



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

RESPONSES TO QUESTIONS FROM THE  
COMMITTEE ON HOUSE ADMINISTRATION  
JULY 29, 2011

MANAGEMENT AND ADMINISTRATION

1. *In March 2010, the FEC Office of Inspector General made recommendations regarding the internal control system for personal communication devices, fleet vehicles, and fleet charge cards that would produce a projected annual savings of about \$50,000. What is the status of the implementation of these recommendations? Please provide any documents related to steps taken to implement the recommendations and the current status of the implementation.*

The FEC OIG's *Final Report: Audit of the Commission's Property Management Controls* (March 2010), observed that a different service plan for personal communication devices (PCDs) offered by a different provider would save approximately \$50,000. However, the Audit Report did not recommend that the FEC change service providers or service plans. Instead, the recommendations were that:

"2i. ITD's Management Assistant should annually monitor monthly PCD usage to assess if the current plan should be adjusted to appropriately meet user needs;" and

"2j. Prior to renewing PCD services or switching service plans, the Contracting Office, in consultation with the PCD Program Office, should conduct and document analysis of service plans offered by the current provider and other potential vendors on the GSA schedule to achieve best value for the agency. Further, the Contracting Office should discuss actual plan details and agency use with the PCD program office and ensure any negotiated service options, such as free texting, are included in the quotes from potential vendors."

The recommendations to monitor monthly PCD usage and survey service plans available have been implemented. In addition to the cost of a service plan, the agency must consider all technical requirements. Among the technical requirements considered when selecting a service provider are: (i) compatibility with the FEC mail system; (ii) area coverage to include all agency travel requirements; (iii) reliability in an emergency competitive environment; and (iv) voice, data, mail, and roaming plans to suit all the mission elements of the FEC.

Each fiscal year, the contracting officer and the program contracting officer's technical representative determine which General Services Administration (GSA) schedule holder has the best value for the FEC for that fiscal year. For FY 2011, the FEC was able to obtain services that

met the FEC's technical requirements while realizing a savings of \$25,000 compared to the previous year. Based on the annual comparison of GSA schedule service providers, the same vendor was again determined to provide the best value to the agency for its PCD services.

The corrective action plan for this audit is attached.

2. *In the FY 2011 Budget Justification, the FEC discussed several initiatives involving security enhancements relating to risk assessments of operations, disaster recovery, and continuity of operations in the event of a disaster. What is the status of these enhancements? Please provide copies of the risk assessments discussed in the budget justification.*

The FEC began to develop an agency-wide Disaster Recovery Plan (DRP) in FY 2008 and completed the plan in FY 2009. This plan provides the means to reduce the risk to the agency and its systems in the event of an emergency situation, including events which affect the FEC alone, or a regional disaster. The plan provides direction for each division of the agency, and it identifies key personnel and assigns duties to those individuals in conducting agency business during the event.

In FY 2009, a back-up primary mission suite of server equipment was purchased and configured to enhance the disaster recovery and allow the FEC to continue operations of the agency if the production environment is lost. This back-up system resides in a separate data center from the production environment and ensures the continuity of operations of the FEC's primary mission systems in the event of a regional disruption.

The FEC developed its Continuity of Operations Plan (COOP) during FY 2009 and FY 2010. This plan documents the requirements and processes necessary for the FEC to perform its mission during various disaster scenarios. The COOP also identifies the minimum computer equipment and space needed to accomplish mission objectives during a period when production equipment and normal work space are not available.

In FY 2010, the FEC began implementing the requirements of Homeland Security Presidential Directive (HSPD-12). The FEC split implementation into three phases. Phase I consisted of procuring the equipment necessary to produce and issue smart cards for all FEC employees. This phase was completed in FY 2010. Phase II consists of using the smart cards as a secondary authentication device for network access. Procurement of additional smart card reading equipment has been completed, and Phase II is in a test environment and will be introduced to the agency as a whole later this fiscal year. Phase II was funded with FY 2011 funds. Phase III is the final phase of HSPD-12 implementation, which involves physical security of the work spaces. Specifically, Kastle Keys will be replaced with the HSPD-12 smart cards to gain access to the building, elevators, and stairwells during off-duty hours by authorized personnel.

The risk assessments are attached.

3. *The FEC's FY 2012 Budget Request Justification states that the agency will be implementing a strategic management system. What does the strategic management plan entail and what else will the agency be implementing in order to comply with the Government Performance Results Modernization Act of 2010? Please provide a copy of the strategic management plan and all communications relating to its implementation.*

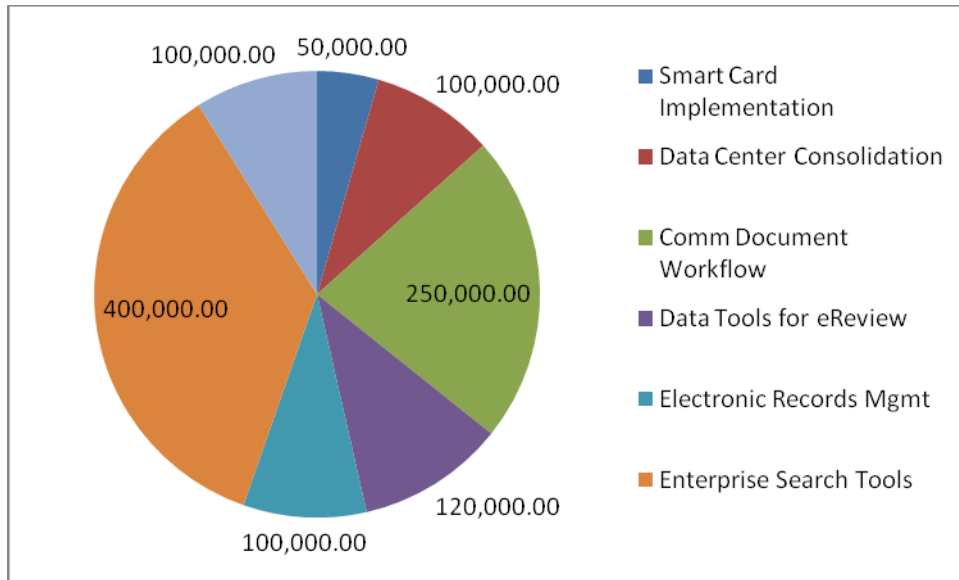
The PowerPoint presentation entitled *An Approach for FEC Strategic Planning and Management* illustrates the FEC's strategic management framework and timeline for revising FEC's *Strategic Plan*, in compliance with GPRA Modernization Act of 2010. The Commission is currently on the first phase of implementation. In this phase, the strategic team developed the "Strengths, Weaknesses, Opportunities, and Threats (SWOT)" questions. Currently, Commission staff is conducting the SWOT analysis with focus groups, reviewing existing plans, and conducting an analysis of FEC mandates. In FY 2012, staff will kick-off a strategic leadership team that will identify the Commission's priority goals in coming years, based on the results of the phase one analysis. During FY 2012, the Commission plans to revisit Agency priorities and strategic initiatives, and will most likely redefine the FEC's performance measures to align them to the strategic plan. To make those revisions, the Commission also plans to consult with Congress, as required by GPRA and the GPRA Modernization Act, and with external stakeholders based on a communication plan that the FEC will develop.

Last winter, the Commission conducted a "Request for Information (RFI)" from the vendor community in order to evaluate the need for potential additional resources for this effort.

The PowerPoint presentation, the SWOT questions, and the RFI are attached.

4. *Please describe, in detail, the allocation of funding for OCIO Support and Initiatives and provide supporting documentation.*

The attached document, entitled *2011 OCIO Projects—Budgeted Projects* provides a list of IT projects, and for each project it states a project description and benefit, the current status, and an estimate of the FY 2011 funds that will be needed for each project. These figures are as of January 1, 2011, and projects that will need funds in later fiscal years are noted. The pie chart below illustrates the allocation of funding.



To provide a process to oversee and approve expenditure of IT project funds in support of the FEC mission, in October 2009, the FEC established and chartered an IT Project Review Board (ITPRB). The board meets periodically as convened by the CIO, but at least during the budget formulation process and the drafting of the agency management plan. The members of the board, representing each office within the FEC, suggest IT initiatives required in support of their part of the mission. The projects are then prioritized by vote of the membership, approved by the Commission, and executed within the IT budget which is part of the management plan approved by the Finance Committee and the Commission. The Commission via the Finance Committee is kept apprised of the status of initiatives and additional funding needs. The board, under the leadership of the CIO, keeps a running list of the projects, their status, the funding required, and those that have been postponed for later implementation pending availability of funding. The charter of the ITPRB and the FY 2011 ITPRB results listing are attached.

