, IL Regional Conference for Candidates, Parties and PACs		38	22	15
Total Attendees:	80			
10/28-29/09 – San Francisco, CA Regional Conference for Candidates, Parties and PACs		45	20	21
Total Attendees:	101			



2010 FEC Outreach Data				PACs	Candidates	Parties
1/20/10 – FEC Reporting Roundtables				20	7	0
Total Attendees:	43					
2/24/10 – FEC Roundtable on New Campaign Travel Rules				3	2	1
Total Attendees:	21					
3/9-10/10 – DC Conference for Corporations and their PACs				60	0	0
Total Attendees:	88					
3/23-24/10 – New Orleans, LA Regional Conference for Candidates, Parties and PACs				33	13	8
Total Attendees:	61					
4/7/10 – FEC Seminar for Nonconnected PACs				23	3	0
Total Attendees:	44					
5/3-4/10 – DC Conference for Candidates and Political Parties				2	35	34
Total Attendees:	66					
6/8-9/10 – DC Conference for Trade, Membership and Labor Organizations and their PACs				113	0	0
Total Attendees:	129					
6/30/10 – FEC Reporting and E-Filing Roundtables				16	6	2
Total Attendees:	41					
9/15/10 – FEC Roundtable on Pre-Election Communications				26	2	3
Total Attendees:	47					
10/6/10 – FEC Reporting and E-Filing Roundtables				45	4	3
Total Attendees:	71					
Event Name: 11/17/10 – FEC Roundtable on Winding Down the Campaign				0	12	0
Total Attendees:	26					

2011 FEC Outreach Data				PACs	Candidates	Parties
1/12/11 – FEC Reporting Roundtables				33	5	2
Total Attendees: 57						
3/2/11 – FEC Seminar for Party Committees				0	0	41
Total Attendees: 13						
4/6/11 – FEC Seminar for Candidates				1	31	0
Total Attendees: 53						
5/11/11 – FEC Seminar for Corporations and their PACs				39	0	0
Total Attendees: 49						
5/18/11 – FEC Seminar for Corporations and their PACs				38	0	0
Total Attendees: 52						
6/7/11 – FEC Seminar for Trade, Membership and Labor Organizations and their PACs				49	0	0
Total Attendees: 53						
6/8/11 – FEC Seminar for Trade, Membership and Labor Organizations and their PACs				45	0	0
Total Attendees: 55						
7/13/11 – FEC Reporting and E-Filing Roundtables				28	9	4
Total Attendees: 62						

101. *Were the seminars all fully funded by the fees collected? Was the staff time expended in preparing for, attending, and teaching at the conferences funded by the seminar fees? Please provide explanations for your answers.*

While many of the costs associated with the Commission's conferences are defrayed using registration fees, none of the Commission's outreach programs is fully funded by the fees collected. The agency's conference coordinator collects and spends conference registration fees, under the terms of a no-cost contract with the Commission. The fees cover a variety of expenses, including rental of facilities, catering, and the coordinator's fee. Currently, the agency's annual appropriation funds all staff time and travel, as well as any expenses for the seminars and roundtable workshops. However, beginning in FY 2012, the agency's conference coordinator will also manage registration for seminars and roundtables, and will use the fees collected to cover some of the related expenses. Nevertheless, the Commission expects that all staff time and travel will continue to be paid for with appropriated funds.

These seminars are an essential component to the Commission's efforts to assist candidates and committees in complying with the statute and regulations. As noted in the answer below, the feedback from the seminars is positive.

102. *Please provide any summaries prepared of evaluations or feedback received from participants in the seminars.*

The Commission seeks feedback from all of its outreach participants, and uses that information to improve its programs. As detailed in the attached evaluation summaries for all outreach programs from January 1, 2007, to the present, participants have consistently rated the workshops higher than 4 on a 5-point scale.

103. *Please provide a list of all the hotlines that the FEC operates.*  
*a. For each hotline, please provide the call volume by month since January 1, 2007.*  
*b. Please provide an estimate of the amount of staff-hours spent per month to operate each hotline.*  
*c. Please provide a list of the issue areas covered by each hotline.*

The Commission maintains a toll-free telephone information line (800-424-9530) that callers can use to reach any office within the agency. Over the years, the Information Division and Public Records Office have been among the most popular destinations for callers. Responses regarding the Information Division and the Public Disclosure Division are below, followed by data and a discussion of the OIG hotline.



### Information Division

The Information Division's Communications Specialists rely on the statute, regulations, Commission precedents, and other legal resources to provide informal guidance to callers with compliance questions. Topics range from the basics of contributions and filing deadlines to the complexities of coordination and express advocacy. The amount of time a Specialist spends researching and responding to phone inquiries varies based on a number of factors, including proximity to the election, changes in the law, and the Specialist's own level of experience. In the past, phone inquiries could dominate a Specialist's work day. As illustrated by the chart below, the growth of the Internet and e-mail has changed that. Now, constituents can often find answers to their questions on the Commission's website, or they may prefer to send an e-mail, rather than call. As a result, on average, Specialists now spend little more than half their time responding to phone calls. The remainder of the work day is spent working on other projects, including drafting responses to the increasing number of email inquiries or creating and updating the web content that answers constituents' questions.

Information Specialist Calls	2007	2008	2009	2010	2011
January	1,330	1,796	1,215	1,674	861
February	1,042	1,559	832	985	578
March	1,128	1,465	1,081	1,782	875
April	1,120	1,756	921	1,606	809
May	1,054	1,164	740	1,236	686
June	1,171	1,638	1,011	1,389	993
July	1,152	1,727	1,064	1,266	-
August	1,095	1,376	820	1,281	-
September	1,047	1,481	1,107	1,330	-
October	1,396	2,401	1,061	2,046	-
November	871	1,879	781	885	-
December	989	713	864	563	-
TOTAL:	13,395	18,955	11,497	16,043	4,802

### Public Disclosure Division

The four Public Information Specialists of the Public Records Office respond to requests received by phone, email and letter, for campaign finance reports and data and Commission documents. The requests vary in complexity and the time needed to fully respond. Some requests are handled in one call while others require the staff to conduct research or make copies of documents. In response to the requests, the staff provide explanations of the disclosure requirements and availability of campaign finance data, tutorials on downloading databases and electronic filings, customized database searches, copies of campaign finance reports not available on the website (prior to 1996), assistance with website navigation to access campaign finance information, assistance with analyzing data across election cycles, copies of historical Commission documents not available on the website (for example, Commission meeting

documents prior to 2000). When not responding to requests, the staff time is spent on other office projects such as tracking federal candidates on the ballots of each state, collecting and publishing the vote results of each election for federal office, updating the directory of federal and state offices that provide campaign finance, election, and lobbying information and data, and processing documents for posting to the website.

