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 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: REVIEWING POLICIES, PROCESSES AND PROCEDURES

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
Holding Power Accountable

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.[1] Of that sum, $133 million funded independent expenditures and electioneering communications by groups that never disclosed the source and/or donors of their money.[2] 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.[3] A former political operative of President Obama is leading a Super PAC that hopes to raise close to $100 million.[4]

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

---

[1] *See* Center for Responsive Politics, OPENSECRETS.ORG, "The Money Behind the Elections," http://www.opensecrets.org/bigpicture/index.php.
[2] *See* Center for Responsive Politics, OPENSECRETS.ORG, "2010 Outside Spending by Non-Disclosing Groups," http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U.
[3] Nicholas Confessore, *Outside Groups Eclipsing G.O.P. as Hub of Campaigns*, N.Y. TIMES, Oct. 29, 2011 at A1.
[4] 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,[5] 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.[6]

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.

---

[5] T.W. Farnam, *FEC Still Hasn't Issued New Campaign Spending Rules*, WASH. POST, Mar. 25, 2011.

[6] 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.*[1]

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,

[1] *Available at* http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7BB4BE5C24-65EA-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*,[2] 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.[3]

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

[2] *Citizens United v. FEC*, 130 S. Ct. 876 (2010).
[3] *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 . . . ."[4]

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.[5]

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"?[6] 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

---

[4] FEC, Electioneering Communications, Final Rule and Explanation and Justification, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).

[5] 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.

[6] *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."[7] This means that the federal law ban on political expenditures by foreign nationals remains in effect.[8] 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

[7] *Citizens United v. FEC*, 130 S. Ct. at 911.
[8] *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 110th Congress.[9] 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.

[9] H.R. 421 (110th Cong., 1st 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.*[1] Congress created the Commission to strengthen the integrity of the federal campaign finance process under the *Federal Election Campaign Act.*[2] 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.*[3] 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

---

[1] *Federal Election Campaign Act Amendments of 1974,* Public Law 93-443, 88 Stat. 1263 (1974).

[2] *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.

[3] *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 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