5. *In June 2009, the Office of Personnel Management performed an evaluation of the FEC's human capital management. Please provide a copy of the final report supplied by OPM at the conclusion of that evaluation.*

The Office of Personnel Management's (OPM) 2009 evaluation of the FEC's human capital management is attached. In response, the FEC developed a fresh approach and strategies to address the OPM findings. The attached PowerPoint presentation, *A Proposed Human Capital Management System for FEC*, illustrates the FEC's approach to addressing its human capital challenges. The FEC consulted with OPM regarding the new approach and obtained its concurrence in January 2011. Since January, the FEC has made considerable progress in implementing this plan.

At the strategic level, the FEC is currently drafting its Human Capital strategies and plan by engaging managers and employees at all levels. The FEC's *Strategic Plan* is under revision to include Human Capital strategic initiatives. A Request for Proposal (RFP) has been released for hiring a contractor to assist FEC to analyze its workforce needs. A second RFP is being released

to acquire HR Line of Business solution. The FEC has consulted with OPM in order to identify necessary steps for obtaining OPM certification for the FEC's performance management system, in compliance with OPM Human Capital Assessment and Accountability Framework (HCAAF).

At the tactical level, the FEC is conducting an internal third party review of its employees' electronic Official Personnel Files (eOPF) to ensure accuracy and completeness of data; policies for personnel security are being developed and a tracking system is being put in place for ensuring personnel security compliances. An analysis of the HR staff is currently underway for development and implementation of a comprehensive training plan.

6. *The FEC recently began several security enhancement initiatives relating to risk assessments of operations, disaster recovery and continuity of operations in the event of a disaster. What were these initiatives? What results have they produced? Please provide all documents relevant to these initiatives.*

Please see the Response to Question 2 above.

7. *In addition to Westlaw, what other legal research tools are being used by the FEC's Office of General Counsel? Is any one tool found to be more helpful than the others? How much does each tool cost? Please provide any supporting documents for your answers.*

The Office of General Counsel primarily uses four major research tools: (i) Westlaw; (ii) Lexis/Nexis; (iii) Dun & Bradstreet; and (iv) PACER. Overall, the Agency and the Office of General Counsel rely most heavily on Westlaw. The FY 2011 yearly cost for Westlaw was \$430,542. The FY 2011 yearly cost for LexisNexis was \$42,996, which was nearly 60% lower than it was in previous fiscal years. The FY 2011 yearly cost for Dun & Bradstreet was \$24,363. The FY 2011 yearly cost for PACER was \$3,500. Invoices for these expenses are attached.

8. *The FEC's FY 2011 budget request for capitalized equipment was 88% higher than the FY 2010 request. The budget justification claims this was due to the FEC's studies on its Case Management and Data Warehouse Systems in 2008 and 2009. What were the results of the study? What within the studies supports such a dramatically higher capitalized equipment request? What is the status of implementation of the projects? Please provide copies of the studies.*

Generally, IT development projects, software development, and IT purchases over the capitalization threshold are considered capitalized equipment. The FY 2011 budget request for capitalized equipment included the implementation phase of the Case Management System (CMS) replacement project. CMS is used to track the status of enforcement, administrative fines, and ADR matters from initiation through case closure. The FEC's CMS study concluded that the current system was outdated, inefficient, no longer met the needs of the FEC, and should be brought up to date utilizing modern technology and collaborative systems available in today's

market. The cost of the CMS replacement project is reflective of a complete re-make of the CMS to include process renewal, mission custom configuration, and a completely new flow strategy. The next phase of this project has not yet been funded.

The FEC also started a Data Warehouse project study and the developmental prototype, funded out of FY 2009 and FY 2010 appropriations. The initial phase studied the need for a data warehouse to organize data, to extract data from the disclosure data base in support of data analysis, and to automate data review without slowing down operational systems. The FY 2011 request was to begin the implementation phase of the Data Warehouse project, capitalizing on the investment made in development of the prototype. The implementation is estimated to exceed \$2 million over a four-year period. The current prototype phase will be completed on September 30.

The studies are attached.

9. *What areas of the FEC's operations (including reporting, enforcement, and audit functions) are formally measured? What new metrics have been adopted since January 1, 2007, and what are the results of those metrics?*

The formal measures of FEC operations are the 17 performance measures in the *FEC Strategic Plan*, which was approved by the Commission on March 4, 2008.

The following table provides the actual results for FY 2008, FY 2009 and FY 2010, along with the targets set by the *Strategic Plan*.

PERFORMANCE MEASURE		Target	FY 2008 Actual	FY 2009 Actual	FY 2010 Actual
<b>Strategic Objective A: TRANSPARENCY</b>					
1.	Process reports within 30 days of receipt as measured quarterly	95%	91%	78%	91%
2.	Meet the statutory requirement to make reports and statements filed on paper with the FEC available to the public within 48 hours of receipt	100%	100%	100%	100%
<b>Strategic Objective B: COMPLIANCE</b>					
3.	Conduct educational conferences and host roundtable workshops on the campaign finance law each election cycle, achieving a mean satisfaction rating of 4.0 on a 5.0 scale	100%	100%	100%	100%
4.	Issue press releases summarizing completed compliance matters within two weeks of a matter being made public by the Commission	100%	22%	63%	98%

5.	Issue press releases containing summaries of campaign finance data quarterly	100%	100%	75%	75%
6.	Process enforcement cases within an average of 15 months of receipt	100%	66%	76%	75%
7.	Process cases assigned to Alternative Dispute Resolution within 155 days of a case being assigned	75%	64%	26%	64%
8.	Process reason-to-believe recommendations for the Administrative Fine Program within 60 days of the original due date of the subject untimely or unfiled report	75%	79%	84%	100%
9.	Process the challenges in the Administrative Fine Program within 60 days of a challenge being filed	75%	14%	60%	100%
10	Conclude non-Presidential audits with findings in an average of ten months, excluding time delays beyond the Commission's control, such as subpoenas and extension requests	100%	95%	12%	60%
11	Conclude non-Presidential audits with no findings in an average of 90 days from beginning of fieldwork	100%	100%	0%	100%
12	Conclude Presidential audits in an average of 24 months of the election, excluding time delays beyond the Commission's control, such as subpoenas and extension requests	100%	N/A	100%	100%
<b>Strategic Objective C: DEVELOPMENT OF THE LAW</b>					
13	Complete rulemakings within specific time frames that reflect the importance of the topics addressed, proximity to upcoming elections, and externally established deadlines	100%	50%	83%	50%
14	Issue all advisory opinions within 60-day and 20-day statutory deadlines	100%	97%	100%	100%
15	Issue expedited advisory opinions for time-sensitive highly significant requests within 30 days of receiving a complete request, or a shorter time when warranted	100%	60%	100%	N/A
16	Ensure that court filings meet all deadlines and rules imposed by the Courts	100%	100%	100%	100%

17	Process public funding payments in the correct amounts and within established time frames	100%	100%	100%	N/A
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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. <i>Sua Sponte</i> submissions	Totals
2007	45	24	19	1	6	95
2008	175	27	14	1	12	229
2009	64	14	12	2	4	96
2010	194	9	4	1	12	220
2011	21	0	6	2	5	34
<b>TOTALS</b>	<b>499</b>	<b>74</b>	<b>55</b>	<b>7</b>	<b>39</b>	<b>674 cases</b>

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
<b>TOTALS</b>	<b>6</b>	<b>11</b>	<b>17</b>

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 inter-circuit nonacquiescence, as implicitly approved by the Supreme Court in *United States v. Mendoza*, 464 U.S. 154 (1984). In that case, the Court noted that estopping the government from challenging an adverse circuit court decision in other circuits would foreclose the development of circuit splits, which the Supreme Court relies on in selecting its docket.

- d) *When a regulation is declared unconstitutional, what steps does the FEC take with regard to notice to the regulated community, modification of enforcement procedures, and revision to the regulation?*

Under current practice, when a regulation is declared unconstitutional, the Commission may take a variety of steps, including seeking further judicial review. If no such further review occurs, the Commission issues a press release indicating to the public the precise provisions that it no longer intends to enforce, and its enforcement practices will then follow the guidance it has issued to the public. Depending upon the regulation and the court's opinion, the Commission may simply rely on the court's decision and cease enforcing the regulation, or it may repeal the regulation or begin a rulemaking to consider revising the regulation rather than repealing it altogether.

