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

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

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

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

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

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

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

publicly disclosed.<sup>4</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Legal Framework**

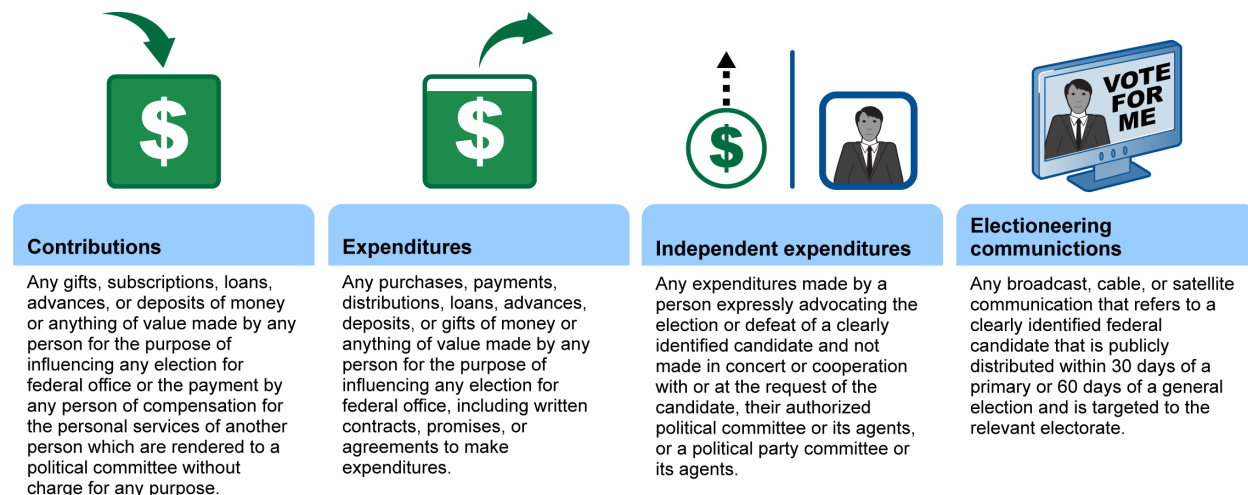
### What is campaign finance?

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

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

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



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

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

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

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

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

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

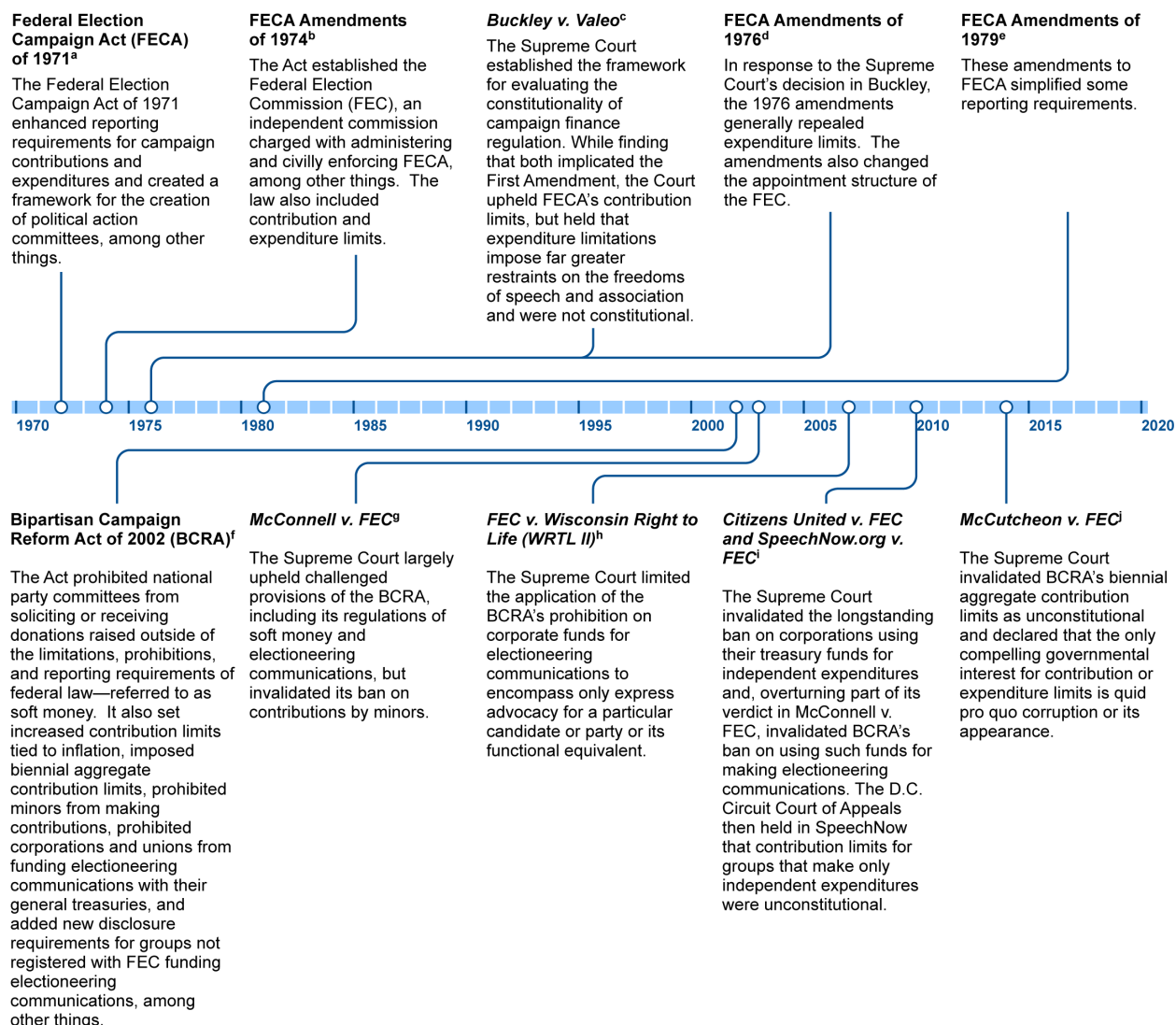
BCRA's prohibition on corporations using their general treasuries to fund electioneering communications in *Citizens United v. FEC*.<sup>19</sup> As a result, corporations may use their general treasury funds to fund independent expenditures explicitly calling for the election or defeat of federal candidates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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

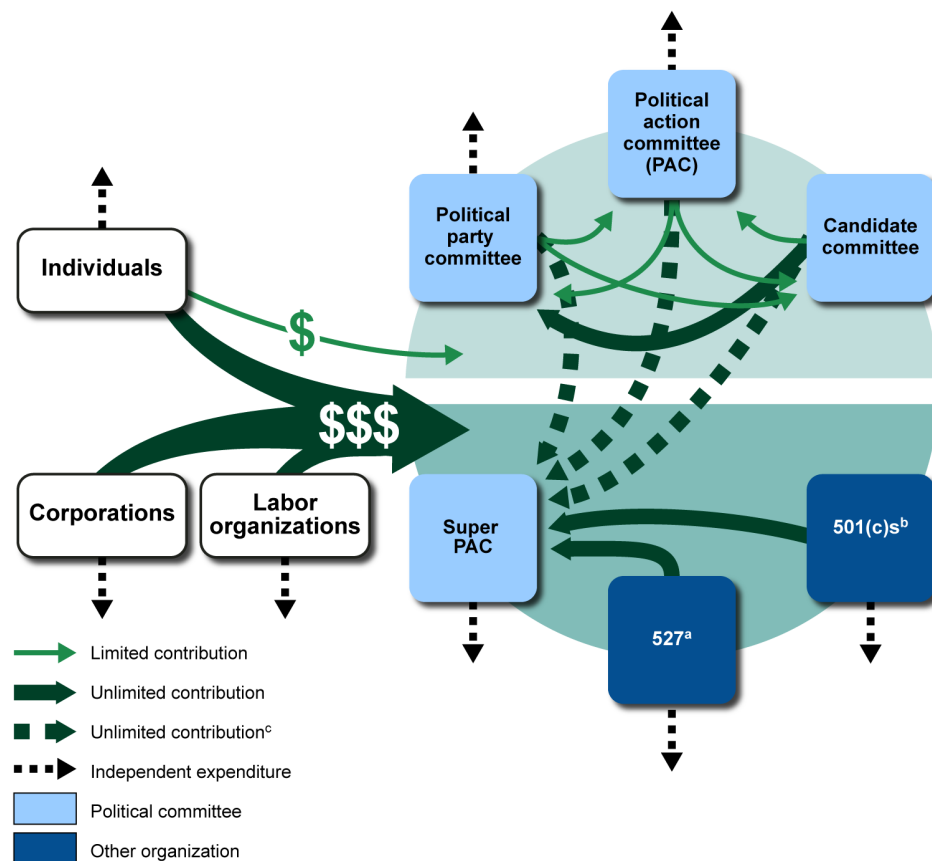
<sup>24</sup>See 52 U.S.C. § 30118.

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

<sup>26</sup>See 52 U.S.C. § 30118.

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

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



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

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

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

<sup>27</sup>26 U.S.C. § 527(e).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>37</sup>52 U.S.C. § 30118.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Federal Election Commission**

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

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

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

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

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

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

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

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

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

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

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

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<sup>46</sup>52 U.S.C. § 30106(f).

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

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

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

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



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

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

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

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

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

<sup>52</sup>52 U.S.C. § 30108.

<sup>53</sup>52 U.S.C. § 30111(a)(9).

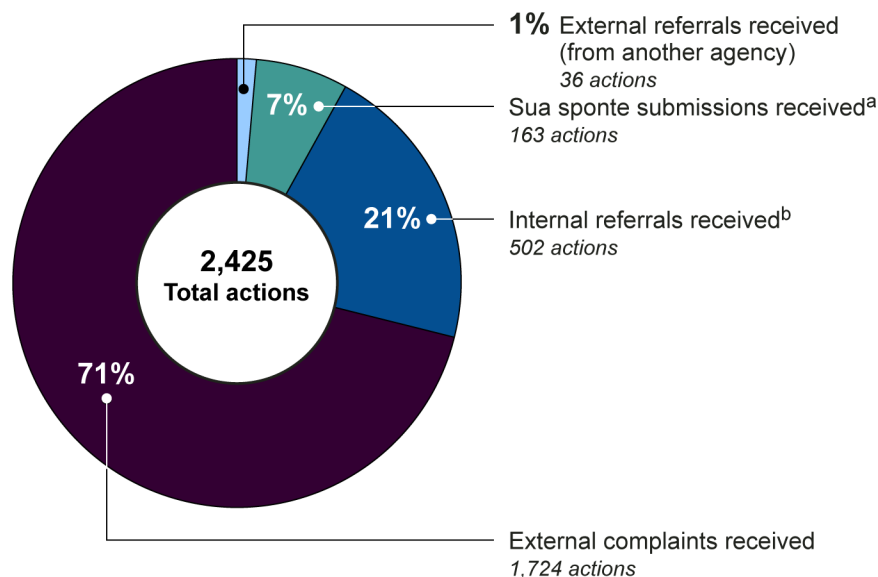
<sup>54</sup>FEC's Reports and Analysis Division reviews all federal campaign finance reports to track compliance with FECA and ensure that the public record provides a full and accurate representation of reported campaign finance activity. The Audit Division conducts audits under FECA in those cases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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

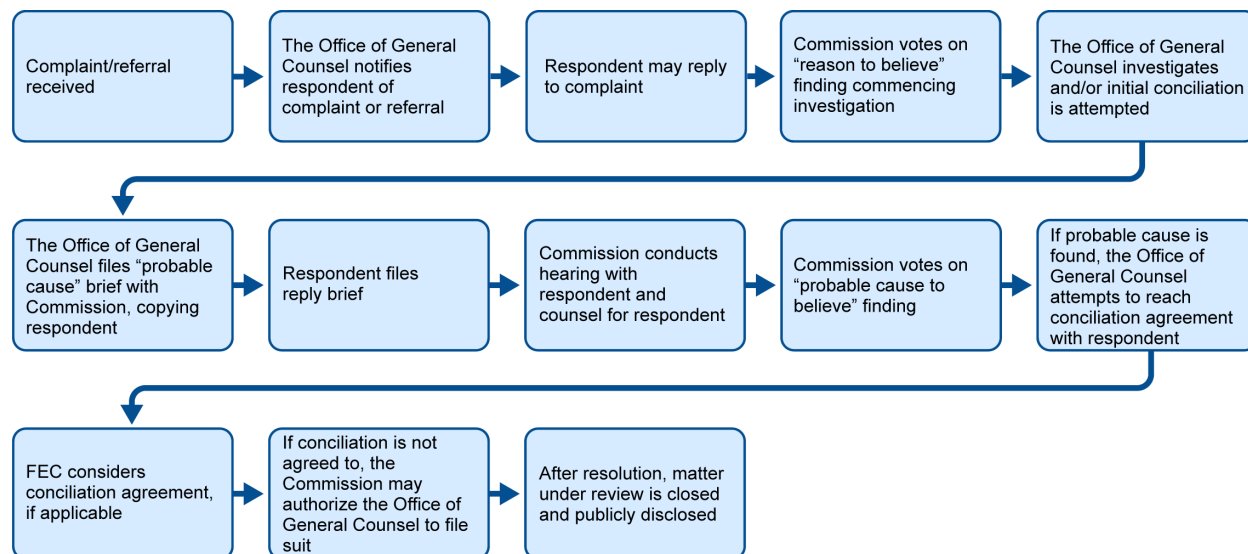
<sup>60</sup>The Alternative Dispute Resolution Office resolves less complex campaign finance violations that meet criteria approved by the Commission. The program focuses on remedial measures for candidates and political committees, such as training, internal audits, and hiring compliance staff. The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

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

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

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

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



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

Note: The figure excludes some optional steps in the FEC’s matters under review process.

FEC’s traditional enforcement process ends when the Commission determines either to take no action or to reach a conciliation agreement with the respondent, at various stages of the process.<sup>64</sup> Additionally, without an affirmative vote from at least four commissioners at each of the stages of the process, there can be no substantive action. If the Commission does not successfully conciliate with a respondent, it may file a civil lawsuit in U.S. district court.<sup>65</sup> In certain circumstances, the Commission may also refer a matter to DOJ for criminal prosecution under FECA.<sup>66</sup> Enclosure IV provides an overview of FEC’s enforcement process for non-criminal campaign finance violations.<sup>67</sup>

### What types of campaign finance violations are enforced by the FEC?

For the FEC’s enforcement process, FEC data showed that the FEC closed a total of 843 matters under review, consisting of a total of 1,164 alleged violations—and representing 33 different types of alleged violations—related to the violation of campaign finance laws during

<sup>64</sup>A conciliation agreement is a voluntary settlement agreement between FEC and a respondent. FEC must attempt to enter in a conciliation agreement upon a finding of probable cause to believe, and FEC may also, at its discretion, attempt to enter in a conciliation agreement before a finding of probable cause. 52 U.S.C. § 30109(a)(4); 11 C.F.R. § 111.18. The agreement generally includes, among other things, an agreement that the respondent will cease and desist from violating the relevant provision in the future and an agreement to pay a civil penalty or take corrective actions.

<sup>65</sup>52 U.S.C. § 30109(a)(6).

<sup>66</sup>52 U.S.C. § 30109(a)(5)(C). A five-year statute of limitations applies to all campaign finance violations. 52 U.S.C. § 30145.

<sup>67</sup>Enclosure V shows the number of the campaign finance enforcement matters and cases addressed through FEC’s traditional enforcement, Alternative Dispute Resolution Office, and Alternative Fines Program processes during fiscal years 2002 through 2017.

fiscal years 2012 through 2017.<sup>68</sup> Figure 8 shows the number of matters under review closed during fiscal years 2012 through 2017, and the types of campaign violation categories addressed by the FEC in these matters under review. As shown in the figure, the top 10 violation categories represent about 89 percent (1,032) of the total alleged violations during this time period and involve violations related to reporting, other activities,<sup>69</sup> disclaimers, prohibited contributions, excessive contributions, contributions from corporations, exceeding contribution limitations, contributions made in the name of another, personal use, and soft money.<sup>70</sup>

As shown in the figure below, reporting violations represent the largest category (27 percent—315 violations) of the alleged violations, which may involve candidates, party committees, and PACs that did not adhere to FECA's campaign finance reporting requirements. For example, FECA requires all political committees to report, among other things, the total amount of receipts received during the reporting period and calendar year for categories such as contributions from political party committees, contributions from persons that are not political committees under FECA, and all loans.<sup>71</sup>

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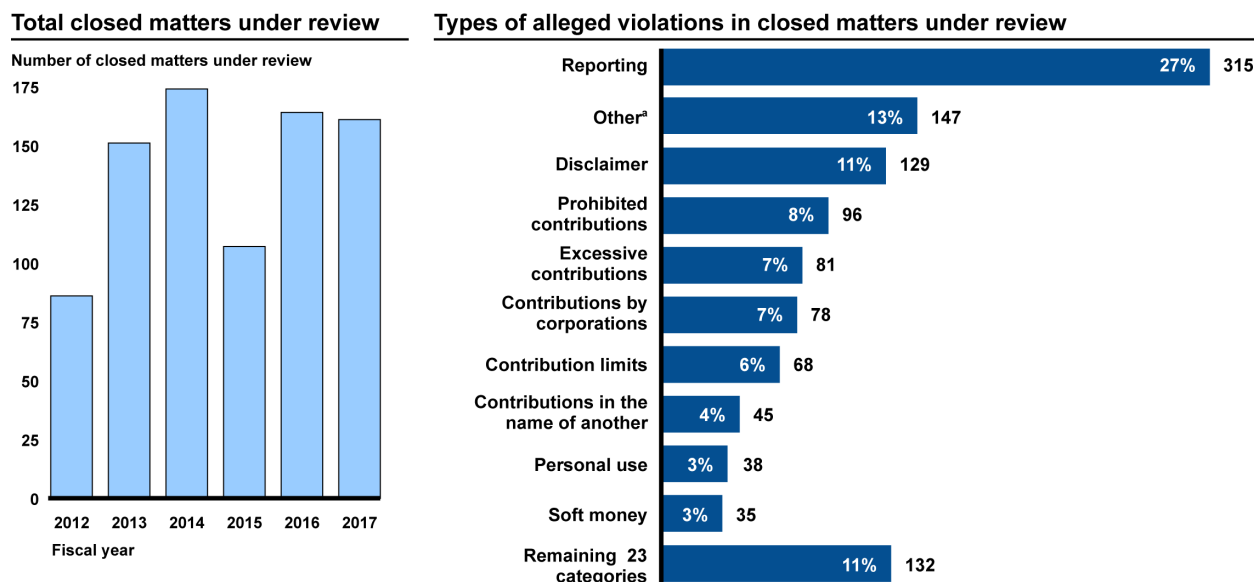
<sup>68</sup>For the closed matters under review, we focused on fiscal years 2012 through 2017 because these data are the most complete and available at the time of this review. In addition, some of the closed matters under review may involve one or multiple alleged violations of campaign finance laws.

<sup>69</sup>According to FEC officials, the “other” activities involve a wide variety of allegations that do not fit into other categories, such as alleged violations of the noncommercial air travel rules and rules about paycheck deductions from corporate or labor separate segregated funds.

<sup>70</sup>Soft money refers to donations to party committees raised outside of the limitations, prohibitions, and reporting requirements of federal law. In addition to individuals and political committees, soft money can also come from corporations and labor unions. Soft money may be used by party committees for “party-building activities” and issue ads; however, soft money cannot be used for advocating for a particular candidate during an election campaign. The national party committees are prohibited from receiving or spending soft money on any activity. 52 U.S.C. § 30125(a)(1).

<sup>71</sup>52 U.S.C. § 30104(b).

**Figure 8: Types of Alleged Violations for Federal Election Commission (FEC) Closed Matters under Review, Fiscal Years 2012 through 2017**



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

Note: Some of the violations in the remaining 23 categories involve allegations such as a candidate failed to timely file a statement of candidacy; illegal loans were made to committees, or legal loans were misreported; a committee disguised expenditures so as to hide the recipient; and a committee failed to report operating expenditures and debts.

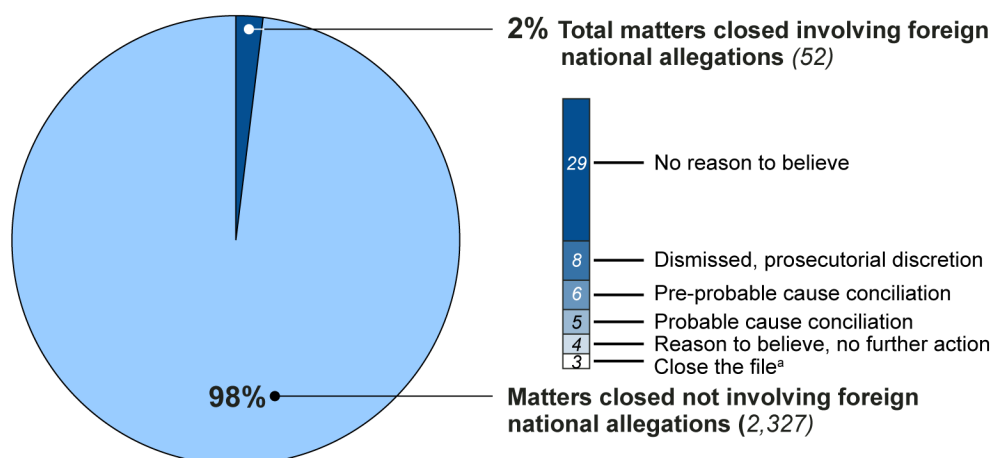
<sup>a</sup>According to FEC officials, the violations in the "other" category involve a wide variety of allegations that do not fit in other categories, such as alleged violations of the noncommercial air travel rules and rules about paycheck deductions from corporate or labor separate segregated funds.

