

1 **FEDERAL ELECTION COMMISSION**

2
3 **FIRST GENERAL COUNSEL'S REPORT**

4
5 **AUDIT REFERRAL:** 17-12R
6 **DATE REFERRED:** November 13, 2017
7 **DATE OF NOTIFICATION:** November 17, 2017
8 **RESPONSE RECEIVED:** None received
9 **DATE ACTIVATED:** March 22, 2018

10
11 **EXPIRATION OF SOL:** May 28, 2020 (earliest)
12 **October 31, 2021 (latest)**
13 **ELECTION CYCLE:** 2016

14
15 **COMPLAINANT:** Internally Generated

16
17 **RESPONDENTS:** Freedom's Defense Fund and Paul Kilgore in his
18 official capacity as treasurer

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20 **RELEVANT STATUTES AND**
21 **REGULATIONS:** 52 U.S.C. § 30104(b)(4)(H)(iii)
22 52 U.S.C. § 30104(b)(8)
23 52 U.S.C. § 30104(g)
24 11 C.F.R. § 104.3(b), (d)
25 11 C.F.R. § 104.4(b)

26
27 **INTERNAL REPORTS CHECKED:** Disclosure Reports

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29 **FEDERAL AGENCIES CHECKED:** None

30
31 **I. INTRODUCTION**

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33 This matter involves over \$1.3 million in apparent misreporting by Freedom's Defense
34 Fund and Paul Kilgore, in his official capacity as treasurer ("FDF" or the "Committee") in 2015
35 and 2016. The Reports Analysis Division ("RAD") initially referred this activity to the Audit
36 Division, and the Commission later referred it to the Office of the General Counsel ("OGC").
37 The Referral includes violations relating to FDF's failure to properly report its independent
38 expenditures ("IEs"), the failure to disclose outstanding debts related to its IEs, and additional
39 misreporting. As set forth below, we recommend that the Commission open a matter under

1 review, find reason to believe that FDF violated 52 U.S.C. § 30104(b)(4)(H)(iii), (8), and (g)(2),
2 and 11 C.F.R. §§ 104.3(d), 104.4, and 104.11, and enter into pre-probable cause conciliation
3 with FDF

4 **II. FACTUAL BACKGROUND**

5 FDF is a multi-candidate committee that has been filing reports with the Commission
6 since July 2004.¹ Scott Mackenzie was its treasurer from its inception through September 2017,
7 when he was replaced by the current treasurer, Paul Kilgore.²

8 RAD sent Requests for Additional Information ("RFAs") to FDF regarding its 2015
9 Mid-Year, 2015 Year-End, 2016 April Quarterly, 2016 July Quarterly, 2016 October Quarterly,
10 2016 Pre-General, and 2016 Post-General Reports.³ FDF did not file responses to any of the
11 RFAs, but did file amendments to these reports that appeared to address issues identified in the
12 RFAs.⁴

¹ See Statement of Organization (June 7, 2004). The Commission has reviewed issues with FDF's reporting in the 2008, 2010, and 2012 election cycles. An audit of FDF's 2008 activity resulted in the Commission pursuing an enforcement action for FDF's failure to file 24- and 48-hour reports in 2008. See Conciliation Agreement (July 9, 2012), MUR 6555 (formerly AR 11-03). A RAD Referral from the 2010 election cycle resulted in the Commission being equally divided over a recommendation to decline to open a MUR and send a caution letter. See OGC Memorandum to Commission (Nov. 13, 2012), RR 11L-29R (Freedom's Defense Fund); Certification (Jan. 31, 2013), RR 11L-29R (Freedom's Defense Fund). The Commission also audited FDF for activity from the 2012 election cycle, but did not take enforcement action because the audit was not completed until after the running of the statute of limitations for all referable violations. See Final Audit Report and Certification, A13-14, *In the Matter of the Proposed Final Audit Report on the Freedom's Defense Fund* (Dec. 7, 2017); OGC Memorandum to Commission (Dec. 26, 2017), AR 13-14 (Freedom's Defense Fund) (recommending Commission decline to open a MUR due to the expired statute of limitations); Certification (Feb. 8, 2018), AR 13-14 (Freedom's Defense Fund) (Commission failed, by a 3-2 vote, to approve OGC's recommendation to decline to open a MUR).