Under current practice, notice to the regulated community often begins with a press release, followed by other less formal means of communication, such as the Tips for Treasurers RSS feed, articles in *The Record* newsletter, and sometimes—as in the case of last year’s *Citizens United* decision—an instructional video. Depending on the scope of the affected regulation, the Commission may also send targeted e-mails to the committees most likely to be affected by the change. Additionally, explanatory notes are added to affected publications and outreach materials are updated.

51. *The FEC website lists a rulemaking petition from 2004 pertaining to MUR documents and records after close as an “ongoing project.” In light of the Commission’s adoption of procedures in December 2009 and recent additional consideration of other disclosure procedures, does the agency intend to conduct a rulemaking in response to the petition?*

The Commission issued a *Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files* in December 2003. See 68 Fed. Reg. 70426 (Dec. 18, 2003). While it may still be useful to update the regulations regarding the public release of MUR files, the Commission has determined that other rulemakings take precedence over this one and has not issued a Notice of Proposed Rulemaking regarding the documents that are made public at the close of a MUR.

The *Statement of Policy* is attached.

52. *What is the role of agency staff in conducting enforcement matters?*

Please see the Response to Question 48, above.

53. *Is there a matrix, chart, or other document identifying the penalties the FEC seeks for each type of violation? If so,*  
a) *Why isn’t that matrix, chart, or other document disclosed to the public?*  
b) *Please provide a current copy of the matrix, chart, or other document to the Committee along with your responses to these questions.*

The Commission maintains information that allows it to apply consistent standards when determining the civil penalty that it will seek in an individual enforcement matter. The Commission’s method of calculating penalties is not disclosed to the public out of concerns that doing so would decrease the deterrence effect. At the same time, the Commission recognizes the competing goals of transparency and the need for flexibility to consider the individual circumstances of a particular case.

The Commission’s current policy is to keep such information confidential, but it has also sought comments from the public in order to consider whether it should revisit this policy. On December 8, 2008, the Commission issued a Notice of Public Hearing and Request for Public Comment regarding the compliance and enforcement aspects of its agency procedures, see FEC,



*Agency Procedures: Notice of Public Hearing and Request for Public Comments*. 73 Fed. Reg. 74494 (Dec. 8, 2008), which requested, *inter alia*, comments on whether it should provide the public with information about how it calculates its penalties, and if it did provide such information, whether it should retain its discretion to depart from the guidelines, and whether such guidelines would minimize or eliminate negotiations over what constitutes an appropriate penalty. The Commission received written comments related to this question, and heard relevant testimony at the public hearing held on January 14 and 15, 2009. (Documents related to this hearing are located on the Commission's website. See <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>.) Most of the written comments and hearing testimony focused on the question of what, if any, information about civil penalty calculations should be published. Although several comments recommended that the Commission increase the transparency of the penalty calculation, there were varying positions on how much, and what, information the Commission should publish, including recommendations that the Commission should keep such information confidential. Since the hearing in January 2009, the Commission has considered several of the issues raised by commenters on a variety of issues raised in the 2008 Notice and has issued several new significant agency procedures, even as recently as June of this year. See e.g., *FEC, Agency Procedure for Disclosure of Documents and Information in the Enforcement Process*, 76 Fed. Reg. 34986 (June 15, 2011). Due to the importance and complexity of the considerations that need to be weighed in order to decide whether the Commission should revise its current policy of maintaining the confidentiality of the manner in which it calculates civil penalties in enforcement matters, the Commission is continuing to consider this issue. Until such time as the Commission revises its policy to make such information public, it does not maintain information regarding the civil penalties that it seeks in a manner that is appropriate for public use.

The 2008 and 2011 *Federal Register* documents are attached.

54. *When the FEC is a party to litigation, are decisions on the positions taken in court made by the staff or by the commissioners? Please provide an explanation for your answer.*

When the Commission is a party to litigation, briefs filed on its behalf are signed (usually electronically) by the General Counsel and staff who participated in their drafting. Although the briefs are not written by the Commissioners, the briefs filed by the General Counsel attempt to reflect the positions taken by the Commission as a body or by the controlling group of Commissioners in any particular matter. For example, in cases brought under 2 U.S.C. § 437g(a)(8) challenging the dismissal of an administrative complaint that resulted from a 3-3 vote by the Commission, the General Counsel defends the position of the three Commissioners who voted not to proceed with the allegations of the complaint. See *FEC v. National Republican Senatorial Comm.*, 966 F. 3d 1471, 1476 (D.C. Cir. 1992). In cases that raise issues about which the Commission has not yet taken a formal position, the Office of General Counsel consults with the Commissioners before taking a position in court. Current practice is that litigation briefs and positions are generally circulated on an informational basis, but are not formally approved by the Commission.

55. *What is the average length of time between the notification to a respondent that a Matter Under Review has been initiated, and the decision by the Commissioners that there is or is not reason to believe a violation occurred? What is the median length of time?*

Number of days from Notification to No-RTB (1/1/07-6/30/11):	
Average	257
Median	225

Number of days from Notification to RTB (1/1/07-6/30/11):	
Average	299
Median	260

56. *Does the Office of General Counsel have a manual or handbook that guides its attorneys in conducting enforcement actions? If so,*

- 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](http://www.fec.gov/em/respondent_guide.pdf). A copy is attached.

57. *What have the results been from the program to allow respondents to submit a request for a hearing prior to a probable cause determination in enforcement proceedings?*

From February 16, 2007 through June 30, 2011, 16 requests for hearings prior to probable cause determinations were submitted. Of these, 12 were granted. The first pilot program regarding probable cause hearings went into effect on February 16, 2007. *See* FEC, *Policy Statement Establishing a Pilot Program for Probable Cause Hearings*, 72 Fed. Reg. 7551 (Feb. 16, 2007), which is attached. The program was made permanent in November 2007. *See* FEC, *Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64919 (Nov. 19, 2007), which is attached. And then later amended in October 2009 to provide that the Commissioners may ask questions of the General Counsel and Staff Director during Probable Cause Hearings. *See* FEC, *Amendment of Agency Procedures for Probable Cause Hearings*, 74 Fed. Reg. 55443 (Oct. 28, 2009), which is attached. The probable cause hearings have been beneficial for the Commission to clarify complex questions of law and fact in a give-and-take format.

58. *What is the current relationship between the FEC and the Department of Justice for handling enforcement matters? What document governs that relationship? When was that document last updated? Has either the FEC or DOJ proposed to modify the document? If so, what modifications were proposed?*

The Act provides that the Commission "shall have exclusive jurisdiction with respect to the civil enforcement" of the provisions of the Act and Chapters 95 and 96 of Title 26. 2 U.S.C. § 437c(b)(1). Jurisdiction for criminal enforcement of the Act and Chapter 95 and 96 of Title 26 resides in the Department of Justice ("DOJ"). DOJ's Public Integrity Section generally handles criminal prosecutions of violations of the Act; it publishes a comprehensive "Election Crimes Manual" (current version at <http://www.usdoj.gov/criminal/pin/docs/electbook-0507.pdf>) that may be of particular use to enforcement staff who are handling cases with overlapping criminal issues. The Commission and DOJ have concurrent jurisdiction over knowing and willful violations of the FECA. 2 U.S.C. § 437g(a)(5)(C). In 1977, the Commission and the Department of Justice entered into a Memorandum of Understanding ("MOU") relating to their respective law enforcement jurisdiction and responsibilities. *See* 43 Fed. Reg. 5441 (1978). A copy of the MOU is attached. However, in light of statutory enhancements to DOJ's ability to prosecute FECA crimes that were contained in the 2002 Bipartisan Campaign Reform Act, the MOU has become somewhat outdated and was the subject of negotiations between DOJ and the Commission in 2003-2007. Although several draft proposals were exchanged between the agencies, those negotiations did not ultimately lead to a revised MOU, and those discussions have not yet been revived.

## Alternative Dispute Resolution

### 59. *How effective has the ADR process been for enforcement matters?*

ADR encourages the parties to engage in interest-based negotiations—a problem-solving process to develop a solution jointly, in the compliance context. The resulting solution is specific and appropriate for the Commission and for the respondent in the administrative complaint or referral. Since the Commission established the Alternative Dispute Resolution (ADR) program in October 2000, it has evaluated the program twice to assess whether the program met its goals. A 2002 evaluation by an outside vendor determined that the adoption of an ADR program could promote increased compliance with federal election and campaign finance laws. The Commission concluded, following the 2002 evaluation of the first year of the pilot program, that ADR should be made a permanent program at the Commission. The documentation and statistics developed in 2007 covering the first five years of the Commission’s ADR program demonstrated that the ADR Program successfully met its goals both by enhancing the processing of cases and expanding compliance with the federal election campaign laws. Specifically, the ADR program reduced Commission costs and processing time compared to traditional enforcement cases; increased the number of cases processed and closed; decreased cases closed without substantive action; expanded the number and type of remedial measures employed to encourage compliance; and showed a low recidivism rate among respondents participating in the ADR program.