Public Disclosure Division Phone/Letter/Email Requests					
	2007	2008	2009	2010	2011
January	328	332	169	195	106
February	432	264	200	159	154
March	432	243	204	215	219
April	346	269	209	231	174
May	448	230	218	231	190
June	296	261	221	208	197
July	318	365	209	193	
August	243	256	196	202	
September	382	275	183	148	
October	331	211	220	198	
November	359	165	196	174	
December	264	207	195	206	
<b>TOTAL:</b>	<b>4179</b>	<b>3078</b>	<b>2420</b>	<b>2360</b>	<b>1040</b>

#### Office of Inspector General

#### **The Office of the Inspector General provided the following response to Question 103:**

The OIG operates a hotline.

a. The OIG has only separately tracked the volume of hotline contacts (including telephone calls, emails, and other methods of communication) since October 1, 2010. Until October 1, 2010, hotline contacts were grouped with other outside contacts for tracking purposes. Both



hotline and other contacts were tracked together on a monthly basis between January 1, 2007, and March 31, 2008, after which time they were tracked on a semiannual basis until October 1, 2010. With these limitations in mind, the following data are provided:

Combined hotline and other contacts tracked on monthly basis through March 2008:	
January 2007	160
February 2007	46
March 2007	53
April 2007	202
May 2007	157
June 2007	94
July 2007	147
August 2007	128
September 2007	120
October 2007	81
November 2007	72
December 2007	90
January 2008	109
February 2008	196
March 2008	237

Combined hotline and other contacts tracked on semi-annual basis between April 2008 and September 2010:	
April 1, 2008, through September 30, 2008	533
October 1, 2008, through March 31, 2009	1,044

April 1, 2009, through September 30, 2009	856
October 1, 2009, through March 31, 2010	200
April 1, 2010, through September 30, 2010	126

Hotline contacts since October 1, 2010:	
October 2010	15 (all emails)
November 2010	7 (all emails)
December 2010	4 (3 emails; 1 U. S. Mail)
January 2011	4 (3 emails; 1 U. S. Mail)
February 2011	3 (2 emails; 1 facsimile)
March 2011	1 (telephone call)
April 2011	over 6,700 (all emails which concerned the Wisconsin Supreme Court election, which is outside the jurisdiction of the FEC OIG)
May 2011	77 (all emails, all but 1 concerning Wisconsin Supreme Court election)
June 2011	66 (1 telephone call; 65 emails concerning Wisconsin Supreme Court election)

b. Approximately two to six OIG staff hours per month are spent to operate the hotline.

c. The types of issues covered by the FEC OIG hotline include allegations of fraud, misconduct, or other issues concerning FEC programs and operations, including violations “of law, rules, or regulations, or mismanagement, gross waste of funds, and abuse of authority.” 5 U.S.C. app. 3 §§ 2, 7(a).

104. *The FEC runs several regional conferences each year to educate campaigns about pitfalls to avoid and stay clear of having to be contacted later for violations. How is the program? Are there changes that you foresee in the near future? What is the percentage of campaigns that participate in the conferences? Is attendance greater in DC or at the regional conferences?*

The Commission’s two-day regional conferences have long been a centerpiece of its educational outreach program, and they continue to be popular and well-received. Attendees have consistently rated the conferences (and all of the outreach programs) higher than 4 on a 5-point

scale. The challenge has been to match that quality with quantity. While attendance varies, regional conferences have typically drawn about 90 people per event, and the DC conferences about 120. While these numbers are certainly respectable and often fill the venue, they represent a very small percentage of those involved in federal campaigns. Overall, less than 20% of campaigns send staff to a Commission conference. Of course, as noted previously, these conferences represent only a portion of the public education program. Nevertheless, attendance statistics did figure prominently in the decision to replace the annual two-day conferences in Washington, DC, with considerably less expensive one-day seminars held at the Commission. By reducing the cost, the Commission hopes to attract more attendees. Additionally, hosting these seminars at the Commission will enable it to offer constituents the option to participate live on-line, beginning in 2012. By eliminating travel costs for those outside the DC area, the Commission may be able to reach even more of an audience. The initial response to the seminars has been positive, but some attendees have expressed a preference for the more formal conferences. As always, the Commission's outreach program will continue to be evaluated and improved. Should these latest changes warrant additional modifications, appropriate adjustments will be made.

Office of Inspector General

105. *The OIG recently decided to revise its policy for reviewing and evaluating hotline complaints. What, exactly, were these revisions? What was the reasoning behind the decision to revise the policy? How has it affected the responses to complaints?*

**The Office of the Inspector General provided the response to Question 105.**

The FEC OIG *Guidelines for Evaluating OIG Hotline Complaints* became effective July 8, 2009. The new policy provides guidance for reviewing and evaluating hotline complaints, and classifies hotline complaints as either high or low priority. The reasoning behind the decision to revise the hotline policy was to standardize and formalize the hotline complaint review and evaluation process. Specifically, the revised policy provides for specific timeframes for OIG investigative staff to review hotline complaints and recommend a decision on the appropriate course of action. The policy also provides specific criteria to categorize hotline complaints as either high or low priority, thereby helping to ensure that high priority hotline complaints are provided the necessary resources and attention. The revised policy provides the OIG investigator with specific criteria to prioritize the OIG investigative caseload to ensure all complaints are responded to in a timely and appropriate manner and has affected the responses by providing a more effective and efficient investigative process.

*106. The OIG participated in an Enterprise Content Management review of the FEC. What were the results of this review? What were the results of the following planning session held to discuss OIG processes and business needs?*

**The Office of the Inspector General provided the following response to Question 106:**

The FEC (agency) contracted with a consulting company to conduct an enterprise content management (ECM) system study of the agency. The purpose of the ECM system study was to identify ECM requirements and associated business processes; provide consulting expertise on requirements analysis, potential technical solutions, and business process improvements; and to propose implementation strategies that effectively balance cost, schedule, and risk to deliver ECM solutions that solve business problems and provide measurable value. Specifically, the scope of the ECM system study project was to recommend a trustworthy, ECM and electronic record keeping system for the entire FEC. As a matter of clarification, the ECM review was a project managed by the agency, and not the OIG. The OIG staff was interviewed, along with other FEC offices, during planning sessions by the consulting company to determine the OIG's business processes and needs. The results of this planning session were a flowchart of the OIG's business processes and a description of how the OIG's information is stored electronically and in paper form.