² See Amended Statement of Organization (Sept. 13, 2017)
<http://docquery.fec.gov/pdf/062/201709139074682062/201709139074682062.pdf>.

³ See RFAs dated May 10, 2016, May 18, 2016, October 4, 2016, December 2, 2016, and April 7, 2017.

⁴ Some of those amendments merely removed the transactions questioned in the initial RFAs without providing any further explanation. RAD sent second RFAs for the amendments filed for the 2015 Mid-Year, 2015 Year-End, 2016 April Quarterly and 2016 July Quarterly Reports, raising questions about certain transactions previously disclosed and other changes on the amendments, but FDF has not responded to those subsequent RFAs or filed any additional amendments. See RFAs dated April 7, 2017.

1 RAD's referral included FDF's apparent reporting violations under Standards 7 and 14 of
2 the 2015-2016 election cycle RAD Referral Procedures for the failure to provide supporting
3 schedules in connection with outstanding debts and IEs, the failure to file 48-Hour Reports, and
4 other IE reporting inaccuracies.⁵ The amount in violation for the referable issues totals
5 \$1,305,317.65 and includes the following violations:

- 6 • failure to timely file 48-hour reports;
- 7
- 8 • failure to disclose IEs on Schedule E that had been disclosed on 48-hour reports;
- 9
- 10 • failure to clarify discrepancies between the amount of an IE on a 48-hour report
- 11 and the amount disclosed on a corresponding Schedule E;
- 12
- 13 • failure to disclose a debt on Schedule D for IEs that had been publicly
- 14 disseminated, but not yet paid for; and
- 15
- 16 • failure to continuously report outstanding debts and to clarify debt discrepancies.
- 17

18 The referable violations in each report are shown below.⁶

REPORT	REFERRED ISSUE
Amended 2015 Mid-Year	Failure to timely file 48-Hour Reports for \$177,606.74 in IEs disclosed on Schedule E (ADRO)
2015 Year-End	Failure to disclose \$30,612.83 in IEs on Schedule E that had been disclosed on 48-Hour Reports
Amended 2015 Year-End	Failure to disclose a debt on Schedule D for IEs totaling \$186,006.93 that had been disseminated and disclosed as memo entries, but not yet paid for
Amended 2016 April Quarterly	<ul style="list-style-type: none">• Failure to continuously report outstanding debts owed to four individuals, totaling \$11,349• Failure to clarify a debt discrepancy of \$25,980.82

⁵ Referral at 5-7.

⁶ Referral at 2-4. Those violations designated "(ADRO)" in the chart only met the thresholds for referral to ADRO, but were referred to OGC in order to "limit the duplicate consideration of matters. *See RAD Review and Referral Procedures for the 2015-2016 Election Cycle* at 21. In addition, the Referral identified other apparent violations that initially met referral thresholds and were the subject of RFAs sent to FDF. However, FDF's amendments to its 2015 Mid-Year, 2015 Year-End, and 2016 April Quarterly Reports made in response to those RFAs reduced the amounts in violation below the relevant referral thresholds, or substantially reduced the amount in violation for activity that was ultimately referred. FDF has not provided an explanation for those changes.

	<ul style="list-style-type: none">• Failure to clarify a credit received for an outstanding debt owed to one vendor totaling \$5,206.79• Failure to disclose a debt on Schedule D for IEs totaling \$94,377.69 that had been disseminated and disclosed as memo entries, but not yet paid for• Failure to file required 48-Hour Reports for \$294,682.27 in IEs disclosed on Schedule E
Amended 2016 July Quarterly	<ul style="list-style-type: none">• Failure to disclose a debt on Schedule D for IEs totaling \$25,191.80 that had been disseminated and disclosed as memo entries, but not yet paid for (ADRO)• Failure to timely file 48-Hour Reports for \$52,537.79 in IEs disclosed on Schedule E (ADRO)
Amended 2016 October Quarterly	<ul style="list-style-type: none">• Failure to clarify a credit received for an outstanding debt owed to one vendor totaling \$3,370.86• Failure to disclose a debt on Schedule D for IEs totaling \$165,338 that had been disseminated and disclosed as memo entries, but not yet paid for• Failure to timely file required 48-Hour Reports for \$219,106.13 in IEs disclosed on Schedule E• Failure to clarify a \$13,950 discrepancy between amount of an IE on a 48-Hour Report and the amount on Schedule E (ADRO)