Both evaluations of the ADR Program are attached.

- *Do the outcomes of matters resolved through ADR differ from similar enforcement matters resolved through litigation?*

The outcomes of matters resolved through ADR differ from similar enforcement matters resolved through traditional enforcement in that, while both may result in a civil penalty, the ADR agreement’s primary focus is on future compliance and how the respondents can become and remain compliant with the FECA. Using interest-based negotiations, respondents and the Commission’s ADR Specialists determine what remedial measures will effectively address any procedural deficiencies that could impact future compliance, and thus mitigate any negotiated civil penalty.

- *Do individuals volunteer to enter the ADR process?*

Entrance in the ADR process is voluntary and dependent on whether a case is internally referred to ADR, deemed appropriate by the ADR staff, and the participants consent to the terms of the ADR process. The ADR Office (ADRO) receives cases by referral from the Office of General Counsel, the Reports Analysis Division, the Audit Division, or by assignment from the Commission when four or more Commissioners vote to refer the case to ADR. The ADRO will conduct an initial review and evaluation to determine whether a case is appropriate for ADR. If a case is deemed appropriate, the respondents may then voluntarily commit to the terms for participation in ADR. The terms require that the respondent agrees to participate in good faith in the ADR process; set aside the statute of limitations while the case is in the ADRO; and

participate in interest-based negotiations and, if mutually agreed as appropriate, mediation. If the respondents choose not to participate in ADR, the matter is forwarded to the Office of General Counsel for further processing.

- *What is the typical profile of an individual entering into the ADR Process?*

The typical respondent in a matter referred to ADR is a political committee against whom there has been an allegation of a violation of the Federal Election Campaign Act. The Committees that participate in the process do not conform to a standard profile, but rather vary greatly in size, level of experience, and type (e.g. authorized committee, party committee, corporate and labor organization PAC, or nonconnected PAC).

- *Is there a specific type of claim that the ADR process best resolves?*

The criteria for what matters are appropriate for resolution in the ADR process are very fact specific. ADRO does not have the resources to investigate, so ADR-appropriate cases tend to be matters in which there are no unsettled issues of law or fact. The Commission is notified of every referral made to the ADRO. The objectives and goals of the ADR program are to promote compliance, expand the tools available to the Commission for resolving selected complaints, and resolve matters more quickly without using the full Commission enforcement mechanism, thus reducing costs to both the Commission and respondents.

- *How has the ADR program changed since its inception in 2001?*

The ADR program has evolved since the first cases were referred in October of 2000. Shortly after the inception of the program, the ADRO referral thresholds were added to the Reports Analysis Division's review and referral manual and the Audit Division's materiality thresholds manual. One of the most significant revisions to the process occurred in 2005 and entailed the referral of cases where committees file amended reports to disclose a considerable change in financial activity. In addition, beginning with the 2005-2006 election cycle, committees that are not in substantial compliance with the Federal Election Campaign Act, and thus could be subject to an Commission audit, may be referred to the ADR program when the Commission lacks resources to audit all eligible committees. The final agreement between the Commission and the respondent will enable the respondent to take an active part in shaping the measures necessary to become and remain compliant with the obligations under the FECA.

60. *What factors determine whether a claim will be handled through the ADR process?*

The predominant factors that determine whether a matter is appropriate for processing in ADR are that there are no disputed facts or unsettled issues of law. ADRO referral thresholds in the Reports Analysis Division's review and referral manual and the Audit Division's materiality thresholds manual determine whether a matter will be referred to the ADRO, both of which are circulated to the Commission for approval every two years and are based on input from both staff and Commissioners.

61. *What are the steps in the ADR process? What is the average time for a claim to move through each step?*

Timeline of the Negotiated Settlement Process (150-165 days)

- 1) Beginning the ADR Process – *30-45 days*
  - a) Matter is referred to the ADRO
  - b) Matter is analyzed for suitability for ADR
  - c) The Commission is informed of the referral
  - d) The Respondent is advised of the referral to the ADRO
  - e) Respondent commits to participating in ADR program
- 2) Interest-based Negotiations and a draft settlement – *30-45 days*
- 3) Settlement signed by respondent and returned to ADRO for submission to the Commission – *20 days*
- 4) Commission approves or rejects settlement – *30 days*
- 5) Appropriate documents are placed on the public record – *30 days*

If a matter is recommended for dismissal, the time line is considerably shorter (within 90 days)

- 1) Beginning the ADR Process – *30 days*
  - a) Matter is referred to the ADRO.
  - b) Matter is analyzed for suitability for ADR
  - c) Matter is recommended for dismissal
- 2) Commission approves or rejects the recommendation to dismiss – *30 days*
- 3) Appropriate documents are placed on the public record – *30 days*

62. *What is the cost (both range and average) to the FEC of a litigation-type enforcement action?*

*a. ADR?*

The current total cost of the ADR program is approximately \$241,345 annually. This figure represents the approximate salary of two full-time ADR Specialists, as discussed further in response to Question 64 below. During fiscal years 2008 through 2010, the per-case cost ranged from approximately \$500 to \$4,000. The average cost per ADR case over the three fiscal years was approximately \$1,900. These costs per case were derived by using the number of days to resolve a matter as an estimate of the cost per ADR case.

*b. Administrative Fine?*

The current total annual cost of the Administrative Fine (AF) program is approximately \$177,000 annually. This figure represents the approximate salary of two and a quarter employees, as discussed further in response to Question 64 below. During fiscal years 2008 through current date, the average overall cost of an AF case was approximately \$7,625. During

fiscal years 2008 through 2011, the yearly average AF case cost ranged from approximately \$1,309 to \$14,624. These costs per case were derived by dividing total program costs by the number of cases closed during the period. Since the program's implementation in July 2000 through July 12, 2011, 2,264 cases have been processed through the AF program and \$4 million in civil money penalties have been assessed.

63. *What are the different functions of the Alternative Dispute Resolution and Administrative Fine Programs?*

#### Alternative Dispute Resolution Program

The ADR program promotes compliance with the FECA and Commission regulations by encouraging settlements outside of the traditional enforcement or litigation processes. By expanding the tools for resolving administrative complaints and referrals, the program consists of a series of constructive and efficient procedures for resolving disputes through the mutual consent of the parties involved.

#### Administrative Fine Program

The Administrative Fine Program uses established, internal thresholds to identify committees that fail to file timely disclosure reports and then uses a published formula to assess civil money penalties following Commission approval. The program includes a written challenge process whereby committees may dispute the fine, providing supporting information and documentation prior to the Commission's final determination. Additionally, the program collects the payments for the penalties assessed and transfers uncollected penalties to the U.S. Department of Treasury for further collection efforts.

64. *What is the total cost to the FEC to run the ADR program?*

The total cost to the Commission to run the ADR program is approximately \$241,345 annually. This figure represents the approximate salary of two full-time ADR Specialists. Additional costs not reflected in this figure include benefits, training, supplies, and costs incurred in the maintenance of current computer programs used to administer the ADR program.

- *What is the total cost to the FEC to run the Administrative Fine program?*

The total cost to the Commission to run the Administrative Fine program is approximately \$177,000 annually. This figure represents the approximate salary of two and a quarter employees principally responsible for administering the program. Additional costs not reflected in this figure include benefits, training, supplies, and costs incurred in the development and maintenance of computer programs used to administer the Administrative Fine program.

65. *What efforts are taken to ensure that ADR enforcement matters (both in process and in end result) are treated in a consistent manner?*

The ADR process is consistent for every referral as to notification of the allegations, ability for respondents to provide a detailed explanation of what occurred and what they believe would be the most beneficial remedies to ensure future compliance, as well as deadlines for each step in the process. Respondents have an opportunity to negotiate for a civil penalty reduction based on actions they take to ensure future compliance. In addition, the final resolution of all matters referred to the ADR Program must be approved by the Commission. Finally, all final conciliation agreements that resolve ADR matters are publicly released in the same searchable database as other enforcement matters.