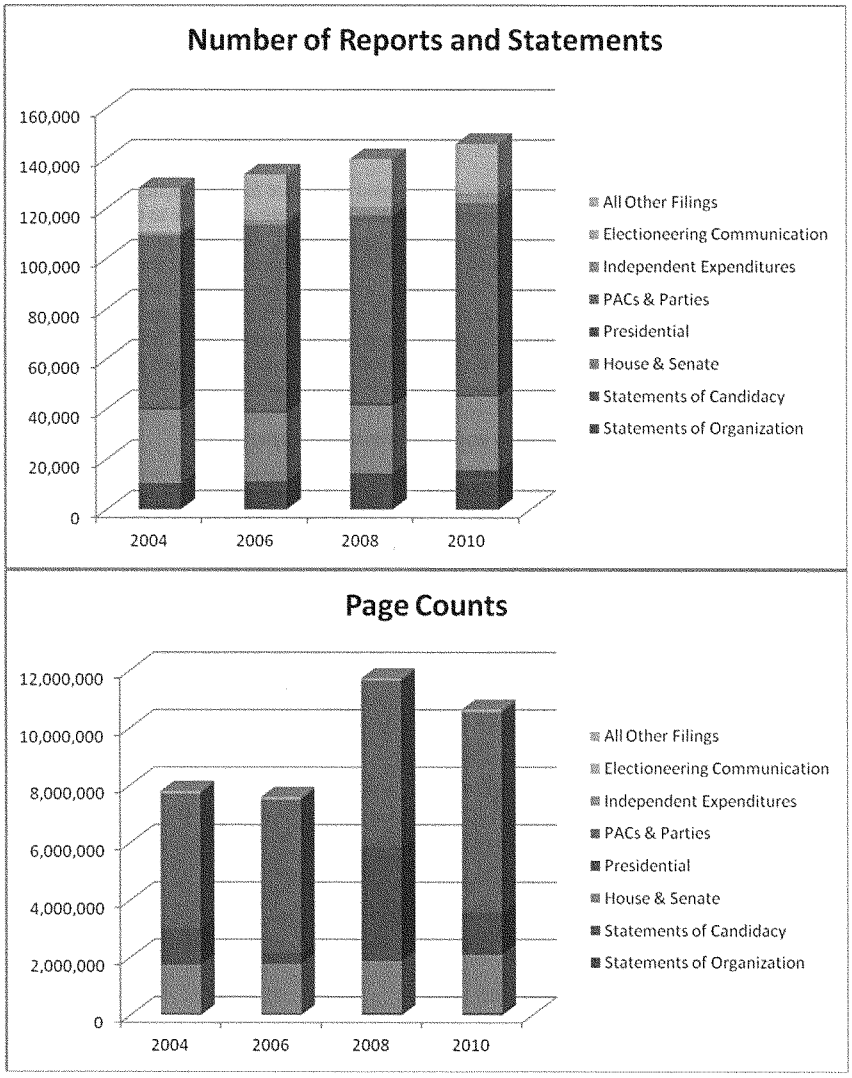
A. DISCLOSING CAMPAIGN FINANCE INFORMATION

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.

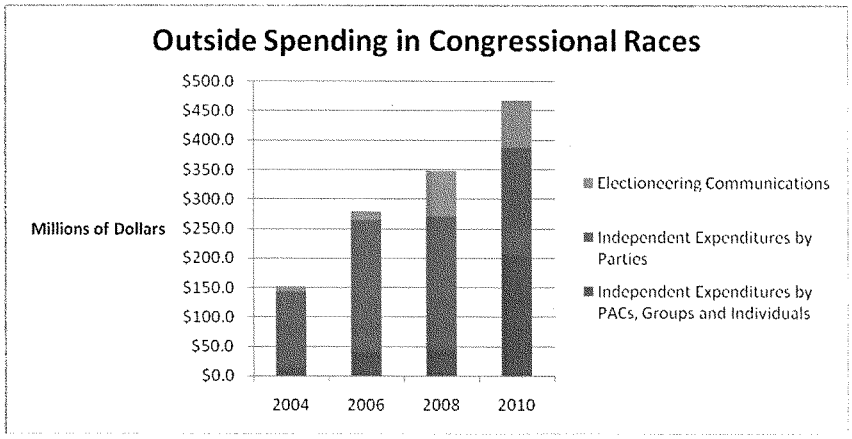
Total Receipts and Disbursements Reported

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

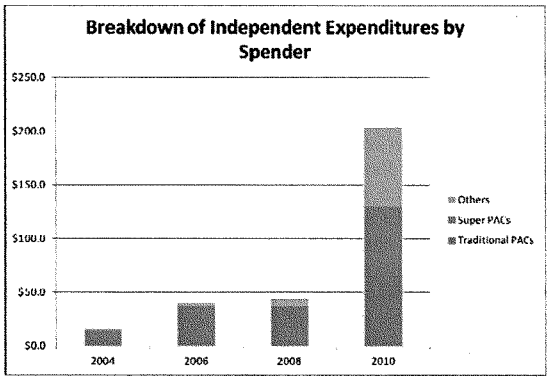


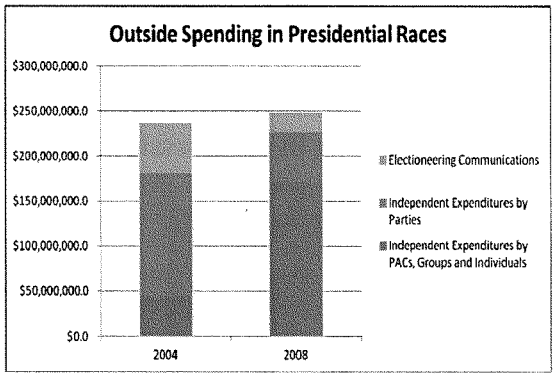
While campaign finance activity reported to the FEC has risen steadily over the past several cycles, major court decisions after the 2008 election cycle have changed the regulatory environment by removing restrictions on the use of financial resources. Notably in *Citizens United v. FEC*,[4] the Supreme 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*[5] 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.