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RAD assessed the Committee a total of 17 audit points and, as mentioned above, referred the Committee for an audit of the 2015-2016 election cycle. The Audit Division recommended that instead of auditing FDF, the Committee be referred directly to OGC, and the Commission did so.⁷

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OGC notified FDF's new treasurer of the referral, but FDF did not submit a response.⁸

⁷ See Certification ¶ 1 (Nov. 9, 2017); 2015-2016 RAD Audit Referrals- Unauthorized Committees, Audit Memorandum to Commission at 1 (Sept. 7, 2017).

⁸ See Notification Ltr. (Nov. 17, 2017). RAD's records reflect that it had previously asked former FDF treasurer Scott Mackenzie about the status of the Committee's correction of the issues noted in RFAIs, but received no response from Mackenzie.

1 **III. LEGAL ANALYSIS**

2 The Federal Election Campaign Act of 1971, as amended ("Act") requires committee
3 treasurers to file reports of disbursements in accordance with the provisions of 52 U.S.C.
4 § 30104(b).⁹ This requirement includes reporting IEs made by political committees other than
5 authorized committees.¹⁰ Every political committee that makes IEs must report them in its
6 regularly scheduled disclosure reports in accordance with 11 C.F.R. § 104.3(b)(3)(vii).¹¹ Such a
7 political committee must disclose on Schedule E the name of a person who receives any
8 disbursement during the reporting period in an aggregate amount or value in excess of \$200
9 within the calendar year in connection with an IE by the reporting committee.¹²

10 In addition, a political committee that makes or contracts to make IEs aggregating
11 \$10,000 or more for an election in any calendar year, up to and including the 20th day before an
12 election, must report these expenditures within 48 hours.¹³ These reports, known as 48-Hour
13 Reports, must be filed by the end of the second day "following the date on which a
14 communication that constitutes an independent expenditure is publicly distributed or otherwise
15 publicly disseminated."¹⁴ Additionally, "[e]very person must include in the aggregate total all
16 disbursements during the calendar year for independent expenditures, and all enforceable
17 contracts, either oral or written, obligating funds for disbursements during the calendar year for

⁹ 52 U.S.C. § 30104(a)(1).

¹⁰ 52 U.S.C. § 30104(b)(4)(H)(iii), *see also* 11 C.F.R. § 104.3(b)(1)(vii).

¹¹ 11 C.F.R. § 104.4(a).

¹² 11 C.F.R. § 104.3(b)(3)(ii). IEs of \$200 or less do not need to be itemized, though the committee must report the total of those expenditures on line (b) of Schedule E. 11 C.F.R. § 104.3(b)(3)(vii).

¹³ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

¹⁴ 11 C.F.R. § 104.4(b)(2).

1 independents expenditures, where those independent expenditures are made with respect to the
2 same election for Federal office.”¹⁵

3 The Act and Commission regulations also require political committees to disclose the
4 amount and nature of their outstanding debts and obligations until those obligations are
5 extinguished.¹⁶ A political committee must file separate schedules for debts owed by the
6 committee on a Schedule D with a statement explaining the circumstances and conditions under
7 which each debt and obligation was incurred and extinguished.¹⁷ A similar statement is required
8 where such debts and obligations are settled for less than their reported amount or value.¹⁸ A
9 debt of \$500 or less must be reported at the time that payment was made or within 60 days of the
10 date the political committee incurs the debt, whichever comes first, and a debt exceeding \$500
11 must be disclosed in the report that covers the date on which the debt was incurred.¹⁹ Where the
12 exact amount of a debt is unknown, the report shall state that the amount reported is an estimate
13 and the exact amount is to be disclosed in an amended report or on the report for a reporting
14 period in which such amount is determined.²⁰ Debts and obligations that remain outstanding
15 shall be continuously reported until extinguished.²¹

16 FDF’s reports reveal a number of violations of the Act and Commission regulations in
17 connection with its reporting of IEs and debts in six different disclosure reports, including

¹⁵ 11 C.F.R. § 104.4(f).