66. *During FY 2010, the ADR Office completed 45 cases including \$93,100 in civil penalties. The Commission met the 155-day processing benchmark in 64.4% of the ADR cases, falling short of its goal of meeting this benchmark in 75% of cases. The 2010 PAR attributed the shortfall to diminished staff availability. However, in response to a dramatic reduction in the volume of work assigned to the Office of Administrative Review (OAR), the FEC transferred two OAR staff members to the Reports Analysis Division (RAD), leaving one staff member in OAR. If there was a deficiency in the ADR program, why not transfer at least one of the OAR staff members to ADR instead of RAD?*

During FY 2010, the ADRO received and continues to receive support as needed for administrative and clerical tasks from the Office of Administrative Review (OAR) and the Reports Analysis Division (RAD). However, the OAR staff members that were transferred to RAD did not possess the specific skill set and expertise required to work within the ADRO. The ADRO has since added a second ADR Specialist, and during the first quarter of FY 2011 the Office reached the set performance goal of processing 75% of cases within 155 days.

- *What is the source of the 155-day benchmark?*

The 155-day benchmark was approved by the Commission, and it dates back to the inception of the ADR Program when the goal was to resolve referrals to the ADR process in approximately 5 months.

### Administrative Fines

67. *Does the Administrative Fine process afford sufficient process to committees and candidates that have allegedly violated relevant rules and regulations? Please provide an explanation for your answer.*

Yes, the Administrative Fine (AF) program affords sufficient process to committees and candidates that have allegedly violated relevant rules and regulations. The Administrative Fine program is based on amendments to the Federal Election Campaign Act that permit the FEC to impose fines, calculated using published schedules, for violations of reporting requirements that



relate to the reporting periods that end on or before December 31, 2013. Committees in the AF program that failed to meet the reporting requirement to file or file timely a specified report are all subject to the same internal thresholds for inclusion in the program. Each committee within the program is also afforded the opportunity to challenge the Commission's reason-to-believe finding, calculated civil money penalty, or both, and once the Commission has made a final determination, may appeal the decision to the U.S. District court in which they reside or transact business.

68. *Since January 1, 2007, how many Administrative Fine cases has the FEC completed? In how many of those cases was the administrative fine contested?*

Between January 1, 2007 and July 12, 2011, the Commission completed 888 Administrative Fine cases. Of these 888 cases, 196 cases were challenged. In 167 (or 85%) of these challenges, the fine was upheld.

69. *What is the range of fines collected in the Administrative Fine program?*

Fines collected in the Administrative Fine program have ranged from \$10 to \$33,170.

70. *How is the Commission evaluating the Administrative Fine program?*

The Commission evaluates the Administrative Fine program through the circulation and voting process for each committee pursued in the program; the quarterly submission of program statistics from the Reports Analysis Division and Office of Administrative Review; and through the increase in compliance. Since the program's implementation there have been fewer reports filed late or not at all, even amidst a steady increase in the number of reports filed each election cycle. During the 2001-2002 election cycle, 47,572 reports were filed and 8.13% were filed late or not filed at all, while during the 2009-2010 election cycle, 80,121 reports were filed and 6.68% were filed late or not filed at all.

71. *What efforts are taken to ensure that Administrative Fine enforcement matters (both in process and in end result) are treated in a consistent manner?*

Each committee included in the Administrative Fine program for failure to meet the Federal Election Campaign Act's requirement to file its reports in a timely manner is subject to the same internal thresholds for inclusion in the program. For further consistency, the Administrative Fine regulations specify the calculation of the fine and uniformly afford each committee the same opportunities, processes, and timeframes described in those regulations, 11 C.F.R. §§ 111.30 through 111.46. In the challenge process, each committee is afforded the opportunity to challenge the Commission's reason-to-believe finding, civil money penalty, or both. If received timely, each challenge is reviewed by the Reviewing Officer according to the challenge guidelines outlined in 11 C.F.R. § 111.35. Whether a committee avails itself of the challenge

process or not, the Commission alone makes a final determination in each case. Finally, all Administrative Fine cases are made public once they are closed in a searchable database on the FEC website.

72. *The Committee on House Administration was instrumental in passing in a bipartisan manner an extension to the administrative fines program. The Committee also set the expiration date to coincide with a non-election year. How is the program going?*

The program continues to be successful. Since the start of the program in 2000, there has been a reduction in the incidence of noncompliance related to the timely filing of reports. This success translates into a direct increase in the transparency and timely disclosure of campaign finance activity.

- *Have there been any unforeseen problems?*

Following the implementation of the Administrative Fine program, reports timely filed and later amended to reflect a substantial increase in reported financial activity increased. It appeared that some committees would submit incomplete reports in order to file them by the prescribed deadline so as to not be placed in the Administrative Fine program, and would later amend the report to disclose substantially more transactions and activity for the period. In order to address these instances, the Reports Analysis Division's internal review and referral policy was revised to allow such matters to be referred to the Alternative Dispute Resolution Office or Office of General Counsel for further action.

- *Is it saving the FEC money?*

The program saves the Commission money in that it allows for a streamlined approach to processing cases centered on the failure to file timely disclosure reports. Prior to the program's implementation, each failure to file timely required a referral to be written by the Reports Analysis Division and formally referred to the Office of General Counsel (OGC) where only a limited number of these cases could be processed, given the other enforcement matters handled by OGC. The Administrative Fine program not only saves money from the standpoint that it frees OGC resources to focus on other, more complex, enforcement matters, but the program's creation has also substantially increased the timeliness in processing such cases while simultaneously allowing for an increase in the number of cases processed. Additionally, the increased compliance since the program's inception has reduced the Commission's potential case load.

- *What changes, if any, would you recommend?*

The Commission recommends making the Administrative Fines Program permanent prior to its expiration after the 2013 Year End Report violations are processed.

### Compliance Costs

73. *The FEC has approximately 197 minutes of instructional videos on its website. What portion of those is a candidate expected to watch in order to comply with campaign finance laws?*

Candidates may choose to watch Commission educational videos, but they are not required to watch them in order to comply with the law. Several of the videos are specifically targeted to candidates (e.g., “Testing the Waters,” “Candidate Registration”) and all but perhaps two (“Corporate PAC Solicitations” and “Corporate/Labor Activity after *Citizens United*” – roughly 16 minutes, combined) have at least some relevance to candidates. However, instructional videos are only one of the tools the Commission uses to educate the public and to encourage voluntary compliance with the federal campaign finance laws. All of the information included in the educational videos—and much more—is available from other sources. For example, candidates could choose to consult the *Campaign Guide for Candidates and Committees*, on-line brochures, and FAQs, or to call or e-mail the agency with questions or to attend Commission outreach programs.

74. *What is the estimated cost for a campaign of each type to comply with FEC regulations?*
- a. *Presidential?*
  - b. *Senatorial?*
  - c. *House of Representatives?*

The information reported to the Commission does not provide an accurate basis to calculate the costs of compliance with FEC regulations. Political committees must report expenditures, but are accorded flexibility in deciding how to report the purpose of an expenditure. As long as the reported purpose is “sufficiently specific” to make the expenditure’s purpose “clear,” the political committee has met the reporting requirement in FECA. Any effort to identify campaign finance compliance expenses of campaigns would need to recognize this variety in reporting expenditure purposes. Some expenditure purposes, considered in light of the recipient’s identity, will be clearly related to complying with campaign finance legal requirements. Other reported purposes—e.g. “legal expenses” or “accounting services”—might be related to FECA compliance costs. However, such expenditures might also include unrelated costs, like other legal expenses or payroll services, along with FECA compliance costs, or these expenses might be entirely unrelated to FECA compliance. Any aggregation of FECA compliance costs based on expenditure purposes reported under FECA will be limited by the purposes the committees elected to report.

Compliance costs will vary not only with the office sought, but also with scope, size, and experience level of the campaign. While some campaigns operate with a few volunteers, others have teams of professionals paid for their work on the many aspects of compliance issues. The Commission provides free software to help with reporting, but some campaigns purchase software and consulting services to go with it.

There are typical FECA compliance costs that candidate campaign committees may face, depending on how the committees choose to run their campaigns. FECA requires candidates to organize a principal campaign committee, and it requires principal campaign committees to have a treasurer, to maintain records, and to file reports of all receipts and disbursements with the Commission.

Presidential candidates who participate in the public funding program for the general election may establish a General Election Legal and Accounting Compliance (GELAC) Fund. GELACs are special accounts maintained exclusively to pay for legal and accounting expenses related to complying with campaign finance law as well as any other laws with which the committees must comply, such as tax law, contract law, or laws regarding employee relations. Compliance expenses are not subject to the expenditure limits, so candidates have an incentive to pay these expenses with GELAC funds, but not a requirement. The table below presents the major party candidates for President who established GELACs from 2008 back to 1980, the inception of GELAC Funds. The dollar amounts for GELACs are funds spent.