**The FEC provided the following response to Question 106:**

The results of the ECM system study and the OIG following planning session are contained in the attached documents.

*107. Please provide a copy of the new OIG Hotline poster. How effective have the new posters been in encouraging FEC employees and Agency contractors to report allegations to the OIG?*

**The Office of the Inspector General provided the response to Question 107.**

A copy of the OIG's hotline poster is being provided with this response as a separate document. The FEC OIG does not track the impetus for complaints made to the OIG. Although a direct correlation between the use of the hotline posters and number of complaints is not feasible, since the fraud posters have been distributed, the OIG received six hotline complaints, and of these six hotline complaints, one investigation was opened. The Hotline posters have been part of a broader outreach effort that has received positive comments from FEC employees. During 2010 and early 2011, the OIG conducted a series of outreach briefings throughout the agency to discuss the OIG hotline, mission, and other topics related to the OIG.



Mr. HARPER. I will now recognize myself for some additional questions, and this time we will make sure we stay on the clock.

So first thing that I would do is direct a comment back to the ranking member's questioning about the EAC and the cost. I believe Chair Bauerly mentioned that she did not know some of the figures, of what they would be. But just to make the commissioners aware, according to the CBO score of the bill, the net effect after cost to the FEC would be \$33 million less spending over 5 years. So those figures are available in the CBO report, to let you know.

And I would like to ask you about, I ask the chair, when you were answering questions by Mr. Schock earlier, there was a question about the FEC policy that was adopted back in 1999—obviously, you were not on the Commission at that time—about the fact that at that point that there was a different enforcement, depending on which Federal Circuit district you were in.

My question would be, is that policy still being used or has that—just so that I am clear, is that still the policy, to have it different in different districts or is it uniform now, according to your enforcement?

Ms. BAUERLY. Thank you, Mr. Chairman.

To my knowledge, at this point in time the Commission is not engaging in what—the legal doctrine of intercircuit nonacquiescence, which is a very fancy way of saying what you just said, that in different circuits different law might govern the Commission's actions. At this point in time, again, I don't know of any that we are actively engaging in.

Mr. HARPER. Could you confirm that and let us know?

Ms. BAUERLY. Sure, we would be happy to.

Mr. HARPER. Thank you very much.

Now, there was some talk that the enforcement manuals were outdated, that releasing those would be confusing; and my question is, if it is outdated, what is being—we were saying, what is the enforcement manual? What is that document when we are saying the current enforcement? What is that? Is that available?

Ms. BAUERLY. Our enforcement division operates its standards with a number of documents that are not housed in one thing. The thing that we were talking about, the thing that is in a binder that is called the enforcement manual, has not been updated on paper simply because that is not how agencies work anymore. As we all know, we store things electronically.

Mr. HARPER. May I interrupt just very briefly? Because somewhere within your written responses that were submitted I believe there was a statement that said the enforcement manual was updated via memos and emails. Is that where you are going?

Ms. BAUERLY. Yes, that is—and, again, obviously I don't have an office within the enforcement division, so I don't have personal access to those. I don't have those sitting on my desk, either. But that—again, Commissioner Walther's effort a couple of years ago was to try to compile all that information in a usable way for people who are engaging in our process.

Mr. HARPER. Okay, and I will ask this question for the chair and the vice chair. I believe all have publicly stated there is an agreement on a large portion of the needed changes to the FEC regulations post-United Citizens—or Citizens United, excuse me. Why



hasn't the Commission acted on those points of agreement and updated its regulations since that decision? And then when might we expect that to be updated, since that is going back to the decision, I believe, in January of 2010?

Ms. BAUERLY. Yes, Mr. Chairman.

In January of 2010, of course, the Supreme Court struck down several provisions of the statute, and we have corresponding regulations that were enacted as part of those. The Commission has on two occasions put out documents suggesting an NPRM, of course, notice of proposed rulemaking, the very beginning of our rule-making process; and, as I think Commissioner Walther referenced, we were unable to reach agreement on the parameters of that. I think, frankly, there is disagreement amongst Commissioners in terms of what issues are raised by that case.

Because the Court decision struck down the statute and not our regulations, there is some overlap in our regulations in terms of some of those provisions at issue. For example, after Wisconsin Right to Life, we provided a regulation regarding how to report that activity. The Citizens United decision, of course, overtakes Wisconsin Right to Life, so one question that some of us would like to ask is whether we should rethink that or consider making any changes. So we were unable thus far to be able to do that, but, as the vice chair mentioned in her opening statement, we do have petitions pending before us with respect to some of the provisions at issue in Citizens United, and I am hopeful we may be able to take action on that soon.

Mr. HARPER. My time is up. Perhaps one of the others will ask you to follow up on that in just a moment.

Now I will recognize the ranking member, Mr. Gonzalez, for a second round of questioning.

Mr. GONZALEZ. Thank you. I am only going to take a couple seconds, because the chairman and I could go for days on the EAC being subsumed by you.

But I have just been handed this, and this is a quote from the CBO: Enacting H.R. 672 would have no significant effect on revenues.

They are accountants, and I understand that, and they can put a pencil to things, but, given your schedule, your duties, what it would take to assume those other responsibilities, I think today's testimony clearly indicates that you can't put a dollar figure on it so that we can make representations to the supercommittee that it is going to result in savings.

I am also a strong proponent of the focus and energy that the EAC brings to a specific area of campaign or elections. But I am going to ask Vice Chair Hunter and Commissioners McGahn and Petersen, because your response to my question about are the disclosure laws adequate today in order for you to do your job, and each of you said yes. So I would just ask you, beyond the obvious, to identify a donor, we establish whether they legally can donate or not. Beyond that, what is the value to identifying donors to any endeavor, entity that can impact an election in this country?

Ms. HUNTER. The value is that the public has the ability to know who gave to a candidate's committee or to a political committee and to all committees that are required to disclose their donors under

the law. I believe some of the committees you may be referring to are not currently—they are not considered political committees; and, therefore, they do not have to disclose their political donors.

Mr. GONZALEZ. And do those committees, by the legal nature that you just referred to that exempt them or whatever it is, do they impact political campaigns in this country today?

Ms. HUNTER. I believe that the Supreme Court has held that if they are making independent expenditures that are not coordinated with candidates or party committees that it is not possible for those independent expenditures to corrupt or to have the potential to corrupt those candidates or party committees.