¹⁶ 52 U.S.C. § 30104(b)(8); 11 C.F.R. §§ 104.3(d), 104.11(a).

¹⁷ See 11 C.F.R. § 104.11(a).

¹⁸ 52 U.S.C. § 30104(b)(8); 11 C.F.R. §§ 104.3(d), 104.11(a).

¹⁹ 11 C.F.R. § 104.11(b).

²⁰ *Id.*

²¹ *Id.* § 104.11(a).

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1 amendments. First, it failed to timely file 48-hour reports for IEs totaling \$743,932.93, in
2 connection with IEs disclosed on its Amended 2015 Mid-Year, Amended 2016 April Quarterly,
3 Amended 2016 July Quarterly, and Amended 2016 October Quarterly Reports. Second, FDF
4 failed to disclose a total of \$30,612.83 in IEs on Schedule E of its 2015 Year-End Report that
5 had been previously disclosed on 48-hour reports. Third, the Committee failed to disclose or
6 continuously report \$482,263.42 in debts on Schedule D of its Amended 2015 Year-End,
7 Amended 2016 April Quarterly, Amended 2016 July Quarterly, and Amended 2016 October
8 Quarterly Reports regarding IEs it disseminated, but had not paid for yet. Finally, the
9 Committee's Amended 2016 April Quarterly and Amended 2016 October Quarterly Reports
10 contain \$34,558.47 in unexplained discrepancies in connection with some of its reported debts,
11 and its Amended 2016 October Quarterly Report contains \$13,950 in discrepancies between the
12 amounts of independent expenditures on a 48-hour report and the amount on the Schedule E.
13 The Committee has not provided an explanation for these errors.

14 Based on these errors, we recommend that the Commission find reason to believe that
15 FDF violated 52 U.S.C. § 30104(b)(4)(H)(iii), (g)(2) and 11 C.F.R. § 104.4 by either failing to
16 report IEs or reporting them inaccurately, and violated 52 U.S.C. § 30104(b)(8) and 11 C.F.R.
17 §§ 104.3(d), 104.11, by failing to report all of its debts and continuously report its outstanding
18 debts and obligations.

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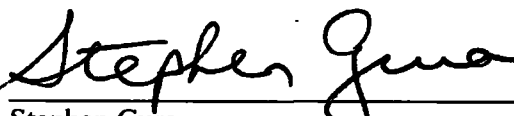
1 **V. RECOMMENDATIONS**


- 2 1. Open a MUR;
3
4 2. Find reason to believe that Freedom's Defense Fund and Paul Kilgore in his
5 official capacity as treasurer violated 52 U.S.C. § 30104(b)(4)(H)(iii),
6 30104(g)(2) and 11 C.F.R. § 104.4;
7 3. Find reason to believe that Freedom's Defense Fund and Paul Kilgore in his official
8 capacity as treasurer violated 52 U.S.C. § 30104(b)(8) and 11 C.F.R. §§ 104.3(d),
9 104.11;
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11 4. Approve the attached Factual and Legal Analysis;
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13 5. Enter into conciliation with Freedom's Defense Fund and Paul Kilgore in his
14 official capacity as treasurer, prior to a finding of probable cause; and
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16 6. Approve the appropriate letters.

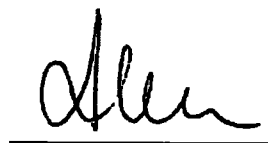
17 Lisa J. Stevenson
18 Acting General Counsel
19

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21 Kathleen M. Guith
22 Associate General Counsel
23

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26 6.20.18
27 Date

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29 _____
30 Stephen Gura
31 Deputy Associate General Counsel

32 
33 _____
34 Mark Shonkwiler
35 Assistant General Counsel

36 
37 _____
38 Ana J. Peña-Wallace
39 Attorney
40

41 Attachments:
42 1- Factual and Legal Analysis
43

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 RESPONDENT: Freedom's Defense Fund and MUR:
4 Paul Kilgore in his official
5 capacity as treasurer
6