Election	Candidate	Grant	GELAC Expenses	%
2008	McCain	\$84,100,000	\$24,787,897 <sup>1</sup>	29.74
2004	Bush	\$74,620,000	\$2,952,842	3.96
2004	Kerry	\$74,620,000	\$6,308,345	8.45
2000	Bush	\$67,560,000	\$3,325,166	4.92
2000	Gore	\$67,560,000	\$4,301,546	6.37
1996	Clinton	\$61,820,000	\$5,343,065	8.64
1996	Dole	\$61,820,000	\$4,981,285	8.06
1992	Bush	\$55,240,000	\$3,486,479	6.31
1992	Clinton	\$55,240,000	\$4,587,859	8.31
1988	Bush	\$46,100,000	\$4,998,842	10.84
1988	Dukakis	\$46,100,000	\$2,868,536	6.22
1984	Mondale	\$40,400,000	\$615,774	1.52
1984	Reagan	\$40,400,000	\$1,035,062	2.56
1980	Carter	\$29,440,000	\$939,702	3.19
1980	Reagan	\$29,440,000	\$1,512,152	5.14

<sup>1</sup> This amount includes \$12.3 million in loans made to the candidate's general election committee.

Presidential Election Campaign 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 RFAs, and the vote margin (for candidate committees only), which, allows for a higher priority to be given to closer races. Disclosing the specific criteria to the public would diminish the incentive to provide full and accurate disclosure.

84. *When an audit report is completed, does the vote by the Commissioners indicate agreement to receive the audit report from the audit division, or does it indicate that the Commissioners have adopted the audit report as a statement by the Commission? Please provide an explanation for your answer.*

The final audit report issued by the Commission reflects both the conclusions of the Commission, and the legal standards enunciated by the Commission and applied to the particular circumstances presented by the audit. Although in the past the Commission had occasionally voted to receive the audit report, FEC *Directive 70* established a procedural change where the audit report now becomes the report of the Commission with the affirmative vote of four or more Commissioners. *Directive 70* is attached.

### Rulemaking

85. *What is the role of agency staff in drafting proposed rulemakings?*

Attorneys in the Office of General Counsel draft proposed and final rules, and the accompanying explanatory materials, for the Commission's consideration. These documents are described in the answer to Question 87. These attorneys may draw upon the expertise of other FEC staff in performing these functions. They also handle all other aspects of the rulemaking process required by the Administrative Procedure Act and other laws.

86. *What is the FEC's appropriate response when a court determines that a Commission regulation or the statute upon which a Commission regulation is based is in violation of the Constitution? When should action in response to such a determination be complete?*

When a regulation or statutory provision is declared unconstitutional, the Commission may take a variety of steps, including seeking further judicial review. If no such further review occurs, the Commission typically issues a press release indicating to the public the precise provisions that it no longer intends to enforce, and its enforcement practices will then follow the guidance it has issued to the public.

Depending upon the provision and the court's opinion, the Commission may (a) simply cease enforcing the provision based on the court's decision; (b) repeal the provision (if it is a



regulation); (c) or begin a rulemaking to consider revising a regulation. It is difficult to determine when a response to a court determination of unconstitutionality is “complete.” For example, once the Supreme Court declares a statutory provision unconstitutional, the Commission will cease to enforce it indefinitely, regardless of whether Congress formally repeals the statute.

Regarding another example concerning a regulation, after the decision in *EMILY’s List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), the Commission issued press releases explaining the steps it was taking to comply with that decision, including the adoption of an interim rule alerting the public that the court had ordered that three regulations be vacated.<sup>2</sup> The Commission then repealed the regulations that had been invalidated. *See* <http://www.fec.gov/agenda/2010/mtgdoc1015.pdf>. Similarly, after the Supreme Court’s decision in *Citizens United*, the Commission issued a press release explaining to the public and regulated community how it would comply with the decision. *See* <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>. Among other things, the Commission told the public that it “will no longer enforce the statutory provisions or its regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications.”

As also discussed in Question 88 below, the Commission recently has issued two Notices of Availability addressing issues related to the *Citizens United* ruling, and is also preparing a Notice of Proposed Rulemaking on the issues addressed by the *EMILY’s List* and *SpeechNow.org* decisions.

87. *The FEC lists three rulemaking projects as “ongoing”: hybrid ads, standards of conduct and public disclosure of closed MUR matters. What are the steps of the FEC rulemaking process and at which step of the process are each of these projects?*

To comply with the Administrative Procedure Act and the requirements of other statutes, the Commission’s rulemakings typically consist of the following three stages:<sup>3</sup>

- a) **Notice of Proposed Rulemaking:** The Notice of Proposed Rulemaking (“NPRM”) is the document that contains the Commission’s proposed revisions to its rules introduced by a narrative that explains the changes and seeks comment from the public on the proposed rules.<sup>4</sup>
- b) **Public Comment Period and Public Hearing:** The second stage of the rulemaking process provides all interested persons with an opportunity to review the Commission’s proposed rules and to submit written comments to the Commission. Those who submit written comments may

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<sup>2</sup> *See* <http://www.fec.gov/press/press2009/2009Dec17EmilyList.shtml>; <http://www.fec.gov/press/press2010/20100112EmilyList.shtml>.

<sup>3</sup> Some rulemakings consist of more than three stages because they begin with an Advance Notice of Proposed Rulemaking (“ANPRM”). The Commission publishes an ANPRM to solicit public comments on broad, general issues that might be addressed in a subsequent Notice of Proposed Rulemaking. An ANPRM does not contain proposed regulatory text, but may describe possible alternatives to address the issues presented for comment.

<sup>4</sup> In certain very limited situations, the Commission may omit the NPRM and public comment stages and move directly to Final Rules by issuing Interim Final Rules or Direct Final Rules.

also be given an opportunity to testify at public hearings, including answering Commission questions regarding their positions. All public comments are included in the public record. Public hearings are transcribed and also made part of the rulemaking record.

c) **Final Rules:** The last stage of the rulemaking process is the promulgation of Final Rules, together with their Explanation & Justification (“E&J”). This document also establishes the effective date for the Final Rules. Although the final language of revised rules may differ from the proposed rules in the NPRM, the Final Rules must be a logical outgrowth of the proposed rules in order for the public to have had adequate notice of, and opportunity to comment on, what the Commission is considering. The E&J is a narrative that provides the Commission’s legal and policy reasoning for its final revisions to rules. The E&J summarizes the public comments and explains how the Final Rules address the commenters’ concerns. It also explains how and why the Final Rules differ from the previous rules and, if appropriate, from the rules proposed in the NPRM, and may provide examples of the application of the Final Rules. The E&J serves as the basis for judicial review of the Final Rules if they are challenged in court. The Commission also sends the Final Rules and their E&J to Congress.

For the Hybrid Ads rulemaking, the Commission completed the first two stages of rulemaking by publishing an NPRM and receiving public input through written comments and conducting an oral hearing, held on July 11, 2007.

The rulemaking on standards of conduct is a joint rulemaking that the Commission is conducting concurrently with the Office of Government Ethics. The first two stages of this rulemaking have been completed. The Commission has also prepared Final Rules and an Explanation and Justification for those rules, which it will soon send to the Office of Government Ethics for review.

With respect to the rulemaking regarding public disclosure of closed MURs, the Commission issued a Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files in December 2003. While it may still be useful to update the regulations regarding the public release of MUR files, the Commission has determined that other rulemakings take precedence over this one and has not issued a Notice of Proposed Rulemaking regarding the documents that are made public at the close of a MUR.

88. *In 2010, the Commission self-reported that it completed rulemakings “within specific time frames that reflect the importance of the topics addressed, proximity to upcoming elections, and externally established deadlines” 50% of the time, as specified by the Fiscal Year 2010 Performance and Accountability Report. Why are rulemakings regularly delayed under the FEC’s self-reported metric?*

There are at several reasons for delays in rulemakings. First, as explained in the answer to Question 87, the APA requires that all significant rulemakings be conducted in accordance with certain procedures under which proposed rules are published, the public is given an adequate amount of time to comment on the proposals, and then Final Rules are prepared together with a detailed Explanation and Justification for their promulgation. In conducting rulemakings, the

Commission strives to ensure that rules are not changed shortly before elections. Consequently, if a rulemaking is delayed at an early stage, it is unlikely that time can be made up later.

Second, for projects like the standards of conduct rulemaking, two agencies must review and reach agreement at each stage of the rulemaking process. Hence, a concurrent rulemaking will inherently take longer than may initially be anticipated.

