ATTACHMENT G

SUPPLEMENTAL RESPONSES OF CHAIRMAN ALLEN DICKERSON AND COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR, III

30. For purposes of this question, assume a "deadlocked vote" is an equally divided vote of the Commission or any other vote that lacks four affirmative votes. Of MURs considered in Executive Session since May 1, 2019 and that are now closed, how many and what percentage of the MURs included at least one deadlocked vote of the Commission during Executive Session? Please provide, categorized by year since 2019, the count and percentages. Please also provide the MUR number for each MUR that included at least one deadlocked vote.

Using a Commission vote database maintained by the Commission's Secretary, an Enforcement Division case management database, and the Enforcement Query System on the FEC's website, all MURs (as defined in response to question 28) that were considered by the Commission in Executive Session after April 1, 2019, and that were closed as of July 31, 2022, were examined. 359 such MURs were identified. 227 of these MURs, or 63 percent, had at least one vote after January 1, 2019, with no position receiving the support of four or more Commissioners, which the Commission has typically called a "split vote." (Split votes are most often 3-3 or 2-2, and can also be any other combination that lacks four or more votes in the affirmative or negative.)

FECA requires four Commissioners' votes for certain decisions, without regard to how many Commissioners are currently serving. Consequently, the Commission views any position supported by four or more Commissioners as a Commission decision, and not as a "deadlocked" vote.[1] However, the question seeks information about votes where there were not four *affirmative* votes.[2] Under this view, Commission votes of 1-4 or 1-5, for example, are viewed as "deadlocked" votes. As a result of conferring with House Administration Committee staff, FEC staff agreed to compile the data related to cases with votes without four affirmative votes and present it separately in footnotes in response to questions 30 and 31.[3]

The following chart breaks down this data by calendar year. Some MURs are subject to one vote in one Executive Session, while others can be considered in multiple Executive

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[1] Congressional Research Service did not consider four or more negative votes to be a deadlocked vote in its work in 2009 or 2015. *See* CRS, "The Federal Election Commission: Enforcement Process and Selected Issues for Congress," R44319, at 10 n.44 (Dec. 22, 2015) and CRS, "Deadlocked Votes Among Members of the Federal Election Commission (FEC): Overview and Potential Considerations for Congress," R40779, at 5 & 10-11 (Oct. 6, 2009).

[2] In one such case, for example, an initial motion to dismiss the case as a matter of prosecutorial discretion was defeated by a vote 1-5, and the case then proceeded through multiple unanimous votes through reason-to-believe and probable-cause-to-believe findings, and was resolved by a conciliation agreement with admissions and a substantial civil penalty. *See* MUR 6394 (Pingree for Congress) https://www.fec.gov/data/legal/matter-under-review/6394/. The initial vote of 1-5 lacks four affirmative votes and is therefore responsive to this question. The Commission, however, would not consider this case an example of a "deadlocked" case.

[3] If additional cases with votes that lack four affirmative votes are also considered responsive to question 30, an additional 12 MURs would be responsive for the entire period, for a total of 239 MURs or 67 percent.

Sessions that might fall in different years. The data below include each MUR considered by the Commission in Executive Session in each of the calendar years, so some MURs have been counted more than once.

Calendar Year	**Closed MURs with At Least One Split Vote** Considered in Executive Session	**Closed MURs** Considered in Executive Session	**Percentage** (At Least One Split/ Closed MURs in Exec.)
4/1-12/31 2019[4]	69	82	84%
2020[5]	4	7	57%
2021[6]	117	182	64%
1/1-7/31 2022[7]	52	107	49%
Total for Entire Period[8]	227	359	63%

For several reasons, these figures and associated statistics overstate, and do not accurately represent, the proportion of "deadlock vote" matters at the Commission. This is principally for two reasons. First, as requested, this information reflects the percentage of matters that include at least one motion that garnered fewer than four votes, without regard to the nature, scope, and timing of the vote relative to the entire matter. For example, when considering a matter in executive session, it is common for one or more Commissioners to move a particular question that he or she knows is unlikely to garner four affirmative votes. This may be for the purpose of establishing Commissioner's first preferred outcome, testing a proposition's support, or otherwise establishing a voting record. As a result, many matters for which the Commission reaches broad agreement on

[4] The 2019 data cover the period from April 1, 2019 to December 31, 2019, which begins after the period covered in the Commission's May 1, 2019 response to questions from the Committee on House Administration.

