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October 28, 2019

The Honorable Theodore E. Deutch, Chairman
The Honorable Kenny Marchant, Ranking Member
Committee on Ethics
United States House of Representatives
Washington, DC 20515

Re: OCE Review No. 19-5449

Dear Chairman Deutch and Ranking Member Marchant:

On behalf of Representative Lori Trahan, we write in response to the Report and Findings of the Office of Congressional Ethics ("OCE") in Review No. 19-5449. We respectfully request that the Committee on Ethics (the "Committee") dismiss OCE's referral and take no further action.

INTRODUCTION

At the heart of this matter is Representative Trahan's First Amendment right, as a first-time candidate in 2018, to spend her personal funds in support of her own campaign. The referral shows that Representative Trahan loaned funds to the campaign from a joint account and a home equity line of credit, and thus spent her personal funds under Federal Election Commission ("FEC") rules, even while she had other, independent means to fund her campaign.

Through this referral, OCE seeks to draw the Committee into the personal financial relationship between a Member and her spouse. It asks the Committee to investigate whether the funds she loaned were really hers, or her husband's. While the Committee does not normally consider questions of mutual spousal support, because Members may receive unlimited gifts from their spouses and need not disclose them,[1] OCE would have the Committee review and determine a highly technical question of campaign finance law—whether the funds in the joint account were Representative Trahan's "personal funds"—a question over which OCE has now arrogated "independent and parallel authority."[2] OCE's referral fails to present correctly the governing law, which supports the treatment of the loans as made from Representative Trahan's "personal funds." While OCE alleges that her spouse's deposits into the joint account caused Representative Trahan's loans to become contributions from him instead, the funds were, in fact, her "personal funds" *before* they were transferred to her joint account. OCE fails to acknowledge the FEC's persistent refusal to find potential violations on closely analogous facts involving joint accounts. OCE would also have the Committee investigate the amendments that Representative Trahan voluntarily made to her campaign finance reports and her personal financial disclosure reports in connection with her first-time candidacy, even though she acted in good faith to complete the public record.

[1] *See* House R. 25, clause 5(a)(3)(C); 5 U.S.C. app. 4 § 102(a)(2)(A). *See also* House Ethics Manual at 259.
[2] Letter from Omar S. Ashmawy to Rep. Lori Trahan (June 10, 2019).

The referral represents a reckless exercise of what has become OCE's effectively untrammeled authority. Under its own rules, OCE lacked jurisdiction to investigate Representative Trahan's campaign, which is why she did not cooperate with that aspect of its review. By plunging heedlessly into a hypertechnical area of campaign finance law involving core First Amendment freedoms, where the law supports Representative Trahan's position, OCE disregarded this Committee's guidance and House rules that protect Members' rights. By carelessly obtaining the Trahans' private bank documents without subpoena or notice and putting images of those same documents into a deliverable intended for public release, OCE egregiously violated the privacy of Representative Trahan and her spouse.

Because Representative Trahan complied with the laws, rules, and standards of conduct in her previous campaign, because she has made the necessary corrections to her reports on her own initiative, and because OCE's referral, if allowed to stand, would encourage that office to investigate other Members and candidates over the full range of disputed FEC issues that inevitably arise from the conduct of their campaigns, the Committee should dismiss the referral in Review No. 19-5449 and take no further action.

ARGUMENT

I. OCE'S FINDING THAT REPRESENTATIVE TRAHAN MAY NOT HAVE PROVIDED PERSONAL FUNDS TO HER CAMPAIGN UNDER FEC RULES WAS PLAINLY ERRONEOUS

In *Buckley v. Valeo,* the Supreme Court held that a candidate has a clear First Amendment right to advocate her own election, and that the Constitution bars limits on the expenditures she may make from personal funds.[3] Using personal funds "reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which … contribution limits are directed."[4] FEC regulations accordingly permit a candidate to "make unlimited expenditures from personal funds."[5] The FEC's regulations define "personal funds" to include "[a]mounts derived from any asset that, under applicable State law, at the time the individual became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had – (1) [l]egal and rightful title; or (2) [a]n equitable interest."[6] The FEC regulation comes directly from *Buckley*, where the Supreme Court, citing legislative history, noted that "[i]f a candidate … already is in a position to exercise control over funds of a member of his immediate family before he becomes a candidate, then he could draw upon these funds" as his own "personal funds."[7]