### How has the FEC enforced the foreign national prohibition?

In 2018, the FEC, in response to language in an explanatory statement, stated in a report to congressional appropriations committees that timely resolution of any enforcement matters involving allegations of prohibited activity by foreign nationals is a priority for the FEC.<sup>72</sup> Allegations of noncompliance with the foreign national prohibition have been handled primarily as FEC traditional enforcement cases, or matters under review. As shown in figure 9, about 2 percent (52) of FEC's total matters closed during fiscal years 2002 through 2017 involved allegations of violations of the foreign national prohibition, and FEC found no reason to believe a violation occurred in over half (29) of these matters.

<sup>72</sup>The explanatory statement accompanying the Consolidated Appropriations Act, 2018, included a reporting requirement for the FEC, which stated: "Preserving the integrity of elections, and protecting them from undue foreign influence is an important function of government at all levels. Federal law, for example, prohibits foreign campaign contributions and expenditures. With that in mind, the [FEC] Chairman is directed to report to the Committees on Appropriations of the House and Senate no later than 180 days after the enactment of this Act on the Commission's role in enforcing this prohibition, including how it identifies foreign contributions to elections, and what it plans to do in the future to continue these efforts." See *Explanatory Statement*, 164 Cong. Rec. H2045, H2520 (March 22, 2018).

**Figure 9: Federal Election Commission (FEC) Matters under Review, including Allegations of Violations of The Foreign National Prohibition, Fiscal Years 2002 Through 2017**



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

Note: With regards to matters closed involving foreign national allegations, for some of the matters, the matters involved multiple respondents and the FEC found no reason to believe allegations with respect to some respondents, and dismissed pursuant to prosecutorial discretion allegations with respect to other respondents. Therefore, the number of matters reflected in the disposition categories (55) is greater than the total number of matters closed (52).

<sup>a</sup>At any stage of the FEC's enforcement process, the Commission may close the entire file or close it only with regard to some of the respondents.

To provide clarity and awareness of the campaign finance laws prohibiting foreign nationals' participation in elections, the Commission has issued advisory opinions in several contexts in which it has considered the foreign national prohibition. For example, as it relates to changes in nationality, the Commission has determined that when an individual's status as a foreign national changes, so does the individual's ability to make contributions in connection with any election.<sup>73</sup> The FEC is also engaged in rulemaking on potential revisions to regulations on disclaimers required for internet communications which could have implications related to the foreign national prohibition, given that disclaimers on paid advertisements are one tool to expose prohibited expenditures by foreign nationals.<sup>74</sup> FEC officials also stated that in efforts to promote voluntary compliance with federal campaign statutes and regulations, the FEC provides compliance guidance to the public, committees, other organizations, and candidates regarding the prohibition on foreign national contributions and expenditures in the context of advisory

<sup>73</sup>See Advisory Opinion 2016-16 (Gary Johnson 2012).

<sup>74</sup>In 2011, FEC published an Advanced Notice of Proposed Rulemaking related to disclaimers on certain internet communications. 76 Fed. Reg. 63,567 (Oct. 13, 2011). FEC re-opened the public comment period in 2016 and 2017. In March, 2018, FEC published a Notice of Proposed Rulemaking that, among other things, examines two alternatives for disclaimer requirements on public communications distributed over the internet. 83 Fed. Reg. 12,864 (Mar. 26, 2018). In June, 2018, FEC held a public hearing on the Notice of Proposed Rulemaking, and in June, 2019, the commissioners made two alternate proposals public as part of the agenda for an open meeting. <https://sers.fec.gov/fosers/> (reg 2011-02).

opinions, rulemaking, and informational publications on the FEC's public website.<sup>75</sup>

What challenges have FEC officials identified facing when administering and enforcing campaign finance laws?

FEC commissioners and senior FEC officials we interviewed identified to us, and in responses to the Committee on House Administration, challenges they face in administering and enforcing federal campaign finance law.<sup>76</sup> The commissioners and senior FEC officials identified challenges in such areas as (1) obtaining complete and accurate information from filings, (2) managing the docket of enforcement matters, (3) completing audits in a timely manner, and (4) addressing staffing shortages. FEC commissioners have also provided varying perspectives on the meaning of and challenges presented by deadlocked, or split, votes.

- **Obtaining complete and accurate information from filings.** FEC officials told us that one challenge they face is receiving complete and accurate information in filings—a report, notification, or statement submitted to the FEC by a candidate, committee, or other entity. Required filings include committee and candidate registration forms and committee reports of the amounts and sources of money they receive and the amounts and kinds of expenditures they make. In particular, FEC officials noted that committee and candidate registration forms sometimes include false or fictitious information, such as fictitious or satirical names of a candidate, committee, or a committee's treasurer, and that the incidence of such filings has increased since the 2016 presidential election cycle. According to FEC officials, another challenge is created when frivolous filers take the next step and file a report of activity (e.g., contributions or expenditures, sometimes in large dollar amounts). FEC officials also noted that some filings contain errors or blank fields, which officials attributed to filers sometimes being unfamiliar with form requirements. FEC officials said that frivolous and incomplete filings with fictitious or missing information can reduce the accuracy of FEC's publicly disclosed campaign finance data and can also hinder the review of filings by FEC staff.

According to FEC officials, the Commission has been taking steps toward addressing these challenges, such as adding new steps for FEC staff to verify potentially fictitious information, including sending verification letters to filers submitting potentially fictitious information, and removing unverified filings from campaign finance data. FEC officials told us the agency is also updating its electronic filing system with automated detection to prevent the submission of filings with missing or erroneous fields. They also stated they have carefully designed the forms and instructions, and provide educational offerings on the FEC website, hold conferences, teach classes, and offer webinars that include reporting guidance. The Reports Analysis Division assigns an analyst to every filing political committee, who is available to answer any questions and provide guidance on filing instructions on a one-to-one basis. According to FEC officials, if a filer's errors or omissions reach a certain threshold it will trigger a request for additional information from the Reports Analysis Division.

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<sup>75</sup>The FEC provides general public guidance regarding the foreign national contribution ban via its website. In June 2017, FEC's brochure on foreign nationals, which provides a general primer on the foreign national prohibition, was updated and republished on the website. Other pages on FEC's website provide information on specific questions about foreign national activities. These pages discuss the definition of "foreign national," how to determine the nationality of a contributor, and how to address issues such as domestic subsidiaries of foreign corporations and the provision of substantial assistance to a foreign national making a contribution.

<sup>76</sup>FEC, "Responses to Questions from the Committee on House Administration," May 1, 2019, including attachments and exhibits, available at <https://www.fec.gov/about/committee-on-house-administration-april-2019-questions/>.



- Managing the docket of enforcement matters.** FEC officials reported that another challenge relates to managing the Office of General Counsel Enforcement Division's docket of enforcement matters, or workload.<sup>77</sup> For example, FEC officials noted that the number of matters on the enforcement docket—or pending Enforcement Division review or Commission action—was 289 matters as of May 2019 and that 45 of those matters have at least some activity that has exceeded or will exceed the statute of limitations before May 1, 2020.<sup>78</sup> An FEC commissioner referred to this as a backlog of matters. To address the backlog, FEC officials reported that they are working to increase productivity by, for example, adopting a more aggressive meeting schedule beginning in July 2019 to address matters on the enforcement docket. FEC officials also reported that the Commission prioritizes for immediate consideration any matters imperiled by an impending statute of limitations deadline, as well as matters that allege violations of the foreign national prohibition. Additionally, FEC officials reported that, in December 2018, the FEC revised two procedures to improve efficiency (1) the Reports Analysis Division review and referral procedures; and (2) the enforcement priority system's rating system, which the Office of General Counsel uses to prioritize and activate matters under review. According to FEC officials, these changes are intended to allow more low-priority matters to be handled through alternative dispute resolution, educational programs, or streamlined enforcement priority system dismissals, which would allow the Enforcement Division to focus its resources on more complex, high-priority matters under review.
- Completing audits in a timely manner.** The FEC Audit Division generally audits a political committee under two circumstances—when a committee participates in a publicly financed Presidential campaign or national party convention, or when it appears that a political committee has not met substantial compliance for reporting. The audit determines whether the committee complied with limitations, prohibitions, and disclosure requirements. FEC officials reported that audits of political committees can take a long time to complete, which can put the Commission at risk of having audit findings that cannot be pursued due to statute of limitations deadlines.<sup>79</sup> FEC officials noted that the Commission is taking steps to complete audits more quickly and that the FEC has reduced the length of time it takes to complete audits. For example, they stated that the Audit Division has implemented stricter milestones, and time-saving mechanisms, including procedures for acquiring committee records more efficiently and the development of standardized templates. According to FEC officials, the average number of months to complete an audit of political committees that are authorized by a candidate declined from 19.1 months in 2010 to 18.3 months in 2016, and the average number of months to complete an audit of political committees that are not authorized by a candidate (e.g., party committees and Super PACs) declined from 25.3 months in 2010 to 5 months in 2016.<sup>80</sup>

<sup>77</sup>According to the FEC, enforcement matters include matters under review, Reports and Analysis Division referrals, audit referrals, *sua sponte* submissions, external referrals, and other internally-generated matters.

<sup>78</sup>FEC, "Responses to Questions from the Committee on House Administration," May 1, 2019. The FEC may seek civil penalties in federal district court within the 5-year statute of limitations period (measured from the time of the violation) provided by 52 U.S.C. § 30145.

<sup>79</sup>FEC, "Responses to Questions from the Committee on House Administration," May 1, 2019.

<sup>80</sup>In addition, FEC officials told us that the Audit Division has faced challenges obtaining committee records for audits. They stated that records are not readily available at times and may require extensive efforts to acquire since, for example, political committees often have high attrition rates of paid personnel or are staffed by volunteers, which can lead to challenges in communication. The Audit Division has procedures in place to seek approval from the Commission for subpoena action if records are not provided.

- **Staffing shortages.** FEC commissioners told us that the Commission has experienced prolonged vacancies among its senior leaders, which officials attributed to salary limitations established by FECA that make it difficult to attract candidates for senior positions.<sup>81</sup> To address the salary limitations and help the FEC to recruit from a government-wide pool of experienced and skilled leaders, the Commission unanimously adopted a legislative recommendation in 7 of the last 8 years. These recommendations asked Congress to allow the FEC to participate in the Senior Executive Service and to amend FECA to remove references to the Executive Schedule in language related to salary for the General Counsel.<sup>82</sup> In October, 2019, FEC officials told us they had concerns about whether the recent departure of one of the FEC commissioners (discussed below) could present an obstacle to hiring for the remaining vacant positions, as applicants could be hesitant to apply for a position with an agency operating without a quorum of commissioners, or may think that the agency has shut down.

FEC officials also provided differing perspectives on issues related to staffing shortages below the senior leadership level. For example, according to one commissioner, within the Office of General Counsel's Enforcement Division, from 2010 through 2018 the number of full-time equivalent staff declined from 59 to 41 (about a 30 percent decrease).<sup>83</sup> The commissioner noted that during this time period, the number of enforcement matters more than tripled, contributing to the backlog in enforcement matters noted above. Another commissioner agreed that the caseload per staff member has been increasing, which can put a great deal of stress on FEC staff. Three of the four commissioners believed the FEC needed to hire more staff. The fourth commissioner told us, however, that the high workload per staff could be addressed through adopting more efficient practices, rather than hiring more staff.

Additionally, from February 2018 through August 2019, the Commission had been operating with only four of six authorized commissioners on board, which FEC officials noted had presented challenges. FECA requires a vote of a majority of the six authorized commissioners for most policy actions, and thus the Commission must have had the unanimous support of all four commissioners who were serving. One commissioner noted that this meant that any one commissioner voting against or abstaining from a vote can result in delays in Commission decisions as to whether or not to pursue an enforcement action.<sup>84</sup>

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<sup>81</sup>52 U.S.C. § 30106(f). The FEC Office of Inspector General has reported management and performance challenges with relying on acting officials. See Federal Election Commission, Office of the Inspector General, *Inspector General Statement on the Federal Election Commission's Management and Performance Challenges - 2018* (October 2018).

<sup>82</sup>The FEC's legislative recommendation states that removing the statutory references to the Executive Schedule would allow the General Counsel to be compensated under the same pay schedule as the FEC's other senior managers. See 52 U.S.C. § 30106(f)(1). At the time of our review, FEC officials reported that the General Counsel position was filled on an acting basis since September 2016 by an experienced individual who served as Deputy General Counsel since November 2012. Under the current pay system, if the Commission were to appoint the Acting General Counsel as General Counsel, the individual would have to accept an over \$20,000 pay cut, according to FEC officials.

<sup>83</sup>FEC, "Responses to Questions from the Committee on House Administration," May 1, 2019.

<sup>84</sup>FEC, "Responses to Questions from the Committee on House Administration," May 1, 2019. FEC officials also reported in May 2019 that the two commissioner vacancies posed other logistical challenges, including that all four commissioners must be present, either physically or by telephone, for the Commission to meet, and if a commissioner is recused from a matter, the matter cannot proceed until the reason for recusal is removed or one of the vacant commissioner seats is filled.

Furthermore, as of August 31, 2019, the FEC is operating with only three commissioners, after one of the four remaining commissioners resigned. This means the FEC is operating without a quorum and, pursuant to FECA, is unable to hold hearings and vote on most actions, including issuing advisory opinions; engaging in rulemaking; initiating litigation or defending the agency in new litigation, including appeals;<sup>85</sup> voting on matters under review and other enforcement actions, including whether to initiate investigations or refer matters to other agencies; and approving audit reports.<sup>86</sup> FEC officials highlighted that the lack of a quorum prevents the FEC from fulfilling the agency's functions of rulemaking and enforcing campaign finance law. According to an official statement by one remaining commissioner, while the Commission cannot engage in substantive enforcement actions or rulemaking, FEC staff offices will continue their work answering questions; maintaining the FEC website; conducting ongoing audits; and processing complaints, disclosure reports, and other filings.<sup>87</sup> Nevertheless, according to FEC officials, when a Commission vote is required to initiate or continue an investigation or take another action, then action stops, and this is not an insignificant issue, in their view.

Additionally, on December 5, 2019, FEC officials reported that during fiscal year 2019, the FEC made four permanent senior leadership appointments, including a permanent Inspector General. According to the officials, the FEC also made permanent selections for three senior positions and approved to be filled on a permanent basis three additional senior positions. However, FEC officials stated that, due to the lack of a quorum and in accordance with FEC policy, the Commission has been unable to approve the selections of senior level positions since September 1, 2019.

FEC officials stated that while the current lack of quorum presents difficulties for the agency, the lack of quorum that the FEC faced in 2008 presented more significant challenges, specifically with regard to the larger number of candidates using public financing in 2008 than in recent elections. An affirmative vote of four commissioners is required to authorize payment to eligible candidates the amounts to which they are entitled, among other things.<sup>88</sup> The officials stated that although not many candidates apply for public financing, media reports indicate that at least one 2020 presidential candidate may seek public financing.

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<sup>85</sup>The Commission needs four affirmative votes to initiate a civil action for injunction, declaratory, or other appropriate relief and to defend against a civil action filed in federal court under 52 U.S.C. § 30109(a)(8), which provides that any party aggrieved by an order of the Commission dismissing that party's complaint or failing to act on the party's complaint within 120 days may file a petition with the U.S. District Court for the District of Columbia. 52 U.S.C. § 30106(c). However, even without a quorum, the Commission can continue to defend previously authorized litigation.

<sup>86</sup>See 52 U.S.C. §§ 30106(c), 30111(b). The FEC previously lost its quorum in the first 6 months of 2008 when it had only two on-board commissioners after expired recess appointments and during Senate consideration of several nominations. According to the Congressional Research Service report, in late 2007, commissioners amended the FEC's rules of internal procedure to permit executing some duties if the Commission lost its four-member policymaking quorum. According to this report, revisions to FEC's Directive 10 permit the Commission to continue meeting with fewer than four members to approve general public information, such as educational guides; appoint certain staff; and approve other basic administrative and employment matters. Congressional Research Service, Federal Election Commission: Membership and Policymaking Quorum, In Brief, updated September 5, 2019 (R45160). President Trump nominated a new commissioner in September 2017 (and re-nominated the individual in January 2018 and January 2019), but the Senate has not taken up consideration of the nomination as of November 2019.

<sup>87</sup>*Statement of Commissioner Caroline C. Hunter on Departure of Vice Chairman Petersen and Loss of Quorum*, August 26, 2019, available at <https://www.fec.gov/about/leadership-and-structure/caroline-c-hunter/>.

<sup>88</sup>See 52 U.S.C. §30106(c); 26 U.S.C. § 9005.

- **Deadlocked, or split, votes.** In May 2019, FEC officials reported data on the number of matters under review that had deadlocked, or split votes, and the four, seated commissioners at the time provided varying perspectives on the meaning of and challenges presented by split votes.<sup>89</sup> The FEC defines “split votes” as most often 3-3 or 2-2 votes or any other combination that does not have four or more votes in the affirmative or negative. Specifically, FEC officials reported that of the 531 matters under review that were considered by the Commission in executive session after January 1, 2012 and that were closed as of April 1, 2019:<sup>90</sup>
  - 269 matters under review—or about 51 percent—had at least one split vote among all votes taken on the matter in executive session.<sup>91</sup> The FEC also reported these data by calendar year, and there has been an increase from calendar years 2012 through 2018 in the proportion of matters under review with at least one split vote. In calendar year 2012, 27 of 61 matters under review considered in executive session had at least one split vote. In calendar year 2018, 51 of 86 matters under review considered in executive session had at least one split vote.
  - 84 matters under review—or about 16 percent—had split votes on all votes taken in executive session.<sup>92</sup> There has also been an increase from calendar years 2012 through 2018 in the proportion of matters under review that had split votes on all votes taken during executive session. In calendar year 2012, two of 61 matters under review considered in executive session had split votes on all votes taken. In calendar year 2018, 24 of 86 matters under review considered in executive session had split votes on all votes taken.

The four commissioners at the time of our review reported varying perspectives on the meaning of and challenges presented by split votes. One commissioner reported that the high number of matters under review that have at least one split vote demonstrates that the Commission has not pursued enforcement actions against those who have violated the law. This commissioner explained that some of the commissioners had consistently voted not to take action on FEC Office of General Counsel recommendations and not to move forward on the more significant violations alleged, while approving moving forward on more minor accusations.<sup>93</sup> Another commissioner stated that split votes can sometimes be instructive in that interested individuals or parties can learn from the arguments the commissioners

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<sup>89</sup>FEC, “Responses to Questions from the Committee on House Administration,” May 1, 2019.

<sup>90</sup>The Commission meets regularly in executive sessions that are closed to the public to discuss pending enforcement actions, litigation and other matters that, by law, must be kept confidential.

<sup>91</sup>According to FEC officials, some matters under review are subject to one vote in one executive session, while others can be considered in multiple executive sessions that might fall in different years. The data reported by calendar year include each matter under review considered by the Commission in executive session in each of the calendar years, so some matters under review appear more than once across calendar years.

<sup>92</sup>According to FEC officials, the 84 matters under review consist of matters where the votes on all substantive issues were split votes, other than votes to close the files. These 84 “all split” matters under review were also included in the aforementioned 261 matters under review with at least one split vote.

<sup>93</sup>FEC, “Responses to Questions from the Committee on House Administration,” May 1, 2019. For example, the commissioner stated that violations of the prohibition on independent groups, such as Super PACs, and candidates or their campaigns coordinating activities was difficult to prove before *Citizens United v. FEC*, and since then, the amount of campaign spending that could be illegally coordinated is even higher. This commissioner stated that some commissioners have blocked the Commission from investigating likely violations of the coordination prohibition, such as a candidate’s close family member setting up a Super PAC that benefits a candidate.

present on an issue, and then decide how to conduct themselves accordingly, in the absence of guidance.<sup>94</sup> This commissioner also noted that a proposal to have an odd number of commissioners, to avoid deadlocks, brings with it the danger that some may view the “tie-breaking” voter as having partisan motives.

The other two commissioners stated that data on deadlocked, or split votes, can be misleading and may not accurately characterize the Commission’s overall performance.<sup>95</sup> For example, they stated that focusing only on the number of “deadlocked” votes in Matters Under Review considered in executive session limits the scope of such analysis to only the most complex and controversial enforcement cases addressed by the Commission. In addition, these two commissioners stated that the Commission’s structure—where no more than three commissioners may be affiliated with the same political party, and four votes are required to take enforcement and regulatory action—was designed so that no single political party or administration can dominate the Commission’s decision making, and that disagreements among commissioners are a natural consequence of the Commission’s unique structure and mandate. These two commissioners added that the FEC is unique among federal agencies in that its core mission involves regulating political association and speech. They stated that they believe overly aggressive regulatory and enforcement actions could harm individuals’ constitutional rights, and that “true deadlocks”—in which at least four commissioners cannot ultimately agree on a way forward—reflect principled disagreements on the proper interpretation and application of the law. They added that while they do not seek to dismiss the significance of disagreements over key campaign finance issues, they believed the disagreements should not overshadow the Commission’s successes in promoting legal compliance and providing the public timely, robust access to the fundraising and spending activities of candidates, parties, and PACs.