During 2019, the Commission was without a quorum of Commissioners from September 1, 2019 to December 31, 2019.

[5] During 2020, the Commission had a quorum from June 5 to July 3 and from December 15 to 31, 2020.

[6] If additional cases with votes that lack four affirmative votes are also considered responsive to question 30, an additional nine MURs would be responsive for 2021, for a total of 126 MURs or 69 percent.

[7] If additional cases with votes that lack four affirmative votes are also considered responsive to question 30, an additional three MURs would be responsive for 2022, for a total of 55 MURs or 51 percent.

[8] If additional cases with votes that lack four affirmative votes are also considered responsive to question 30, an additional 12 MURs would be responsive for the entire period, for a total of 239 MURs or 67 percent.

the ultimate outcome may contain one or more votes on issues that garner fewer than four affirmative votes. In our view, this reflects the natural consequence of serious deliberation at the Commission and is not an accurate measure of division at the Commission.

Second, the information responsive to this question further overstates the existence of evenly divided votes because it includes only those matters considered in Executive Session, not those resolved on a tally vote. As a result, it excludes 143 matters where the Commission resolves a matter on a single vote carried by at least four Commissioners—often a unanimous vote. *See* Question 28. Indeed, it is only matters over which there is some initial disagreement that are considered in Executive Session, and therefore such matters are not representative of the Commission's matters as a whole. Therefore, limiting the question only to matters considered in Executive Session skews the statistic and may indicate a greater proportion of evenly divided votes than is true. If the 143 matters resolved by a tally vote were included, the percentage of matters resolved in the subject time period with at least one split vote would fall further from 63 percent to 45.2 percent.

31. For purposes of this question, assume a "deadlocked vote" is an equally divided vote of the Commission or any other vote that lacks four affirmative votes. Of MURs considered in Executive Session since May 1, 2019 and that are now closed, how many and what percentage of the MURs deadlocked on all votes taken during Executive Session, other than a vote to close the file and send the appropriate letter(s)? Please provide, categorized by year since 2019, the count and percentages. Please also provide the MUR numbers and MUR subject of the cases that deadlocked on all votes taken in Executive Session (other than a vote to close the file and send the appropriate letter(s)).

Of the 359 MURs that were considered by the Commission in Executive Session after April 1, 2019, and that were closed as of July 31, 2022, 54 of these MURs, or 15 percent, had split votes (as defined in response to question 30) on all votes taken during the Executive Session, other than a vote to close the file.[9]

[9] If additional cases with votes that lack four affirmative votes are also considered responsive to question 31, an additional 10 MURs would be responsive for the entire period, for a total of 64 MURs or 18 percent.

Calendar Year	**Closed MURs with All Split Votes** Considered in Executive Session	**Total Closed MURs** Considered in Executive Session	**Percentage** (All Split/ Closed MURs in Exec.)
4/1-12/31/ 2019[10]	18	82	22%
2020[11]	0	7	0%
2021[12]	23	182	13%
1/1-7/31 2022[13]	13	107	12%
Total for Entire Period[14]	54	359	15%

The MURs responsive to question 31 consist of matters where the votes on all substantive issues were split votes, other than votes to close the files. These 54 "all split" MURs were also responsive to question 30, as MURs with at least one split vote.

Consistent with our supplemental response to Question 30, we note again that this calculation of the Commission's voting record likely overstates and does not accurately reflect the proportion of matters where the Commission evenly divides on all issues. As was also true with the statistics provided in response to Question 30, the exclusion of 143 matters resolved by tally vote lowers the relevant denominator of the calculation and causes the percentage of evenly divided matters to appear higher than is true. *See* Question 28. Indeed, it is only matters over which there is some initial disagreement that are considered in Executive Session, and therefore such matters are not representative of the Commission's matters as a whole. If matters resolved by a

[10] The period from April 1, 2019 to December 31, 2019 begins after the period covered in the Commission's May 1, 2019 response to questions from the Committee on House Administration.