Relying on *Buckley*, the FEC has consistently found that spousal income qualifies as the candidate's "personal funds" and is eligible for use in the campaign, provided that the candidate has an equal right to manage and dispose of the income under applicable state law, *even when the*

[3] *Buckley v. Valeo*, 424 U.S. 1, 52-54 (1976). *See also Davis v. FEC,* 554 U.S. 724 (2008) (invalidating indirect yet effective limits on candidate personal spending).
[4] *Buckley*, 424 U.S. at 53.
[5] 11 C.F.R. § 110.10 (2018).
[6] *Id*. § 100.33(a).
[7] *Buckley*, 424 U.S. at 51 (1976), *quoting* S. Conf. Rep. No. 93-1237, p. 58 (1974).

funds originate from a bank account maintained by the candidate's spouse. For example, in a 1976 enforcement action involving actress Jane Fonda and her then-husband, Tom Hayden, the FEC found no violation when Ms. Fonda transferred $64,050 from a bank account maintained solely in her name and $250,000 from loan proceeds she secured from her employers, Twentieth Century Fox Corporation and United Artists Corporation, directly to Mr. Hayden's campaign committee.[8] Five years later, the FEC declined to find that Elizabeth Dole's $25,000 loan to then-Senator Bob Dole's presidential campaign violated the law.[9]

In both matters, the FEC concluded that the funds in question were the candidates' "personal funds," notwithstanding their origin in their spouses' bank accounts. In the Fonda/Hayden matter, the FEC pointed to California being a "community property" state and noted that, under state law, either spouse has "management and control of the community personal property, with the absolute power of disposition … as he has of his separate estate."[10] As further proof of Mr. Hayden's legal right to access or control the funds pre-candidacy, the FEC acknowledged the "pattern or practice of using the money from the accounts in question, for communal matters."[11] Likewise, in recommending dismissal of the Dole matter, the FEC's General Counsel found that Mrs. Dole had acquired the funds in question during the Doles' marriage and, under Kansas law at the time, "property acquired by a person during marriage [was] subject to the disposal of his or her spouse" and such property "shall be marital property in which each spouse has a common ownership regardless of whether title is held individually or by the spouse in some form of co-ownership …."[12] Because the candidates had an equal right to manage and dispose of their spouses' assets, they had an equitable interest in and legal right to access those assets under applicable state law. That made the funds in the spouses' accounts the candidates' "personal funds" under FEC regulations.

For the same reason, the funds that Representative Trahan loaned to her campaign qualify as her "personal funds." Massachusetts law provides that "[a]t any time before marriage, the parties may make a written contract providing that, after the marriage is solemnized, the whole or any designated part of the real or personal property or any right of action, of which either party may be seized or possessed at the time of the marriage, shall remain or become the property of the husband or wife, according to the terms of the contract."[13] As noted in the attached opinion letter, Massachusetts law "has a strong policy in favor of enforcing such prenuptial agreements."[14] Pursuant to Massachusetts law, Representative Trahan and her husband, David, signed a pre-marital agreement (the "Agreement"), which remains in effect today.[15] Through the

[8] FEC Matter Under Review 149 (Jane Fonda and the Hayden for Senate Committee), Interim Conciliation Report (June 3, 1977).
[9] FEC Matter Under Review 1257 (Dole for President), General Counsel's Report (Oct. 27, 1981).
[10] FEC Matter Under Review 149 (Jane Fonda and the Hayden for Senate Committee), Interim Conciliation Report (June 3, 1977), *citing* to Cal. Civil Code § 5125.
[11] *Id.*
[12] FEC Matter Under Review 1257 (Dole for President), General Counsel's Report (Oct. 27, 1981).
[13] M.G.L.A. 209 § 25.
[14] Ex. A (Blake Opinion Letter) at 2.
[15] *Id.*

Agreement, the Trahans specifically stated their "inten[t] to define their respective rights in the property of the other ***during marriage*** …."[16]

Significantly, the Agreement provides that ***"[e]ach party shall have equal rights in regard to the management of and disposition of all marital property."***[17] And the Agreement broadly defines "marital property" to include:

- All property purchased with proceeds of a fund for the maintenance of their household and the care of their children, to which each spouse would make equal periodic contributions; *and*

- All wages, salary, and income of each party earned or received during marriage, together with property purchased with these funds.[18]