Mr. GONZALEZ. Do they influence elections?

I mean, this is a practical question. We can sit here and say what is the Supreme Court going to say. I mean, they have already equated a corporation to an individual. We can go from there. But I am just asking everyone in this room, my colleagues and such, do these entities impact and make a difference in elections today in this country?

Ms. HUNTER. Yes, they do. Of course. Just as my neighbor does when he is talking to me as I walk down the street. There is a multitude of different factors that affect elections.

Mr. GONZALEZ. I think there is a huge difference between you talking to a neighbor and the moneys that these groups raise and spend to influence elections. I mean, it is obvious what is going on, and you may say it is the Supreme Court and the legal nature of an entity that exempts them. My point is, what is a rose by any other name?

Mr. McGahn, you answered yes. Mr. Petersen, you answered yes. What is the value? I mean, why should we know who is contributing to organizations or entities that influence our elections?

Mr. MCGAHN. Well, for those who give to candidates, I think we need to know because of corruption or appearance. I think the voters have a right to know who is taking money from whom before they vote for the person.

With respect to noncandidates, I think the argument is that the voter can factor in how they view the message based upon who is paying for the message. Some say there is value to that. Some say that that actually just clouds the message. The message ought to stand on its own. You know, there is case law in both sides.

Anonymous speech is still protected in some instances. Some instances it is not. There could be harassment against the donors and all that. But there is some value. The courts have recognized it in some sort of subjective way. Certainly we all agree there is some value there. The question is whether it is enough of a value to compel people to say who they are when they speak. There is arguments on both sides. The Court has drawn lines on this.

Mr. GONZALEZ. I only have a couple of seconds. I want to give Mr. Petersen a chance.

Mr. PETERSEN. I mean, the value of disclosure—just to repeat some of what has been said but to add some additional—when money is given to a candidate—disclosure serves an anti-corruption purpose.

When we are in the realm of independent speech, the Supreme Court starting in Buckley talked about the value is for the public

who is receiving the message to be able to take into account the person who is funding that message. That is a piece of information that they can take into account when evaluating the merits or the lack thereof of that particular speech. It is a different interest in the independent realm than it is when we are talking about disclosure of donors to candidates.

Mr. GONZALEZ. Different interest, same result.

Mr. Chairman, I know I have run out of time, but I ask unanimous consent to tender into the record Mr. Brady's statement.

Mr. HARPER. Without objection. Thank you.

[The statement of Mr. Brady follows:]

Opening Statement of Rep. Robert A. Brady  
Committee on House Administration  
Subcommittee on Elections  
Hearing on: "Federal Election Commission: Reviewing Policies, Processes and  
Procedures"  
November 3, 2011  
10:00am

I want to thank the chairman for holding this oversight hearing on the Federal Elections Commission.

The committee has exercised its oversight role of the FEC over the years by approving committee reports on legislation and including oversight findings, reviewing reports sent to Congress, informally and formally meeting with the commissioners, meeting with the Inspector General, the General Counsel and Congressional Relations office to gather more clarity on issues and work to improve the functions of the agency. And let me be clear – the FEC is an agency that needs to improve.

It is timely that we have the FEC here today, just as a new trend is starting to emerge in campaign finance: the Super PAC. Prior to the Supreme Court's decision in Citizen's United, and subsequently SpeechNow.org, the Super PAC did not exist. There is now roughly one Super PAC registering with the FEC per day. Officially known as "independent-expenditure only committees," Super PAC's are not subject to the same contribution limits as other fundraising groups and while they must disclose their donors, it is not always clear, as a result of tactics such as shell corporations, exactly who is donating. A lack of meaningful disclosure coupled with unlimited contribution limits is a dangerous mix to a democracy.

Never before in our history has the role of money in elections been more influential than it is today. This new form of outside spending has dramatically increased the cost of federal elections. As a result, it is imperative that the FEC ensure the integrity and fairness in our electoral system. It must level the playing field. Since 2003, the Commission's percentage of split votes -- votes that did not result in a decision on enforcement actions -- skyrocketed from less than 1% in 2003 to more than 10% today. Further, the percentage of split advisory opinion votes is at its highest level, 29%, since 2008, when it was 22%. While few will debate the merits of the FEC's mission, it is the agency's propensity to deadlock, sometimes on the most mundane of issues, that has me

concerned. It is an agency full on controversy and dissension often times the result of partisan politics rather than a genuine disagreement of ideas. It has been jokingly observed that the FEC cannot even agree on which day of the week it is.

I am not inclined to believe this is a result of thoughtful debate but rather a strict and blind adherence to partisan beliefs. We cannot afford to continue this political charade at the expense of much needed enforcement and regulation.

Not only are the percentages of split votes increasing, but the number of total votes taken decreasing. Since 2003, the number of total votes taken in enforcement actions is down from 1036 to 139. With respect to audits, the number is down from 59 to 13. Regulation votes have seen a decrease from 29 to 11. Advisory opinion votes are down from 51 in 2003 to 41 in 2010. This is a troubling trend.

This Committee, and Congress, have taken up several pieces of legislation that are within the FEC's purview. Some, like the administrative fines program, have become law, while others, such as the DISCLOSE Act, were never enacted. America will continue to hold scheduled elections, regardless of inaction or deadlock at the FEC and those elections require rules and protections for their continued safety and integrity. This Committee has always encouraged disclosure and I would ask that we continue to embrace the sunlight that should be cast upon all elections.

Prior to the FEC's creation, Congress sought to limit the effect that wealthy individuals and special interests could have on elections through, among other things, laws mandating disclosure of campaign contributions. When Congress saw these laws were not enough, the FEC was created to enforce them. We are already in the midst of presidential primaries. In little more than a year, we will have another presidential election. We, as voters, are in an era of uncertainty when it comes to our elections and who is funding them. The Supreme Court, whose Justices are appointed by the President to lifetime terms, has already drastically transformed the face of campaign finance by allowing for Super PAC's, and more change is inevitable. As such, it is critical that the FEC fulfills its intended mission.

I would again like to thank the Chairman for calling this hearing and I look forward to hearing the testimony of our witnesses.



Mr. HARPER. I now recognize the gentleman from Illinois, Mr. Schock, for additional questions.

Mr. SCHOCK. Thank you, Mr. Chairman. I will run through some here.

Mr. Chairman, you had asked specifically about why there hadn't been changes. The commissioners said there will be changes. My question is when. Is there a timeline on Citizens United?