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8 **I. INTRODUCTION**
9

10 This matter was generated based on information ascertained by the Federal Election
11 Commission (the "Commission") in the normal course of carrying out its supervisory
12 responsibilities. *See* 52 U.S.C. § 30109(a)(2). The Reports Analysis Division ("RAD") referred
13 Freedom's Defense Fund and Paul Kilgore, in his official capacity as treasurer ("FDF" or the
14 "Committee") for misreporting \$1 million in 2015 and 2016. Specifically, the Referral includes
15 violations relating to FDF's failure to properly report its independent expenditures ("IEs"), the
16 failure to disclose outstanding debts related to its IEs, and additional misreporting. The
17 Commission opened a matter under review and found reason to believe that FDF violated
18 52 U.S.C. § 30104(b)(4)(H)(iii), (8), and (g)(2), and 11 C.F.R. §§ 104.3(d), 104.4, and 104.11.

19 **II. FACTUAL BACKGROUND**

20 FDF is a multi-candidate committee that has been filing reports with the Commission
21 since July 2004.¹ Scott Mackenzie was its treasurer from its inception through September 2017,
22 when he was replaced by the current treasurer, Paul Kilgore.²

¹ *See* Statement of Organization (June 7, 2004). The Commission has reviewed issues with FDF's reporting in past election cycles. An audit of FDF's 2008 activity resulted in the Commission pursuing an enforcement action for FDF's failure to file 24- and 48-hour reports. *See* Conciliation Agreement (July 9, 2012), MUR 6555. The Commission also audited FDF for activity from the 2012 election cycle and found that it had failed to file 24- and 48-hour reports. *See* Final Audit Report and Certification, A13-14, *In the Matter of the Proposed Final Audit Report on the Freedom's Defense Fund* (Dec. 7, 2017).

² *See* Amended Statement of Organization (Sept. 13, 2017)
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1 RAD sent Requests for Additional Information ("RFAs") to FDF regarding its 2015
2 Mid-Year, 2015 Year-End, 2016 April Quarterly, 2016 July Quarterly, 2016 October Quarterly,
3 2016 Pre-General, and 2016 Post-General Reports.³ FDF did not file responses to any of the
4 RFAs, but did file amendments to these reports that appeared to address issues identified in the
5 RFAs.⁴

6 RAD's referral included FDF's apparent failure to provide supporting schedules in
7 connection with outstanding debts and IEs, the failure to file 48-Hour Reports, and other IE
8 reporting inaccuracies.⁵ The amount in violation for the referable issues totals \$1,305,317.50 and
9 includes the following violations:

- 10 • failure to timely file 48-hour reports;
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- 12 • failure to disclose IEs on Schedule E that had been disclosed on 48-hour reports;
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- 14 • failure to clarify discrepancies between the amount of an IE on a 48-hour report
- 15 and the amount disclosed on a corresponding Schedule E;
- 16
- 17 • failure to disclose a debt on Schedule D for IEs that had been publicly
- 18 disseminated, but not yet paid for; and
- 19
- 20 • failure to continuously report outstanding debts and to clarify debt discrepancies.
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22 The referable violations in each report are shown below.⁶

23

³ See RFAs dated May 10, 2016, May 18, 2016, October 4, 2016, December 2, 2016, and April 7, 2017.

⁴ Some of those amendments merely removed the transactions questioned in the initial RFAs without providing any further explanation. RAD sent second RFAs for the amendments filed for the 2015 Mid-Year, 2015 Year-End, 2016 April Quarterly, and 2016 July Quarterly Reports, raising questions about certain transactions previously disclosed and other changes on the amendments, but FDF has not responded to those subsequent RFAs or filed any additional amendments. See RFAs dated April 7, 2017.

⁵ Referral at 5-7.

⁶ Referral at 2-4.

1

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2

1 The Office of General Counsel notified FDF's new treasurer of the referral, but FDF did
2 not submit a response.⁷

3 **III. LEGAL ANALYSIS**

4 The Federal Election Campaign Act of 1971, as amended ("Act") requires committee
5 treasurers to file reports of disbursements in accordance with the provisions of 52 U.S.C.
6 § 30104(b).⁸ This requirement includes reporting IEs made by political committees other than
7 authorized committees.⁹ Every political committee that makes IEs must report them in its
8 regularly scheduled disclosure reports in accordance with 11 C.F.R. § 104.3(b)(3)(vii).¹⁰ Such a
9 political committee must disclose on Schedule E the name of a person who receives any
10 disbursement during the reporting period in an aggregate amount or value in excess of \$200
11 within the calendar year in connection with an IE by the reporting committee.¹¹