In addition to the issues discussed above, the FEC has provided legislative recommendations to Congress seeking to clarify or amend campaign finance laws, which the FEC believes will strengthen its oversight and enforcement efforts. For example, in December 2018, the FEC submitted a recommendation for Congress to amend FECA to address the practice of PACs fraudulently soliciting contributions to support certain candidates, but subsequently disclosing minimal or no candidate support activities and using the funds primarily to pay vendors and consultants with whom the political committees’ officers appear to have financial interests.<sup>96</sup> FEC officials stated they believe that enactment of the legislative recommendations would provide the Commission with additional authority to strengthen the agency’s investigation of alleged violations of FECA and related campaign finance requirements in these areas.

What challenges have literature and selected organizations reported regarding the FEC’s administration and enforcement of campaign finance laws?

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<sup>94</sup>FEC, “Responses to Questions from the Committee on House Administration,” May 1, 2019.

<sup>95</sup>FEC, “Responses to Questions from the Committee on House Administration,” May 1, 2019.

<sup>96</sup>In addition to PACs engaging in fraudulent behavior, FEC officials highlighted two other areas of concern for which it has developed legislative recommendations: (1) the fraudulent misrepresentation of campaign authority by individuals who are not candidates, agents of candidates, or employees of a campaign; and (2) the conversion (or theft) of campaign funds by individuals for personal use, such as paying for personal expenses that would exist irrespective of a political committee’s political activities. The FEC usually submits legislative recommendations to Congress on an annual basis; in December 2018, the FEC unanimously approved and submitted 11 legislative recommendations to Congress.

Through our literature review and interviews with subject-matter specialists on campaign finance from selected organizations, we identified challenges, and learned of varying perspectives, related to the FEC's administration and enforcement of campaign finance requirements in such areas as (1) timeliness of updating guidance and regulations; (2) enforcement of campaign finance laws; and (3) the completeness of FEC data for enforcement, research, and public transparency.<sup>97</sup>

**Timeliness of updating guidance and regulations.** Some sources identified the timeliness of FEC updates to guidance and regulations to address changes in the law and technology use as a challenge. For example, various sources noted that the FEC has not issued any new disclosure requirements for corporations since the Supreme Court's 2010 ruling in *Citizens United v. FEC*. According to one source, despite the Supreme Court's emphasis on the importance of disclosure, particularly with respect to corporate contributions, the FEC has not issued disclosure rules that take account of the increase in corporate contributions, including those from incorporated 501(c)(4) organizations. Some literature and organizations also stated that federal law and FEC regulations have not kept pace with changes in use of technology, such as the rise of political advertising on the internet, which we discuss later in this report.

**Enforcement of campaign finance laws.** Literature and organizations identified several challenges related to the FEC's enforcement of campaign finance laws, including some related to the structure of the Commission, and others related to FEC's ability to audit political committees. FECA established the FEC as a six-member body, where no more than three members from one political party may serve as commissioners, and at least four votes are required to advance rulemaking and enforcement actions.<sup>98</sup> However, some literature and organizations pointed out that increased ideological disagreements among the evenly-split Commission over the past decade have stalled or limited the FEC's ability to obtain four affirmative votes. For instance, some literature and organizations stated that the FEC's structure and ideological disagreements among commissioners have resulted in an increasing number of split, or deadlocked, votes related to rulemaking, advisory opinions, and enforcement actions.

Literature and organizations provided differing views on such deadlocks. Some literature and organizations stated that, as a result of increasing deadlocks, the total amount of fines imposed for campaign finance violations has dropped; the processing of enforcement cases has slowed; and alternative dispute resolutions have taken longer to assign. For example, according to one source, in the 8 years from 2001 through 2008, the FEC assessed an average of \$2.66 million in civil fines per year; over the next 8 years, from 2009 through 2016, the average was \$561,030 in fines per year.<sup>99</sup> As a result of fewer civil fines in recent years, the limited risk of enforcement action may not deter candidates from noncompliant activities, such as coordinating with "independent" spenders, according to one source. However, some literature we reviewed and organizations we interviewed argued that data on split or deadlocked votes can be

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<sup>97</sup>To address questions related to perspectives on key aspects of the campaign finance framework, we performed a literature review of scholarly publications, government reports, and publications by nonprofits and think tanks from 2016 through 2018, and conducted nine interviews with subject-matter specialists on campaign finance issues from a nongeneralizable sample of research, advocacy, and practitioner organizations, selected to represent a range of views about campaign finance regulation. For a more detailed discussion of our scope and methodology, see enclosure I.

<sup>98</sup>See 52 U.S.C. § 30106.

<sup>99</sup>Potter, Trevor, "Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission's Arguable Inability to Effectively Regulate Money in American Elections," *Administrative Law Review*, Spring 2017, Vol. 69, Issue 2, p. 447-466.

misunderstood or misleading. For example, in the view of some sources, deadlocked votes may indicate that the Commission is carefully considering what the law does and does not prohibit. Similarly, some organizations stated that the Commission's structure was designed to prevent political bias and the Commission is functioning as designed.

Another enforcement challenge identified in literature we reviewed is that the FEC currently does not have the authority to conduct random audits. Audits of political committees, other than those of publicly funded presidential candidates, are only permitted for cause, that is, when the committee appears not to have met the threshold requirements for substantial compliance with FECA.<sup>100</sup> In the view of these sources, the ability to conduct random audits could serve as a deterrent for would-be violators.

**Completeness of FEC data for enforcement, research, and public transparency.** Some literature and one organization stated that FEC's campaign finance data from required filings is not always complete, specific, or consistently reported, making it difficult to analyze these data to uncover possible violations and describe various trends in campaign finance activities. For example, representatives from one organization told us that incomplete reported campaign finance data (e.g., missing addresses for contributors and independent groups) makes it difficult to discern whether there are connections among what are supposed to be independent groups, such as Super PACs and certain 501(c) organizations, and candidates' campaign committees (e.g., whether the same individual may be participating in various entities' political activities).

Additionally, some sources noted that although the FEC records certain information about campaign contributions and contributors, it is difficult for researchers to identify the number of unique individual contributors because there is no unique identifier assigned to individual contributors. For example, according to one source, some contributors may have multiple occupations or residential or business addresses. These sources stated that not having a unique identifier assigned to contributors makes it difficult for researchers to identify individual contributors and their demographic characteristics to analyze donor occupation or industry and other trends, such as the number of individuals who have made contributions, how large those contributions are, and how often or for how long donors have made contributions. In addition, representatives of one organization stated that some groups, such as some Super PACs, that wish to keep the identity of their donors anonymous intentionally file reports after the reporting deadline for an election, so contributions and expenditures are not public until after the election. The representatives stated that the reporting deadlines were established in 1976 and asked why the requirements could not be updated to require reporting on a more ongoing basis (e.g., when or shortly after the contribution or expenditure occurs) so the public has this information ahead of elections.

Although some sources identified areas for improving FEC data, several of the organizations we interviewed reported that the FEC has provided comprehensive data on contributions and expenditures that have been informative for federal oversight, the public, researchers, and political campaigns. For example, some of the organizations stated that FEC's campaign finance data assist federal agencies in detecting actions prohibited under federal law and assist the public in identifying undue influence, such as elected representatives who may be acting in the interests of their donors rather than their constituents. Representatives of some organizations also stated that the FEC publishes reported campaign finance data online in a timely manner, and FEC staff are knowledgeable about the data and responsive to questions.

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<sup>100</sup>52 U.S.C. § 30111(b).

## Department of Justice

### How does DOJ identify, investigate, and prosecute potential campaign finance violations?

According to DOJ officials, the department and its components generally identify matters involving FECA violations through referrals from political campaigns, media reports, and during investigations related to other criminal matters (e.g., mail and wire fraud schemes) not directly involving the violation of campaign finance laws. As the primary investigative agency of the federal government, within DOJ, the Federal Bureau of Investigation (FBI) has the authority and responsibility to investigate all violations of federal law (including potential criminal violations of FECA) that are not exclusively assigned to another federal agency.<sup>101</sup>

DOJ and FEC have parallel jurisdiction over FECA violations. DOJ is responsible for prosecuting criminal violations of FECA. The FEC's exclusive jurisdiction over civil enforcement does not supplant DOJ's jurisdiction over criminal enforcement. Therefore, DOJ may bring criminal campaign finance prosecutions independent of whether the FEC formally refers a case to DOJ that it has investigated and believes involves potential criminal FECA violations. At the same time, DOJ cannot waive the FEC's jurisdiction over civil FECA violations.

In instances when an individual or organization is suspected of criminally violating FECA, DOJ's investigative and prosecutorial components must generally consult with DOJ's Public Integrity Section within the Criminal Division to<sup>102</sup>

- conduct any inquiry or preliminary investigation in a matter involving a possible campaign financing offense (including Title 18 offenses);<sup>103</sup>
- issue a subpoena or search warrant in connection with a campaign financing matter;
- present evidence involving a campaign financing matter to a grand jury;
- file a criminal charge involving a campaign financing crime; or
- present an indictment to a grand jury that charges a campaign financing crime.

The Public Integrity Section oversees the federal prosecution of campaign finance and other election crimes, and assists FBI field offices and U.S. Attorneys' Offices in the investigation and prosecution of FECA violations. This assistance includes the predating of campaign finance allegations, structuring investigations, and drafting indictments and other pleadings. The Section's attorneys also prosecute selected cases against federal, state, and local officials. According to Public Integrity Section officials, because of the complexity of the area for criminal prosecutions, U.S. Attorneys' Offices must consult the Section before beginning criminal

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<sup>101</sup>From an investigative perspective, the FBI does not solely focus on campaign finance violations because the bureau's efforts involve a spectrum of threats with such violations falling under the broader umbrella of public corruption, according to FBI officials.

<sup>102</sup>According to DOJ officials, in most foreign money cases, the department's investigative and prosecutorial components must consult with the DOJ National Security Division.

<sup>103</sup>For example, FECA criminal violations may be prosecuted under the false statements statute, 18 U.S.C. § 1001, and the false records statute, 18 U.S.C. § 1519.



investigations or prosecutions of campaign finance activities.<sup>104</sup> In addition, according to these officials, the Section has discretion to require more or fewer consults or particular investigative steps, as well as discretion on charging decisions, depending on the circumstances.

#### What are the outcomes of DOJ investigations and prosecutions?

Federal campaign finance violations are subject to three types of enforcement—(1) criminal prosecution by DOJ as felonies either under FECA; federal criminal statutes addressing fraud, obstruction, and false statements;<sup>105</sup> or Title 26 of the U.S. Code;<sup>106</sup> (2) criminal prosecution by DOJ as misdemeanors under FECA; and (3) civil enforcement by the FEC.<sup>107</sup> FECA's criminal penalties apply to violations involving the making, receiving, or reporting of a contribution, donation, or expenditure.<sup>108</sup> DOJ's guidance for federal prosecution of election offenses lays out the following elements that constitute a criminal violation of FECA, and associated penalties:<sup>109</sup>

- **Aggregate value.** For most FECA offenses to be eligible for criminal penalties, the contributions or expenditures at issue must aggregate to \$2,000 or more in a calendar year.
- **Intent.** FECA violations become potential crimes when they are committed knowingly and willfully by offenders who acted with knowledge that some part of their course of conduct was against the law. According to DOJ guidance, while this is at times a difficult element to satisfy, examples of evidence that has been used to prove knowing and willful violations include an attempt to disguise or conceal financial activity regulated by FECA and proof that the offender is active in political fundraising and is personally well-versed in federal campaign financing laws.
- **Applicable penalties.** Violations aggregating \$2,000 or more during a calendar year are misdemeanors and subject to a fine (up to \$100,000 for each offense by an individual and up to \$200,000 for each offense by an organization), or imprisonment for not more than 1 year, or both. Violations aggregating \$25,000 or more per calendar year are felonies and subject to a fine (up to \$250,000 for each offense by an individual and up to \$500,000 for each offense by an organization), or imprisoned for not more than five years, or both.<sup>110</sup>

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<sup>104</sup>Justice Manual 9-85.210.

<sup>105</sup>18 U.S.C. § 1341 (frauds and swindles); 18 U.S.C. § 371 (conspiracy to commit offense or to defraud U.S.); 18 U.S.C. § 1343 (fraud by wire, radio, or television); 18 U.S.C. § 1519 (destruction, alteration, or falsification of records in federal investigations and bankruptcy); and 18 U.S.C. § 1001 (statements or entries generally).

<sup>106</sup>In addition to criminal violations of the tax code, DOJ has enforcement authority over criminal violations involving publicly funded presidential campaigns. See 26 U.S.C. ch. 95 (Presidential Election Campaign Fund), ch. 96 (Presidential Primary Matching Payment Account). According to DOJ officials, Title 26 tax offenses are overseen by the department's Tax Division.

<sup>107</sup>FECA creates a statutory distinction between non-knowing and non-willful violations involving any amount, which are subject to the exclusive jurisdiction of the FEC, and knowing and willful violations involving \$2,000 or more within a calendar year, which are subject to both civil enforcement proceedings by the FEC and criminal prosecution by DOJ. 52 U.S.C. § 30109. Criminal prosecution under FECA can be pursued before civil and administrative remedies are exhausted.

<sup>108</sup>52 U.S.C. § 30109(d).

<sup>109</sup>Department of Justice, *Federal Prosecution of Election Offenses*, Eighth Edition, December 2017.

<sup>110</sup>There are different thresholds for knowing and willful violations of FECA provisions regarding campaign misrepresentations and certain coerced contributions, and a different threshold and penalty for violations regarding

If an alleged action involving campaign finance was intended to disrupt and impede the function of the FEC or other federal agency, DOJ also may pursue the matter as a conspiracy to defraud the United States.<sup>111</sup> Additionally, DOJ may charge false statements made in records of a federal political entity, such as a political committee, or in reports to the FEC.<sup>112</sup> According to DOJ guidance, the federal mail and wire fraud statutes, which criminalize the use of the mail or interstate wires to further a scheme or artifice to defraud, can provide an additional basis for prosecuting conduct that also violates FECA.<sup>113</sup> Further, DOJ guidance states that conduct in violation of state campaign finance laws, although not subject to FECA's provisions, may violate other federal laws, like the mail and wire fraud statutes. Federal prosecutors may consider these statutes when evaluating possible charges for unlawful campaign finance conduct.

During fiscal years 2010 through 2017,<sup>114</sup> DOJ filed 23 FECA-related charges in cases prosecuted by the Public Integrity Section.<sup>115</sup> Additionally, DOJ filed 10 FECA-related charges in cases prosecuted by U.S. Attorneys during fiscal years 2015 through 2017. These charges included statutes such as 52 U.S.C. § 30122 (contributions in the name of another prohibited), 52 U.S.C. § 30116 (limitation on contributions and expenditures) and 52 U.S.C. § 30121 (contributions and donations by foreign nationals).<sup>116</sup>

#### How has DOJ enforced the foreign national prohibition?

According to FBI officials, the underlying investigation for campaign finance-related matters can be similar to other types of financial-related investigations. These officials stated that campaign finance violations can occur by the same mechanisms used in financial fraud, despite differing motives and actors. Officials from the Executive Office for U.S. Attorneys and the FBI stated that, given the strict prohibition on foreign money in campaigns at all levels, foreign nationals may use different mechanisms to conceal funding—which generally focus on funneling the foreign money through a U.S. citizen or entity that can make a legal contribution. The FBI's Foreign Influence Task Force assists the bureau in its efforts to identify and combat foreign influence operations—specifically, threats originating in foreign countries that target U.S.

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conduit contributions. For example, for conduit contributions, a person that knowingly and willfully commits a violation involving an amount aggregating more than \$10,000 shall be imprisoned for not more than 2 years or an amount aggregating \$25,000 or more for not more than 5 years, fined not less than 300 percent of the amount involved and not more than the greater of \$50,000 or 1,000 percent of the amount involved, or both. 52 U.S.C. § 30109(d).

<sup>111</sup>18 U.S.C. § 371.

<sup>112</sup>18 U.S.C. § 1519.

<sup>113</sup>Department of Justice, *Federal Prosecution of Election Offenses*, Eighth Edition, December 2017. 18 U.S.C. §§ 1341, 1343.

<sup>114</sup>We selected the fiscal year 2010 through 2017 time frame to capture information on DOJ's campaign finance enforcement efforts across multiple presidential administrations. In addition, data for charges filed by U.S. Attorneys' Offices were the most complete for fiscal years 2015 through 2017 at the time of our review.

<sup>115</sup>A case is an activity that has resulted in the filing of a complaint, indictment, or information in court.

<sup>116</sup>FECA charges under Title 52 were previously classified under Title 2, prior to reclassification in September 2014. The total number of FECA-related charges filed by the Public Integrity Section for fiscal years 2010 through 2017 includes charges filed under both Title 2 and Title 52. Officials from the Public Integrity Section also stated that a number of campaign finance investigations and prosecutions were jointly handled by the Section and U.S. Attorney's offices, so the total number of FECA-related charges filed by the Section during fiscal years 2010 through 2017 (23), and by U.S. Attorneys during fiscal years 2015 through 2017 (10) includes charges that were jointly filed by both DOJ components during these time periods.

democratic institutions with a specific focus on the U.S. electoral process.<sup>117</sup> FBI officials stated that the Foreign Influence Task Force is aware of federal campaign finance laws and, as appropriate, disseminates information regarding potential violations to the appropriate FBI field offices, which then consult with the Public Integrity Section, as appropriate.

What challenges have DOJ officials identified facing when investigating and prosecuting potential campaign finance violations?

DOJ officials identified several challenges related to investigating and prosecuting potential campaign finance violations, such as identifying violations; establishing improper coordination between campaigns and independent expenditure-only groups; identifying donors to tax-exempt groups for law enforcement purposes; and proving criminal intent.

- **Identifying violations.** DOJ officials stated that identifying campaign finance violations is difficult because they are often concealed. For example, they stated that in a typical fraud case, the result of the fraud is clearly visible where the criminal conduct is reported by the victims. In campaign finance cases, the violations may not be readily apparent because, if the concealment is successful, there is no complaining victim or public awareness. According to DOJ officials, most campaign finance offenses involve false reporting by political committees to the FEC. For example, in certain cases, referred to as conduit contribution violations, the goal of the offender is to contribute in another individual's name to hide one's identity or exceed contribution limits. An individual may contribute his or her money through 50 friends or associates, who may or may not be knowing accomplices. According to DOJ officials, if the individual is successful, a campaign committee receiving these contributions does not know that one individual has contributed money in 50 other individuals' names, and reports the names of the 50 contributors. If a knowing friend or associate does not complain to the FEC or DOJ, nothing appears to be unusual about those contributions in the view of the FEC, the campaign, the public, or DOJ.
- **Coordination between campaigns and independent expenditure-only groups, such as Super PACs.** DOJ officials have stated that bringing criminal charges for potential coordination between campaigns and independent expenditure-only groups is another challenge. The officials explained that these cases require a cooperating witness who is an insider at the given campaign or Super PAC, for example. The officials stated that those witnesses are often involved in the offense and are therefore unlikely to come forward. In 2013 testimony, the then Acting Assistant Attorney General for DOJ's Criminal Division stated that DOJ faced significant challenges in seeking to establish, in a criminal case, improper coordination between a Super PAC and a campaign or official.<sup>118</sup> Specifically, she stated that the FEC had been unable to reach agreement or declined to take administrative action, such as through advisory opinions, regulations, and matters under review, in several instances of possible coordination. Examples of such instances include: a candidate's mother running a Super PAC expressly supporting the candidacy; sharing of office facilities

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<sup>117</sup>The Foreign Influence Task Force is structured as a multi-division task force, including representation from FBI's Criminal Investigative Division's Public Corruption Unit and its Public Corruption and Civil Rights Intelligence Unit. The Public Corruption Unit is generally responsible for managing any investigations involving FECA, and personnel in the Public Corruption and Civil Rights Intelligence Unit analyze national trends in election crimes to include campaign finance violations.

<sup>118</sup>Statement of Mythili Raman, Acting Assistant Attorney General, DOJ Criminal Division, before the Subcommittee on Crime and Terrorism, Committee on the Judiciary, U.S. Senate, at a hearing entitled, "Current Issues in Campaign Finance Law Enforcement," presented April 9, 2013.

by political committees and firms providing services to candidates; and candidates themselves soliciting contributions to the supposedly independent committees, among other instances. She explained that, as a result, it would be rare that the evidence could give rise to proof beyond a reasonable doubt of a criminal intent to illegally coordinate through contribution to, or expenditures by, a Super PAC. DOJ officials we interviewed explained that because there is not a consensus position from the FEC on these, and other, factual scenarios, they stated that proving willful intent in such cases can be difficult.