[4] *Citizens United v. FEC*, 558 U.S. ---, 130 S.Ct. 876 (Jan. 21, 2010).

[5] *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C.Cir. Mar. 26, 2010)(*en banc*).

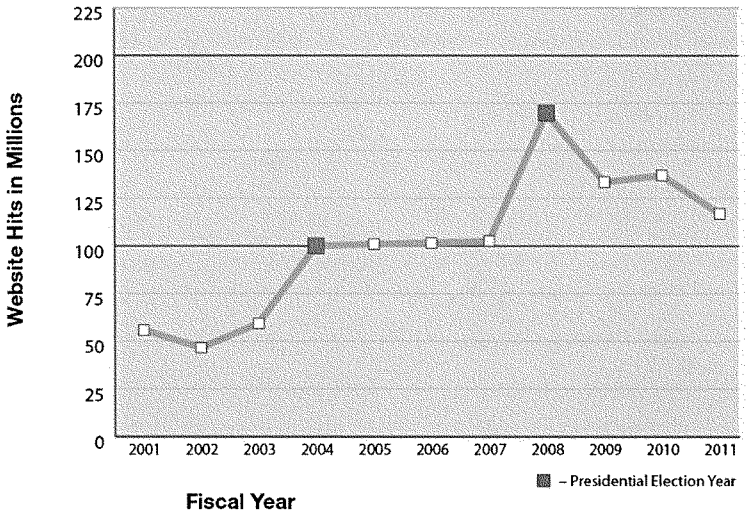




The Commission took a number of steps during FY 2011 to ensure that it will be fully successful in its mission to receive reports and make public reports filed in connection with the 2012 elections, and it has augmented its programs to help make data from these reports, and other campaign finance information, 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 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 RFAIs *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.[6] 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.[7] Additional improvements include: providing additional notice and opportunity to request to respond to new facts and arguments in probable cause briefing; placing

---

[6] 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).

[7] 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.[8]

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.[9] 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.[10] 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.[11]

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

---

[8] 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/mtgdoc_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; FEC, *Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters,* 74 Fed. Reg. 38617 (Aug. 4, 2009).

[9] FEC, *Procedural Rules for Audit Hearings,* 74 Fed. Reg. 33140 (July 10, 2009).

[10] FEC, *Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission,* 76 Fed. Reg. 45798 (Aug. 1, 2011).

[11] FEC, *Directive on Processing Audit Reports,* Dir. No. 70 (April 26, 2011), *available at* 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 22audit 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.[12] During FY 2011, the Commission completed within the deadlines 100% of the 28 AOs considered.[13] 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

---

[12] *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).

[13] 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.[14] 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.*[15] 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.[16] 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.[17] Recently, the Commission approved an Advance Notice of Proposed Rulemaking regarding disclaimers appearing on Internet ads.[18] 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 $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
2007	8.28 %
2008	7.38 %
2009	7.28 %
2010	6.59 %

[14] 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).

[15] *Carey v. FEC,* Civ. No. 11-259-RMC (D.D.C. Aug. 19, 2011).

[16] 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).

[17] 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.

[18] FEC, *Internet Communication Disclaimers* (forthcoming), *available at:* 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:

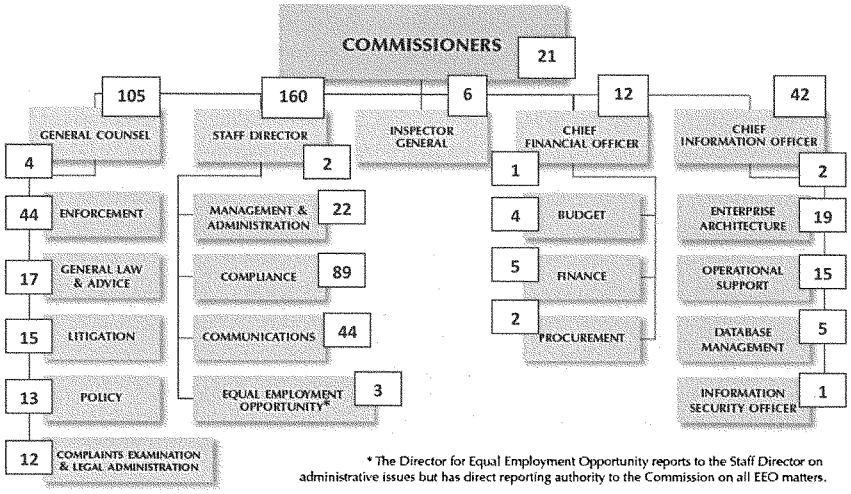
- Electronic Filing of Senate Reports
- Fraudulent Misrepresentation of Campaign Authority
- Conversion of Campaign Funds
- Pay Levels for the Staff Director and General Counsel and Authority to Create Senior Executive Service Positions