Ms. BAUERLY. Oh, thank you. I think we weren't sure which timeline you were looking for.

We are in the process of considering when we might schedule that. We are hopeful by the end of the year. We are looking at each other because, frankly, these processes are complex and we want to make sure that we consider all of the options when we do put things out for public comment.

Mr. SCHOCK. Okay. I want to be clear there is consensus among you that in addition to the manual you support also releasing the fee schedule or the penalty schedule.

Ms. BAUERLY. Representative Schock, if I could make sure I understand your question, you are asking whether there is consensus among us about releasing our penalty schedule?

Mr. SCHOCK. Yes.

Ms. BAUERLY. Again, I believe that you heard consensus among us that we think that should be public. I think the challenge will be making it for some set of documents, some pieces of paper that at least four of us can agree on to make public. There are some disagreements over what the formula should be.

And, again, we would want to also make sure that any documents released do indicate that the Commission has discretion to make modifications in either direction and also to note that we must conciliate with people and so penalties at the end of the day may look different than they do on these formulas.

Mr. SCHOCK. Okay. Well, I just want to state for the record, with all due respect to the commissioners, Mr. Chairman, I would support your subpoena request so that we are sure that we get all the information that we are requesting.

Finally, I want to follow up on my last question about the request for more information. You stated that there is really no penalty for people to—for committees that don't respond to the request for more information, there is no specific penalty. However, I will tell you, as a candidate, when you receive the request for additional information, it states specifically on that document from the FEC that if a candidate does not respond with the information that you are requesting, we will then be subject to an audit.

So I would suggest that, again to Mr. Lungren's point about appearances for a candidate who is trying to spend as much time getting to know the voters, when we get a document from you requesting information that we are not required to produce based on law, based on statute, followed by a statement that if we don't compel to provide that information we will be subject to an audit, I would suggest to you that that is inconsistent. It is not helpful. And I would urge the commissioners to review that practice, quite frankly.

Ms. BAUERLY. Thank you. If I might, Representative Schock, clarify what I said. I didn't mean to suggest—I agree with you that

an audit certainly would be viewed by some as certainly some consequence, perhaps a penalty.

What I was, I think, responding to was your statement about due process; and, as I mentioned, we do have a process by which committees may come directly to the Commission to seek further guidance on whether they need to respond to that letter. If information in a letter can be resolved easily, the public record is complete; and there is nothing further taken with respect to that request for information.

If the information remains inadequate, the discrepancies in the report are not corrected, for example, if there are mathematical errors, cash on hand does not match, for example, those things may over the course of time if a committee demonstrates an inability to comply with their disclosure requirements, then that committee may be referred to a number of different processes within the building, including ADR enforcement or audit.

So I apologize if I wasn't clear about the process—the full process that is involved with request for information.

Mr. SCHOCK. But you can understand where we are coming from. If you are being requested to provide information that you are not required to provide and then also the dangling audit is hung above your head, there might as well not be a law that says what you can provide. You might as well be able to request whatever it is you want so long as you have the audit to be able to hang over our heads if and when we don't provide the information requested.

Ms. BAUERLY. Representative Schock, we send requests for information when there are discrepancies on reports that indicate that there may be more information required. All of that is based on the existing law and the regulations. There is no—not in RFAI—

Mr. SCHOCK. Let me give you one example where I think there is a discrepancy. In June of 2011, the FEC sent a letter to Crossroads GPS requiring more information, demanding that they disclose their donors. By law, groups are only required to disclose this information to the FEC if the contributions are earmarked for specific independent expenditures. That is the law.

Crossroads has made it clear publicly throughout the press as well as in documents to you that their response to the FEC would be that its reports were full and complete and that they had no donors to report because no contributions were earmarked for a particular election. So it was out there, it is public, it has been stated, and yet the FEC sent them a request for more information requiring them to submit—to provide their donors, and then once again stating if you don't provide the information requested, you will be subject to an audit.

So I would just encourage you that your legal counsel should make sure that what you are requesting is, in fact, required by law before you compel them because—and not in every instance as you are suggesting is it just a clerical error or some clarification that needs to be made on a filing statement.

I believe my time has expired. Thank you.

Mr. HARPER. I will now recognize the gentleman from Indiana, Mr. Rokita, but I am going to give you an opportunity to answer, Madam Chair.

Ms. BAUERLY. Thank you very much, Mr. Chairman.

I just wanted to make clear to Mr. Schock that requests for information are sent based upon the review of the reports. The RAD analysts don't go out and look for information about committees that they might—whose reports they might be reviewing. So I just want to make clear that the report analyst is looking at the report being filed by the committee.

They would not go out and look at other information about the committee. In certain instances, you might view that as a detriment to the committee. In other instances, committees might view that as unfair to them. So what we look at is the report that is filed with us. So I just wanted to clarify what our process is.

Thank you, Mr. Chairman.

Mr. HARPER. Thank you.

I will now recognize Mr. Rokita for questioning.

Mr. ROKITA. Thank you, Mr. Chairman. I appreciate the way the discussion is going. I would like to yield 2 minutes to Congressman Schock.

Mr. SCHOCK. Well, Mr. Rokita, thank you for your generosity.

Mr. ROKITA. I am new.

Mr. SCHOCK. Shifting gears here, last year, the Commission issued an advisory opinion which gave Google permission to run political ads, yet denied Facebook an advisory opinion on nearly an identical type of ad. Can you explain why?

Ms. BAUERLY. Congressman Schock, the advisory opinion in Google indicated that there were, I believe, four commissioners who agreed that the way that the ad was presented on Google would comply with the law. My view of that one was that because of the way the Google ad was structured that it would be going to a landing page where there was a full disclaimer on it. My view was that that satisfied our alternative disclaimer requirement.

I won't speak for other commissioners who may have voted in favor of that Google opinion. I think there were obviously different ways that different commissioners got to that result of saying that that was an appropriate course of conduct for the Google ads.

With respect to Facebook, that was a different type of ad. Facebook has a different format, and the request indicated that they thought they were entitled to an exemption from the disclaimer requirements.

Again, I will speak only from my view. Others may want to include theirs. I did not think that it met the existing exemptions for a disclaimer requirement.

Of course, when the Internet rulemaking was conducted a few years ago, the one area where the Internet is part of our regulations is for ads placed for a fee on another's Web site. We have attempted—we understand that technology is changing. These are very important innovations for campaigns and candidates and voters to use, and we recently put out an advance notice of rulemaking to try to gather input on whether the Commission should or should not engage in a rulemaking to address this issue. We think this is very important.