- **Identifying donors to tax-exempt groups for law enforcement purposes.** A senior DOJ official stated that campaign finance cases are usually about finding the source of the money involved in potential violations and, for potential coordination violations, identifying who is coordinating donations. This official stated that while criminal investigators can readily identify donors to political committees in public filings to the FEC, criminal investigators face challenges with identifying the original source of funds in cases involving certain 501(c) groups that make independent expenditures. Certain classes of 501(c) organizations, such as 501(c)(4) social welfare organizations, 501(c)(5) labor organizations, and 501(c)(6) trade associations, are required to report their donors to IRS as part of their information returns;<sup>119</sup> however, the names and addresses of those donors are not subject to public disclosure,<sup>120</sup> and DOJ officials stated that the department cannot obtain donor information reported to IRS without a court order.<sup>121</sup> They stated that this makes it difficult to establish a case as a coordination crime or foreign contribution crime.<sup>122</sup> In 2013, the then Acting Assistant Attorney General identified similar challenges in her testimony before Congress. She stated that because disclosure of donors by these classes of 501(c) organizations occurs only through tax returns, it is possible for one of these organizations—one that is created during an election year and spend millions of dollars engaging in campaign activities—to ultimately disclose its donors and activities to the IRS for the first

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<sup>119</sup>IRS regulations provide that organizations required to file an annual information return generally must provide the names and addresses of persons who contribute \$5,000 or more during the taxable year. 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). In 2018, IRS issued Revenue Procedure 2018-38, stating that certain 501(c) organizations—including 501(c)(4) social welfare organizations, 501(c)(5) labor organizations, and 501(c)(6) trade associations among others—are no longer required to report the names and addresses of the donors on Schedule B of the tax return, but they must continue to collect and record this information and make it available to IRS upon request, when needed for tax administration. On July 30, 2019, in *Bullock v. IRS*, a district court set aside this IRS Revenue Procedure. The court found the Revenue Procedure to be a legislative rule and set it aside because the Treasury Department and IRS did not follow the required notice and public comment procedures for a legislative rule before promulgating it. *Bullock v. IRS*, 401 F. Supp. 3d 1144 (D. Mont. 2019). On September 10, 2019, IRS published a proposed rule that would require only 501(c)(3) and 527 organizations to report the names and addresses of certain donors on their Forms 990. 501(c)(4), (5), and (6) organizations, among others, would not be required to report such information. 84 Fed. Reg. 47,447 (Sept. 10, 2019).

<sup>120</sup>26 U.S.C. § 6104(b), (d).

<sup>121</sup>See 26 U.S.C. § 6103(i).

<sup>122</sup>For example, according to DOJ officials, for coordination crimes, one piece of evidence that would suggest coordination is if members of an official campaign are contributing to tax-exempt entities that are making purportedly uncoordinated independent expenditures. Without information on the identity of donors to these entities, DOJ officials cannot establish the circumstantial link that someone from the campaign is funding tax-exempt organizations. Additionally, without DOJ knowing the identity of donors to certain tax-exempt organizations, it is difficult to establish whether the donors are foreign nationals, or whether foreign money is being passed through domestic conduits.

time a year or more after the election. This makes it difficult for DOJ investigators to obtain information in a timely manner.<sup>123</sup>

- **Proving criminal intent.** According to DOJ officials, proving intent in campaign finance cases is the most difficult element, where criminal violations of FECA require proof that the violation was committed knowingly and willfully. DOJ officials stated that a specific issue that can make campaign finance violations difficult to prosecute is that people may be genuinely unaware of the rules, and what may appear to be a knowing violation may in fact be a lack of knowledge or information.

What challenges have literature and selected organizations reported regarding DOJ's investigation and prosecution of campaign finance laws?

Our literature review and interviews identified challenges facing DOJ in its efforts to investigate and prosecute campaign finance violations similar to those identified by DOJ officials. For example, similar to what we heard from DOJ officials, one source reported that prosecuting violations of federal campaign finance laws is challenging because criminal violations require proof that the violation was committed knowingly and willfully. Additionally, some sources reported that a lack of requirements for disclosing information about the sources of money for organizations, such as 501(c)(4) organizations or limited liability companies who contribute to political committees, limits DOJ's ability to detect and prosecute prohibited contributions and expenditures, including those from foreign entities.

**Coordination between FEC and DOJ**

To what extent, if any, do the FEC and DOJ have guidance and policies to coordinate their efforts to enforce campaign finance violations?

Both DOJ and the FEC have established guidance and policies which address how to coordinate their respective activities to enforce campaign finance violations. For example, FEC's enforcement manual<sup>124</sup> and other policies<sup>125</sup> outline the Commission's relationship with DOJ in the enforcement of FECA, including when to refer potential criminal violations to DOJ,<sup>126</sup> and procedures for processing requests for information and records submitted by DOJ. Further, DOJ's Public Integrity Section has issued internal guidance to assist federal prosecutors in handling federal election offenses, including campaign finance violations.<sup>127</sup> The guidance identifies DOJ's recommended practices for coordinating with the FEC in addressing campaign

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<sup>123</sup>According to DOJ officials, the DOJ Tax Division determines which cases to pursue or refer to the U.S. Attorneys' Offices involving tax-exempt organizations and formally oversees any tax-focused offenses charged under Title 26 or otherwise.

<sup>124</sup>Office of General Counsel Enforcement Manual, Federal Election Commission, June 2013. FEC officials stated that the enforcement manual has not been approved by the Commission; however, FEC continues to use the manual as supplemental guidance in its enforcement efforts.

<sup>125</sup>FEC Memorandum, *Request for Records or Information from Federal, State, and Local Government Entities*, June 14, 2012.

<sup>126</sup>52 U.S.C. § 30109(c). FECA states that whenever the Commission refers a violation to DOJ, the DOJ shall report to the Commission any action taken by DOJ regarding the violation. During calendar years 2002 through 2017, FEC referred a total of six matters to DOJ for possible criminal investigation and prosecution, according to FEC data.

<sup>127</sup>Department of Justice, *Federal Prosecution of Election Offenses*, Eighth Edition, December 2017.

finance violations, including identifying an FEC resource that has been helpful in developing DOJ's campaign finance cases and specifying that inquiries to the FEC should be routed through the Public Integrity Section. The guidance also notes that such practices have led to the development of good relationships between DOJ and FEC personnel, assisted prosecutors and agents in quickly obtaining the information they need from the FEC, and reduced confusion between the agencies—increasing the likelihood of a positive response from the Commission.<sup>128</sup>

While these coordination activities are viewed positively by DOJ and FEC officials, some of the agencies' coordination activities are not reflected in the jointly signed Memorandum of Understanding (MOU)—entered into in 1977—which sets forth general guidelines for referring potential FECA violations to each other, as well as outlining their respective law enforcement jurisdictions and responsibilities.<sup>129</sup> For example, one of the FEC commissioners stated in follow-up responses to a congressional hearing that some coordination activities are not addressed by the MOU.<sup>130</sup> These activities include determining whether it is possible or advisable for DOJ to share investigative information with the FEC, the timing of certain investigative steps (e.g. the taking of depositions), whether to grant immunity to alleged violators, and whether to consider a global settlement.<sup>131</sup> FEC and DOJ officials stated that such activities are sometimes “ad hoc” and occur on a case-by-case basis since they are not documented in the MOU or other documents.

In addition, DOJ's guidance for prosecuting federal election offenses states that the MOU “no longer reflects current congressional intent or Department policy.”<sup>132</sup> DOJ officials told us that the department abrogated the MOU following the enactment of BCRA. As a result, officials said DOJ no longer considers the agreement to be binding policy, though they continue to follow the “spirit” of the agreement in coordinating with the FEC. FEC officials, however, stated that they consider the MOU to be in effect and that it is the current guidance used to coordinate the two agencies' enforcement efforts regarding violations of campaign finance laws. The MOU has not been updated since 1977, and while the FEC and DOJ made efforts to update the MOU in 2003, 2007, and 2012, the agencies were not able to agree on proposed revisions.

DOJ and FEC officials provided differing perspectives on the need to update the MOU or develop or update other guidance addressing coordination between the two agencies. For example, in July 2019, the FEC commissioners told us that they did not identify a need to update the MOU because, in their view, the current MOU meets the agency's enforcement needs. They also noted that there are a limited number of staff from both agencies who coordinate with each other and understand how that coordination should work. However, DOJ

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<sup>128</sup>During calendar years 2002 through 2017, DOJ referred a total of 15 matters to FEC for possible civil enforcement, according to FEC data.

<sup>129</sup>Under 52 U.S.C. 30109(a)(5)(C), if the Commission “determines that there is probable cause to believe that a knowing and willful violation has occurred, the Commission may refer such apparent violation to the Attorney General of the United States.” Pursuant to that statute, in 1977, the Commission and the DOJ entered into a MOU. 43 Fed. Reg. 5441 (Feb. 8, 1978). The MOU is not intended to confer any procedural or substantive rights on any person in any manner before DOJ, FEC, or any court or federal agency.

<sup>130</sup>This information reflects the written responses provided by the FEC to the U.S. Senate Committee on Rules and Administration, *Hearing on Nominations to the Federal Election Commission and Responses to Post-Hearing Questions*, July 6, 2007.

<sup>131</sup>A global settlement is where there are multiple parties or multiple cases and all the parties reach a settlement that fully and completely resolves all outstanding disputes.

<sup>132</sup>*Federal Prosecution of Election Offenses*, page 170.

officials stated that an updated MOU would have a positive effect, reflecting the good cooperation and working relationship between the two agencies.

We have previously reported that the implementation of collaborative mechanisms can help agencies achieve their joint objectives.<sup>133</sup> FEC and DOJ leadership could benefit from engaging such a mechanism in the form of an updated MOU, or a written agreement. Written agreements can also incorporate any consensus reached among the agencies regarding their coordination activity's leadership, accountability, roles and responsibilities, or resources.

Further, *Standards for Internal Controls in the Federal Government* states that periodic review of policies, procedures, and related control activities should occur to determine their continued relevance and effectiveness in achieving identified objectives or addressing related risks. In addition, documentation provides a means to retain organizational knowledge and mitigate the risk of having that knowledge limited to a few personnel.<sup>134</sup> Although DOJ and FEC officials noted that coordination between the two agencies works well, they provided varying perspectives on the need to document their coordination mechanisms. While the limited number of staff that coordinate between FEC and DOJ indicate that they are working together, without documentation of those mechanisms consistent with internal control standards, the agencies risk having knowledge limited just to those few personnel who could change positions or leave the agencies, taking that knowledge with them. Reviewing and updating, as appropriate, coordination practices between the FEC and DOJ, to include the MOU or other guidance, could help the agencies ensure that written guidance reflects current practices between the agencies and better ensure that coordination between FEC and DOJ occurs consistently and effectively when enforcing campaign finance law.

### **Internal Revenue Service**

#### **How does the IRS identify non-compliant tax-exempt organizations, and what are the outcomes of the agency's enforcement actions?**

According to IRS documents, within the IRS's Tax Exempt and Government Entities Division, Exempt Organizations is the function with oversight responsibility for organizations seeking exempt status and it also examines exempt organizations' operations and information returns, including the Form 990-series returns. The IRS may conduct an examination to ensure that (1) the organization is organized and operates in accordance with its exempt purpose(s); (2) the organization's information return is complete, correct, and contains all public information required; and (3) if the organization is liable for other taxes, the organization has paid the correct amount of tax. According to IRS officials, during an examination, potential noncompliance related to political campaign intervention is evaluated using a facts and circumstances analysis. If the IRS determines noncompliance, the IRS may revoke the organization's tax-exempt status or assess excise taxes for certain types of violations. In addition, in certain circumstances, the IRS can request the Department of Justice to bring an action to enjoin political expenditures by a 501(c)(3) organization under the Internal Revenue Code.<sup>135</sup>

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<sup>133</sup>GAO, *Managing for Results: Key Consideration for Implementing Interagency Collaborative Mechanisms*, [GAO-12-1022](#) (Washington, D.C.: Sept. 27, 2012).

<sup>134</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sept. 2014).

<sup>135</sup>26 U.S.C. § 7409(a).

According to IRS officials, the agency identifies returns for potential examinations of tax-exempt organizations' violations of the standard for political campaign intervention<sup>136</sup> through sources such as data-driven analytics, referrals, and compliance strategies.<sup>137</sup> The officials added that determining the permissible level of political campaign intervention depends on the organization's tax-exempt status. For example, under the Internal Revenue Code, 501(c)(3) organizations are subject to a strict prohibition against political campaign intervention, where they may not participate in or intervene in any political campaign on behalf of or in opposition to any candidate for public office.<sup>138</sup> These organizations may participate in nonpartisan activities that do not support or oppose candidates. In contrast, a 501(c)(4) organization may engage in some political campaign intervention, so long as it continues to be primarily engaged in activities that promote social welfare.<sup>139</sup> (See enclosure VI for some of the types of tax-exempt organizations and rules for political campaign intervention).

During fiscal years 2010 through 2017, the IRS conducted and closed 226 examinations related to tax-exempt organizations' non-compliant political campaign intervention.<sup>140</sup> A majority (97 percent—219 examinations) of these examinations were identified through the IRS's data-driven analytics efforts (57 percent—129 examinations) and referrals (40 percent—90 examinations) from other entities (e.g., other federal agencies) and 91 percent (205 examinations) focused on 501(c)(3) organizations. In addition, during this period, a majority of the examinations did not result in the IRS revoking or terminating an organization's exempt status, or imposing an excise tax for an organization's political campaign intervention. For example, IRS reported that for 127 (56 percent) of the 226 examinations conducted, an organization was issued a written advisory and there was no change to the organization's tax-exempt status.<sup>141</sup> For 77 (34 percent) of the 226 examinations conducted by the IRS there was no change to an organization's exempt status or tax liability, and there were no issues for which a written advisory was warranted.<sup>142</sup>

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<sup>136</sup>Political campaign intervention includes any and all activities that favor or oppose one or more candidates for public office. See, e.g., 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).

<sup>137</sup>Based on IRS documents, data-driven analytics use data, models, and queries to identify information returns (Form 990) for potential noncompliance. Different weights are assigned to basic information return characteristics. The weights are added together to obtain a composite score for each return, which are then ranked in numerical sequence; the higher the score the greater probability of an issue warranting examination. Referrals are complaints of exempt organizations' noncompliance made by third parties, including the public and other parts of IRS. Compliance strategies, approved by the agency's Tax Exempt and Government Entities Division's Compliance Governance Board, identify, prioritize and allocate resources to address issues that are considered to be priorities within the division's filing population.

<sup>138</sup>See 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(3)-1(b)(3)(ii).

<sup>139</sup>See 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).

<sup>140</sup>Based on IRS guidance, the objectives of an examination are to ensure that the organization is organized and operated in accordance with its exempt purpose(s); IRS Form 990 (Return of Organization Exempt From Income Tax) is complete, correct, and contains all public information required; and if the organization is liable for other taxes, the organization has paid the correct amount of tax.

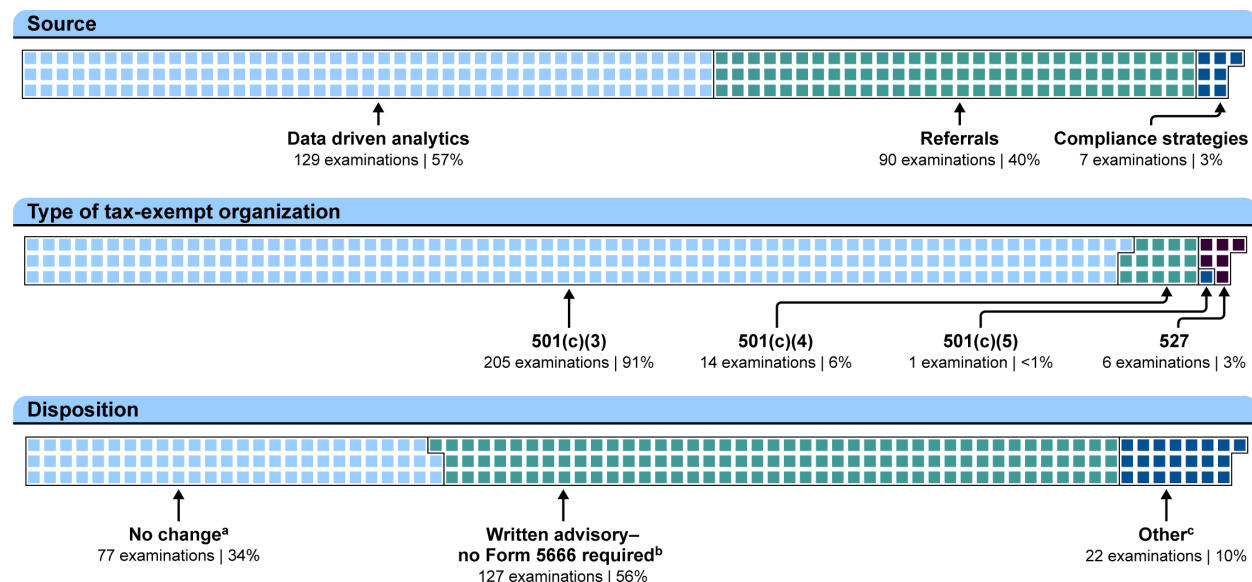
<sup>141</sup>Generally, a written advisory is appropriate when there are: (1) some aspect of an organization's activities or operations, if enlarged or ongoing, may jeopardize the organization's exempt status, such as a proposed expansion of an unrelated business income producing activity that could become a primary purpose for an Internal Revenue Code 501(c)(3) organization; (2) changes to tax addressed in separate reports; (3) tax change issues that are below tolerances; (4) identified delinquencies, imposition of penalties, and whether reasonable cause was established; or (5) other compliance issues (not including status or tax change issues) which are appropriate to call to the attention of the organization. Internal Revenue Manual, 4.75.15.4(3).

<sup>142</sup>We requested data on closed examinations from IRS beginning in fiscal year 2010 because the Supreme Court and federal appeals court rulings in *Citizens United v. FEC* and *SpeechNow.org v. FEC* changed the campaign



Figure 10 provides a more detailed description of the sources and dispositions of the closed examinations as well as the types of tax-exempt organizations examined during fiscal years 2010 through 2017.

**Figure 10: Internal Revenue Service (IRS) Closed Examinations, Tax-Exempt Organizations' Compliance (In Connection with Political Campaign Intervention), Fiscal Years 2010 through 2017**



Source: GAO analysis of Internal Revenue Service data. | GAO-20-66R

<sup>a</sup>The “No change” code is used to close an examination with no changes or adjustments (all significant return information is complete and correct) or when unable to complete a church examination within the two-year period provided by 26 U.S.C. § 7611(c)(1)(A).

<sup>b</sup>The “Written advisory—no Form 5666 required” code is used to close examinations that issue written advisories. Advisories can include reference to secured delinquent returns, changes to related returns, miscellaneous civil penalties imposed and non-compliant issues of the organization. Form 5666 is the Tax Exempt Government Entities Referral Information Report.

<sup>c</sup>The “other” category includes: (1) Delinquent Return Secured, (2) Delinquent Related Return Secured, (3) Change to Related Return, (4) Revocation – Agreed, (5) Written Advisory-Form 5666 Required, (6) Regulatory/Revenue, (7) Unagreed Protest to Appeals, (8) Unagreed – Without Protest, (9) Termination, (10) Unagreed Revocation – Without Protest.

### What is IRS’s role in enforcing FECA’s foreign national prohibition?

According to IRS officials, the IRS administers and enforces federal tax law and it plays no role in enforcing FECA’s foreign national prohibition.<sup>143</sup> IRS officials added that examiners do not review the national origin of sources of donations reported by a tax-exempt organization on the

finance landscape, enabling corporations (including nonprofit corporations) to (1) use their general treasuries to make unlimited independent expenditures and electioneering communications and (2) make unlimited contributions to Super PACs. After these decisions in 2010, corporations, such as tax-exempt social welfare organizations (501(c)(4) organizations) that are incorporated, could make independent expenditures, electioneering communications, and contribute to Super PACs. We recognize that some of the examinations closed in 2010 may include activity prior to this time frame.

<sup>143</sup>Federal tax law does not prohibit foreign donations to tax-exempt organizations.

agency's IRS Form 990-series (Return of Organization Exempt From Income Tax) and do not assess an organization's compliance with FECA provisions during audits.

What challenges have IRS officials identified facing when administering and enforcing requirements related to tax-exempt organizations and political campaign intervention?

IRS officials we interviewed identified facing various challenges when administering and enforcing requirements related to tax-exempt organizations and political campaign intervention. These officials noted questions related to the clarity of certain aspects of statute and regulation governing tax-exempt organizations and political campaign intervention. Specifically, they identified challenges related to obtaining complete, timely, and accurate information and navigating statutes and regulations in monitoring compliance, as discussed below.