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	*Continuing Appropriations Act, 2012*[19]	$65,369,504
FY 2013	Budget Request to OMB	$67,998,561[20]

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

[19] Public Law 112-36, 125 Stat. 386 (2011).

[20] 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.[21] 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.

---

[21] 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. 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.*[22] 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.

---

[22] 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.*[23] 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.

---

[23] *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.[1] 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").[2] 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.[3] 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

---

[1] *Citizens United v. FEC*, 130 S.Ct. 876 (2010).
[2] *Id.*
[3] "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.[4] 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.[5] 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."[6]

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.[7] In two advisory opinions, the FEC confirmed it would act in accordance with the *SpeechNow* decision.[8]

---

[4] 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).

[5] *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

[6] *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.

[7] *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*).

[8] 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.[9] After the Commission deadlocked on an affirmative response, NDPAC sued the agency in *Carey v. FEC*.[10] The D.C. District Court recently ruled in favor of NDPAC's motion for a preliminary injunction,[11] 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.[12] 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.[13]

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.[14] These cases, which are currently pending, involve some of the more legally significant issues on our enforcement docket.

---

[9] Advisory Opinion 2010-20 (National Defense PAC).
[10] *Carey v. FEC*, Civ. No. 11-259 (D. D.C. filed Jan. 31, 2011).
[11] *Carey v. FEC*, Civ. No. 11-259, Memorandum Opinion on Motion for Preliminary Injunction (D. D.C. Jun. 14, 2011).
[12] *Carey v. FEC*, Civ. No. 11-259, Stipulated Order and Consent Judgment (D. D.C. Aug. 19, 2011).
[13] "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.
[14] 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,[15] 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.

[15] *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,[16] 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."[17]

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.[18]

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.[19] 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.[20] 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

---

[16] *See* 2 U.S.C. § 437f.
[17] *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 451 (2007) (internal citations omitted).
[18] *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.").
[19] 2 U.S.C. §§ 437g(a)(4)(C) and (a)(5)(A).
[20] MUR 5390 (Delk).

greater emphasis on the statute's mandate that the FEC "encourage voluntary compliance,"[21] 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.

[21] 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 longstanding 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 20006
PHONE 202.719.7000
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

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).[1] 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

[1] 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).

Wiley Rein LLP

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.[2] 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.

---

[2] *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.").

Wiley Rein LLP

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.[3] By making its civil penalty process publicly known, the FEC can continue to advance these important goals.

Sincerely,

Caleb P. Burns

---

[3] *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: 202.828.2814

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

COVINGTON & 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 K. KELNER
TEL 202.662.5503
FAX 202.778.5503
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

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)[1]; 2010 Federal Sentencing Guidelines Manual (Nov. 1, 2010)[2]; 74 Fed. Reg. 57593 (Nov. 9, 2009) (Office of Foreign Assets Control Economic Sanctions Enforcement Guidelines)[3]; 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)[4].

For instance, the Environmental Protection Agency's ("EPA") website publishes a list of civil penalty policies for a number of the laws EPA administers.[5] 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").[6] The 14-page policy was introduced in 1994 and includes a worksheet for calculating settlement penalties. The SWDA 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 SWDA 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 SWDA Policy makes clear that it applies only in settlement negotiations and that EPA will seek the statutory maximum in a

---

[1] *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.

