

**Statement of Commissioner Trainor regarding the Memorandum of Understanding
between the Department of Justice and the Federal Election Commission**

Thank you, Madam Chair. I would also like to thank Commissioners Cooksey and Weintraub for taking on the task of negotiating this Memorandum with the Department of Justice. I know that it was not an easy task and one that took considerable time.

That said, I would like to take a few minutes to outline for my colleagues and the American people what a dark day I believe this to be for our Republic. Not since the Alien and Sedition Acts of 1789 has there been a more grievous affront to the First Amendment than what we have before us today. This Memorandum of Understanding (MOU) is harmful to the free, public discourse of ideas, and the transparency mission of this agency, in four significant ways. First, there is no statutory authority for this agency to enter into such an information sharing agreement with another executive branch agency. Second, this MOU will significantly, and I believe irreparably, harm the level of candor between the entities that are regulated by the Federal Election Campaign Act (“FECA”) and this agency. Third, I believe there are significant Constitutional concerns that are implicated in this type of MOU. Finally, as a matter of policy, this MOU is just another example of the recent move to criminalize the participation of the American people in the necessary open exchange of ideas which is the foundation of our political system.

As a threshold matter, we must always look to our limited statutory jurisdiction when we undertake any action. Especially when it involves this independent agency sharing information and authority with an agency that is completely under the control of the Chief Executive. I firmly believe that the only statutory authority that this agency possesses to share information with the Department of Justice (DOJ) is found in 52 USC 30109 (a)(5)(C) wherein it states that “[i]f the Commission, by an affirmative vote of 4 of its members, determines that there is probable cause

to believe that a knowing and willful violation of [FECA has occurred or is about to occur], it may refer such apparent violation to the Attorney General.” Such a probable cause finding comes towards the end of our administrative enforcement proceedings.

Moreover, when the Commission pauses an enforcement matter at the request of the Department of Justice, criminal defendants are denied access to certain statutory provisions. Because, in any criminal action brought for a violation of FECA, a defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into with the FEC (52 USC 30109 (d)(2)), and the court, when assessing a penalty in such a criminal action, must consider the existence of a conciliation agreement (52 USC 30109 (d)(3)(B)). Unfortunately, the MOU before us would allow the Department of Justice access to information before the Commission has completed an administrative prosecution, which could cut-off access to a conciliation agreement defense and controlling sentencing guideline. Therefore, without specific statutory authority to enter into this type of agreement to abate our proceedings, we should stay within the scope of what FECA currently allows, and the protections provided therein to those facing criminal prosecution.

Second, candor. Candor between the candidates, campaigns, committees, and other entities that we regulate, is critical to the Commission’s mission of encouraging voluntary compliance with the law and providing transparency in campaign financing to the American people. For example, when the Reports Analysis Division makes a request to a committee for more information to clarify a contribution or expenditure, we rely, almost exclusively, on the representations of that committee to help us clarify the public record. Moreover, those same committees rely upon our staff to be helpful when they cannot understand the rules and regulations we have put in place. Now, as this MOU envisions, those requests for additional

information, and the act of calling for assistance with our onerous regulations will be subject to disclosure to the Department of Justice, at their request. How can we expect the regulated community to be forthright with us, or seek our assistance, when such actions can now be used as the basis for criminal investigations? We cannot, and more importantly, we should not.

Third, I believe there are constitutional infirmities with the information sharing arrangement espoused by the MOU. The current forms used by the Commission are woefully lacking in notice to those who complete those forms that such information may be shared with the Department of Justice to aid in the investigating of any crimes that they may commit when completing the forms. Callers to the Reports Analysis Division are given no notice that our staff will be memorializing their conversation in notes of the call which may, at a future date, be turned over to the Department of Justice, which may seek to use that as evidence of intent in a criminal prosecution. Additionally, this MOU would allow for the sharing of information and investigative material used by the staff in the prosecution of Matters Under Review by the Commission and little, if any, disclosure of how that information may be transmitted to law enforcement is given in that process. All of that is to say, there are 5th and 6th Amendment issues that are lurking within this MOU's information sharing. Unfortunately, our counsel has been unable to provide an assessment of any liability the Commission might face should such constitutional claims arrive. We, as a Commission, should be concerned with upholding our oaths to defend the Constitution by not potentially jeopardizing the rights of those who are brought under our jurisdiction.

Finally, I am concerned that this MOU only exacerbates the growing trend in America of criminalizing the participation of Americans in the political process. We have seen campaign finance reports used as a weapon to go after donors to candidates and causes both criminally and

civilly. Those prosecutions create a chilling effect on the First Amendment rights of all citizens. We have seen the rise of calls for criminal prosecutions of political opponents. Over and above the government prosecutions, we see third party groups using the complaint processes of this agency to get press headlines that necessarily force criminal investigations. Those groups are looking to obtain the imprimatur of a FEC investigation as a means for calling forth a criminal witch hunt. Frankly, they have little concern for the administrative fines that could be imposed by the Commission.

In fact, over the past five year this agency has been aske to abate our administrative proceeding approximately forty times to allow the Department of Justice to pursue various investigations within their criminal jurisdiction. If this MOU takes effect, the Commission will continue to be enticed by the Department of Justice to stall in investigating complaints while it batters the matter around, the campaign finance system will continue to be used to hunt down those whom we disagree with politically, and the agency itself will continue to be a tool of those looking to harm their political and ideological opponents.

Based upon what I have laid out I will not be able to support this MOU the Department of Justice. It is my firm resolve that this memorandum is without statutory authority, inhibits a necessary level of candor for our systems to function properly, has serious constitutional implications, and does nothing to quell the criminalization of political participation we are experiencing today. In fact, at least the American people had fair notice of criminal political acts under the Alien and Sedition Acts. Here, they will be required to comb the federal register and our website to see exactly how we are going to share their information about their political activities with federal law enforcement.

One can question whether at least having a written agreement with the Department of Justice in place is an improvement over the Commission's recent practice of considering these requests for abatement and documents in a black box. But unfortunately, the answer to that question is largely rendered mute by the defects in this new arrangement. Accordingly, I plan to vote against adoption of this MOU.

Madam chair, I would ask unanimous consent for my remarks to be reduced to writing and placed within the minutes of this meeting.

A handwritten signature in black ink that reads "J. E. Trainor, III". The signature is written in a cursive style with a large, sweeping initial "J" and a stylized "E".

Commissioner James E. "Trey" Trainor III

April 19, 2023