Put simply, the Agreement provided Representative Trahan and her husband equal rights to manage and dispose of *all* income that each spouse earned or received during their marriage. And, both before and after she became a candidate, Representative Trahan and her husband fully exercised these rights. The Trahans each owned their own businesses; Representative Trahan earned $361,000 in 2017 and $274,000 in 2018. Rather than taking steady salaries, both regularly transferred funds from their respective business accounts into their joint checking account to pay for household expenses. That practice continued after Representative Trahan became a candidate in 2017. In addition, both spouses also had individual checking accounts that were used interchangeably to pay for joint expenses like credit card and tuition payments, as well as health and child care costs. While Mr. Trahan has historically had a larger income and has thus historically contributed more to the joint checking account and paid for more expenses than Representative Trahan has done, that practice, too, both preceded and post-dated Representative Trahan's candidacy.

It was under this longstanding practice, with each spouse exercising equal rights to manage and dispose of marital income, that Mr. Trahan transferred income into the joint checking account, and Representative Trahan loaned funds from that account to her campaign. As the FEC recognized with Mr. Hayden, the "pattern or practice of using the money from the accounts in question, for communal matters" prior to Representative Trahan's candidacy underscores her legal right of access to the funds in question.[19] At the time she became a candidate, and as a direct result of the Agreement, Representative Trahan had an equitable interest in and legal right to access her husband's income under Massachusetts law.[20] Accordingly, the funds she used to make a loan to her campaign were her "personal funds" under 11 C.F.R. § 100.33(a).[21]

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[16] *Id.* (emphasis added). Section 11 of the Agreement defines each spouse's rights in marital property during her marriage. A separate provision, section 12, governs each spouse's rights in marital property in the event of divorce.
[17] *Id.* at 3 (emphasis added).
[18] *Id*. at 2.
[19] FEC Matter Under Review 149 (Jane Fonda and the Hayden for Senate Committee), Interim Conciliation Report (June 3, 1977).
[20] Ex. A (Blake Opinion Letter) at 2.
[21] 11 C.F.R. § 100.33(a).

The fact that the funds were transferred from a joint checking account to the campaign further bolsters Representative Trahan's claim that the funds at issue were her "personal funds." As the FEC has repeatedly explained, a candidate may use the full value of her share of assets jointly owned with a spouse. That value is assessed at either the candidate's ownership under a written agreement, or, if there is no agreement, the FEC considers the candidate to own 50% of joint assets. This is true in both community property states and noncommunity property states.[22] When both parties have access to and control over the entire account, "it is presumed that all funds in the joint account are the candidate's 'personal funds.'"[23] The questions of access and control depend on state law.[24] Under Massachusetts law, which controls here, "any part or all of the deposits and interest represented by joint accounts may be withdrawn, assigned or transferred in whole or in part by any of the individual parties."[25] The FEC's treatment of marital assets recognizes the reality that spouses, when sharing their lives, share their finances as well. To treat funds deposited by Representative Trahan's husband into the joint account as political contributions has no basis in FEC rules or the reality of the Trahans' shared life.

Thus, even if there had been no pre-marital agreement, Representative Trahan *still* could have withdrawn all the funds deposited into a joint account, and past FEC actions would presume those funds to be her personal funds—a fact acknowledged nowhere in OCE's referral.[26] For example, FEC Matter Under Review 6860 involved a 2014 Senate candidate who made $1.45 million in loans to her campaign from a joint checking account maintained with her spouse, who stated that he had deposited his income into the joint account during the election cycle, and the factual record established that nearly all of the funds in the joint account came from him.[27] The FEC did not find reason to believe that the candidate's use of these joint account funds to finance her campaign violated campaign finance law.[28] In another enforcement action arising from the 2014 election cycle, the FEC again did not find a violation when a candidate used $2.5 million in funds transferred by his spouse into a joint account to finance his campaign.[29]

While OCE claims "independent and parallel authority" to investigate the application of campaign finance law,[30] its referral omits an astonishing range of the controlling authority. It does not mention the Fonda/Hayden matter or the Dole matter, in which the FEC permitted a spouse even to transfer funds directly to the candidate's campaign, when the candidate had a