[2] *At* http://www.ussc.gov/guidelines/2010_guidelines/index.cfm.

[3] OFAC publishes guidance, including risk matrices, for several economic and trade sanctions online at http://www.treasury.gov/resource-center/sanctions/Pages/default.aspx.

[4] *At* http://www.occ.gov/news-issuances/bulletins/pre-1994/banking-circulars/bulletin-273a.pdf.

[5] *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.

[6] *At* http://www.epa.gov/compliance/resources/policies/civil/sdwa/sdwapen.pdf.

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 asses 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%

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.[7] 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

[7] For example, the Federal Sentencing Guidelines set forth very high, but very clear, penalties. *See* 2008 Federal Sentencing Guidelines Manual, *supra*.

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,

Robert K. Kelner

THE WALL STREET JOURNAL.
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

Enforcement Manuals Made Public

Department of Labor

http://www.dol.gov/ebsa/ocmanual/

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/eousa/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

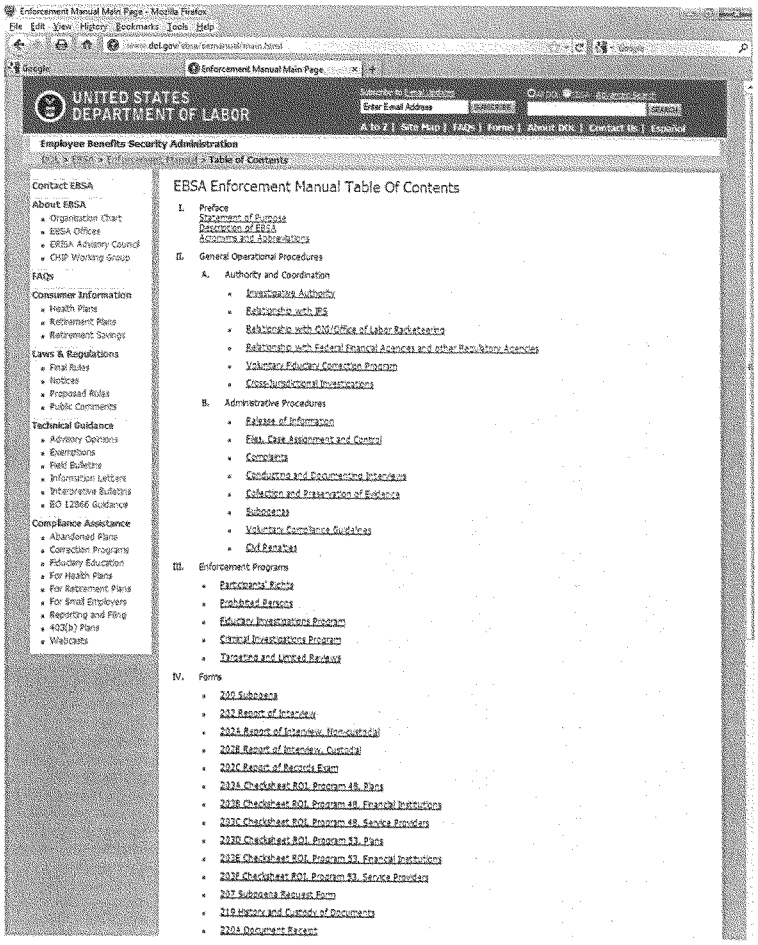
http://www.justice.gov/uspc/rules_procedures/uspc-manual111507.pdf

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.



Enforcement Manual Main Page - Mozilla Firefox

File Edit View History Bookmarks Tools Help

UNITED STATES DEPARTMENT OF LABOR

Employee Benefits Security Administration

DOL > EBSA > Enforcement Manual > Table of Contents

Contact EBSA

About EBSA
- Organization Chart
- EBSA Offices
- ERISA Advisory Council
- CHIP Working Group

FAQs

Consumer Information
- Health Plans
- Retirement Plans
- Retirement Savings

Laws & Regulations
- Final Rules
- Notices
- Proposed Rules
- Public Comments

Technical Guidance
- Advisory Opinions
- Exemptions
- Field Bulletins
- Information Letters
- Interpretive Bulletins
- EO 12866 Guidance