The Commission obviously can't adopt a Twitter rule and a Facebook rule and a Google rule, but we do want to make sure that we are trying to keep up with innovation if we can, and we welcome public comment on that notice. It is out for public comment

right now, and comments are due in the next few weeks. So we are looking forward to some guidance not only from users of this technology but other providers.

Mr. ROKITA. Reclaiming my time.

Mr. SCHOCK. Thank you very much, Commissioner.

Mr. HARPER. Reclaiming his time, Mr. Rokita.

Mr. ROKITA. If I knew Congressman Schock was going to ask my question, I wouldn't have yielded any time.

Mr. SCHOCK. I have more.

Mr. ROKITA. With my remaining time, I would like to go to the vice chairwoman and see if you want to respond at all to any question that Mr. Schock may have asked or Mr. Harper may have asked.

Ms. HUNTER. Thank you, Congressman. I would like to follow up on the RFAI question.

While it is true that the letters are sent out pursuant to the RAD manual that we have been discussing a lot this morning, you have to have four votes to get the RAD manual to be approved.

Several years ago, several of the commissioners brought up the exact letter that you are referring to, Congressman, the letter that was sent to American Crossroads. But years ago it was sent to a different group—and I can't remember what the organization was—and we, too, had an issue with the letter saying that this is information that the FEC is not entitled to ask. And you are right. The letter does end by saying you could end up in an enforcement proceeding or an audit proceeding, because that is absolutely true.

But we didn't have a fourth vote to change that letter. So we are aware of that issue. It is just there is only so much we are able to do.

And something that came to mind as you were talking, I think it would be a helpful improvement to add a sentence to the RFAI letter. As the chair notes, we have a new policy now that outside groups and the public can ask the Commission to weigh in on outstanding legal issues. So I think it would be helpful to reference that policy in the RFAI letters so people are fully aware that they can contest the premise of those letters.

Thank you.

The CHAIRMAN. Mr. Rokita, would you yield for a second?

I was just thinking that maybe you can take care of this by including RFAI letters in the Anti-Bullying Act that is coming through the Congress.

Mr. ROKITA. So noted.

Mr. Chairman, I yield back.

Mr. HARPER. I will now recognize the gentleman from Florida, Mr. Nugent, for additional questions.

Mr. NUGENT. Thank you, Mr. Chairman; and I concur with the chairman's idea.

You know, the comment has been made about, you know, we are worried about, particularly as I relate to a candidate, that there is a threshold that you don't want them to know about because they may violate it up to a threshold. I will tell you that I don't know any candidate that wants to get a letter from the FEC saying that you are in violation of anything. Because that in and of itself, I will tell you, is a sanction that most of us as candidates always were

concerned about, whether you are running in a State but also particularly in a Federal election.

Let me ask, on the RFAIs, do you believe that is part of the enforcement action? And each commissioner I would like an answer, do you believe that is part of the enforcement action, starting with Commissioner Walther.

Mr. WALTHER. Well, I think the issue is that it could be the beginning of it. I think the RFAIs serve a purpose because it offers somebody who has filed—and there is a lot of people who file and they don't really understand our reg book very well, make mistakes, and it gives us the opportunity to communicate informally on ways in which they might be able to comply. So there is a benefit to that.

I think—and I asked the question right now of my assistant. I thought we had sent out—when we sent out an RFAI—a warning—that they do not have to answer anything. And I was just told now that that is only in the case where we think that is so, and sometimes they really have to answer the question because it is required by law.

I don't support that. I think we ought to have a warning, at least, that you are not obligated to answer anything if you don't want to.

Mr. NUGENT. So——

Mr. WALTHER. So I am not sure exactly how that——

Mr. NUGENT. Do you believe that is an enforcement action or not, the RFAI?

Mr. WALTHER. At that particular time, no.

Mr. NUGENT. Okay.

Commissioner Weintraub.

Ms. WEINTRAUB. I view the RFAIs primarily as a disclosure mechanism to ensure that the reports that are filed contain all the information that the law requires.

Mr. NUGENT. Okay.

Chairman.

Ms. BAUERLY. I agree with Commissioner Weintraub. It is the way that we ensure that we are enforcing—that we are complying with our duty to ensure that the reports are accurate when they are filed.

As Commissioner Walther noted, at some point, if there are enough discrepancies or there are enough problems with someone filing, it may later move further down the process. But, again, that would have to be a substantial number of problems and ongoing problems with reports in order to get there. We have an obligation to make sure the public has access to accurate information, and when we see problems, that is the step in doing so.

Mr. NUGENT. Commissioner Hunter.

Ms. HUNTER. They are absolutely part of the enforcement process, as there are consequences; and if one doesn't answer them, you know, in total, you can be referred for enforcement—or for audit.

Mr. NUGENT. Commissioner McGahn.

Mr. MCGAHN. I think the FEC has wanted it both ways. On the one hand, it is not enforcement when it is convenient; on the other hand, it is. It is enforcement when we talk about the manual be-



cause all of a sudden the manual is secret, but it is not enforcement because it is in the public record.

Personally, I think they are a form of enforcement. I think it is a form of branding someone without an opportunity to be heard. When they were only available in the public records room, okay, they are public. But now they are on the Internet and, as you know, they end up in 30-second TV ads and you don't really have a meaningful opportunity to respond. It is a very real issue, and I think they are a form of enforcement.

Just if I could take one second, there are examples of things the Commission in the past has asked for that they don't—that they aren't entitled to ask for. Party committees used to get an RFAI all the time when they did a coordinated expenditure and an independent expenditure, saying, we see you have done both, you know, please explain how you can do both.

Well, the Supreme Court in Colorado Republican said you could do both. It was an old letter that predated Colorado Republican that really had never been updated.

A lot of this has been fixed. There is more work to be done, but there are things that are being asked for that still are on the cusp beyond the letter to Crossroads. So I just want to echo that. But I think the answer is it is part of the enforcement process.

Mr. NUGENT. Mr. Petersen.

Mr. PETERSEN. I agree, I think it also is part of the enforcement process. Even though it may not be part of the formal process where a matter under review number is assigned to it and so forth, it can definitely lead to that. And I have often wondered why we do make those public, and I think as a result of them leading to or potentially leading to an enforcement matter, I think we should question whether or not they should remain public on the Web site.