- **Obtaining complete and accurate information.** According to IRS officials, some tax-exempt organizations are not forthcoming or complete in reporting information on their information returns, but this is a challenge they stated they face from filers in general (e.g., individuals not reporting their full income) and is not specific to tax-exempt organizations. IRS officials also told us that the information return for tax-exempt organizations, or Form 990, is fairly detailed, and accurate completion of the form by filers partly depends on how completely the filing organization understands the terms and questions in the form. For example, the organization should understand the difference between “lobbying” (attempting to influence legislation) and “political campaign activities” (directly or indirectly participating in, or intervening in, any political campaign on behalf of or in opposition to any candidate for public office). IRS officials told us that incomplete and inaccurate information reported on information returns presents a challenge because, in general, tax administration consists of obtaining information from filers. It is a voluntary compliance system, and filers not fully or accurately reporting information (e.g., the full amount of political campaign activity expenditures) limits the IRS's ability to carry out its basic functions. To help address filers' confusion or misunderstanding of certain terms on the form 990, IRS officials stated that they provide education about political campaign intervention on the IRS website.
- **Navigating statutes and regulations in monitoring compliance.** IRS officials told us that applying certain aspects of statutes and regulations can be challenging in their efforts to monitor exempt organizations' compliance with requirements related to political campaign intervention. For example, they explained that, when determining whether an organization should maintain exempt status under Internal Revenue Code sections 501(c)(3) and 501(c)(4)-(6), IRS examiners apply the law to the facts and circumstances of each case and conduct a qualitative analysis using a set of specified factors to do so.<sup>144</sup> According to IRS officials, the IRS has published a number of revenue rulings on what is political campaign intervention, most recently Revenue Ruling 2007-41.<sup>145</sup> However, some IRS officials told us

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<sup>144</sup>For example, according to IRS guidance relevant to 501(c)(3) organizations, during this facts and circumstances analysis, IRS examiners are to consider a variety of factors to determine whether an organization's communications are considered political campaign intervention, including whether the communication identifies a candidate for public office, expresses approval or disapproval for one or more candidates' positions or actions, is delivered close in time to an election, makes reference to voting or an election, and the communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue, among other factors. See IRS Revenue Ruling 2007-41, Situations 14-16.

<sup>145</sup>IRS Revenue Ruling 2007-41 provides 21 examples illustrating the application of the facts and circumstances analysis to different factual situations relevant to 501(c)(3) organizations (Revenue Ruling 2007-41). According to IRS officials, IRS generally applies the same facts and circumstances analysis in the context of 501(c)(4) organizations. See, e.g., Revenue Ruling 2004-6.

that existing guidance is not sufficiently clear about what constitutes political campaign intervention (e.g., examining a 501(c)(3) organization engaging in issue advocacy near the time of an election may be particularly challenging, as that advocacy can be very close to advocating for a specific candidate).<sup>146</sup>

Additionally, as discussed above, a 501(c)(4) organization may engage in some political campaign intervention as long as it continues to be primarily engaged in activities that promote the social welfare. However, some IRS officials stated that no clear and concise guidance exists regarding the extent to which organizations (other than 501(c)(3) organizations) can participate in political campaign intervention. Furthermore, IRS officials stated that a prohibition in recent appropriations acts limits the IRS's ability to develop or issue new guidance or regulations related to the standard for determining whether an organization is operated exclusively for the promotion of social welfare.<sup>147</sup> IRS officials stated that additional clarification of the law and the ability to issue new regulations and guidance could aid in their efforts to review organizations' compliance with this section of the code.

According to IRS officials, the overarching challenge is that in the absence of "bright line" rules regarding what constitutes political campaign intervention (currently a facts and circumstances analysis), or the extent to which organizations (other than 501(c)(3) organizations) can participate in political campaign intervention, there will always be challenges in applying the law to a particular set of facts.

What challenges have literature and selected organizations reported related to the IRS's administration and enforcement of requirements for tax-exempt organizations and political campaign intervention?

Literature we reviewed and organizations we interviewed identified challenges related to the IRS's administration and enforcement of requirements related to tax-exempt organizations and political campaign intervention in areas such as IRS guidance and enforcement efforts.

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<sup>146</sup>Section 501(c)(3) organizations are prohibited from participating in, or intervening in, any political campaign on behalf of or in opposition to any candidate for public office. In addition, an organization will not qualify under § 501(c)(3) if more than an insubstantial part of its activities is not in furtherance of an exempt purpose. See 26 C.F.R. § 1.501(c)(3)-1(c)(1). Such exempt purposes are religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals. 26 U.S.C. § 501(c)(3).

<sup>147</sup>In 2013, the Treasury Department and IRS proposed a regulation regarding 501(c)(4) organizations, more clearly defining activities that do not further the social welfare. The proposed rule would have replaced the language in the existing regulation – "participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" – with a new term – "candidate-related political activity" – and defined the term with examples of activities that would be considered "candidate-related political activity." In this notice, IRS also requested comments from the public regarding the standard under current regulations that considers a tax-exempt social welfare organization to be operated exclusively for the social welfare if it is "primarily" engaged in activities that promote the common good and general welfare of the people of the community. 78 Fed. Reg. 71,535 (Nov. 29, 2013). IRS officials stated that the agency received over 100,000 public comments on the proposed regulation. However, recent appropriations acts have prohibited IRS from issuing, revising, or finalizing any new regulations or other guidance related to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of 501(c)(4) of the Internal Revenue Code of 1986 (including the proposed regulations published at 78 Fed. Reg. 71,535 (Nov. 29, 2013)). See, e.g., Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. C., title I, § 122, 133 Stat. 2317, 2444 (2019).

**IRS guidance.** Literature we reviewed and organizations we interviewed identified challenges related to IRS’s guidance regarding tax-exempt organizations and political campaign intervention. For example, some literature and organizations noted that it can be challenging for tax-exempt organizations to understand and navigate tax law related to political campaign intervention. These sources noted that the IRS has published guidance materials that have helped inform and clarify requirements for organizations—such as continuing professional education training materials and its 2007 revenue ruling on 501(c)(3) organizations and political campaign intervention—but additional materials could aid organizations’ understanding.<sup>148</sup> In particular, these sources identified the need for more updated guidance on how to consider or define political campaign intervention for 501(c)(3) and 501(c)(4) organizations and on internet communications for tax-exempt organizations, such as what could be considered an issue ad or a political campaign ad.

- For example, with regard to 501(c)(3) organizations, according to some sources, the IRS has not, in its guidance, clarified what constitutes political campaign intervention, which is prohibited for 501(c)(3) organizations, and issue advocacy, which is generally allowed for such organizations. These sources noted that this lack of clarity has caused some confusion for 501(c)(3) organizations attempting to comply with the law. For example, a 501(c)(3) organization that promotes helping the homeless may engage in issue advocacy by encouraging its supporters to fight homelessness and to consider this issue when deciding how to vote. However, the 501(c)(3) organization risks entering into political campaign intervention if it is seen as supporting a particular party or candidate, which may jeopardize its status as a charitable organization under 501(c)(3).<sup>149</sup>
- Some literature and organizations also noted that it can be challenging for organizations to understand IRS guidance regarding the extent to which 501(c)(4) organizations can participate in political campaign intervention because the IRS has not clearly defined aspects of this guidance. More specifically, as mentioned above, under the Internal Revenue Code, organizations that operate “exclusively for the promotion of social welfare” are eligible for 501(c)(4) tax-exempt status. Some literature noted that a Treasury Department regulation regarding 501(c)(4) organizations defines “exclusively” in a lenient manner, by stating that a 501(c)(4) organization may engage in political campaign intervention as long as the organization continues to be primarily engaged in activities that promote the social welfare.<sup>150</sup> In addition, according to some sources, the IRS has not clearly defined what it means to be “primarily engaged” in social welfare activities or, as IRS officials stated above, the extent to which organizations (other than 501(c)(3) organizations) can participate in political campaign intervention.

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<sup>148</sup>IRS Revenue Ruling 2007-41.

<sup>149</sup>As noted earlier, IRS issued Revenue Ruling 2007-41 which is intended to help 501(c)(3) organizations distinguish issue advocacy from political campaign intervention, among other things. The guidance includes 21 examples illustrating the application of the facts and circumstances analysis to different factual situations. Rev. Rul. 2007-41. However, representatives of one organization stated that applying IRS’s guidance can be difficult for nonprofits. They stated that advocacy is a spectrum, and it can be difficult for organizations to figure out where the lines are between issue advocacy and political campaign intervention. They stated that navigating complex campaign finance and related internal revenue statutes, regulations, and guidance to ensure nonprofits are not in violation may require hiring lawyers and accountants that smaller, grassroots nonprofits often cannot afford. In their view, this can deter smaller nonprofits’ advocacy and engagement in the democratic process.

<sup>150</sup>26 C.F.R. § 1.501(c)(4)-1(a)(2)(i). According to IRS officials, the regulatory interpretation of “exclusively” as “primarily” originates from *Better Business Bureau v. United States*, 326 U.S. 279 (1945). See *Contracting Plumbers v. United States*, 488 F.2d 684 (2d Cir. 1973); *Commissioner v. Lake Forest*, 305 F.2d 814 (4th Cir. 1962).

**IRS enforcement efforts.** Some sources identified challenges in IRS's enforcement efforts, particularly related to (1) regulating tax-exempt organizations described in section 501(c) that engage in political campaign intervention; (2) examining exempt organizations to determine whether they are violating regulations; and (3) revoking exempt status of organizations that primarily engage in political campaign intervention. For example, according to some sources, in recent years IRS has conducted more limited enforcement on tax-exempt organizations that engage in political campaign intervention because of prior questions about how IRS was selecting and reviewing certain organizations' exempt status applications based on the organization's name, among other things.<sup>151</sup>

In addition, representatives of organizations we met with held varying views on the role they believed the IRS should have in regulating exempt organizations' political campaign intervention. Some stated that the IRS should not regulate exempt organizations' political campaign intervention because it is not its mission, and the IRS does not have the subject matter expertise and it would be a misuse of its resources to take on responsibility for overseeing such requirements. Some stated that IRS's attempts to address various issues related to tax-exempt organizations' political campaign intervention through proposed rules are issues that should be left for Congress to handle.<sup>152</sup> However, representatives of another organization stated that IRS should continue to have a role in regulating the political campaign intervention of tax-exempt organizations because many of the groups spending money during campaigns, particularly 501(c)(4) and 501(c)(6) organizations, are registered with the IRS, not the FEC, and without an IRS role in regulating them, their political campaign intervention would be mostly unregulated.

### **Perspectives of Literature and Selected Organizations on Key Aspects of the Federal Campaign Finance Framework**

We obtained perspectives from literature and selected organizations on key aspects of the campaign finance framework, including the scope and nature of campaign finance laws; how the framework has addressed developments in technology and foreign influence in elections; the purposes served by contribution limits and how these limits are enforced; the benefits and costs of unlimited independent expenditures; and the extent to which the sources of campaign funding should be disclosed. To obtain the perspectives, we conducted a literature review of scholarly publications, government reports, and publications by nonprofits and think tanks from 2016 through 2018, and conducted interviews with subject-matter specialists on campaign finance

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<sup>151</sup>In 2013, The Treasury Inspector General for Tax Administration reported that IRS used inappropriate criteria that identified for review certain organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention. Specifically, the report found that ineffective management 1) allowed inappropriate criteria to be developed and stay in place for more than 18 months, 2) resulted in substantial delays in processing certain applications, and 3) allowed unnecessary information requests to be issued. The report made nine recommendations to address these issues. Treasury Inspector General for Tax Administration (TIGTA), *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, May 14, 2013, Reference Number: 2013-10-053. In a follow-up audit, TIGTA found that the IRS had taken significant actions to eliminate the selection of potential political cases based on names and policy positions, expedite processing of 501(c)(4) applications, and eliminate unnecessary information requests. TIGTA, *Status of Actions Taken to Improve the Processing of Tax-Exempt Applications Involving Political Campaign Intervention*, March 27, 2015, Reference Number 2015-10-025.

<sup>152</sup>As discussed above, in 2013, IRS proposed a regulation regarding 501(c)(4) organizations and activities that do not further the social welfare. 78 Fed. Reg. 71,535 (Nov. 29, 2013). In subsequent years, appropriations acts have prohibited IRS from issuing, revising, or finalizing any new regulations or other guidance in this area. See, e.g., Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. C, title I, § 122,133 Stat. 2317, 2444 (2019).

issues from a nongeneralizable sample of research, advocacy, and practitioner organizations, selected to represent a range of views about the campaign finance framework.<sup>153</sup> The literature and organizations provided a range of perspectives about these aspects of the campaign finance framework, presented below.

What are the perspectives of literature and selected organizations regarding the scope and nature of campaign finance laws?

Literature and organizations reported various perspectives on the scope and nature of the current campaign finance statutory and regulatory framework. The campaign finance framework rests on two major laws enacted in 1974 and 2002, and Supreme Court and lower court rulings that have invalidated portions of those laws in intervening years. The FEC has further interpreted these laws through rulemaking, advisory opinions, and enforcement actions. Given these developments, literature and organizations reported a range of perspectives regarding (1) federal statutes and regulations on campaign finance requirements; (2) how campaign finance statutes and regulations address changes in technology; and (3) how campaign finance statutes and regulations address prohibited foreign influence in U.S. elections, which we discuss below.

**Perspectives on federal campaign finance statutes and regulations.** The literature we reviewed and organizations we interviewed presented various perspectives on federal campaign finance statutes and regulations. For example, some literature and organizations stated that campaign finance and related tax statutes and regulations are overly complex, and some definitions of activities within the campaign finance framework—such as political campaign intervention, major purpose, and coordination—are vague and need to be clarified or simplified. As one example, some literature we reviewed and organizations we interviewed stated that the FEC’s definitions for determining whether an organization is a political committee are not clear, which can contribute to confusion for organizations, such as tax-exempt organizations, as to whether or not they are a political committee that should register with the FEC. FECA defines a political committee as any committee, club, association, or other group of persons which receives contributions or makes expenditures in excess of \$1,000 in a calendar year.<sup>154</sup> Additionally, the Supreme Court held in *Buckley v. Valeo* that only organizations under the control of a federal candidate or whose major purpose is the election or defeat of federal candidates may be regulated as political committees.<sup>155</sup> However, according to some literature and organizations we interviewed, neither federal law nor the FEC have clearly defined how to measure an organization’s major purpose.<sup>156</sup>

One article noted that because the FEC has not defined a numerical threshold of expenditures for determining an organization’s major purpose, some practitioners have interpreted the

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<sup>153</sup>We reviewed literature published from calendar years 2016 through 2018. This time frame includes the 2016 U.S. Presidential election, and extends through the end of the most recent calendar year at the time of our review. For a more detailed discussion of our scope and methodology, see enclosure I.

<sup>154</sup>52 U.S.C. § 30101(4). Under FECA, political committees must raise and spend money in accordance with contribution limits, source prohibitions, and disclosure requirements.

<sup>155</sup>*Buckley v. Valeo*, 424 U.S. at 79–80.

<sup>156</sup>FEC uses a case-by-case analysis of an organization’s conduct to determine whether it has the major purpose of engaging in federal campaign activity. FEC’s approach is described in its 2007 Supplemental Explanation and Justification on Political Committees. 72 Fed. Reg. 5,596 (Feb. 7, 2007). In 2007, the U.S. District Court for the District of Columbia held that the FEC decision to use a case-by-case approach, rather than rulemaking, to apply the major purpose test was not arbitrary and capricious. *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007).

threshold to be 49 percent, so that certain organizations, such as 501(c)(4) organizations, can spend up to 49 percent of their total expenditures on federal campaign activity without satisfying the major purpose test and becoming subject to FEC requirements for political committees. Representatives of some organizations stated that unclear FEC definitions create uncertainty regarding whether some politically active organizations, such as some 501(c)(4) organizations, should be registered as political committees and subject to FECA reporting and disclosure requirements, as discussed earlier. As noted above, in order to qualify for their tax-exempt status, 501(c)(4) organizations must satisfy a primary purpose test; they may engage in some political campaign intervention provided that they continue to be primarily engaged in activities to promote the social welfare. However, according to IRS officials and other sources, the IRS has not issued clear and concise guidance regarding the extent to which 501(c)(4) organizations can engage in political campaign intervention. Furthermore, some sources noted that some 501(c)(4) organizations have taken advantage of the vague major purpose and primary purpose criteria to avoid registering as political committees and being subject to disclosure requirements.

**Perspectives on how campaign finance statutes and regulations address changes in technology.** The literature we reviewed and organizations we interviewed presented various perspectives on how campaign finance statutes and regulations have addressed changes in the use of technology over time. According to some sources included in our review, campaign finance statutes and regulations have not kept up with the rapid expansion of campaign spending on the internet and do not regulate online political ads to the same extent as television, radio, and print ads. According to these sources, this creates disclosure and disclaimer gaps, which can exclude a large amount of campaign spending from regulation. For example, some sources highlighted that BCRA's definition of regulated electioneering communications applies to "broadcast, cable, or satellite communications," but not to internet communications.<sup>157</sup> As a result, some sources stated that voters do not have information about the sponsors of many internet communications that refer to a candidate, which could help voters identify whether communications are real, or potential sources of disinformation.<sup>158</sup> Some literature, on the other hand, noted that, while expanding the definition of electioneering communications to include internet communications would be helpful, it would not provide transparency on ads that do not mention a candidate's name. Some sources discussed other proposals that have been put forward to provide more information about sponsors of internet ads, for example proposed legislation that would require that technology companies maintain a "political file" (or public, searchable database) of online ads, as television and radio broadcasters are required to do. Currently, contracts for television ad purchases are made public through the Federal Communication Commission, but contracts for internet ad purchases are not. Representatives of one organization stated that while legislation that specifically regulates online political communications has not been enacted, many of the FEC's rules that apply to broadcast media are not statutorily confined and therefore could be updated to apply to new media.

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<sup>157</sup>52 U.S.C. § 30104(f)(3)(A)(i).

<sup>158</sup>Although the definition of electioneering communications does not include internet communications, certain internet communications, such as those that meet the definition of public communication, are subject to disclaimer requirements. As discussed later in this report, the definition of public communication includes communications that are placed for a fee on another person's website. See 11 C.F.R. § 100.26. FEC regulations also require that all internet websites of political committees available to the general public include disclaimers. 11 C.F.R. § 110.11(a). See also Advisory Opinion 2017-12 (Take Back Action Fund) (finding that the 501(c)(4) organization that requested the advisory opinion was required to include disclaimers on paid Facebook image and video advertising that expressly advocated election or defeat of clearly identified federal candidates).

According to some sources, current FEC regulations also do not sufficiently address requirements for disclaimers for political communications made on the internet. For example, some sources noted that FEC regulations related to online ads only apply to ads that are “purchased for a fee,” which often excludes political communications through YouTube and other online platforms. Other sources noted that under FEC regulations, certain internet ads, such as those in games on mobile devices, may be exempted from disclaimer requirements through exceptions in the regulations referred to as the “small items” and “impracticable” exceptions for disclaimers. More specifically, these exceptions state that if the size of the ad is small (such as the length of a phrase on a bumper sticker, or a small online ad) or a disclaimer cannot be “conveniently printed” on the ad, a disclaimer is not required.<sup>159</sup> According to one article, some major internet companies have argued that their ads should not be obligated to have disclaimers because of their small size.<sup>160</sup> However, the FEC has not taken an official position on the application of these exceptions to small online ads.<sup>161</sup> Some sources also reported that FEC regulations have not considered the changing landscape of political advertising and thus have not developed requirements for things such as “native ads” (ads that match the editorial content of media or technology platforms, also known as sponsored content) or bots, which automatically generate political ads.

The FEC expanded disclaimer requirements to internet communications in 2006 by amending the definition of public communication to include paid internet advertising placed on another person’s website.<sup>162</sup> Since 2011, the FEC has sought comments on several issues related to technology and disclaimers on public communications distributed over the internet.<sup>163</sup> Most recently, on March 26, 2018, the FEC published a Notice of Proposed Rulemaking related to the definition of public communication to determine whether to include paid internet advertising placed on another person’s “internet-enabled device or application” and examining two alternatives for disclaimer requirements on public communications distributed over the internet.<sup>164</sup> The FEC has held public meetings and a public hearing to inform the rulemaking, but has not yet finalized the rule.

According to some literature and organizations, some technology companies have started to regulate online political speech through transparency requirements, such as requiring political advertisers to confirm their identity and location before purchasing ads, but varying definitions of political speech across platforms and between platforms and the FEC can cause confusion. Additionally, according to some sources, the fact that technology companies are willing to self-

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<sup>159</sup>See 11 C.F.R. § 110.11(f).

<sup>160</sup>See Advisory Opinion 2010-19 (Google); Advisory Opinion 2011-09 (Facebook).

<sup>161</sup>The Commission has, however, stated in an advisory opinion that the 501(c)(4) organization that requested the advisory opinion “must include all of the disclaimer information specified by 52 U.S.C. § 30120(a) on its proposed Facebook Image and Video advertising.” While the Commission unanimously agreed to that conclusion, Commissioners relied upon different rationales to reach it. Advisory Opinion 2017-12 (Take Back Action Fund).

<sup>162</sup>71 Fed. Reg. 18,589 (Apr. 12, 2006).

<sup>163</sup>Specifically, in 2011, the FEC published an Advance Notice of Proposed Rulemaking related to disclaimers on certain internet communications, and re-opened the issue for public comment in 2016 and 2017. 76 Fed. Reg. 63,567 (Oct. 13, 2011). On November 2, 2016, FEC published a notice seeking comment on several technology-related proposals, including updating the term “public communication” to include communications placed for a fee on another person’s “internet-enabled device or application” in addition to communications placed for a fee on another person’s “Web site.” 81 Fed. Reg. 76,416 (Nov. 2, 2016).