12 In addition, a political committee that makes or contracts to make IEs aggregating
13 \$10,000 or more for an election in any calendar year, up to and including the 20th day before an
14 election, must report these expenditures within 48 hours.¹² These reports, known as 48-Hour
15 Reports, must be filed by the end of the second day "following the date on which a
16 communication that constitutes an independent expenditure is publicly distributed or otherwise

⁷ See Notification Ltr. (Nov. 17, 2017). RAD's records reflect that it had previously asked former FDF treasurer Scott Mackenzie about the status of the Committee's correction of the issues noted in RFAs, but received no response from Mackenzie.

⁸ 52 U.S.C. § 30104(a)(1).

⁹ 52 U.S.C. § 30104(b)(4)(H)(iii), *see also* 11 C.F.R. § 104.3(b)(1)(vii).

¹⁰ 11 C.F.R. § 104.4(a).

¹¹ 11 C.F.R. § 104.3(b)(3)(ii). IEs of \$200 or less do not need to be itemized, though the committee must report the total of those expenditures on line (b) of Schedule E. 11 C.F.R. § 104.3(b)(3)(vii).

¹² 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

1 publicly disseminated.”¹³ Additionally, “[e]very person must include in the aggregate total all
2 disbursements during the calendar year for independent expenditures, and all enforceable
3 contracts, either oral or written, obligating funds for disbursements during the calendar year for
4 independents expenditures, where those independent expenditures are made with respect to the
5 same election for Federal office.”¹⁴

6 The Act and Commission regulations also require political committees to disclose the
7 amount and nature of their outstanding debts and obligations until those obligations are
8 extinguished.¹⁵ A political committee must file separate schedules for debts owed by the
9 committee on a Schedule D with a statement explaining the circumstances and conditions under
10 which each debt and obligation was incurred and extinguished.¹⁶ A similar statement is required
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14 must be disclosed in the report that covers the date on which the debt was incurred.¹⁸ Where the
15 exact amount of a debt is unknown, the report shall state that the amount reported is an estimate
16 and the exact amount is to be disclosed in an amended report or on the report for a reporting

¹³ 11 C.F.R. § 104.4(b)(2).

¹⁴ 11 C.F.R. § 104.4(f).

¹⁵ 52 U.S.C. § 30104(b)(8); 11 C.F.R. §§ 104.3(d), 104.11(a).

¹⁶ See 11 C.F.R. § 104.11(a).

¹⁷ 52 U.S.C. § 30104(b)(8); 11 C.F.R. §§ 104.3(d), 104.11(a).

¹⁸ 11 C.F.R. § 104.11(b).

1 period in which such amount is determined.¹⁹ Debts and obligations that remain outstanding
2 shall be continuously reported until extinguished.²⁰

3 FDF's reports reveal a number of violations of the Act and Commission regulations in
4 connection with its reporting of IEs and debts in six different disclosure reports, including
5 amendments. First, it failed to timely file 48-hour reports for IEs totaling \$743,932.93, in
6 connection with IEs disclosed on its Amended 2015 Mid-Year, Amended 2016 April Quarterly,
7 Amended 2016 July Quarterly, and Amended 2016 October Quarterly Reports. Second, FDF
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13 Committee's Amended 2016 April Quarterly and Amended 2016 October Quarterly Reports
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15 and its Amended 2016 October Quarterly Report contains \$13,950 in discrepancies between the
16 amounts of independent expenditures on a 48-hour report and the amount on the Schedule E.
17 The Committee has not provided an explanation for these errors.

18 Therefore, there is reason to believe that FDF violated 52 U.S.C. § 30104(b)(4)(H)(iii),
19 (g)(2) and 11 C.F.R. § 104.4 by either failing to report IEs or reporting them inaccurately, and

¹⁹ *Id.*

²⁰ *Id.* § 104.11(a).

- 1 violated 52 U.S.C. § 30104(b)(8) and 11 C.F.R. §§ 104.3(d), 104.11, by failing to report all of its
- 2 debts and continuously report its outstanding debts and obligations.

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