FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

Policy Statement of Vice Chairman James E. "Trey" Trainor, III and Commissioners Allen J. Dickerson and Dara Lindenbaum Concerning Enforcement Procedures

We are issuing this policy statement to apprise complainants, respondents, and the public of its procedures for the initial and final stages of the enforcement process.[1] The Federal Election Campaign Act ("FECA" or "Act") provides for two ways to initiate an enforcement matter. First, any person may file a written, notarized complaint under penalty of perjury bringing an alleged violation of the Act to the Federal Election Commission's ("FEC" or "Commission") attention.[2] Second, the Commission may self-generate an enforcement matter "in the normal course of carrying out its supervisory responsibilities."[3] In all matters, respondents are notified and given the opportunity to submit a response.[4]

By regulation and custom, the Commission has entrusted its Office of General Counsel ("OGC") with reviewing complaints and responses. This review takes the form of a First General Counsel's Report containing a recommendation whether to dismiss or find reason-to-believe.[5] The Commission then will either vote to dismiss or find reason-to-believe a violation has occurred.[6] In practice, a reason-to-believe vote functions as the Commission deciding that the Matter is one warranting either pre-probable cause conciliation (a negotiated settlement between the Respondent and the Commission) or investigation.[7]

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[1] Fed. Election Comm'n, "Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process," 89 Fed. Reg. 19729, Mar. 20, 2024 ("Initial Stage Policy").

[2] 52 U.S.C. § 30109(a)(1).

[3] 52 U.S.C. § 30109(a)(2).

[4] *See* 52 U.S.C. § 30109(a)(1-2).

[5] 11 C.F.R. § 111.7 ("[T]he General Counsel may recommend to the Commission whether or not it should find reason to believe…").

[6] 52 U.S.C. § 30109(a)(2) (a reason-to-believe vote must carry by "affirmative vote of 4 of its members"); Initial Stage Policy, 89 Fed. Reg. at 19730.

[7] 52 U.S.C. § 30109(a)(2); *see* Fed. Election Comm'n Dir. 74 (Nov. 1, 2023).

Following an investigation or a failed pre-probable cause conciliation, the matter proceeds to the probable cause stage. FECA requires OGC to draft a brief containing "any recommendation…to proceed to a vote on probable cause."[8] OGC notifies each respondent of its recommendation and attaches its brief.[9] After reviewing respondents' briefs, OGC advises the Commission whether it intends to proceed with the recommendation to find probable cause to believe that a violation occurred.[10] The Commission then votes on OGC's recommendations. If the Commission votes to find probable cause to believe that a violation occurred, the Commission must attempt conciliation for a period of at least 30 days.[11] If conciliation is unsuccessful, the Commission may vote to institute a civil action for relief.[12]

In 1987, the D.C. Circuit established that in circumstances where the Commission has "rejected or failed to follow the General Counsel's recommendation" at the reason-to-believe threshold, the commissioners who decline to support OGC's recommendation must provide a written explanation for that decision so that any reviewing court can "say whether reason or caprice determined the dismissal of [the] complaint."[13] In a recent matter, *CREW v. FEC*, the district court extended that requirement to circumstances where the Commission declines to embrace the General Counsel's recommendation that the agency "determine[], by an affirmative vote of 4 of its members, that there is probable cause to believe" a respondent has violated FECA.[14]

In addition, the court held that "[t]he FEC's dismissal of [the] complaint was contrary to law because the agency failed to explain its actions at the time of the dismissal," because "[a]gencies must explain their actions *at the same time* that they take them."[15] In doing so, the court relied on *End Citizens United PAC v. Federal Election Commission*,[16] a D.C. Circuit opinion which determined that when a "controlling Commissioners' explanation [is not]…issued 'at the time when a deadlock vote results in an order of dismissal,'"[17] it will be treated by the judiciary as a prohibited *post hoc* rationalization.

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[8] 52 U.S.C. §§ 30109(a)(3); (a)(4).

[9] 11 C.F.R. § 111.16(b).

[10] 11 C.F.R. § 111.16(d).

[11] 52 U.S.C. § 30109(a)(4).

[12] 52 U.S.C. § 30109(a)(6).

[13] *Dem. Cong. Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131, 1135 (D.C. Cir. 1987).

[14] 52 U.S.C. § 30109(a)(4); *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm'n*, Case No. 22-35 (D.D.C. Mar. 17, 2025).

[15] Mem. Op. at 6, *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm'n*, Case No. 22-35 (D.D.C. Mar. 17, 2025) (emphasis supplied).

[16] 69 F.4th 916 (D.C. Cir. 2023).

[17] *Id*. at 921 (quoting *Common Cause v. Fed. Election Comm'n*, 842 F.2d 436, 449 (D.C. Cir. 1988)).

The Commission does not interpret the court's ruling to require that explanatory Statements of Reasons must be pre-written and issued at the moment the Commission votes to dismiss a complaint. That rule would pose intractable practical difficulties and hamper the Commission's ability to function as a bipartisan deliberative body.

The Commission votes on enforcement matters at regular executive sessions. Those sessions consist of serious deliberations between the Commission and its Office of General Counsel, as well as amongst commissioners. It is not uncommon for commissioners to come to executive session uncertain of their vote on a given Matter and receptive to arguments made by colleagues. These deliberations, which generally occur contemporaneously with commissioners' voting decisions, are the hallmark of the Commission's decision-making process.

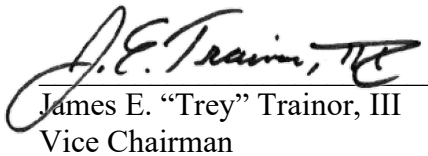
As a practical matter, then, the writing of a Statement of Reasons typically cannot begin until after deliberations have occurred and after votes have been taken. Meanwhile, the Commission continues to juggle oversight of its other divisions. As such, providing a Statement of Reasons engaging with oftentimes lengthy, resource-intensive General Counsel's Reports and probable cause briefs also takes considerable time.

Moreover, a rule that Statements of Reasons must be issued simultaneously with the Commission's vote is incompatible with the Government in the Sunshine Act because the Commission's "real" decision-making would occur outside of regular order.[18] Such a change could also undermine the agency's legitimacy if it is perceived to "manufacture contemporaneity by artificially delaying the closure of a case."[19] These concerns further animated the Commission's decision to adopt a 30-day file closing deadline for statements of reasons memorializing commissioners' reasoning.

This Statement is intended to clarify the FEC's internal procedures for the benefit of all parties appearing before the Commission. It does not announce any rule of general applicability, nor does it replace the formal policies adopted by vote of the Commission.

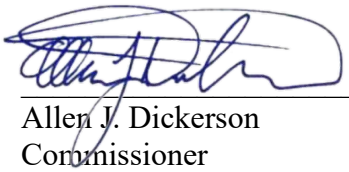
[18] 11 C.F.R. § 2.4.

[19] Mem. Op. at 6, *Campaign Legal Ctr. v. Fed. Election Comm'n*, Case No. 19-2336 (D.D.C. Jan. 28, 2025).



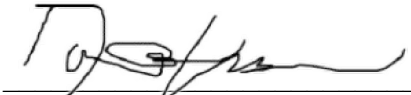
James E. "Trey" Trainor, III
Vice Chairman

April 15, 2025
Date



Allen J. Dickerson
Commissioner

April 15, 2025
Date



Dara Lindenbaum
Commissioner

April 15, 2025
Date