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Federal Election Commission
1050 First Street, NE
Washington, DC 20002

Re: Comments on policies and procedures regarding the auditing of political committees that do not receive public funds

Dear Commissioners:

The Federal Election Commission (“Commission”) issued a notice on January 9, 2023, seeking public comments on its policies and procedures regarding the auditing of political committees that do not receive public funds. 88 *Fed. Reg.* 1228 (January 9, 2023). I submit the attached public comments on the Commission’s audit process for committees that do not receive public funds. I also request an opportunity to testify at the public hearing on this matter.

I counseled on this audit process for 32 years as an attorney and managing attorney at the Federal Election Commission. I retired from the Commission and opened a law firm, the Holloway Law Office, to advise on campaign finance matters.

I respectfully offer the following comments as a way for the Commission to improve the audit process. As a general matter, the Commission should shorten the audit process and make it more efficient. This will save the resources of the Commission and committees subject to the audits. I believe that the Commission can shorten the audit process and make it more efficient if it moves the audit hearing and the process for requesting consideration of legal questions to the interim audit report stage.

Sincerely

Lorenzo Holloway, Esq.

I. RECOMMENDATION: MOVE THE AUDIT HEARING TO THE INTERIM AUDIT REPORT STAGE AND HOLD THE HEARING AFTER THE COMMITTEE RESPONDS TO THE INTERIM AUDIT REPORT

A. Primary Recommendation

The current audit process for committees that do not receive public funds has two stages: 1) interim audit report stage and 2) final audit report stage. Commission Directive 70 (April 26, 2011). The auditors prepare the interim audit report, and the committees are allowed 60 days to file a written response to the interim audit report. *Id.* However, there is no opportunity for committees to request an audit hearing before the Commission at this point.

The committees cannot request a hearing until the final audit report stage – after the auditors have already begun work on the draft final audit report. Commission Directive 70 (April 26, 2011). Committees may file a written response to the draft final audit report, and they are allowed to request a hearing as a part of their response to the draft final audit report. *Id.* This places the Commission and committees at a disadvantage because the auditors have already begun finalizing the audit report. However, the Commission has not heard the committees' oral arguments.

I recommend that the Commission move the audit hearing to the interim audit report stage. The Commission should hold the hearing after a committee responds to the interim audit report.

Moving the audit hearing to this stage of the process has several advantages. First, the Commission will hear directly from the committees, and it will be able to ask questions of the committees earlier in the process. This would allow the Commission to resolve issues earlier in the process. If the Commission resolves the issues earlier in the audit process, the auditors and the committees would not need to spend additional time and resources on those issues during the final audit report stage of the process.¹ Therefore, resolving the issues early in the audit process should shorten the audit process.

Second, this recommendation gives the committees the satisfaction that their concerns have been heard by the deciding body early in the process. Even if the Commission decides against a committee, there is value to the committee in knowing that the Commission has heard the oral arguments and concerns early in the process.

Finally, it shows the Commission's commitment to resolving issues early in the audit process. Committees could take this as a signal and an incentive to cooperate with the auditors early in the audit process and submit relevant information early in the process.

B. Additional Considerations

If the Commission moves the audit hearing to the interim audit report stage, the Commission should consider two additional changes to the process. First, the Commission should expand the committees' time to respond to the interim audit report. While the Commission has to be mindful

¹ This approach is consistent with the purpose of the Program for Requesting Consideration of Legal Questions by the Commission to resolve issues early in the audit process. 76 *Fed. Reg.* 45798 (August 1, 2011).

of its overall intent to shorten the audit process, the committees may need more time to identify the issues that they want to raise at the audit hearing.²

Second, the Commission should consider whether a committee response to the draft final audit report is still necessary. By the time the auditors begin working on the draft audit report, the Commission will have reviewed the committees' written response to the interim audit report and heard from the committees directly at the audit hearing.

If the Commission decides to eliminate the committees' responses to the draft final audit report, it should consider offering the committees a petition for rehearing procedure after it approves the final audit report. This rehearing procedure can be similar to and use the same standard of review as those offered to publicly financed committees under 11 C.F.R. §§ 9007.5 and 9038.5. This standard would require committees to: 1) "raise new questions of law or fact that would materially alter" the Commission's final audit report findings and 2) "[s]et forth clear and convincing grounds why such questions were not and could not have been presented during the original" interim audit report stage. 11 C.F.R. §§ 9007.5(a)(1)(ii) and (iii); 11 C.F.R. §§ 9038.5(a)(1)(ii) and (iii).

II. RECOMMENDATION: INCORPORATE THE PROGRAM FOR REQUESTING CONSIDERATION OF LEGAL QUESTIONS INTO THE INTERIM AUDIT REPORT PROCESS

A. Primary Recommendation

The Commission adopted the Program for Requesting Legal Consideration ("Request for Legal Consideration Program") on August 1, 2011. 76 *Fed. Reg.* 45798 (August 1, 2011). Since then, the program has been a part of the initial audit process. *Id.* Committees are allowed to submit a Request for Legal Consideration within 15 days after the end of the audit exit conference response period. *Id.* As a result, the program has played an essential role in helping the Commission resolve legal issues early in the audit process.

The Commission, however, should now consider whether the overall audit process could be more efficient if the Request for Legal Consideration Program was a part of the interim audit report process. I recommend that the Commission incorporate the Request for Legal Consideration Program into the interim audit report process. Specifically, committees should be allowed to request consideration of a legal question in their response to the interim audit report.

There are three advantages to this approach. First, committees will spend less time explaining, identifying, and framing the legal issues because the interim audit report and the committees' responses to the audit report will give the legal issues more context. Similarly, the Commission's Office of General Counsel would spend less time explaining the issues to the Commission in the memorandum that recommends how the Commission should resolve the issue.

Second, if the Commission decides to move the audit hearing to the interim audit report stage, this would allow the committees to present the issues and arguments that it raises in the Request for Legal Consideration orally at the audit hearing.

² For example, the Commission could increase the interim audit report response period from 60 to 75 days.

Finally, this approach has the benefit of further condensing the audit process. The committees would raise, and the Commission would address, all legal issues at one time – during the interim audit report stage.

While the Request for Legal Consideration Program would be later in the audit process, the advantages of having more context for the legal issues and allowing the committees to present all of their issues and arguments at the interim audit report stage outweigh any disadvantages caused by moving the Request for Legal Consideration Program to later in the audit process.³

B. Additional Considerations

If the Commission decides to incorporate the Request for Legal Consideration Program into the interim audit report response process, the Commission should revise the program procedures to allow committees to identify the issue for consideration in their response to the interim audit report. In addition, the committees should provide a recommendation, supported by law and facts, on how the Commission should decide the issue.

Given that the committees will need to raise all issues (including the issues for legal consideration) in their response to the interim audit report, the Commission should expand the time that committees have to respond to the interim audit report. The committees may need more time to identify the issues they want to raise in the request for legal consideration.

To keep the process efficient, the Commission should resolve the issues that the committees raise in the Request for Legal Consideration before it begins working on the final audit report. This will allow the auditors to incorporate the resolved issues or dismiss them from the final audit report findings.

The preceding comments are submitted for the Commission's consideration.

³ If there is a legal issue that the auditors and the Office of General Counsel need the Commission to resolve before the auditors prepare the interim audit report, the auditors and the Office of General Counsel may use the memorandum and procedures in Commission Directive 69 (July 1, 2010) to raise the issue before the Commission.