Compliance Assistance
- Abandoned Plans
- Correction Programs
- Fiduciary Education
- For Health Plans
- For Retirement Plans
- For Small Employers
- Reporting and Filing
- 403(b) Plans
- Webcasts

EBSA Enforcement Manual Table Of Contents

I. Preface
- Statement of Purpose
- Description of EBSA
- Acronyms and Abbreviations

II. General Operational Procedures

A. Authority and Coordination
- Investigative Authority
- Relationship with IRS
- Relationship with CID/Office of Labor Racketeering
- Relationship with Federal Financial Agencies and other Regulatory Agencies
- Voluntary Fiduciary Correction Program
- Cross-Jurisdictional Investigations

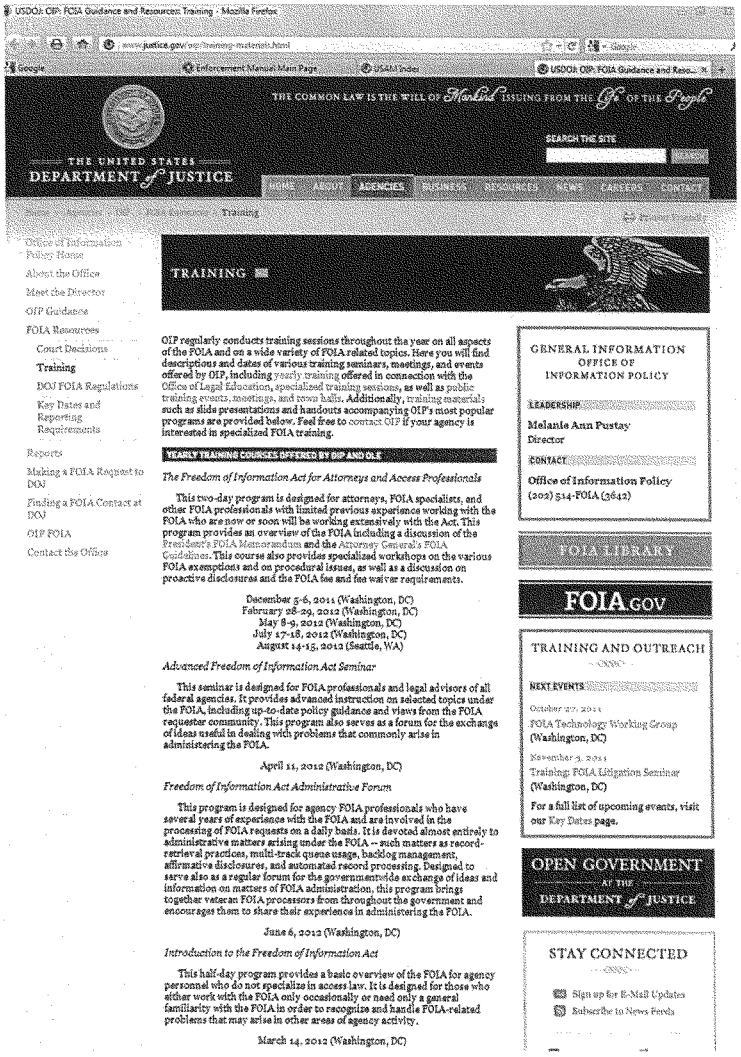
B. Administrative Procedures
- Release of Information
- Plan, Case Assignment and Control
- Complaints
- Conducting and Documenting Interviews
- Collection and Preservation of Evidence
- Subpoenas
- Voluntary Compliance Guidelines
- Civil Remedies

III. Enforcement Programs
- Participants' Rights
- Prohibited Persons
- Fiduciary Investigations Program
- Criminal Investigations Program
- Targeting and Limited Reviews

IV. Forms
- 200 Subpoena
- 202 Report of Interview
- 202A Report of Interview, Non-custodial
- 202B Report of Interview, Custodial
- 202C Report of Records Exam
- 202A Checksheet ROI, Program 4B, Plans
- 202B Checksheet ROI, Program 4B, Financial Institutions
- 202C Checksheet ROI, Program 4B, Service Providers
- 202D Checksheet ROI, Program 53, Plans
- 202E Checksheet ROI, Program 53, Financial Institutions
- 202F Checksheet ROI, Program 53, Service Providers
- 207 Subpoena Request Form
- 219 History and Custody of Documents
- 220A Document Receipt

United States Attorneys' Manual

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.