<sup>164</sup>83 Fed. Reg. 12,864 (Mar. 26, 2018).



regulate does not mean that it will always be in their interest to do so, that they will do so effectively, or that it obviates the need for the federal government to take steps to regulate online campaign-related speech. For example, according to some literature, technology companies may have conflicts of interest in promoting increased transparency (i.e., requiring more transparency may negatively affect their profits), and they could be susceptible to unintentional political bias in how they regulate.

**Perspectives on how campaign finance statutes and regulations address prohibited foreign influence in U.S. elections.** The literature we reviewed and organizations we interviewed presented various perspectives on how federal campaign finance laws address prohibited foreign influence in U.S. elections. As previously mentioned, based on federal campaign finance laws, foreign nationals are prohibited from directly or indirectly making contributions or donations of money or other things of value, or making an express or implied promise to make a contribution or donation, in connection with a federal, state, or local election. FECA also prohibits a person from soliciting, accepting, or receiving such a contribution or donation from a foreign national.<sup>165</sup> According to some literature and organizations, federal campaign finance laws related to prohibited activities for foreign nationals are sometimes unclear and do not fully address the types of activities that foreign nationals may engage in to hide their influence in U.S. elections. For example, these sources stated that the federal campaign finance laws and FEC regulations have not clearly defined “other things of value” and whether certain activities—such as providing opposition research or negative information about an opposing candidate to a campaign—by foreign nationals constitute an “other thing of value.”<sup>166</sup> Some literature also stated that the FEC has not clearly defined how two exemptions—the volunteer services exemption and media exemption—may affect activities by foreign nationals.<sup>167</sup> Specifically, according to one article, the FEC has inconsistently defined the scope of volunteer services in its advisory opinions and has found an increasing range of election-related activities by foreign actors to be covered by the exemption.<sup>168</sup> Some literature

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<sup>165</sup>52 U.S.C. § 30121; 11 C.F.R. § 110.20. Foreign nationals are prohibited from making any of the following—contribution or donation of money or other thing of value or an implied promise to make a contribution or donation in connection with any federal, state, or local election; contribution or donation to any committee or organization of a national, state, district, or local political party; donation to a presidential inaugural committee; disbursement for an electioneering communication; or any expenditure, independent expenditure, or disbursement in connection with a federal, state, or local election. Foreign nationals are also prohibited from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person’s federal or non-federal election-related activities.

<sup>166</sup>FEC regulations define a “thing of value” to include all in-kind contributions, and, unless specifically exempted, the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services is a contribution. 11 C.F.R. § 100.52(d)(1). The FEC has also issued advisory opinions and approved legal analyses in enforcement and compliance actions that further define a “thing of value.” For examples of advisory opinions and matters under review regarding FEC’s definition of a “thing of value,” see Commissioner Weintraub’s and Commissioner Hunter’s responses, dated October 18, 2019, to a request for information from Senator Klobuchar, Ranking Member of the Senate Committee on Rules and Administration.

<sup>167</sup>According to FEC regulations, the definition of contribution does not include the value of services provided without compensation by an individual who volunteers on behalf of a candidate or political committee and any costs incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, website, newspaper, magazine, or other periodical publication, unless the facility is owned or controlled by a political party, political committee, or candidate. 11 C.F.R. §§ 100.73, .74.

<sup>168</sup>For example, according to one article, in 1981, the FEC prohibited a foreign artist from donating an original work of art to a campaign fundraiser (FEC Advisory Opinion 1981-51); in 2015, the FEC, superseding the 1981 Advisory Opinion, allowed foreigners to develop website code, logos, and trademarks for a political action committee on an “ad hoc, continuous basis” given that the foreigners would use their own equipment, pay their own out-of-pocket

also noted that the FEC has not clearly defined what constitutes a “press or media entity,” especially online, and has applied the media exemption broadly, including to some foreign media entities.<sup>169</sup> Furthermore, some sources noted that although the prohibition on foreign contributions and expenditures in U.S. elections is broad, current law is not definitive regarding whether foreign actors are prohibited from engaging in issue advocacy, such as purchasing social media ads that do not expressly advocate for the election or defeat of a candidate.<sup>170</sup>

What are perspectives from literature and selected organizations on the purposes served by contribution limits and how these limits are enforced?

Literature and selected organizations reported a range of views about the purposes served by contribution limits in the current campaign finance system and their enforcement. FECA established limits on contributions to candidates and political committees. In the years since the enactment of FECA, the U.S. Court of Appeals for the District of Columbia Circuit has struck down limits on contributions received by some groups, such as Super PACs, but the courts have kept intact contribution limits for candidates, political parties, and most political committees.<sup>171</sup> Given these changing circumstances, literature and representatives of selected organizations expressed a range of views about the value and implications of contribution limits for candidates and political committees. For example, some literature and organizations reported that contribution limits help prevent corruption and its appearance by limiting the amount of money individuals and organizations can give directly to candidates and political committees. Other sources reported that contribution limits hinder individuals’ First Amendment rights to give to candidates and parties that represent their views and restrict political parties’ ability to support candidates and nominees. Additionally, some sources stated that contribution limits have not alleviated public concerns about the appearance of corruption, as demonstrated by declining confidence in political institutions. For example, one report cited a 2015 poll that found that 84 percent of Americans believe that money has too much influence in political campaigns, and 85 percent believe that politicians enact policies favorable to campaign contributors.<sup>172</sup>

Moreover, according to some sources, contribution limits force candidates and political parties to spend increasing amounts of time and resources on fundraising to compete with independent expenditure groups, which may receive and spend unlimited sums of money. As a result, one

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expenses, would not be compensated by anyone, and would not participate in any of the PAC’s operational decisions (FEC Advisory Opinion 2014-20).

<sup>169</sup>For example, one article noted that the FEC applies a two-part test to determine whether an organization is a legitimate press entity, but the criteria do not include whether the materials are produced by trained journalists, whether the organization employs a fact-checker or employs fact-checking functions, or any other typical indicators of a legitimate media organization.

<sup>170</sup>See *Bluman v. FEC*, 800 F. Supp. 2d 281, 284, 292 (D.D.C. 2011), *aff’d* 565 U.S. 1104 (2012) (“This statute [52 U.S.C. § 30121] as we see it, does not bar foreign nationals from issue advocacy, that is, speech that does not expressly advocate the election or defeat of a specific candidate.” “They similarly express concern that Congress might bar them from issue advocacy and speaking out on issues of public policy. Our holding does not address such questions, and our holding should not be read to support such bans.”)

<sup>171</sup>See *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

<sup>172</sup>The New York Times (in a poll conducted with CBS NEWS), “Americans’ Views on Money in Politics,” June 2, 2015, <https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html>, cited in *Secret and Foreign Spending in U.S. Elections: Why America Needs the DISCLOSE Act*, Center for American Progress (July 2017).

source stated that politicians running for re-election spend less time working on substantive issues, which undermines the legislative process. In addition, some sources reported that contribution limits for candidates and political parties weaken the power of political parties by limiting how much they can raise, and encourage donors to contribute to independent expenditure groups, such as Super PACs. This can shift control of traditional party functions (such as developing the party platform, building consensus around and selecting party nominees) from political parties to Super PACs and other groups that may accept and spend significant amounts of money, such as 501(c)(4) organizations. Some literature asserted that political parties are more regulated by the FEC and accountable to voters, while Super PACs and 501(c)(4) organizations are less regulated by the FEC, and less accountable to voters; and are required to disclose less information about their original sources of funding.<sup>173</sup>

Finally, one article noted that uniform contribution limits for all Presidential and congressional elections do not recognize that candidates for President may have a need to raise more money than congressional candidates, in order to reach voters nationwide. For example, the article noted that the cost of presidential campaigns has skyrocketed in recent years, relative to increases in contribution limits. It also cited that contribution limits in presidential elections are lower than many state-level contribution limits for gubernatorial candidates.

What are perspectives of literature and selected organizations about the benefits and costs of unlimited independent expenditures?

Literature and representatives of organizations identified various perspectives on the benefits and costs of unlimited independent expenditures. For example, some literature noted that, in *Buckley v. Valeo*, the Supreme Court recognized that restrictions on campaign contributions and expenditures both have potential First Amendment implications, but that limitations on expenditures constituted "significantly more severe restrictions on protected freedom of political expression and association than do [FECA's] limitations on financial contributions."<sup>174</sup>

Additionally, some organizations stated that associations of citizens have a right to engage in political advocacy and the removal of contribution limits for groups that are able to make independent expenditures has helped foster citizens' participation in the political process.

Other literature and organizations noted that since the 2010 court decisions, spending on independent expenditures in federal elections by organizations that are allowed to accept unlimited contributions from individuals, corporations, and unions, such as Super PACs, has increased dramatically, raising debate about the role of these organizations in the political system. Some sources also noted that changes in campaign finance law have resulted in a disproportional increase in the political speech and representation of a small group of wealthy individuals and organizations through groups such as Super PACs over ordinary citizens. According to some literature, unlimited spending by certain individuals and groups distorts policy outcomes by pressuring candidates and politicians to adopt their preferred policies.

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<sup>173</sup>For example, a Super PAC must report to the FEC the names of its donors--which may include a 501(c) organization--but does not have to report the names of the donors to the 501(c) organization.

<sup>174</sup>424 U.S. at 23. Then, in 2010, *Citizens United v. FEC* invalidated the prohibition on corporations from engaging in independent expenditures, so that corporations were able to make unlimited independent expenditures. 558 U.S. 310. *SpeechNow.org v. FEC* held that contribution limits to independent expenditures-only organizations also violate the First Amendment, allowing for the rise of Super PACs. Because Super PACs make only independent expenditures, they could accept unlimited contributions and contributions from prohibited sources for other political committees, such as corporations. 599 F.3d 686.

In addition, according to some sources, despite the Supreme Court's finding in *Buckley v. Valeo* that independent expenditures did not pose the same threat of corruption as large contributions because the "absence of prearrangement or coordination...alleviates the danger that expenditures will be given as a quid pro quo,"<sup>175</sup> concerns about coordination and the influence of independent expenditure groups on politicians' behavior remain. Specifically, the FEC has issued regulations defining coordination, including a three-pronged test to determine whether an expenditure is coordinated.<sup>176</sup> However, some literature and organizations stated that the FEC's definition of coordination between campaigns and groups that are prohibited from making contributions, such as Super PACs and corporations, is not sufficiently clear, which raises the possibility for coordination between such groups and candidates and campaigns. For example, a representative of one organization stated that regulatory language regarding coordination does not take into account the sometimes close relationship of organizations making independent expenditures to candidates.<sup>177</sup> He stated that this allows organizations making independent expenditures (e.g., Super PACs) to be run by former staff of candidates who understand what will help the candidate and make expenditures intended to help the candidate, such as funding events about more general issues that feature the candidate.<sup>178</sup>

Finally, some literature highlighted that spending on Presidential and congressional elections has significantly increased in recent years, with independent groups, such as Super PACs, outspending candidate and party committees. Some literature stated that the rising influence of outside groups relative to political parties has contributed to increased political polarization and gridlock because political parties traditionally support candidates that can connect a broad range of interests, while outside groups tend to amplify the views of more narrow and special interests.

#### What are perspectives of literature and selected organizations regarding the extent to which the sources of campaign funding should be disclosed?

Literature and selected organizations reported various perspectives about the extent to which the sources of campaign funding should be publicly disclosed. Since the 2010 *Citizens United* ruling which invalidated a restriction on corporations, including certain 501(c) organizations, from using their general treasures to make independent expenditures, there has been increased attention and debate about the extent to which sources of campaign funding should be disclosed. While some sources see increased transparency as creating a better-informed

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<sup>175</sup>424 U.S. at 47.

<sup>176</sup>According to FEC regulations, if a communication meets the standards for the three prongs of the test, which are (1) the source of payment, (2) the subject matter of the communication (content standard), and (3) the interaction between the person paying for the communication and the candidate or political party committee (conduct standard), then the communication is considered coordinated. 11 C.F.R. § 109.21.

<sup>177</sup>FEC regulations provide that independent expenditures are expenditures by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that are not made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. 11 C.F.R. § 100.16. When a committee, group or individual pays for a communication that is coordinated with a campaign or a candidate, the communication is either an in-kind contribution or, in some limited cases, a coordinated party expenditure by a party committee.

<sup>178</sup>FEC regulations provide that, by itself, the involvement of a former staff person will not cause a communication to meet the conduct standard, which is one of the three prongs of FEC's test, discussed above, so long as that person has not been an employee or independent contractor of the candidate, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee for the previous 120 days. 11 C.F.R. § 109.21(d)(5)(i).

electorate and helping to prevent corruption, other sources see disclosure requirements as oppressive or stigmatizing to those who may support unpopular candidates or organizations. For example, some sources highlighted that FECA established, and the Supreme Court has consistently upheld, disclosure requirements in part on the grounds that knowledge of a candidate's financial supporters may be an important aspect informing voters' views of a candidate.

Some literature and organizations stated that current disclosure requirements do not provide enough information to the public regarding the original sources of funds spent in elections, such as donors to 501(c) groups; owners of limited liability companies; and foreign actors. For example, 501(c)(4) organizations have historically not had to publicly disclose the identities of their donors, except in some limited cases.<sup>179</sup> According to some sources, because these groups can accept unlimited contributions for and have been shown to spend significant amounts on election-related activity, they should be required to register with the FEC and report the sources of their funding, as do political committees. Similarly, some sources stated that source disclosure requirements should apply to organizations based on the amount of political campaign expenditures the organization makes, rather than on the basis of whether the organization is a political committee.

Some sources also highlighted that individuals and organizations, including corporations and foreign entities, that seek to keep their political donations private or anonymous may use 501(c) organizations or other organizations, such as limited liability companies, to contribute to Super PACs. These organizations can contribute unlimited sums to Super PACs. Super PACs are required to disclose the names of the 501(c) organizations or limited liability companies that contributed to them, and not the original sources of funds, such as the contributors to the 501(c) organizations or the owners of the companies. According to some sources, Super PACs frequently work together with 501(c)(4) organizations because some donors are more likely to contribute to these tax-exempt groups with less disclosure requirements than to Super PACs. Finally, some sources reported that they believed that FEC penalties against individuals or organizations that establish 501(c) organizations or limited liability companies to hide political spending have been rare or in some cases much after the fact, and thus may not deter major spenders from using these methods.

Other sources offered the view that disclosure requirements infringe on rights to free speech and privacy, and are complex and burdensome. For example, according to some sources,

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<sup>179</sup>501(c)(4) organizations are required to report to IRS and, in some instances, to the FEC. They must file with IRS a Form 990-series annual information return for tax-exempt organizations, including information about the organization's political campaign intervention on Schedule C of the form, which may be made publicly available. Under current regulations, donors that contributed at least \$5,000 to the 501(c)(4) organization for any purpose (not only political campaign intervention) must be reported to IRS on the form's Schedule B, but identifying information about the donors is not made publicly available, pursuant to section 6104(b) of the Internal Revenue Code. Tax-exempt organizations generally are required to file the Form 990 annually, and sometimes this occurs months after an election. Certain 501(c)(4) organizations that make independent expenditures are also required to disclose the identity of certain donors to FEC. Under FECA and FEC regulations, persons other than political committees that make independent expenditures aggregating in excess of \$250 with respect to a given election in a calendar year must report certain information about those independent expenditures. On August 3, 2018, a court vacated the FEC regulation providing that persons other than political committees that make independent expenditures aggregating in excess of \$250 with respect to a given election in a calendar year need report only the identification of donors that contributed to further *the reported* independent expenditure. *CREW v. FEC and Crossroads GPS*, No. 15-0259 (D.D.C. 2018). On October 4, 2018, following the decision, FEC issued guidance stating that it will enforce the statute by requiring disclosure of donors of over \$200 annually who contribute for the purpose of furthering *an* independent expenditure, as well as donors of over \$200 annually making contributions earmarked for political purposes and intended to influence elections.

disclosure requirements can stigmatize those who may support unpopular candidates or organizations and deter them from engaging in the political process. Some organizations stated that the thresholds for reporting the names of donors (\$200) are too low and questioned the governmental and public interest in knowing the names of everyone who contributed \$200 to a political party or 501(c)(4) organization (for the purpose of furthering an independent expenditures) compared to individuals' rights to free speech and privacy.<sup>180</sup> They suggested that, as a way of protecting privacy for donors who give relatively small contributions, disclosure requirements should be indexed to inflation, much like contribution limits are.

Some literature and organizations also stated that disclosure requirements are complicated and often require attorneys to decipher them, which grassroots organizations may not be able to afford and which can limit their ability or desire to engage in the democratic process. They explained that low campaign finance monetary thresholds for triggering registration as a political committee with the FEC (\$1,000), and thus, compliance with disclosure and reporting requirements, may overly burden nonprofit groups that seek to participate in the political process.

## **Conclusion**

Although DOJ and FEC officials noted that coordination between the two agencies works well, they provided varying perspectives on the need to document their coordination mechanisms. While the limited number of staff that coordinate between FEC and DOJ indicate that they work together, without documentation of those mechanisms consistent with internal control standards, the agencies risk having knowledge limited just to those few personnel who could change positions or leave the agencies, taking that knowledge with them. Reviewing and updating, as appropriate, coordination practices between the FEC and DOJ, to include the MOU or other guidance, could help the agencies ensure that written guidance reflects current practices between the agencies and better ensure that coordination between FEC and DOJ occurs consistently and effectively when enforcing campaign finance law.

## **Recommendations for Executive Action**

We are making two recommendations to the FEC and DOJ.

- The FEC, in consultation with DOJ, should review guidance addressing coordination with DOJ, to include the MOU, and once a quorum of commissioners is in place, update that guidance as appropriate based on the review.  
(Recommendation 1)
- The Attorney General, in consultation with the FEC, should review guidance addressing coordination with the FEC, to include the MOU, and once a quorum of commissioners is in place, update that guidance as appropriate based on the review.

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<sup>180</sup>As discussed earlier, political committees must identify any person who contributes more than \$200 during a calendar year and any person to whom an expenditure or disbursement of more than \$200 during a calendar year is made. 52 U.S.C. §30104(b). Not-political committees, such as 501(c) organizations, who make independent expenditures in an aggregate amount of more than \$250 in a calendar year must file with the FEC, disclosing whether the expenditure was made independently of the campaign, supports or opposes a candidate, and the identity of each person who made a contribution in excess of \$200 for the purpose of furthering an independent expenditure, as well as donors of over \$200 annually when that donation is earmarked for political purposes and intended to influence elections. 52 U.S.C. §30104(c).

(Recommendation 2)

Enclosure I: Scope and Methodology

Enclosure II: Contribution Limits for Calendar Years 2019 and 2020

Enclosure III: Political Committees and Organizations Spending and Raising Money in Support of Federal Elections

Enclosure IV: Overview of the Federal Election Commission's (FEC) Enforcement Process for Campaign Finance Violations

Enclosure V: The Federal Election Commission's (FEC) Campaign Finance Violation Enforcement Activities, Fiscal Years 2002 through 2017

Enclosure VI: Certain Types of Tax-Exempt Organizations and Permitted Political Activity

Enclosure VII: Comments from the Federal Election Commission

**Agency Comments**

We provided a draft of this report to the FEC, DOJ, and IRS for review and comment, and incorporated technical comments, as appropriate. DOJ indicated via email that it did not have formal written comments on the draft report. The FEC provided written comments, which are reproduced in enclosure VII and summarized below. In its comments, the FEC noted that, as recognized by our recommendation, its current composition of three commissioners leaves it with less than a quorum and currently unable to act on our recommendation. The FEC noted that once a quorum is restored, a freshly reconstituted FEC could consider our recommendation to review and update the guidance that addresses coordination between the FEC and DOJ.

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We are sending copies of this report to the Commissioners of the FEC, the Attorney General, the Commissioner of the IRS, appropriate congressional committees and members, and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you and your staff have any questions concerning this report, please contact me at (202) 512-8777, or [gablerr@gao.gov](mailto:gablerr@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Major contributors to this report were Tom Jessor (Assistant Director), Jennifer Bryant, Colleen Candrl, Dominick Dale, Eric Hauswirth, Tracey King, Frederick Lyles, Jr., Amanda Miller, Jan Montgomery, Erin O'Brien, Maria Psara, Janet Temko-Blinder, and Jeff Tessin.



Rebecca Gambler  
Director, Homeland Security and Justice

## Enclosure I: Scope and Methodology

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

To address questions on the legal framework, we reviewed relevant statutes, regulations, and court cases to understand the federal election campaign finance laws governing contributions, expenditures, prohibitions, disclosures, and responsibilities for enforcement, as well as rules governing tax-exempt organizations' political campaign intervention.