Lastly, in 2010, the Commission began rulemakings to implement far-reaching judicial decisions in the *Citizens United* and *SpeechNow.org* cases. While these court opinions resolved the specific cases before the courts, there are certain significant issues that might or might not also be addressed in the *Citizens United* and *SpeechNow.org* rulemakings. The FECA specifies that the affirmative vote of four members of the six-member Commission is required to take any action regarding rulemakings. 2 U.S.C. §§ 437c(c) and 437d(a)(8). For the *Citizens United* rulemaking, the Commission has considered draft NPRMs on January 20 and June 15, 2011, but has not yet reached a four-vote majority as to the inclusion or exclusion of various issues. The Commission has also received petitions for rulemakings prompted by the *Citizens United* decision and given the absence of an NPRM, on June 15, 2011, the Commission issued notices of availability to address the specific issues raised by those petitions. See *FEC, Rulemaking Petition Independent Expenditure Reporting*, 76 Fed. Reg. 36000 (June 21, 2011); *FEC, Rulemaking Petition: Independent Expenditure and Electioneering Communications by Corporations and Labor Organizations*, 76 Fed. Reg. 36001 (June 21, 2011). Public comments to the Notices are due to the Commission by August 22, 2011. Finally, the Commission is working to issue an NPRM to address issues raised by the *SpeechNow.org* and *EMILY's List* cases, however the normal process was held in abeyance due to a lawsuit addressing one of the key issues.

89. *Can you give the Committee an update of the Internet rulemaking?*

The Commission is currently looking into beginning a new rulemaking to resolve questions that have arisen after the Commission completed its last Internet rulemaking five years ago. Although not all of the topics to be considered in this project have been determined, one likely topic is the applicability of the disclaimer requirement for political advertisements on space-limited media. The answer to Question 91 below provides more details about the advisory opinions in which this topic has been addressed.

### Miscellaneous

90. *Does the FEC interpret its authority to administer and regulate under the Federal Election Campaign Act as exclusive? If not, where else does such authority reside?*

Yes. Pursuant to 2 U.S.C. § 437c(b), the “Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to civil enforcement of such provisions.” The FECA also gives the Commission exclusive authority to render advisory

opinions, 2 U.S.C. §§ 437d(a)(7), 437f; to make rules necessary to carry out the provisions of the Act and chapters 95 and 96 of title 26, 2 U.S.C. §§ 437d(a)(8), 438(a)(8), 26 U.S.C. §§ 9009(b), 9039(b); and with one limited exception, to initiate civil actions to enforce the Act, 2 U.S.C. § 437d(e). The Attorney General does have jurisdiction to prosecute criminal violations of the Act. *See* 28 U.S.C. § 516; 2 U.S.C. § 437g(d), and the Commission can refer a matter to the Attorney General for possible criminal prosecution under certain circumstances. 2 U.S.C. § 437g(a)(5)(C). The Commission and the Department of Justice entered into a Memorandum of Understanding that jointly outlines their respective roles in pursuing election law violations. *See* 43 Fed. Reg. 5441 (1978). In addition, when cases arising under FECA are heard by the Supreme Court, the Solicitor General normally represents the Commission before the Court. *See FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994); 2 U.S.C. §§ 437c(f)(4) and 437d(a)(6).

91. *What criteria does the FEC use to decide when the “small item” exception from the disclosure requirement will apply? How does the Commission approach advertising media that limit the number of characters available for advertising content and disclaimers to be consistent across different advertisers and media?*

The FECA requires political committees to place statements on their general public political advertising disclosing who authorized and paid for these communications. 2 U.S.C. 441d(a). Similar statements are required when other persons make communications that publicly solicit contributions, or expressly advocate the election or defeat of clearly identified candidates, or that are electioneering communications. *Id.* The Commission’s regulations at 11 CFR 110.11(f) create exceptions to the disclaimer requirement for “bumper stickers, pins, buttons, pens, and similar small item upon which the disclaimer cannot be conveniently printed.” The Commission is guided by this regulation and its previous advisory opinions in determining in a specific case whether the small item exception applies.

The Commission has been asked in three different advisory opinion requests whether a particular advertising medium or advertiser that limits the number of characters available for advertising content will trigger an exception to the disclaimer requirement. Specifically, in 2002, the Commission was first asked if either the small item exception or the impracticable exception applied to wireless telephone advertisements sent by “short messaging service,” where the text messages are limited to 160 characters per screen. *See* Advisory Opinion 2002-09 (Target Wireless). The Commission determined that the small item exception applied. Next, in 2010, Google requested an advisory opinion as to whether Google ads purchased by candidates and political committees qualify for the small item exception to the disclaimer requirements given that Google limits the ads to 95 characters. *See* Advisory Opinion Request 2010-19 (Google). Although the Commission could not reach a response to the questions presented by the 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:*
- inquiries that may be made of the requestor before considering the advisory opinion request;*
  - the time that may elapse between the original submission and consideration of the request;*
  - the scope of information that may be obtained from the requestor before considering the request; and*
  - the use that may be made of information obtained from the requestor before considering the request?*

The policies and procedures that apply to the advisory opinion process are set out at 2 U.S.C. 437f and in Commission regulations at 11 C.F.R. part 112. The Commission has also issued two Federal Register notices regarding advisory opinion policies and procedures. *See* FEC, *Revision to Advisory Opinion Comment Procedure*, 58 Fed. Reg. 62259 (Nov. 26, 1993); FEC, *Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures*, 74 Fed. Reg. 32160 (July 7, 2009). Lastly, a plain language description of the process for obtaining advisory opinions is posted on the Commission’s website in a question and answer format. *See* <http://www.fec.gov/pages/brochures/ao.shtml>.

a) Inquiries may be sent to the requestor at any point during the advisory opinion process. These inquiries may seek to clarify the question(s) the requestor is asking, or to clear up ambiguous or conflicting statements in the requestor's written submissions, or to obtain additional information necessary to the resolution of the questions presented. In addition, oral inquiries may be directed to requestors, or counsel for the requestors, if they are present at the Commission meeting during which their advisory opinions are considered. *See* FEC, *Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures*, 74 Fed. Reg. 32160 (July 7, 2009).

b) Commission rules at 11 CFR 112.1(d) require the Office of General Counsel to review all advisory opinion requests within 10 calendar days from the date of receipt and to notify the requestors of any deficiencies in their requests. OGC meets this deadline 100% of the time, and usually responds to requestors in one to four days. Beginning on the date the advisory opinion request is complete, the Act directs the Commission to issue an advisory opinion within 60 days. 2 U.S.C. 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.*

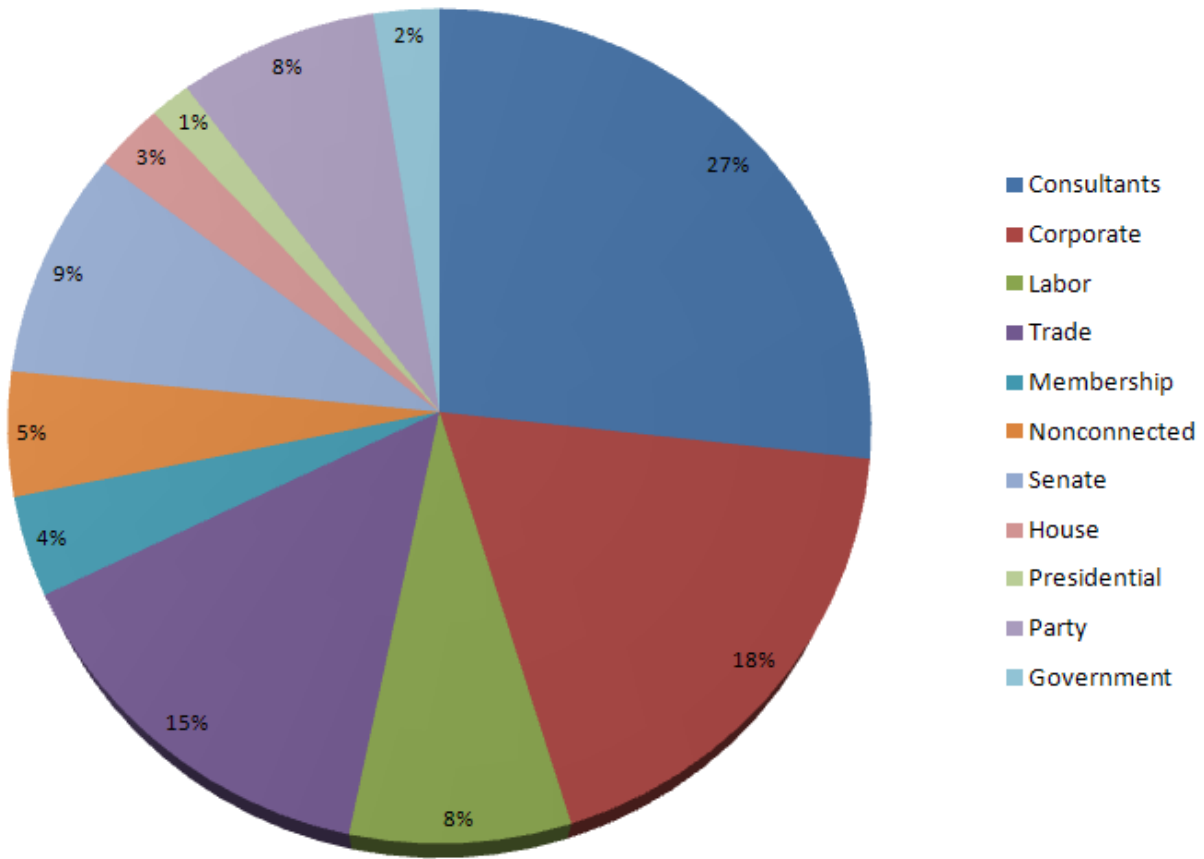
The Response to Question 100 below includes this information.