USDOJ: OIP: FOIA Guidance and Resources: Training - Mozilla Firefox

www.justice.gov/oip/training-materials.html

Google | Enforcement Manual: Main Page | USAM: Index | USDOJ: OIP: FOIA Guidance and Reso...

THE COMMON LAW IS THE WILL OF Mankind ISSUING FROM THE Life OF THE People

THE UNITED STATES DEPARTMENT of JUSTICE

SEARCH THE SITE

HOME | ABOUT | AGENCIES | BUSINESS | RESOURCES | NEWS | CAREERS | CONTACT

Home » Agencies » OIP » FOIA Resources » Training

Print | Share

Office of Information Policy Home
About the Office
Meet the Director
OIP Guidance
FOIA Resources
Court Decisions
Training
DOJ FOIA Regulations
Key Dates and Reporting Requirements
Reports
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's 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 now 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 (Seattle, WA)

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 experience 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) 514-FOIA (3642)

FOIA LIBRARY

FOIA.GOV

TRAINING AND OUTREACH

NEXT EVENTS

October 27, 2011
FOIA Technology Working Group
(Washington, DC)

November 3, 2011
Training: FOIA Litigation Seminar
(Washington, DC)

For a full list of upcoming events, visit our Key Dates page.

OPEN GOVERNMENT AT THE DEPARTMENT of JUSTICE

STAY CONNECTED

Sign up for E-Mail Updates
Subscribe to News Feeds

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.

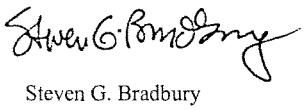
At the same time, many OLC opinions address issues of relevance to a broader circle of Executive Branch lawyers or agencies than just those officials directly involved in the opinion request. In some cases, the President or an affected agency may have a programmatic interest in putting other agencies, 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. 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.



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

United States Parole Commission
Rules and Procedures Manual

TABLE OF CONTENTS

Section (§) Title

Page

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

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. Specficially, 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.*

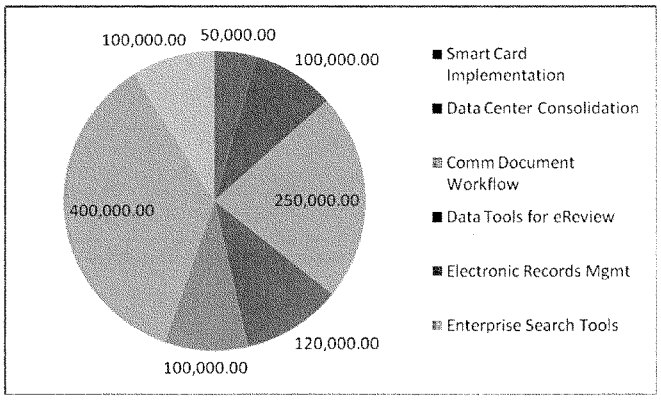
The PowerPoint presentation entitled *An Approach for FEC Strategic Planning and Management* illustrates the FEC's strategic management framework and timeline for revising FEC's *Strategic Plan*, in compliance with GPRA Modernization Act of 2010. The Commission is currently on the first phase of implementation. 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
	Strategic Objective A: TRANSPARENCY				
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%
	Strategic Objective B: COMPLIANCE				
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%
	Strategic Objective C: DEVELOPMENT OF THE LAW				
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 RFAIs been sent to PACs? If so, how many and what percentage do they represent of the total number of RFAIs?*

Yes, RFAIs 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 RFAIs were sent to PACs. This represented 48% of the total RFAIs sent. During the 2009-2010 election cycle, 6,550 RFAIs were sent to PACs. This represented 45% of the total RFAIs sent.