To address questions on federal agencies' roles and responsibilities in administering and enforcing campaign finance law, we selected the Federal Election Commission (FEC) for review because it is substantially involved in interpreting and administering federal campaign finance law and investigating violations and enforcing compliance with campaign finance requirements in connection with federal elections. We also reviewed information from the Department of Justice (DOJ), which is responsible for investigating and prosecuting criminal violations related to campaign finance. We reviewed information from the Internal Revenue Service (IRS) because it oversees compliance with the tax code governing allowable levels of political campaign intervention by tax-exempt organizations. We reviewed documentation from the FEC, DOJ and IRS related to how they implement their respective functions and strategic objectives, and the methods they use to administer or enforce campaign finance-related laws and identify and address violations, including the prohibition on foreign contributions and expenditures in federal elections. These documents include policies, procedures, and guidance, and existing agreements between FEC and DOJ regarding enforcement of the Federal Election Campaign Act of 1971 (FECA), as amended. We also interviewed officials from each agency to better understand how they carry out the agencies' functions with respect to campaign finance laws, as well as to obtain their perspectives on any challenges faced in administering and enforcing the laws. For example, we met with all four FEC commissioners in July 2019, as well as senior FEC officials. We describe in this report the challenges that FEC, DOJ, and IRS officials identified that were relevant to the scope of our review.

To describe how the FEC identifies potential campaign finance violations, we reviewed and analyzed enforcement data from the FEC's Office of General Counsel's and Alternative Dispute Resolution Office's Law Manager System to identify the sources of FEC's enforcement actions for fiscal years 2002 through 2017.<sup>181</sup> To describe how the FEC enforces campaign finance requirements, we reviewed and analyzed enforcement data from the Law Manager System and the Administrative Fine Program's Disclosure Suite to identify the distribution of the FEC's enforcement activities, which represents the matters under review ongoing and closed, matters resulting in dismissal or settlement, and administrative fines cases unchallenged and challenged for fiscal years 2002 through 2017. To identify the types of campaign finance violations that were enforced by the FEC, we reviewed and analyzed data from the Law Manager System for

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<sup>181</sup>We focused on fiscal years 2002 through 2017 because FECA's most recent significant amendment was the Bipartisan Campaign Reform Act of 2002 (BCRA). Pub. L. No. 107-155, 116 Stat. 81. In addition, fiscal year 2017 is the latest period for which we obtained complete data from the FEC.



matters under review closed during fiscal years 2012 through 2017.<sup>182</sup> We also reviewed and analyzed data from the Law Manager System to identify how the FEC has enforced allegations of violations of the foreign national prohibition for fiscal years 2002 through 2017. To assess the reliability of FEC's enforcement data, we performed electronic data testing for obvious errors in accuracy and completeness and queried agency officials knowledgeable about those data systems to determine the processes in place to ensure the integrity of the data. We found the data sufficiently reliable to provide information on FEC's efforts to enforce campaign finance law.

To identify the number of FECA-related charges filed in cases prosecuted by DOJ, we reviewed and analyzed case management data from DOJ's Criminal Division's Public Integrity Section and the U.S. Attorneys' Offices, which share responsibility for prosecuting campaign finance violations. For the Public Integrity Section, we reviewed and analyzed data for fiscal years 2010 through 2017.<sup>183</sup> Specifically, we obtained data from the Section on all cases that were categorized using a program code for "campaign finance" in the Automated Case Tracking System, based on the judgment of knowledgeable DOJ attorneys, as well as all cases that included criminal charges brought under FECA. To identify applicable charges, we interviewed officials from the Section and reviewed DOJ guidance on the federal prosecution of election offenses.<sup>184</sup> We developed a list of statutes with campaign finance offenses and provided the list to DOJ to ensure the list was accurate and complete. The Section extracted data from the Automated Case Tracking System for all cases that were opened under the campaign finance, wire fraud, or conspiracy statutes and any cases that were opened under the relevant program category codes for fiscal years 2010 through 2017. The Section manually pulled court and internal documents (e.g. case opening and closing forms) and reviewed those documents to determine which cases had accompanying charges associated with violations of FECA provisions. We also reviewed and analyzed case management data from the Executive Office for United States Attorneys' Legal Information Office Network System, to determine the total number of charges filed for violations of FECA provisions by U.S. Attorneys' Offices for fiscal years 2015 through 2017. At the time of our review, data on FECA charges were the most complete for these three fiscal years.<sup>185</sup> We assessed the reliability of the data provided by DOJ by reviewing data system user manuals and data dictionaries, identifying inconsistencies, and working with agency officials to resolve issues or identify potential limitations. We found the data sufficiently reliable to provide information on the number of FECA charges filed in cases prosecuted by DOJ.

To describe how IRS identifies impermissible levels of political campaign intervention by tax-exempt organizations and the outcomes of the agency's enforcement efforts, we reviewed and analyzed compliance data from IRS's Reporting Compliance Case Management System to

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<sup>182</sup>For the closed matters under review, we focused on fiscal years 2012 through 2017 because these data were the most complete and available at the time of this review.

<sup>183</sup>We selected the fiscal year 2010 through 2017 time frame to capture information on DOJ's campaign finance enforcement efforts across multiple presidential administrations. In addition, fiscal year 2017 was the last complete year of DOJ data available at the time of our request.

<sup>184</sup>Department of Justice, *Federal Prosecution of Election Offenses*, Eighth Edition, December 2017.

<sup>185</sup>Effective September 1, 2014, FECA (previously codified under in the U.S. Code under 2 U.S.C. § 431 et seq) was consolidated with other laws governing voting and elections in the new Title 52 of the U.S. Code. Case management data from the Executive Office for United States Attorneys did not capture charges under Title 2 with sufficient precision for our purposes; therefore we restricted our analysis to charges filed under Title 52 starting with fiscal year 2015.

identify the agency's sources and dispositions of closed examinations as well as the types of tax-exempt organizations examined during fiscal years 2010 through 2017.<sup>186</sup> We assessed the reliability of these data by reviewing data system user manuals and data dictionaries and querying agency officials knowledgeable about the data system to determine the processes in place to ensure the integrity of the data. We determined that the IRS data were sufficiently reliable for the purpose of providing information on IRS's efforts to enforce compliance with provisions related to political campaign intervention.

We also interviewed FEC and DOJ officials about guidance and procedures used to coordinate and document referrals of matters involving potential FECA violations between the two agencies, and assessed processes against the implementation of collaborative mechanisms<sup>187</sup> and applicable internal control guidance on documentation and organizational knowledge retention from *Standards for Internal Control in the Federal Government*.<sup>188</sup>

To address questions related to perspectives on (a) challenges regarding the FEC's, DOJ's, and IRS's administration and enforcement of campaign finance laws and related tax law, and (b) key aspects of the campaign finance framework, we obtained perspectives through a literature review of publications from calendar years 2016 through 2018 and from interviews with subject-matter specialists on campaign finance issues from a nongeneralizable sample of nine research, advocacy, and practitioner organizations. To identify relevant publications, we took the following steps:

1. A GAO research librarian conducted a literature search of various research databases and platforms including ProQuest, HeinOnline, Harvard's Custom Think Tank Search Engine, PolicyFile, and WestEdge, among others, to identify scholarly and peer reviewed publications, including law journal articles; dissertations; government reports; conference papers; and publications by nonprofits and think tanks published from 2016 through 2018, a period chosen to include the 2016 U.S. Presidential election through the end of the most recent calendar year at the time of our review. We excluded books, trade journal articles (except law journal articles), and news articles from the literature review. Our search terms and formulas included "campaign finance" and related terms, such as "contribution," "expenditure," "disclosure," "prohibition," "Federal Election Commission," "Department of Justice," "Internal Revenue Service," and "foreign," among others. Multiple abstract, title and keyword searches were conducted in iterations from August 2018 through February 2019.
2. To select the publications that were relevant to our research areas of (a) challenges regarding the FEC's, DOJ's, and IRS's administration and enforcement of campaign finance laws and related tax law, and (b) key aspects of the campaign finance framework, two reviewers started by independently assessing the abstracts for each publication and, if

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<sup>186</sup>We requested data on closed examinations from IRS beginning in fiscal year 2010 because the Supreme Court and federal appeals court rulings in *Citizens United v. FEC* and *SpeechNow.org v. FEC* changed the campaign finance landscape, enabling corporations (including nonprofit corporations) to (1) use their general treasuries to make unlimited independent expenditures and electioneering communications and (2) make unlimited contributions to Super PACs. After these decisions in 2010, nonprofit corporations, such as tax-exempt social welfare organizations (501(c)(4) organizations) that are incorporated, could make independent expenditures and electioneering communications, and contribute to Super PACs. We recognize that some of the examinations closed in 2010 may include activity prior to this time frame.

<sup>187</sup>GAO, *Managing for Results: Key Consideration for Implementing Interagency Collaborative Mechanisms*, [GAO-12-1022](#) (Washington, D.C.: Sept. 27, 2012).

<sup>188</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sept. 2014).

necessary, reviewed the full text of the publication, to determine if they met the following criteria:

- a. The publication identifies one or more challenges (i.e., problems) related to the campaign finance framework.<sup>189</sup>
- b. The article focused on campaign finance for U.S. federal elections (not state, tribal, or other countries' elections).<sup>190</sup>

Any differences in the reviewers' determinations about whether the article was relevant and should be included in the review were discussed and reconciled.

3. For the 126 publications that met the above two criteria, we reviewed the full text of the publication. We evaluated each publication using a data collection instrument. The data collection instrument captured information on the challenge(s) related to the campaign finance framework identified in each publication in the following categories, based on the scope of our review: 1) FEC oversight; 2) DOJ oversight; 3) IRS oversight; 4) other agency oversight; 5) contribution limits; 6) expenditures; 7) disclosure; 8) new technology/the internet; 9) foreign national prohibition; 10) legal critiques; and 11) other category. We further categorized the publications into sub-categories under each category, based on emerging themes from our review of abstracts and full articles, described in step 2 above. For example, under the FEC oversight category, sub-categories were identified for challenges related to FEC's regulations, FEC's enforcement, and FEC's structure. The data collection instrument was initially filled out by one GAO analyst and then verified for accuracy by another analyst. For law journal publications, a separate data collection instrument was initially filled out by one GAO analyst and then another analyst verified for accuracy a subset of the above identified challenges. One GAO analyst then reviewed each of the individual challenges recorded in the data collection instrument by category and sub-category and summarized the major themes of challenges, in a separate record of analysis. For example, the analyst sorted all the challenges that fell under the "new technology" category, reviewed them, and summarized the major themes of challenges related to "new technology."

We obtained additional perspectives through interviews with subject-matter specialists on campaign finance issues from a nongeneralizable sample of nine research, advocacy, or practitioner organizations, selected to represent a range of views about the campaign finance framework. The nine organizations included the Alliance for Justice, Bipartisan Policy Center, Campaign Finance Institute, Campaign Legal Center, Cato Institute, Center for Responsive Politics, Institute for Free Speech, Institute for Justice, and Republican National Committee.<sup>191</sup> To select the nine organizations, we first researched organizations whose mission, primary work, or a portfolio of work focused on campaign finance research or advocacy and campaign

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<sup>189</sup>For the purposes of this review, the campaign finance "framework" includes the statutes; regulations; and agency roles, policies, and procedures related to overseeing contribution limits, expenditures, disclosure requirements, and prohibitions, including those for foreign entities, in connection with federal elections.

<sup>190</sup>We also excluded articles that did not primarily discuss campaign finance (e.g., referred to campaign finance as an example for a different issue); did not identify challenges related to the campaign finance framework (e.g., tested a hypothesis or analyzed data, but did not identify a challenge); and were outside of our scope (e.g., debated corporate personhood).

<sup>191</sup>We also attempted to obtain the perspectives of the Democratic National Committee but did not receive a response.

finance practitioners, such as national political parties and a national association representing politically active nonprofit organizations and identified a total of 21 organizations. We selected the nine organizations to interview to obtain a balanced range of perspectives on federal agencies' oversight of campaign finance laws and key aspects of the campaign finance framework, including the scope and nature of campaign finance laws, the purposes served by contribution limits, the benefits and costs of unlimited independent expenditures, and the extent to which the sources of campaign funding should be disclosed. We analyzed the information that each of the above organizations provided during interviews by the same main categories we used for the literature review. While the information we obtained from our literature review and interviews with specialists from selected organizations cannot be generalized or be considered representative of all views on campaign finance issues, they provided important perspectives on key aspects of the campaign finance framework, including the scope and nature of campaign finance laws, the purposes served by contribution limits, the benefits and costs of unlimited independent expenditures, and the extent to which the sources of campaign funding should be disclosed.

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

## Enclosure II: Contribution Limits for Calendar Years 2019 and 2020

The Federal Election Campaign Act of 1971 (FECA), as amended, specifies the contribution limits for the amount that an individual, party, or political action committee (PAC) can contribute to a single candidate (per election) or to a party or PAC (per calendar year).<sup>192</sup> The limits on contributions to candidates apply separately to each federal election in which the candidate participates. A primary election, general election, runoff election and special election are each considered a separate election with a separate limit. Table 1 shows contribution limits for donors and recipients for calendar years 2019 and 2020.<sup>193</sup>

**Table 1: Contribution Limits for Calendar Years 2019 and 2020**

Amounts in Dollars

Donors	Recipients				
	Candidate Committee in Dollars	Political Action Committee (PAC) (Separate Segregated Fund and Nonconnected) in Dollars <sup>a</sup>	National Party Committee in Dollars	State, District, Local Party in Dollars	Additional National Party Committee Accounts in Dollars <sup>b</sup>
<b>Individual</b>	2,800 per election	5,000 per year	35,500 per year	10,000 per year (combined)	106,500 per account, per year
<b>Candidate committee</b>	2,000 per election	5,000 per year	Unlimited transfers to party committee	Unlimited transfers to party committee	
<b>PAC Multicandidate</b>	5,000 per election	5,000 per year	15,000 per year	5,000 per year (combined)	45,000 per account, per year
<b>PAC Non-multicandidate</b>	2,800 per election	5,000 per year	35,500 per year	10,000 per year, (combined)	106,500 per account, per year
<b>State, district, local party committee</b>	5,000 per election (combined)	5,000 per year (combined)	Unlimited Transfers		
<b>National party committee</b>	5,000 per election <sup>c</sup>	5,000 per year			

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

Note: These limits are indexed for inflation in odd-numbered years.

<sup>a</sup>"PAC" here refers to a committee that makes contributions to other federal political committees. Independent expenditure-only political committees (sometimes called "super PACs") may accept unlimited contributions, including from corporations and labor organizations. A nonconnected PAC is considered any committee that conducts activities in connection with an election, but that is not a party committee, an authorized committee of any candidate for federal election, or a separate segregated fund. A separate segregated fund is a political committee established, administered or financially supported by a corporation or labor organization—also referred to as corporate or labor political action committee. See 11 C.F.R. § 114.1(a)(2)(iii).

<sup>192</sup>52 U.S.C. § 30116.

<sup>193</sup>A contribution is defined as a gift, subscription, loan, advance or deposit of money or anything of value given to influence a federal election; or payment by any person of compensation for the personal services of another person if those services are rendered without charge to a political committee for any purpose. 11 C.F.R. §§ 100.52(a), .54.

<sup>b</sup>The limits in this column apply to a national party committee's accounts for: (i) the presidential nominating convention; (ii) election recounts and contests and other legal proceedings; and (iii) national party headquarters buildings. A party's national committee, Senate campaign committee and House campaign committee are each considered separate national party committees with separate limits. Only a national party committee, not the parties' national congressional campaign committees, may have an account for the presidential nominating convention.

<sup>c</sup>Additionally, a national party committee and its Senatorial campaign committee may contribute up to \$49,600 combined per campaign to each Senate candidate.

### Enclosure III: Political Committees and Organizations Spending and Raising Money in Support of Federal Elections

Federal campaign finance laws permit various types of political committees and organizations to conduct campaign finance related activities.<sup>194</sup> Some entities, like political committees, can both raise and spend money to influence federal elections. For example, political action committees (PACs) may make contributions to candidates and make independent expenditures. In contrast, corporations and labor organizations cannot use their general treasuries to make contributions to candidates or political committees, but may spend money in other ways to influence federal elections.<sup>195</sup> They may (1) establish a separate segregated fund, known as a corporate or labor PAC; (2) make unlimited independent expenditures and electioneering communications; and (3) make unlimited contributions to Super PACs.<sup>196</sup> While Super PACs may not contribute directly to federal candidates, they may raise unlimited funds from corporations, unions, and individuals and spend unlimited funds in the form of independent expenditures.

Under the Internal Revenue code, social welfare organizations that are tax-exempt under 501(c)(4) and political organizations that are tax-exempt under section 527 may engage in activities to influence elections, to varying extents. An organization may engage in some political campaign intervention, without losing its tax-exempt status under section 501(c)(4), so long as it continues to be primarily engaged in activities that promote social welfare.<sup>197</sup> Under FECA, such organizations that are incorporated are prohibited from contributing directly to federal candidates, but may raise unlimited funds and make independent expenditures, as well as make contributions to Super PACs. Political organizations qualifying for tax-exempt status under section 527 of the Internal Revenue Code are formed and operated primarily to accept contributions or make expenditures for the purpose of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of presidential or vice presidential

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<sup>194</sup>The Federal Election Campaign Act of 1971, as amended, generally defines political committees as any committee, club, association, or other group of persons, which receives contributions or makes expenditures aggregating in excess of \$1,000 during a calendar year for the purposes of influencing any federal election. 52 U.S.C. § 30101(4). The Supreme Court held in *Buckley v. Valeo* that only organizations under the control of a federal candidate or whose major purpose is the election or defeat of federal candidates may be regulated as political committees. *Buckley v. Valeo*, 424 U.S. at 79–80.

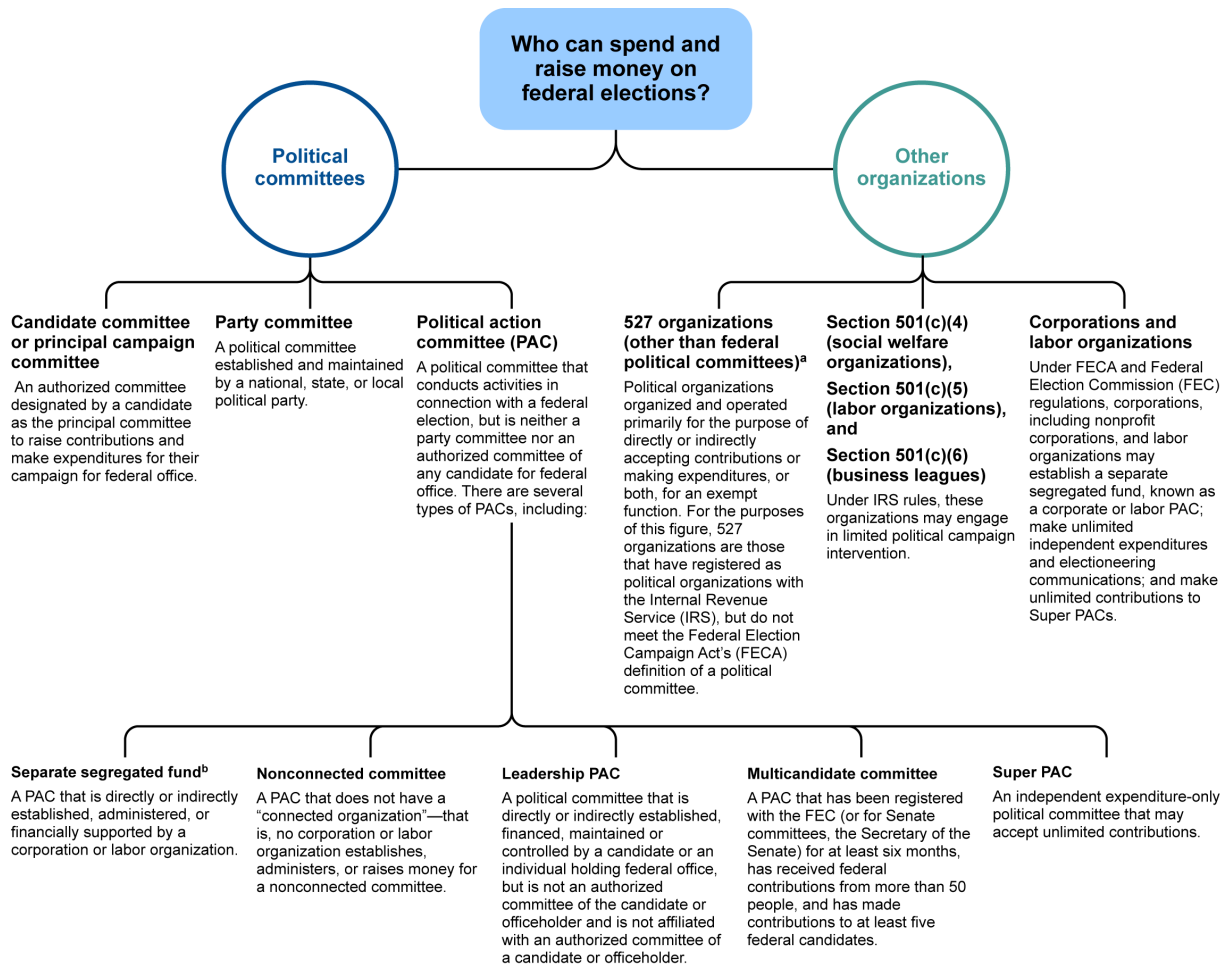
<sup>195</sup>52 U.S.C. § 30118.

