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February 8, 2023

The Honorable Dara Lindenbaum, Chair
Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463

Re: Policies and Procedures for the Auditing of Political Committees That Do Not Receive Public Funds

Dear Chair Lindenbaum:

On behalf of the Perkins Coie LLP Political Law Group, we submit these comments in response to the Federal Election Commission's January 9, 2023 Notice of Public Hearing and Request for Public Comments.[1] We provide these comments not on behalf of any client, but as practitioners who have frequently represented political committees in the audit process, and who are closely familiar with the Commission's practices in this regard. We respectfully request the opportunity to testify at the Commission's February 14, 2023 hearing.

The Commission's general audit process is indistinguishable in purpose and effect from the enforcement process set forth at 52 U.S.C. § 30109 and Part 111 of Commission regulations. Like the enforcement process, the audit process is designed to identify contended instances of noncompliance, and to spur future action to remedy them. In the case of the enforcement process, the Office of General Counsel identifies potential violations and makes recommendations to the Commission, which can then decide to pursue conciliation or offensive litigation. In the case of the audit process, the Audit Division likewise identifies potential violations and asks the Commission to adopt their findings in a written report, which can then trigger the normal enforcement processes.

Yet the regulations governing § 30109's enforcement process are extensive, while those governing the audit process are virtually nonexistent. Section 30111(b) authorizes the Commission to conduct audits and field investigations of political committees required to file reports; requires that, before conducting an audit, the Commission must perform an internal review to determine whether "reports filed by selected committees" meet thresholds for substantial compliance established by

[1] 88 Fed. Reg. 1,228 (2023).

the Commission; allows the Commission to conduct the audit on an affirmative vote of four Commissioners; and provides that the audit must be commenced within 30 days of the vote, and within six months of the election in the case of an authorized committee.[2] However, no regulations state the thresholds for substantial compliance. No regulations state how the Commission decides which of the committees meeting the thresholds will be audited.[3] And no regulations say when or how notice must be provided to an audited committee; how an audit is to be conducted; how the findings are identified, reviewed or presented; how committees may respond to draft findings; how the auditors and the Commission consider these responses; or how the Commission publishes or otherwise disposes of the audit. Rather than addressing these issues through regulation—as it does with section 30109's enforcement process, the administrative fine process, and the audits of publicly funded presidential and convention committees—the Commission addresses these matters through informal agency practices or Commission directives.[4]

Moreover, enforcement under section 30109 occurs under strict, express confidentiality rules, while audits under section 30111(b) do not. By directive, the Commission considers Draft Final Audit Reports in open meetings.[5] Ironically, the Draft Final Audit Reports that are least likely to be adopted by the Commission—those in which the Commissioners fail to agree on a finding by tally vote—are automatically placed on an open meeting agenda, and the auditors' recommendation memorandum and the Draft Final Audit Report are made publicly available, even before the Commission has resolved the issues.[6] This creates situations in which the auditors, without Commission approval, can present a finding that asserts a violation of the law, and in which that finding can be published, even when the full Commission ultimately decides that the finding is erroneous. Moreover, at the audit's conclusion, the Commission publishes a full range of documents, beginning with the Interim Audit Report, that can extensively discuss proposed findings that the Commission refused to adopt, sometimes with little explanation as to why the Commission disagreed. In contrast, in the enforcement process, the Office of General Counsel might assert that there was reason to believe a violation occurred, but the dispute will remain confidential until after the Commission has deliberated fully on the merits of the allegations and the committee's response.[7]

The lack of formal procedures can diminish a committee's opportunity to persuade the Audit Division not to assert an erroneous finding. Audits normally occur on a schedule of "hurry up and wait." Prep and fieldwork can last for an indeterminate period of time, but committees are given ten business days to respond to the findings at an exit conference, with no opportunity for extension, and are told that the response is not to include legal arguments. Many months might then pass before the issuance of the interim audit report, but the committee will then normally have thirty days to respond, with an opportunity for a fifteen-day extension. The exit conference is especially important: if a committee cannot persuade the auditors to resolve a finding at that stage,

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[2] *See* 52 U.S.C. § 30111(b).
[3] While those who closely follow Commission audits have a general, anecdotal sense of the types of issues that can cause a committee to be audited, the precise criteria are not specifically known, nor are the circumstances that cause the Commission to select among similarly situated committees.
[4] *See* Federal Election Commission Directive No. 70 (2011) ("Dir. 70"); Audit Division, Federal Election Commission, *The FEC Audit Process: What to Expect* (Feb. 2012).
[5] *See* Dir. 70 at 3.
[6] *See id.*
[7] *See* 11 C.F.R. § 111.21 (2022).

then the finding will persist in future documents and remain a part of the public record, even if the Commission decisively rejects it. Yet committees need not be provided with the Audit Division's preliminary fieldwork findings until the exit conference,[8] and then are told not to assert valid legal defenses in response to those findings. It is not always clear to the audited committee that an adverse finding has been subject to the same sort of review from the Office of General Counsel that a proposed recommendation in the enforcement process would receive.

In recent years, the Commission has taken steps to address these concerns, but they have not been fully effective. While Directive 70 allows a committee to respond to a draft final audit report before the Commission considers it, and to have its representatives participate in an audit hearing, that process can be public, and can discourage committees from pursuing it. The Commission itself has little opportunity to stop the development or pursuit of an erroneous finding. As Directive 70 makes clear, only interim audit reports "that present complex, novel, or unsettled questions of law, as well as all audits of state party committees, are circulated to the Commission for vote …"[9] It is not clear to a committee how this criterion is applied, or what role—if any—the Commission has in addressing unsettled questions of law at or before the interim audit report stage.