During 2019, the Commission was without a quorum of Commissioners from September 1, 2019 to December 31, 2019.

[11] During 2020, the Commission had a quorum from June 5 to July 3 and from December 15 to 31, 2020.

[12] If additional cases with votes that lack four affirmative votes are also considered responsive to question 31, an additional five MURs would be responsive for 2021, for a total of 28 MURs or 15 percent.

[13] If additional cases with votes that lack four affirmative votes are also considered responsive to question 31, an additional five MURs would be responsive for 2022, for a total of 18 MURs or 14 percent.

[14] If additional cases with votes that lack four affirmative votes are also considered responsive to question 31, an additional 10 MURs would be responsive for the entire period, for a total of 64 MURs or 18 percent.

tally vote were included, the percentage of matters resolved in the subject time period with all split votes excepting a vote to close the file would fall from 15 percent to 10.8 percent.

49. In at least 22 cases, the Commission's Office of General Counsel recommended that the Commission find reason to believe that former President Trump, his committee, or his family members violated federal election laws. In each instance, three commissioners voted against finding reason to believe that a violation occurred. This indicates a significant disconnect between the Commission's non-partisan staff and those three commissioners. To what does the Commission attribute these repeated disagreements between the Office of General Counsel and its commissioners?

As Commissioners, we evaluate each enforcement matter based on its individual legal merits, without regard to the political party or affiliation of any complainant or respondent. Consequently, there are a multiplicity of factors that may lead one or more Commissioners to disagree with the recommendations of the Commission's Office of General Counsel as to the appropriate disposition for an individual enforcement matter. For instance, Commissioners may reach a different view about the correct interpretation or application of relevant statutes or Commission regulations, may evaluate or weigh relevant inculpatory or exculpatory information differently, or may judge differently the prudential interests of the Commission in prioritizing matters and allocating agency enforcement resources. In some cases, the Office of General Counsel's original recommendations may be impacted by changes in circumstances over the passage of time, such as during the period when the Commission was without a quorum. In cases in which a majority of the Commission does not agree with the Office of General Counsel's recommendation, the controlling group of Commissioners typically issues a Statement of Reasons explaining the basis for their votes in that particular matter, which permits the judicial review of Commission decisions for which Congress has provided.

Some number of the matters cited in the Committee's question were considered by previous Commissioners, prior to our service, and we are therefore unable to speak to those Commissioners' consideration of those matters. *See*, *e.g.*, MURs 7094, 7096, and 7098. For others, it appears that the premise of the question is mistaken, and the Office of General Counsel recommended dismissals or findings of no reason to believe against relevant respondents. *See*, *e.g.*, MURs 6961 and 7037. In other matters, we respectfully refer the Committee to associated Statements of Reasons for each matter for a more detailed explanation of the individualized reasoning behind our votes in each matter.

50. These 22 cases create the appearance that the three commissioners are voting with partisan considerations in mind. For example, the Commission did not find reason to believe a violation occurred in a case alleging misreported vendor payments by former President Trump's committee, with all three commissioners voting against the Office of General Counsel's recommendation to proceed. The Commission did, however, find reason to believe that a violation occurred in an apparently analogous fact pattern involving Hillary Clinton's presidential campaign committee. How does the Commission plan to combat the perception that it selectively enforces (or fails to enforce) the law based on partisan considerations?

As stated in our answer to Question 49, as Commissioners, we evaluate each enforcement matter based on its individual legal merits, unique factual record, and in light of the varying prudential considerations at play from matter-to-matter, without regard to the political party or affiliation of any complainant or respondent. Indeed, during our service on the Commission, we have both pursued and declined to pursue enforcement against respondents affiliated with both the Republican and Democratic parties, as well as those associated with third parties or no political party at all. We take seriously our obligation to interpret and enforce the law consistently and fairly, without regard to partisanship. We believe this commitment to unbiased and consistent treatment of enforcement matters is reflected in the reasoning provided for relevant votes, whether through Factual and Legal Analyses we have approved or Statements of Reasons we have issued. We further note that it is not uncommon for Commissioners who are affiliated with the same political party to vote for different outcomes, or to support the same outcome for different reasons.