b. *Have RFAIs been sent to organizations conducting independent expenditures? If so, how many and what percentage do they represent of the total number of RFAIs?*

Yes, RFAIs are routinely sent to organizations making independent expenditures. During the 2007-2008 election cycle, 161 RFAIs were sent to these organizations. This represented 1% of the total RFAIs sent. During the 2009-2010 election cycle, 245 RFAIs 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 RFAIs 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 (RFAIs) 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 RFAIs specifically cite to an applicable regulation or statute at issue. Thus, an RFAI 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 RFAI 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 RFAIs are not used to discourage or suppress political speech?*

RFAIs 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 RFAI. *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 RFAI should be sent, is updated and circulated to the Commission for approval every two years. As an additional safeguard, all RFAIs and Committee responses to RFAIs 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. *Sua Sponte* 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 (*Sua Sponte *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 intercircuit nonacquiesence, 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 a 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,*
   a) *Why is the manual not made available to the public in the same way the Department of Justice discloses its manuals?*
   b) *How is the manual updated after the FEC loses a court case?*
   c) *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. 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[1]	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

[1] This amount includes $12.3 million in loans made to the candidate's general election committee.

Presidential Election Campaign Fund

75. 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.

Audits

77. 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 RFAIs, 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.[2] 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:[3]

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.[4]

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

---

[2] *See* http://www.fec.gov/press/press2009/2009Dec17EmilyList.shtml; http://www.fec.gov/press/press2010/20100112EmilyList.shtml.

[3] 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.

[4] 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 required four affirmative votes, the Commission did conclude that, under the circumstances described in 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:

a) inquiries that may be made of the requestor before considering the advisory opinion request;

b) the time that may elapse between the original submission and consideration of the request;

c) the scope of information that may be obtained from the requestor before considering the request; and

d) 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 inquires 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. 437f(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.

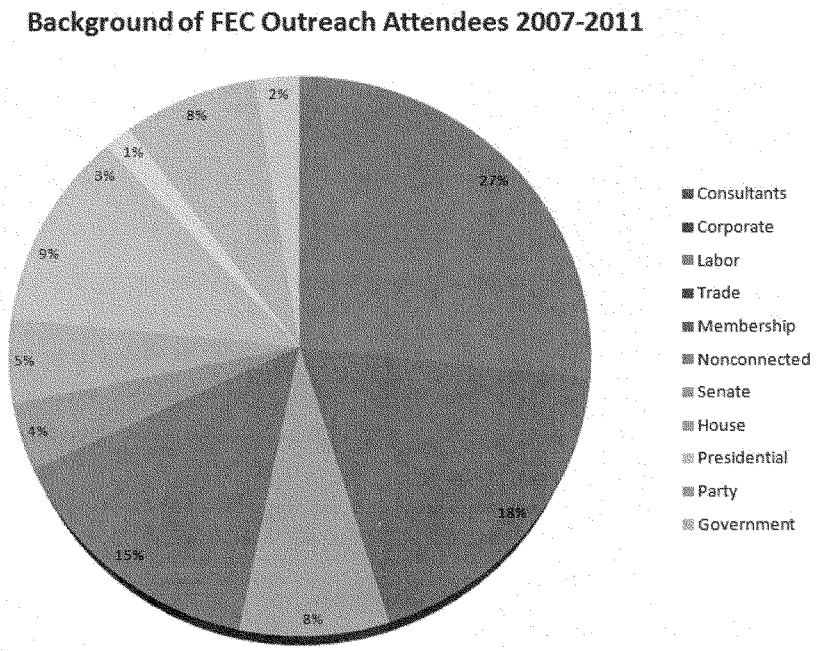
98. *Please list all seminars held by the FEC for the public since January 1, 2007.*

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.



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	
TOTAL:	4179	3078	2420	2360	1040

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, though 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 rulemaking 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 nonacquiesence. I indicated at the hearing that I knew of no cases in which the Commission was currently engaging in intercircuit nonacquiesence 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 nonacquiesence. The Commission did invoke the doctrine of intercircuit nonacquiesence 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

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 111th and 110th 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

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.[1/]

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.[2/]

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.