Mr. NUGENT. And I agree. I think the question was, and you may—panel members—some panel members may disagree that it is an enforcement action, but if I am held accountable to the public in regards to something that you are just—you are saying it is just—well, we are just trying to clarify a possible mistake in numbers in addition. It could be, you know, you had 228 or you had 230 donors. The damage has already been done once you release that on your Web site. It then becomes—that is enforcement, I guess, through omission on your part by just releasing it.

And part of what the chairman had mentioned about the bullying aspect of it, particularly for those first-time candidates, it can be a crusher to their viability, and so the unintended consequence is it is an enforcement. It may not be the way you sought, but it is to the candidate.

I am over time.

Mr. HARPER. The gentleman yields back.

I now recognize the gentleman from California, chair of the full committee, Mr. Lungren, for questions.

The CHAIRMAN. My observation would be if I received a letter from a government agency that said if you don't answer this, you could be audited, that sounds like a threat. You may not see it that way, but I can certainly see a reporter saying candidate A received a letter from the FEC threatening an audit. Boy, boom, that kind of puts a negative connotation on it, I would think. So when you

put words like that in there, I think you ought to realize what the impact is.

I was just thinking from Mr. Gonzalez's questions about Citizens United and influencing and so forth, does anybody here know who financed the original publication of the Federalist Papers?

Mr. MCGAHN. Publius.

The CHAIRMAN. Did he pay for it?

Mr. MCGAHN. It is anonymous.

The CHAIRMAN. Well, I am just saying, should that have been disclosed?

Mr. MCGAHN. No.

The CHAIRMAN. I think that probably influenced the founding of this Republic, if I am not mistaken. And they used other names, and they didn't tell anybody where they got their money, and it was done to persuade legislatures to adopt the Constitution to give us protections under the First Amendment. Maybe they didn't understand.

Let me just ask this question, Madam Chair. Under current law, could a candidate designate an individual other than their treasurer of their campaign to dispose of campaign assets if they were to pass away? Do you have any flexibility in allowing a campaign—a candidate to say it is not my treasury. I want—in the unfortunate situation that I might pass away, somebody else might know a better idea of how I would want those campaign funds to go to charitable institutions than my campaign manager who—I mean my campaign treasurer who I may hire because he or she speaks your language and knows how to make sure I don't get one of those audit letters.

Ms. BAUERLY. Chairman Lungren, if I understand your question, the question is, were a candidate to pass away, could a new treasurer be assigned for that committee?

The CHAIRMAN. Yeah, could they designate, in other words, one person for purposes of campaign treasury but if in the untimely event they passed away someone else to dispose of the campaign assets other than the designated treasurer?

Ms. BAUERLY. Of course, a campaign may designate a treasurer and an assistant treasurer at any point in time. It wouldn't require any other circumstances. So there could always be sort of a backup person, and we frankly encourage that because that is very useful in case something were to happen to the treasurer rather than the candidate.

At this point in time, I don't believe we have specific regulations on that. Were such an unfortunate event to occur, I think the Commission would make every effort to work with a committee in terms of ensuring that whatever the wishes of the candidate were could be carried out.

The CHAIRMAN. Okay. Thank you.

Mr. HARPER. I want to thank everyone, and also we do look forward to seeing those manuals and penalty schedules. We think that that is an important issue for us today.

I think it is good that we have had this hearing after many years of not having one, and I want to thank each of the witnesses for their testimony and the members for their participation, and I now adjourn the subcommittee.

[Whereupon, at 11:39 a.m., the subcommittee was adjourned.]



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

November 18, 2011

The Honorable Gregg Harper  
Chairman  
Subcommittee on Elections, Committee on House Administration  
U.S. House of Representatives  
1309 Longworth House Office Building  
Washington, D.C. 20515

Dear Chairman Harper:

On November 3, 2011, the Subcommittee on Elections of the Committee on House Administration held a hearing entitled: *Federal Election Commission: Hearing on Policies, Processes and Procedures*. I am pleased to provide additional information about two of the questions that arose during that hearing.

Both you, Mr. Chairman, and Representative Schock asked about intercircuit nonacquiescence. I indicated at the hearing that I knew of no cases in which the Commission was currently engaging in intercircuit nonacquiescence and that I would confirm that fact for you. As you know, federal agencies may encounter situations in which circuit courts reach different legal conclusions and thus must therefore engage in such nonacquiescence, a doctrine which was implicitly approved by the U.S. Supreme Court in *United States v. Mendoza*, 464 U.S. 154 (1984). I can confirm that the Commission is not currently engaging in intercircuit nonacquiescence. The Commission did invoke the doctrine of intercircuit nonacquiescence with regard to a regulation defining express advocacy that, while based on an earlier decision of the U.S. Court of Appeals for the Ninth Circuit, was rejected by the Courts of Appeals for the First and Fourth Circuits. Faced with the apparent disagreement among the Circuit Courts, the Commission limited its observance of the decisions from the First and Fourth Circuits to those circuits. In 2003, in *McConnell v. FEC*, the Supreme Court held that its prior construction of express advocacy was not a constitutional requirement; since then, the Fourth Circuit has preliminarily held that the regulation is constitutional in light of the Supreme Court's decision in *Wisconsin Right to Life*. Thus, the regulation currently applies nationwide.

Chairman Lungren also asked whether a candidate could designate an individual other than his or her treasurer to dispose of campaign assets in the event of the candidate's death. Please allow me to provide additional information regarding this question. The *Federal Election Campaign Act (FECA)* specifies broad categories of permissible uses of campaign funds while prohibiting the conversion of campaign funds to the personal use of any person. 2 U.S.C. § 439a. *FECA* also specifies that a campaign committee's



The Honorable Gregg Harper  
Page 2

treasurer must authorize any expenditure of campaign funds. 2 U.S.C. § 432(a). These provisions continue to apply to the use of campaign funds after a candidate's death. *FECA* does not, however, specify who in a campaign committee is empowered to decide how campaign funds should be used at any time. Generally speaking, campaign committees are separate legal entities that survive the death of a candidate. For example, campaign committees that are incorporated for liability purposes would look to the relevant state law to determine which committee/corporate officers may direct the treasurer on the disposition of campaign funds. When campaign committees are being established and incorporated, the arrangements made at that point might include appointment of officers in addition to the candidate or treasurer, and these other officers may be empowered by state law to direct the campaign committee in the event of the candidate's death.