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[22] *See* Candidate's Use of Property In Which Spouse Has an Interest, 48 Fed. Reg. 19019, 19020 (April 27, 1983).
[23] FEC Matter Under Review 3505/3560/3569 (Klink), General Counsel's Report (March 2, 1995) at 23.
[24] *See, e.g.*, OGC Addendum to Legal Analysis to Proposed Interim Audit Report on Friends for Menor (LRA 732) - Contributions from Personal Funds in Jointly Held Bank Accounts (July 2, 2008) at 2.
[25] M.G.L.A. 167D § 3.
[26] OCE presumably did not know of the Trahans' pre-marital agreement: as discussed above, Representative Trahan did not cooperate in the review of the campaign finance allegation, because of OCE's lack of jurisdiction, and the inescapable conclusion that she had been selected improperly for investigation. Still, the FEC's general treatment of spousal joint accounts ought to have alerted OCE to the lack of clear legal basis for referral on this issue.
[27] FEC Matter Under Review 6860 (Land), First General Counsel's Report (Feb. 26, 2015) at 10.
[28] *See* FEC Matter Under Review 6860 (Land), Notification to Land Committee (Sept. 23, 2016) at 1. The candidate and her spouse settled separately with the FEC, without admission, on other funds that the spouse provided not to a joint account, but to "a personal account held solely in her name." FEC Matter Under Review 6860 (Land), Conciliation Agreement (June 13, 2018) at 2.
[29] *See* Matter Under Review 6848 (Demos), Certification (Nov. 15, 2018).
[30] Letter from Omar S. Ashmawy to Rep. Lori Trahan (June 10, 2019).

legal right of access to and control over those funds under state law.[31] In fact, OCE mentions none of the cases in which the FEC has allowed candidates to treat the *entire* amount of funds in a joint account as "personal funds."[32] Ignoring more than 40 years of inconvenient FEC precedents, OCE cherry-picks a single FEC enforcement action for the proposition that a spouse's deposits into a joint account are treated as contributions from the spouse to the campaign.[33] But the enforcement action cited by OCE is entirely distinguishable. Unlike in this matter—or the Fonda/Hayden or Dole matters—the spouses in the enforcement action cited by OCE did not argue that the candidate had a legal right of access to or control over the funds that were loaned to the campaign. Moreover, OCE fails to acknowledge the two 2014 matters discussed above—decided *after* the case it cites—where the FEC did not find a violation after a candidate made a loan from a joint account that had been funded with her spouse's income.[34]

OCE also fails to acknowledge the FEC's longstanding, general struggle with the treatment of interfamilial transfers, which reflects the *Buckley* Court's acknowledgment that "the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members …."[35] As Commissioners Matthew S. Petersen and Caroline C. Hunter put it in one Statement of Reasons, when the FEC deadlocked over a mother's gift to her candidate son: "The Commission's past handling of enforcement matters involving monetary gifts from family members has been inconsistent, to put it charitably."[36] The Commissioners said that, even if they agreed that the gift represented a contribution, proceeding with enforcement "would have been manifestly unfair. The Commission's contradictory approaches in past matters involving family gifts provide inadequate notice to the regulated community about what is permitted and what is not."[37] The Commissioners contended that "due process and fundamental fairness" required additional rules or policy statements "before pursuing enforcement actions in this area."[38] Such

[31] *See, e.g.*, FEC Matter Under Review 149 (Jane Fonda and the Hayden for Senate Committee), Interim Conciliation Report (June 3, 1977).
[32] *See, e.g.*, FEC Matters Under Review 2292 (Stein) and 3505/3560/3569 (Klink).
[33] *See* OCE Findings ¶ 16 n.6 (citing FEC Matter Under Review 6417).
[34] FEC Matter Under Review 6860 (Land), First General Counsel's Report (Feb. 26, 2015) at 10.
[35] *Buckley*, 424 U.S. at 53 n.59.
[36] Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Statement of Reasons, FEC Matter Under Review 5724 (Dec.11, 2009) at 1.
[37] *Id.* at 2. Concerns on the part of FEC Commissioners over enforcement practices surrounding interfamilial transfers increased after the agency's 2003 settlement with a then-sitting Member of Congress over funds he received from his parents during the campaign in which he was elected to the House. *See* FEC Matter Under Review 5138 (Ferguson for Congress), Conciliation Agreement (June 13, 2003). Two Commissioners dissented from the agency's imposition of a civil penalty because they saw the penalty as "grossly disproportionate to the offense," citing *Buckley's* dicta on interfamilial transfers. Vice Chair Bradley A. Smith and Commissioner Michael E. Toner, Statement of Reasons, FEC Matters Under Review 5138 (June 12, 2003) at 1, 2.
[38] Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Statement of Reasons, FEC Matter Under Review 5724 (Dec. 11, 2009) at 2. *See generally* Chair Ellen L. Weintraub, Vice Chairman Matthew S. Petersen, and Commissioners Caroline C. Hunter and Steven T. Walther, Statement of Reasons, FEC Matters Under Review 7263 and 7264 (June 20, 2019) at 3 (full Commission choosing not to investigate an allegation based in part on "lack of explicit guidance" on the underlying area of the law at issue in that matter); Chair Caroline C. Hunter and Commissioner Matthew S. Petersen, Statement of Reasons, FEC Matters Under Review 6969, 7031, and 7034 (Sept. 13, 2018) at 6 (noting that fair notice concerns carry "special weight" in the Commission's enforcement decisions and are "particularly acute where First Amendment rights are at stake").