51. Citizens for Responsibility and Ethics in Washington v. FEC invalidated and vacated a longstanding Commission regulation governing disclosure of contributions received by persons, other than political committees, which make independent expenditures. Vacatur of the rule became effective on September 18, 2018. The Commission released public guidance shortly after the District Court's vacatur became effective on October 4, 2018. On June 8, 2022, Chairman Dickerson and Commissioners Cooksey and Trainor released a "Policy Statement" expressing the position that the statute is "effectively unenforceable" without the Commission pursuing "clear direction" in the form of new regulation and an intent to exercise prosecutorial discretion to dismiss matters involving conduct preceding or contemporaneous with the June 8, 2022 Statement.

a. Both the District Court and D.C. Circuit reviewed the now-vacated rule under the two-step framework of Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which provides that a court will accept an agency's reasonable construction of an ambiguous statutory provision, but "[i]f the intent of Congress is clear, that is the end of the matter."* Chevron*, 467 U.S. at 842. Both the District Court and D.C. Circuit held that the statutory text was "unambiguous" and that the now-vacated rule conflicted with that clear statutory text. If the statute is unambiguously clear, is the position of the Policy Statement, which finds such ambiguity that the statute is "effectively unenforceable," in conflict with the determinations of* CREW v. FEC*?*

The purpose of the Policy Statement issued by Chairman Dickerson and Commissioners Cooksey and Trainor on June 8, 2022 is to explain our understanding of the proper scope and enforcement of the Act's requirement for organizations other than political committees ("non-committee organizations") to disclose certain "contributions" when making reportable independent expenditures, in light of the invalidation of the Commission's longstanding regulation at 11 C.F.R. § 109.10(e)(1)(iv) in *Citizens for Responsibility and Ethics in Washington v. FEC* ("*CREW*").[15] The Policy Statement is not a declaration that the relevant portion of the statute is "effectively unenforceable"; rather, it clarifies how three Commissioners construe the Federal Election Campaign Act's (the "Act") independent expenditure reporting provisions given the *CREW* ruling, until such time that the Commission promulgates a final rulemaking on the issue.

In *CREW*, the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit both held that 11 C.F.R. § 109.10(e)(1)(iv) "conflicts with the FECA's unambiguous terms twice over"[16]: first, by failing to give effect to 52 U.S.C. § 30104(c)(1)'s requirement that persons making independent expenditures identify the source of each "contribution," *i.e.*, any funds "earmarked for political purposes of influencing federal elections," in excess of $200 received in a calendar year;[17] and, second, by impermissibly narrowing the complementary reporting requirement in § 30104(c)(2)(C) so that it applied only to contributions "made for the purpose of furthering *the reported* independent expenditure," rather than to all contributions "made for the purpose of furthering *an* independent expenditure," in accordance with the language of the Act.[18]

With respect to the broader reporting of "contributions" obligated by 52 U.S.C. § 30104(c)(1), neither the District Court nor the D.C. Circuit made clear how non-committee organizations, which in addition to engaging in electoral advocacy can lawfully raise and spend money for a multitude of purposes unrelated to federal campaigns, should determine which of their receipts are "earmarked for political purposes" and thus subject to disclosure under the Act.[19] Because "earmarked for political purposes" is also not defined in the Act or in Commission regulations, the Policy Statement helps to fill in this definitional gap by setting out three Commissioners' understanding of the phrase "earmarked for political purposes," which is integral to the scope of 52 U.S.C. § 30104(c)(1)'s reporting requirements as construed by *CREW*. The Policy Statement is entirely consistent with the *CREW* decision in its objective of "establish[ing]

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[15] *See Citizens for Responsibility & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) [*CREW I*]; *Citizens for Responsibility & Ethics in Wash. v. FEC*, 971 F.3d 340 (D.C. Cir. 2020) [*CREW II*].

[16] *CREW II*, 971 F.3d at 350.

[17] *CREW I*, 316 F. Supp. 3d at 389, 423; *CREW II*, 971 F.3d at 354.

[18] *CREW I*, 316 F. Supp. 3d at 379, 423; *CREW II*, 971 F.3d at 354-55.