Additionally, in 1992, former Representative Dan Burton sought an advisory opinion from the Commission on whether *FECA* and Commission regulations permit him to issue instructions to his treasurer about how campaign funds should be distributed in the event of Representative Burton's death. The Commission recognized that state law may preclude such a designation, but found that if it was permissible under state law, *FECA* and Commission regulations permit candidates to issue instructions to treasurers about the distribution of campaign funds in the event of the candidate's death. I have enclosed a copy of this Advisory Opinion 1992-14 (Burton) for your convenience. As you are aware, *FECA* permits similarly situated candidates to rely on advisory opinions issued to other candidates when considering activities that are indistinguishable in all material respects. 2 U.S.C. § 437f.

Finally, a bill pending before the Committee on House Administration would amend *FECA* in this regard. Introduced by Representative Walter B. Jones, Jr., H.R. 406 would amend *FECA* to provide a mechanism for candidates to designate an individual and an alternate who would be empowered to disburse campaign funds in the event of the candidate's death and specific instructions for the disposition of campaign funds in the event of their death. All of this information would be publicly disclosed on Statements of Candidacy filed with the Commission. As you know, similar bills were passed by House of Representatives in the 111<sup>th</sup> and 110<sup>th</sup> Congresses. (H.R. 749 and 3032, respectively). Commission staff worked with Representative Jones's staff and House Administration staff on technical questions related to these bills, and the Commission stands ready to implement the bill should it become law.

Thank you for the opportunity to provide this additional information. As always, the Commission seeks to maintain an open dialogue with the Committee, and to be responsive to the Committee's concerns about enforcement processes. I can assure you that it has always been the Commission's intent to be conscientious in responding to questions and concerns raised by the Committee as it exercises its oversight responsibilities. Although it appears there may have been insufficient opportunity to discuss the content and nature of the Commission's response to a handful of the Committee's inquiries prior to the hearing, I am pleased that, since then, the Commission's General Counsel and Staff Director have been able to work with



The Honorable Gregg Harper  
Page 3

Committee staff to establish a framework to ensure that the Commission fully responds to the concerns expressed by you and the other Committee Members.

The Commission looks forward to continuing to work with the Committee. If you or your staff have any additional questions or oversight concerns, please do not hesitate to contact me at (202) 694-1020 or Duane Pugh, the FEC's Director of Congressional Affairs, at (202) 694-1002.

Sincerely,



Cynthia L. Bauerly  
Chair

cc: The Hon. Daniel E. Lungren  
Chairman, Committee on House Administration

The Hon. Robert A Brady  
Ranking Member, Committee on House Administration

The Hon. Charles A. Gonzalez  
Ranking Member, Subcommittee on Elections



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

May 15, 1992

CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1992-14

The Honorable Dan Burton  
120 Cannon House Office Building  
Washington, D.C. 20515

Dear Mr. Burton:

This responds to your letter dated April 15, 1992 requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a proposed transfer of your campaign funds to a charitable organization.

You state that you would like to arrange to have your excess campaign funds transferred to a nonprofit, tax-exempt foundation in the event of your unforeseen death. You wish to prepare written instructions now directing your campaign treasurer to make this transfer upon your death. You state that the foundation will be established to provide student scholarships or to make grants to colleges or other charitable institutions. You indicate that the instructions you intend to prepare would not involve any testamentary device, and that your personal estate would not receive any direct or indirect financial benefit from the foundation. You ask whether the Act and Commission regulations allow you to designate, in advance, that your excess campaign funds be put to this use after your death.

The Act and Commission regulations define "excess campaign funds" as amounts received by a candidate as contributions which are in excess of any amount necessary to defray campaign expenditures. 2 U.S.C. 439a and 11 CFR 113.1. Excess campaign funds may be used for a variety of specified purposes that are expressly made lawful: they may be used to defray any ordinary and necessary expenses incurred in connection with the candidate's duties as a holder of Federal office; they may be contributed to any organization described in section 170(c) of Title 26, United States Code; and they may be used "for any other lawful purpose," including transfers

without limitation to any national, State, or local committee of any political party. 11 CFR 113.2 and Advisory Opinions 1987-11, 1986-39, 1985-9 and 1981-15.

Thus, the Act and regulations specifically authorize transfers of excess campaign funds to organizations described in 26 U.S.C. 170(c). The Commission concludes that, if the foundation described in your request is one described in section 170(c), transfers of excess campaign funds from your campaign committee to the foundation would be permissible under the Act. See, for example, Advisory Opinion 1985-9.

The distribution of the campaign funds to an entity that does not qualify under 26 U.S.C. 170(c) may nonetheless be a transfer "for any other lawful purpose" under the Act. Advisory Opinion 1986-39 (private trust for sole benefit of minor child not related to former candidate would not confer financial benefit to former candidate). Such a use may, however, have adverse Federal income tax consequences.<sup>1/</sup>

You ask whether the Act and regulations permit you to issue instructions to your treasurer now on how your funds are to be distributed after your death. Previous advisory opinions authorizing transfers of excess funds to charitable foundations, and a private trust, did not involve designations by the candidate of how funds were to be distributed at some time in the future. See Advisory Opinions 1987-11 and 1986-39. However, the Act and the regulations do not limit the time when these transfers may be made. Therefore, absent any applicable State law precluding such a designation, you may issue instructions to your treasurer now on the distribution of your excess campaign funds at a later date.<sup>2/</sup>

The Commission notes that your committee is required to report all disbursements of its excess campaign funds. 2 U.S.C. 434(b)(4), 434(b)(5), and 11 CFR 104.3(b). Payments to a charitable organization are reportable as other disbursements. See 2 U.S.C. 434(b)(4)(G) and 434(b)(6)(A), 11 CFR 104.3(b)(2)(vi) and 104.3(b)(4)(vi).

The Commission expresses no opinion about the Federal or other tax ramifications of this activity, nor on the application of any other State or Federal law outside the Commission's jurisdiction.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Joan D. Aikens  
Chairman for the Federal Election Commission

Enclosures (AOs 1987-11, 1986-39, 1985-9, 1983-27, and 1981-15)

## ENDNOTES:

1/ For example, 26 U.S.C. 527(d) provides, in part, that campaign funds donated to an entity described in 26 U.S.C. 509(a)(1) or (a)(2), which is exempt from tax under 26 U.S.C. 501(a), are not treated as diverted for the personal use of the candidate or any other person. The implication is that donations to other entities, not similarly exempted by section 527(d), may result in taxable income.

2/ Your request states that your personal estate will not receive any direct or indirect financial benefit from the foundation. Consequently, the Commission does not address any question involving the conversion of excess campaign funds to personal use. 2U.S.C. 439a, Advisory Opinions 1986-39 and 1983-27.