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.

### Background of FEC Outreach Attendees 2007-2011



100. For each seminar, please provide the number of attendees for each track (candidate, party, PAC).

The Commission hosts a variety of educational outreach programs, including conferences, seminars and roundtable workshops. Conferences provide the most detailed information and typically last two days; the day-long seminars are more condensed; and roundtable workshops focus on a specific topic and run about 90 minutes. The state outreach workshops held in 2007 and 2009 have been discontinued, based on ongoing cost-benefit analyses. In 2011, those analyses contributed to the decision to replace the annual Washington, DC, conferences with less expensive seminars held at Commission headquarters.

The lists below identify all of the Commission’s educational outreach programs from 2007 to the present and include the total attendance for each event, as well as a breakdown of PAC, candidate, and party representatives.

<b>2007 FEC Outreach Data</b>						<b>PACs</b>	<b>Candidates</b>	<b>Parties</b>
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						

<b>2008 FEC Outreach Data</b>						<b>PACs</b>	<b>Candidates</b>	<b>Parties</b>
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						

<b>2009 FEC Outreach Data</b>						<b>PACs</b>	<b>Candidates</b>	<b>Parties</b>
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						

<b>2010 FEC Outreach Data</b>						<b>PACs</b>	<b>Candidates</b>	<b>Parties</b>
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						



101. *Were the seminars all fully funded by the fees collected? Was the staff time expended in preparing for, attending, and teaching at the conferences funded by the seminar fees? Please provide explanations for your answers.*

While many of the costs associated with the Commission's conferences are defrayed using registration fees, none of the Commission's outreach programs is fully funded by the fees collected. The agency's conference coordinator collects and spends conference registration fees, under the terms of a no-cost contract with the Commission. The fees cover a variety of expenses, including rental of facilities, catering, and the coordinator's fee. Currently, the agency's annual appropriation funds all staff time and travel, as well as any expenses for the seminars and roundtable workshops. However, beginning in FY 2012, the agency's conference coordinator will also manage registration for seminars and roundtables, and will use the fees collected to cover some of the related expenses. Nevertheless, the Commission expects that all staff time and travel will continue to be paid for with appropriated funds.

These seminars are an essential component to the Commission's efforts to assist candidates and committees in complying with the statute and regulations. As noted in the answer below, the feedback from the seminars is positive.

102. *Please provide any summaries prepared of evaluations or feedback received from participants in the seminars.*

The Commission seeks feedback from all of its outreach participants, and uses that information to improve its programs. As detailed in the attached evaluation summaries for all outreach programs from January 1, 2007, to the present, participants have consistently rated the workshops higher than 4 on a 5-point scale.

103. *Please provide a list of all the hotlines that the FEC operates.*

- a. *For each hotline, please provide the call volume by month since January 1, 2007.*
- b. *Please provide an estimate of the amount of staff-hours spent per month to operate each hotline.*
- c. *Please provide a list of the issue areas covered by each hotline.*

The Commission maintains a toll-free telephone information line (800-424-9530) that callers can use to reach any office within the agency. Over the years, the Information Division and Public Records Office have been among the most popular destinations for callers. Responses regarding the Information Division and the Public Disclosure Division are below, followed by data and a discussion of the OIG hotline.



## Information Division

The Information Division's Communications Specialists rely on the statute, regulations, Commission precedents, and other legal resources to provide informal guidance to callers with compliance questions. Topics range from the basics of contributions and filing deadlines to the complexities of coordination and express advocacy. The amount of time a Specialist spends researching and responding to phone inquiries varies based on a number of factors, including proximity to the election, changes in the law, and the Specialist's own level of experience. In the past, phone inquiries could dominate a Specialist's work day. As illustrated by the chart below, the growth of the Internet and e-mail has changed that. Now, constituents can often find answers to their questions on the Commission's website, or they may prefer to send an e-mail, rather than call. As a result, on average, Specialists now spend little more than half their time responding to phone calls. The remainder of the work day is spent working on other projects, including drafting responses to the increasing number of email inquiries or creating and updating the web content that answers constituents' questions.

Information Specialist Calls	2007	2008	2009	2010	2011
January	1,330	1,796	1,215	1,674	861
February	1,042	1,559	832	985	578
March	1,128	1,465	1,081	1,782	875
April	1,120	1,756	921	1,606	809
May	1,054	1,164	740	1,236	686
June	1,171	1,638	1,011	1,389	993
July	1,152	1,727	1,064	1,266	-
August	1,095	1,376	820	1,281	-
September	1,047	1,481	1,107	1,330	-
October	1,396	2,401	1,061	2,046	-
November	871	1,879	781	885	-
December	989	713	864	563	-
TOTAL:	13,395	18,955	11,497	16,043	4,802

## Public Disclosure Division

The four Public Information Specialists of the Public Records Office respond to requests received by phone, email and letter, for campaign finance reports and data and Commission documents. The requests vary in complexity and the time needed to fully respond. Some requests are handled in one call while others require the staff to conduct research or make copies of documents. In response to the requests, the staff provide explanations of the disclosure requirements and availability of campaign finance data, tutorials on downloading databases and electronic filings, customized database searches, copies of campaign finance reports not available on the website (prior to 1996), assistance with website navigation to access campaign finance information, assistance with analyzing data across election cycles, copies of historical Commission documents not available on the website (for example, Commission meeting

documents prior to 2000). When not responding to requests, the staff time is spent on other office projects such as tracking federal candidates on the ballots of each state, collecting and publishing the vote results of each election for federal office, updating the directory of federal and state offices that provide campaign finance, election, and lobbying information and data, and processing documents for posting to the website.

Public Disclosure Division Phone/Letter/Email Requests					
	2007	2008	2009	2010	2011
January	328	332	169	195	106
February	432	264	200	159	154
March	432	243	204	215	219
April	346	269	209	231	174
May	448	230	218	231	190
June	296	261	221	208	197
July	318	365	209	193	
August	243	256	196	202	
September	382	275	183	148	
October	331	211	220	198	
November	359	165	196	174	
December	264	207	195	206	
<b>TOTAL:</b>	<b>4179</b>	<b>3078</b>	<b>2420</b>	<b>2360</b>	<b>1040</b>

Office of Inspector General

**The Office of the Inspector General provided the following response to Question 103:**

The OIG operates a hotline.

a. The OIG has only separately tracked the volume of hotline contacts (including telephone calls, emails, and other methods of communication) since October 1, 2010. Until October 1, 2010, hotline contacts were grouped with other outside contacts for tracking purposes. Both

hotline and other contacts were tracked together on a monthly basis between January 1, 2007, and March 31, 2008, after which time they were tracked on a semiannual basis until October 1, 2010. With these limitations in mind, the following data are provided:

Combined hotline and other contacts tracked on monthly basis through March 2008:	
January 2007	160
February 2007	46
March 2007	53
April 2007	202
May 2007	157
June 2007	94
July 2007	147
August 2007	128
September 2007	120
October 2007	81
November 2007	72
December 2007	90
January 2008	109
February 2008	196
March 2008	237

Combined hotline and other contacts tracked on semi-annual basis between April 2008 and September 2010:	
April 1, 2008, through September 30, 2008	533
October 1, 2008, through March 31, 2009	1,044

April 1, 2009, through September 30, 2009	856
October 1, 2009, through March 31, 2010	200
April 1, 2010, 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.