<sup>196</sup>A Super PAC is a political committee that makes only independent expenditures and may solicit or accept unlimited contributions from individuals, corporations, labor organizations and other political committees.

<sup>197</sup>The Internal Revenue Code provides that a 501(c)(4) organization must be operated exclusively for the promotion of social welfare. 26 U.S.C. § 501(c)(4). IRS regulations provide that an organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community, and the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. 26 C.F.R. § 1.501(c)(4)-1(a)(2). 501(c)(5) labor organizations and 501(c)(6) trade associations may also engage in limited political campaign intervention. See Rev. Rul. 2004-6. If these organizations make expenditures for a section 527(e)(2) exempt function, they may be subject to tax under 527(f). Such exempt functions include influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. 26 U.S.C. § 527(e)(2).

electors.<sup>198</sup> Some, but not all, 527 organizations are political committees regulated by FEC.<sup>199</sup> Section 527 organizations that are not political committees may engage in issue advocacy (other than electioneering communications), if it is not coordinated with campaigns. Figure 11 identifies the types of political committees and organizations that raise and spend money in support of federal elections.

**Figure 11: Political Committees and Organizations That Raise and Spend Money in Support of Federal Elections**



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

<sup>a</sup>Under section 527 the exempt function means influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. 26 U.S.C. § 527(e)(2).

<sup>b</sup>The term "financially supported" does not include contributions to the political committee, but does include the payment of establishment, administration or solicitation costs.

<sup>198</sup>26 U.S.C. § 527(e).

<sup>199</sup>Political committees that are registered with FEC and are also organized under section 527 of the Internal Revenue Code are subject to FEC reporting requirements and exempt from some IRS reporting requirements. 26 U.S.C. § 527(j)(5)(A).



## Enclosure IV: Overview of the Federal Election Commission's (FEC) Enforcement Process for Campaign Finance Violations

Under FEC regulations, the enforcement process begins when a complaint or referral is made alleging that a violation of federal campaign finance laws has occurred or is about to occur.<sup>200</sup> Respondents are notified of the filing of a complaint or referral and have an opportunity to respond in writing.<sup>201</sup> The FEC's Office of General Counsel reviews and analyzes complaints, referrals, and *sua sponte* submissions; respondents' responses to FEC notifications; and publicly available information to formulate a recommended course of action for the Commission. The Commission then reviews the Office of General Counsel's report and recommendations and the associated complaint, referral, or *sua sponte* submission and responses from respondents. The Commission can find that there is no reason to believe a violation occurred, or it may otherwise dismiss a complaint, referral or submission at any point during its consideration of the matter. If the Commission finds reason to believe a violation occurred, it is to conduct an investigation to determine if there is probable cause that a violation has occurred or may proceed—prior to a finding of probable cause—to negotiations to reach a conciliation, or voluntary settlement agreement, which may include a monetary penalty.<sup>202</sup> If the Commission finds probable cause to believe a violation occurred, it must attempt to reach a tentative conciliation agreement with the respondent,<sup>203</sup> and if the Commission fails to conciliate with a respondent, it may authorize a civil lawsuit in U.S. district court.<sup>204</sup> In certain circumstances, the Commission may also refer a matter to the Department of Justice (DOJ) for criminal prosecution under the Federal Election Campaign Act of 1971, as amended.<sup>205</sup> Figure 12 provides an overview of the FEC's enforcement process for campaign finance violations.

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<sup>200</sup>See 11 C.F.R. §§ 111.3, .4, .8. *Office of General Counsel Enforcement Manual*, Federal Election Commission, June 2013. According to FEC officials, the enforcement manual has not been approved by the Commission as of July 2019; however, the FEC continues to use the manual as supplemental guidance in its enforcement efforts.

<sup>201</sup>11 C.F.R. §§ 111.6, .9.

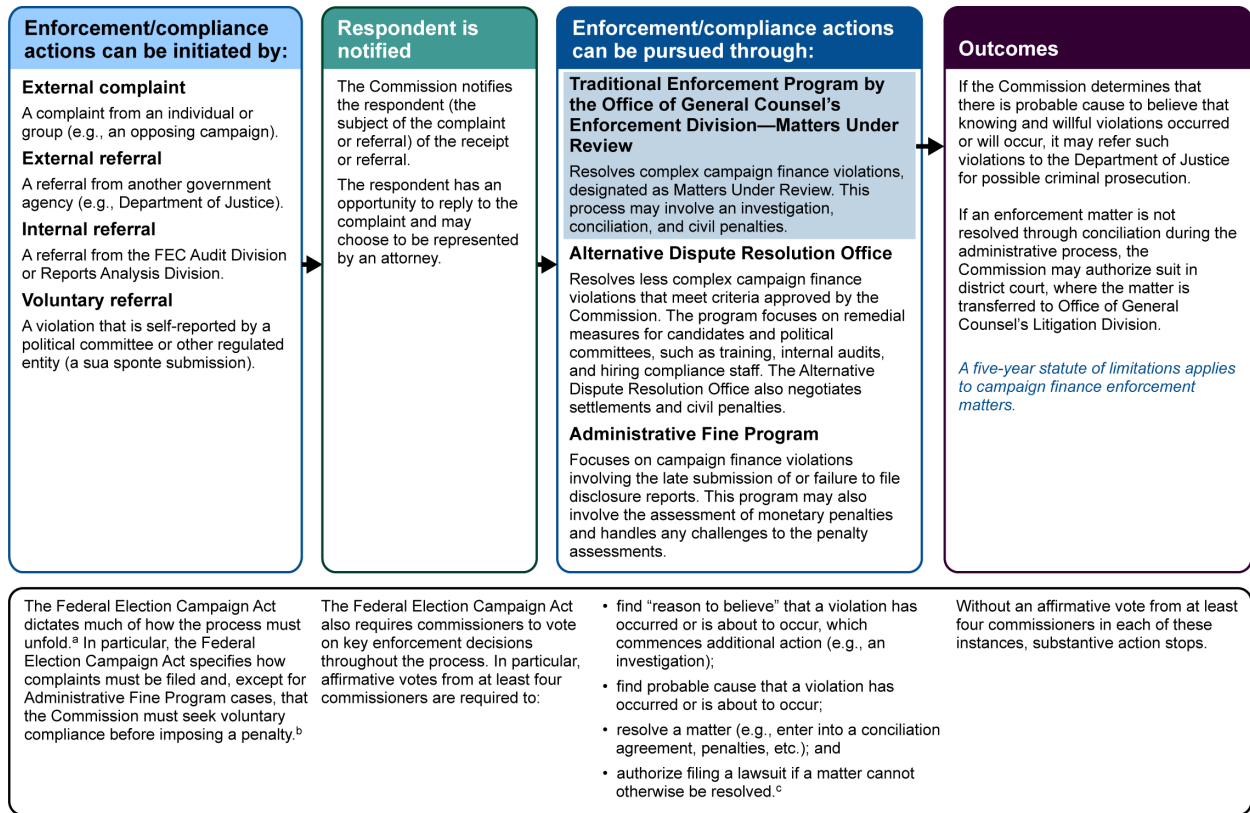
<sup>202</sup>11 C.F.R. §§ 111.10, .18(d).

<sup>203</sup>11 C.F.R. § 111.18(a).

<sup>204</sup>11 C.F.R. § 111.19.

<sup>205</sup>Under 52 U.S.C. § 30109(a)(5)(C), if the Commission determines that there is probable cause to believe that a knowing and willful violation has occurred or is about to occur, the Commission may refer such apparent violation to the Attorney General of the United States.

**Figure 12: Overview of the Federal Election Commission’s (FEC) Enforcement Process for Campaign Finance Violations**



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

<sup>a</sup>52 U.S.C. § 30109.

<sup>b</sup>52 U.S.C. § 30109(a)(1), (4).

<sup>c</sup>52 U.S.C. § 30109(a)(2), (4)(i), (6)(A).

## **Enclosure V: The Federal Election Commission’s (FEC) Campaign Finance Violation Enforcement Activities, Fiscal Years 2002 through 2017**

For the traditional enforcement process, the FEC received a total of 2,444 matters under review and closed a total of 2,379 matters under review during the time period.<sup>206</sup> On average, the traditional enforcement program received about 153 matters under review per fiscal year—ranging from 85 to 235 matters under review received annually—and closed about 149 matters under review per fiscal year—ranging from 86 to 239 matters under review closed annually. A majority of the FEC’s Alternative Dispute Resolution Office’s matters resulted in settlements during this period. The Alternative Dispute Resolution Office total matters consisted of 568 (79 percent) settlements and 148 (21 percent) dismissals, totaling 716 matters adjudicated.<sup>207</sup> A majority of the FEC’s Administrative Fine Program’s enforcement related cases were not challenged during this time period. The Administrative Fine Program’s case load was comprised of 2,095 (76 percent) non-challenged cases and 662 (24 percent) challenged cases, totaling 2,757 cases.<sup>208</sup> Figure 13 shows the distribution of the FEC’s enforcement activities for fiscal years 2002 through 2017.

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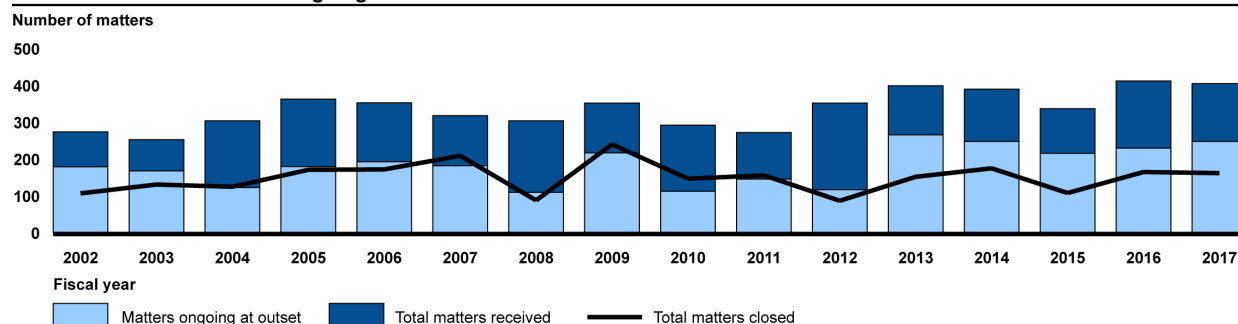
<sup>206</sup>FEC’s traditional enforcement process resolves campaign finance violations, designated as matters under review. This process may involve an investigation, conciliation, and civil penalties.

<sup>207</sup>The category for dismissal includes matters in which the Commission approved the Alternative Dispute Resolution Office’s recommendation that a matter be dismissed.

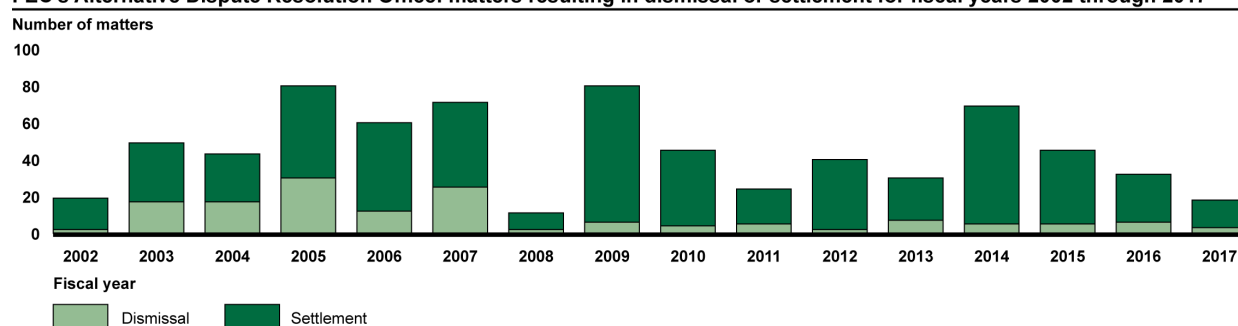
<sup>208</sup>The Commission has established procedures permitting respondents to challenge the imposition of an administrative fine based on specific defenses. Specifically, a challenge must explain the factual basis for the challenge and demonstrate at least one of the following (1) the reason to believe finding was based on factual errors, (2) the civil penalty amount was improperly calculated, or (3) the committee could not file because of unforeseen circumstances beyond its control, and when those circumstances ended, the committee filed the late report within 24 hours.

**Figure 13: The Federal Election Commission's (FEC) Enforcement Activities, Fiscal Years 2002 through 2017**

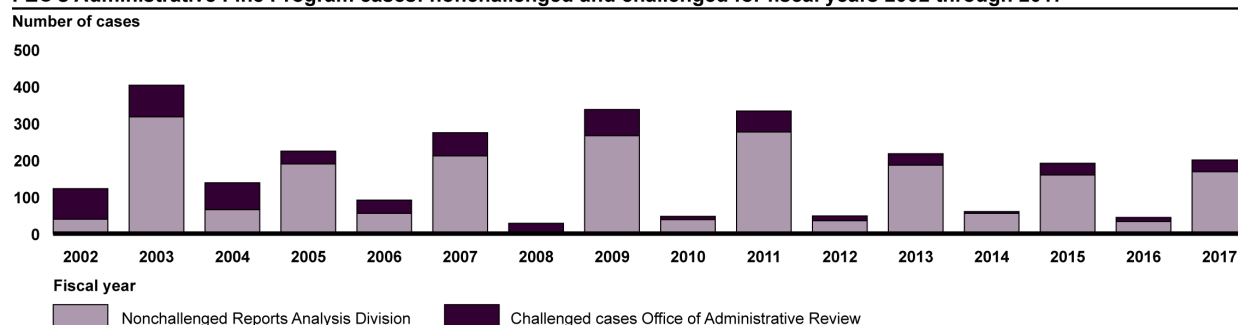
**FEC's matters under review ongoing and closed**



**FEC's Alternative Dispute Resolution Office: matters resulting in dismissal or settlement for fiscal years 2002 through 2017**



**FEC's Administrative Fine Program cases: nonchallenged and challenged for fiscal years 2002 through 2017**



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

Note: The FEC's Reports Analysis Division and Office of Administrative Review administer the Administrative Fines Program. Under the program regulations, if the Commission finds reason to believe that a committee violated the Federal Election Campaign Act of 1971, as amended, the Commission sends a letter to the committee containing the factual and legal basis for its finding and the amount of the proposed calculated fine, among other things. 11 C.F.R. § 111.32. The Reports Analysis Division administers this part of the process. Unlike enforcement matters handled through the Office of General Counsel or the Alternative Dispute Resolution Office, the penalties assessed through the Administrative Fines Program are not subject to negotiation. As stated, the Commission has established procedures permitting respondents to challenge the imposition of an administrative fine based on specific defenses. 11 C.F.R. § 111.35. The Office of Administrative Review handles the challenge process and forwards a written recommendation to the full Commission and to the respondent. After reviewing the respondent's written response and the recommendation from the Office of Administrative Review, the Commission makes a final determination. 11 C.F.R. § 111.37.

## Enclosure VI: Certain Types of Tax-Exempt Organizations and Permitted Political Campaign Intervention

The Internal Revenue Code imposes limitations on the amount of political campaign intervention in which certain 501(c) groups may engage. For example, 501(c)(3) charitable organizations (including churches and other houses of worship) are prohibited under the Internal Revenue Code from engaging in political campaign intervention. However, these groups are permitted to take policy positions and engage in an insubstantial amount of lobbying.<sup>209</sup> Other types of 501(c) organizations—such as 501(c)(4) social welfare organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations—may engage in limited political campaign intervention.<sup>210</sup> In contrast to organizations established under section 501(c), an organization that is tax-exempt under section 527 is a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.<sup>211</sup> An exempt function is the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.<sup>212</sup> Figure 14 provides an overview of some of the types of tax-exempt organizations allowed under the Internal Revenue Code, and the type and extent of political campaign intervention these organizations may conduct without losing their tax-exempt status.

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<sup>209</sup>26 U.S.C. §501(c)(3) refers to organizations “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition ... or for the prevention of cruelty to children or animals.” Among other things, “no substantial part” of the organization’s activities may be attempting to influence legislation, and it may “not participate in, or intervene in ... any political campaign on behalf of (or in opposition to) any candidate for public office.” *Id.*

<sup>210</sup>The Internal Revenue Code provides that a 501(c)(4) organization must be operated exclusively for the promotion of social welfare. 26 U.S.C. § 501(c)(4). IRS regulations provide that an organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community, and the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. 26 C.F.R. § 1.501(c)(4)-1(a)(2). 501(c)(5) labor organizations and 501(c)(6) trade associations may also engage in limited political campaign intervention. See Rev. Rul. 2004-6.

<sup>211</sup>26 U.S.C. § 527(e)(1).

<sup>212</sup>26 U.S.C. § 527(e)(2).

**Figure 14: Select Types of Tax-Exempt Organizations and Permitted Political Campaign Intervention**

527 organization	501(c)(3) organization	501(c)(4) organization	501(c)(5) organization	501(c)(6) organization
Section 527 of the Internal Revenue Code provides for the exemption of political organizations. A 527 organization is a party, committee, association, fund, or other organization organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function. <sup>a</sup>	<p>A 501(c)(3) organization is organized and operated exclusively for charitable, religious, educational, scientific, testing for public safety, literary or educational purposes, to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals.</p> <p>Charitable organizations under section 501(c)(3) are prohibited from participating or intervening in a political campaign on behalf of or in opposition to any candidate for public office.</p>	A 501(c)(4) organization is a civic league or organization not organized for profit but operated exclusively for the promotion of social welfare, or a local association of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.	A 501(c)(5) organization is a labor, agricultural, or horticultural organization.	A 501(c)(6) organization is a business league, chamber of commerce, real estate board, board of trade, or professional football league, which is not organized for profit.
<p>Unlike section 501(c)(3) organizations, these organizations may engage in limited political campaign intervention. If they make expenditures for a section 527(e)(2) exempt function, they may be subject to tax under section 527(f).<sup>b</sup></p>				

Source: GAO analysis of Internal Revenue Service information. | GAO-20-66R

<sup>a</sup>An exempt function is influencing or attempting to influence the selection, nomination, election or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. 26 U.S.C. § 527(e)(2).

<sup>b</sup>Section 527(f) of the Internal Revenue Code provides that a Section 501(c) organization is subject to tax if it spends any amount for an exempt function. The tax is imposed on the lesser of the organization's net investment income or its section 527 exempt function expenditures.

## Enclosure VII: Comments from the Federal Election Commission



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIR

January 10, 2020

Ms. Rebecca Gambler  
Director, Homeland Security and Justice  
Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Re: Draft GAO Report *Campaign Finance* (Engagement Code 102707)

Dear Ms. Gambler:

Thank you for providing the Federal Election Commission (FEC) with the opportunity to review and comment on the draft Government Accountability Office (GAO) Report on its *Campaign Finance* engagement.

The FEC thoroughly cooperated with GAO as it worked on this review, which began for the FEC with an entrance conference in July 2018. Under the supervision of the FEC Commissioners, a large team of agency staff drafted responses to more than 200 written questions from GAO and prepared more than 1,200 pages of supporting documents requested by GAO. GAO also met with all four of the then-serving FEC Commissioners in July 2019 as noted in the draft Report, in addition to meetings with many agency staff members.

GAO has prepared a lengthy Report on its Campaign Finance engagement, which provides information on three aspects of federal campaign finance: (1) the legal requirements and prohibitions that apply to campaign finance; (2) the roles and responsibilities of federal agencies in enforcing campaign finance laws; and (3) the perspectives of other organizations on the enforcement of campaign finance laws. Based on its analysis, GAO recommends that the FEC and the U.S. Department of Justice (DOJ) should review and update guidance that addresses coordination between the two agencies, once a quorum of FEC commissioners has been restored.

While the FEC has exclusive jurisdiction over *civil* enforcement of federal campaign finance laws, DOJ has jurisdiction over *criminal* enforcement of those laws. Thus, the FEC and DOJ have parallel jurisdiction over facts that present potential civil and criminal violations of FECA. The FEC and DOJ entered a Memorandum of Understanding (MOU) that, along with other guidance from both agencies, sets forth basic principles of cooperation. These principles continue to animate an ongoing collaboration between the agencies. In fact, both DOJ and FEC

Ms. Rebecca Gambler, GAO  
January 10, 2020  
Page 2

officials noted that coordination between the two agencies works well, as stated in GAO's draft Report. This reflects the importance that current FEC Commissioners and staff place on maintaining the agency's relationship with DOJ.

As recognized by GAO's recommendation, the FEC's current composition of only three Commissioners leaves it with less than a quorum and currently unable to act on GAO's recommendation. Once a quorum is restored to the FEC by the appointment of at least one new Commissioner, a freshly reconstituted FEC can consider GAO's recommendation to review and update the guidance that addresses coordination between the FEC and DOJ.

The FEC appreciates the work of the entire GAO team on this review, particularly the efforts of Frederick T. Lyles, Analyst-in-Charge, who coordinated GAO's interaction with this agency, as well as the opportunity to comment on GAO's draft Report. If you have any questions, please contact me or Duane Pugh, the FEC's Director of Congressional, Legislative and Intergovernmental Affairs at [dpugh@fec.gov](mailto:dpugh@fec.gov) or (202) 694-1002.

On behalf of the Commission,



Caroline C. Hunter  
Chair



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