[19] *See CREW I*, 316 F. Supp. 3d at 389 ("[T]he making of independent expenditures in excess of the annual $250 threshold by a not-political committee triggers the obligation to identify those donors funding the organization's political purposes of influencing federal elections"); *CREW II*, 971 F.3d at 354 ("[W]e have no occasion . . . to delineate the precise scope of [§ 30104(c)(1)'s] requirement to disclose all donations 'made . . . for the purpose of influencing any election for Federal office.'").

a broader disclosure mandate" that is more closely aligned with the Act's provisions,[20] and, at the same time, accounts for the interests in due process and fair notice implicated by the Commission's post-*CREW* enforcement of 52 U.S.C. § 30104(c).

b. Is the Policy Statement an indication to the regulated community that the Commission will not enforce the requirements of 52 U.S.C. §§ 30104(c)(1), (c)(2)(C)?

The Policy Statement represents the views of the three Commissioners who issued it, and it does not indicate to the public that the Federal Election Commission will not enforce the requirements of 52 U.S.C. § 30104(c) in appropriate cases. In fact, the Policy Statement provides the regulated community with clear notice of the circumstances in which those three Commissioners believe 52 U.S.C. § 30104(c)(1) and (c)(2)(C) can and should be enforced. As the Policy Statement explains, "in cases supported by sufficient evidence, we will vote in favor of pursuing appropriate enforcement action against non-committee organizations that fail to properly report 'contributions earmarked for political purposes' or contributions intended to support any independent expenditure by the recipient organization, as interpreted here."[21]

c. The June 8, 2022 Statement was released 1,343 days after the October 4, 2018 Commission guidance following the vacatur of the prior regulation. Are the interests of "due process" and "fair notice" advanced by providing conflicting guidance so long after the Commission has made public its position on the impact of the ruling?

We believe the Policy Statement promotes the interests of due process and fair notice to provide a clearer and more administrable interpretation of "earmarked for political purposes" in relation to the reporting requirements in 52 U.S.C. § 30104(c). By contrast, the FEC press release from October 2018 offered no new insight or guidance for the regulated community about post-*CREW* disclosure obligations beyond restating language from the District Court's opinion.[22] As the Policy Statement observes, the press release "provided no additional clarity about how the Commission would interpret and apply the law to require reporting of 'contributions used for other political purposes' going forward, and non-committee organizations were left to guess which of their donors might be subject to mandated disclosure in the future."[23] There is ample evidence to corroborate that the press release has done little to stem concerns and uncertainty among non-committee organizations after the *CREW* decision.[24]

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[20] *CREW II*, 971 F.3d at 356.

[21] Policy Statement of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Concerning the Application of 52 U.S.C. § 30104(c) at 7 (June 8, 2022) [hereinafter Policy Statement].

[22] *See* Press Release, FEC, FEC provides guidance following U.S. District Court decision in *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (Oct. 4, 2018), https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/.

[23] Policy Statement at 4.

[24] *See, e.g.*, R. Sam Garrett, CONG. RESEARCH SERV., IF11005, DONOR DISCLOSURE: 501(C) GROUPS AND CAMPAIGN SPENDING (Oct. 18, 2018), https://crsreports.congress.gov /product/pdf/IF/IF11005/2 ("Some politically active 501(c) groups have stated that the [*CREW*] ruling chills their political speech and that they will curtail or refrain from making their planned IEs."); Zachary G. Parks & Kevin Glandon, *FEC Issues New Guidance On Donor Disclosure for Entities Making Independent Expenditures*,

The Policy Statement does not conflict with the text of the press release but rather expands on its generalized guidance by clarifying how three Commissioners, none of whom was serving on the Commission when it published the press release in 2018, interpret the phrase "earmarked for political purposes" for purposes of the Act's independent expenditure reporting requirements. While the length of time between the issuance of the press release and the Policy Statement is not insubstantial, it has shown the public's need for further direction from the Commission on this important issue, which the Policy Statement is intended to provide.

COVINGTON: INSIDE POLITICAL LAW (Oct. 4, 2018), https://www.insidepoliticallaw.com/2018/10/04/fec-issues-new-guidance-on-donor-disclosure-for-entities-makingindependent-expenditures/ (observing "there is still considerable ambiguity as to how far-reaching the disclosures must be" under § 30104(c) after the publication of the FEC's press release).