Finally, in the recent past, final audit reports have not served as a definitive statement of what the Commission finds, like an advisory opinion or a Factual and Legal Analysis in enforcement does. Rather, the reports are written as the auditors' narrative of how the audit unfolded: what findings the auditors initially made, how the committee responded, and what the Commission ultimately decided. If the Commission rejects a finding recommended by the Audit Division, or if the Audit Division determines its initial recommendation was not accurate, an ordinary reader might still be misled into thinking that the committee committed a violation.

It is long past time for the Commission to commence a rulemaking and provide the same sort of controls for the audit process that the enforcement process has. The rulemaking should start from the premise that the audit process is, functionally, an enforcement process. It involves the same issues of due process, fundamental fairness, reasoned agency decision-making, and Commission authority that enforcement under section 30109 involves. While the scope and content of the regulations would be appropriate for a Notice of Inquiry, draft regulations might address the following topics:

- The thresholds the Commission evaluates in selecting committees for audit.
- The scope of records that a committee must make available for inspection, including how to resolve auditor requests for records preceding or following the period under audit.
- The criteria by which the auditors may present a finding at the Exit Conference, the provision of sufficient time to respond to the finding, and the availability of a confidential process to ensure Commission consideration of a finding that a committee might reasonably think is legally erroneous, before that finding can later be published.

[8] *See* Dir. 70 at 1.
[9] *Id.*

- The format and content of audit reports in each of their iterations, whether at the interim or final audit report stages.

- Guidelines for the length of the various stages of the audit process, including fieldwork.

In particular, the Commission can and should bring the same confidentiality protections to the audit process that it does to the enforcement process until the audit is over. Indeed, existing Commission regulations permit—and appear to require—audits to be considered in executive session until the issuance of the final report. The Sunshine Act requires that every portion of every meeting of an agency be open to public observation, but provides for certain exemptions.[10] A meeting exemption can apply when, for example, the agency determines that a public meeting is likely to:

- Disclose matters specifically exempted from disclosure by statute;

- Involve accusing any person of a crime, or formally censuring any person;

- Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, under certain circumstances including when the production of such records or information would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, or constitute an unwarranted invasion of personal privacy, among others;

- Disclose information, for which a premature disclosure is likely to significantly frustrate implementation of a proposed agency action;

- Specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. § 554 or otherwise involving a determination on the record after opportunity for a hearing.[11]

The Commission commonly issues Sunshine Notices for executive sessions, noting that the meeting will involve compliance matters pursuant to section 30109, that premature disclosure of the information would likely have a considerable adverse effect on the implementation of a proposed Commission action, and that the matters concern participation in civil actions or proceedings or arbitration.[12] Moreover, Commission regulations state that, as required by 52 U.S.C. § 30109, meetings pertaining to any notification or investigation that a violation of the Act has occurred must be closed to the public.[13] Section 2.4(a)(2) defines "any notification or investigation that a violation of the Act has occurred" as including, but not limited to, determinations under section 30109, the issuance of subpoenas, discussion of referrals to the DOJ, "or consideration of any other matter related to the Commission's enforcement authority, as set

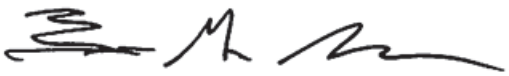
[10] 5 U.S.C. § 552b(b), (c).
[11] *Id*. §§ 552b(c)(3), (5), (7), (9), (10).
[12] *See, e.g*., https://www.fec.gov/resources/cms-content/documents/Sunshine_Act_Notice_for_January_10_and_12_2023__ES.pdf.
[13] *See* 11 C.F.R. § 2.4(a)(1).

forth in 11 CFR part 111."[14] The Explanation and Justification for this rule states expressly that "discussions of audit reports are covered by this exemption whenever they are likely to lead to a compliance action."[15] Under the current statute, audits are necessarily "based upon a determination by the Commission that the committees to be audited are not in substantial compliance with the Act."[16] Few would dispute that an adverse audit finding is "likely to lead to a compliance action," insofar as such findings are commonly the catalysts for section 30109 enforcement. Moreover, the Explanation and Justification says that the discretionary exemption for meetings involving formal proceedings or formal censure of a person applies generally whenever "opening to the public agency discussions of such matters could irreparably harm the person's reputation. If the agency decides not to accuse the person of a crime or not to censure him the harm done to the person's reputation by the open meeting could be very unfair."[17] That, too, can be an apt characterization of the audit process as it now operates.

None would deny that the audit process can perform the salutary functions of identifying actual instances of noncompliance, deterring violations, encouraging committees to take remedial actions in response to the findings, and surfacing common compliance issues among the regulated for Commission attention and potential action. And none would deny that, pursuant to the Commission's transparency mission, audit reports should, at their conclusion, be made public. However, the process can also serve as a vehicle by which novel and disputed interpretations of law can be advanced without Commission approval, an outcome that the Commission has wisely sought to avoid.[18] The Commission should consider ways to diminish the possibilities for such error, and to provide the same sorts of norms that have governed the enforcement process for nearly fifty years.

We appreciate the opportunity to provide these views to the Commission.

Very truly yours,



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[14] *Id.* § 2.4(a)(2).
[15] Sunshine Act Regulations Scope and Definitions; Meetings, 50 Fed. Reg. 39,968, 39,969 (1985).
[16] Reports Analysis Division Review and Referral Procedures for the 2021-2022 Election Cycle at 16.
[17] 50 Fed. Reg. at 39,970 (internal citation omitted).
[18] *See, e.g.,* Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason and Karl J. Sandstrom on the Audits of Dole for President Committee, Inc., et al., at 3 (June 24, 1999).