was the state of the law when Representative Trahan, a first-time candidate, made loans to her campaign from her joint account.[39]

Representative Trahan also loaned funds to her campaign from a home equity line of credit, complying clearly with the separate FEC rules that govern loans secured by real property. In the case of real property owned by two spouses, the candidate's "personal funds" include either the candidate's share of the asset under the controlling documents, or—if no such share is indicated—the value of one-half the property.[40] Under that test, the $71,000 that Representative Trahan used from her and her spouse's home equity line of credit clearly constituted her personal funds. Representative Trahan owns a one-half interest in her house. Before her candidacy, she and her spouse took out two home equity lines of credit worth up to $700,000 in total.[41] Under FEC rules, up to $350,000 of these lines of credit constituted Representative Trahan's personal funds, and she only used $71,000 to finance her loan to the Committee, thus complying with the FEC's regulations.

II. OCE ERRED IN FINDING THAT A FIRST-TIME CANDIDATE'S GOOD-FAITH AMENDMENTS TO HER DISCLOSURE REPORTS WARRANT COMMITTEE INVESTIGATION

A. Representative Trahan Complied in Good Faith with Her FEC Reporting Obligations, Filing the Necessary Amendments to Complete the Public Record.

Representative Trahan's campaign properly reported the candidate herself as the source of the loans from the joint account. Regarding the $71,000 transaction, the referral notes that Representative Trahan first reported the line of credit as a personal loan without reporting it as a revolving line of credit. However, the campaign timely reported the $71,000 loan amount on October 15, 2018 in its original 2018 FEC October Quarterly Report. When it discovered that it had not reported the loan as being sourced from a line of credit, it immediately amended its

[39] The FEC's repeated refusal to pursue enforcement in closely analogous situations utterly contradicts OCE's baseless suggestion that the supposed "violations" were somehow knowing and willful. *See* OCE Findings ¶ 15. OCE further misreads FEC rules to make the inflammatory and unsupported insinuation that the campaign intentionally misreported the date it received the March 31, 2018 and June 30, 2018 checks from the joint account. *See id*. ¶¶ 18, 27, 31. OCE fails to say that FEC regulations require committees to report the date on which a check is received – which is the date on which the committee obtains possession of the contribution, no matter when deposited. *See* 11 C.F.R. § 102.8(a). The FEC specifically tells campaigns: "Under FEC regulations, the date of receipt is used for reporting purposes and that date is considered to be the date when that initial recipient … receives the contribution." https://www.fec.gov/updates/date-of-receipt-is-the-date-for-reporting/. OCE also fails to say that FEC rules give campaigns up to ten days after the date of receipt to deposit a check. *Id*. § 103.3. Thus, the reporting of the March 31 and June 30 checks was entirely consistent with FEC rules. The documents and public reports show the candidate issuing the checks on those dates, they show the campaign receiving them on those same dates—OCE offers no evidence whatsoever to the contrary—and they show the campaign depositing the checks later, within the ten-day window, as the rules expressly allowed the campaign to do.

[40] 11 C.F.R. § 100.33(c).

[41] Amounts derived from a home equity line are not "contributions." *Id*. § 100.83(a).

reports to provide the additional details.[42] While the initial reporting was incomplete, it was a *de minimis* mistake of the sort common among first-time campaigns. The public still knew that the candidate had loaned funds to the campaign, and it knew the underlying details about the line of credit once the Committee amended its reports. Representative Trahan's amendments and good-faith self-correction remove the need for any further action on this matter.

B. Representative Trahan Substantially Complied with the Personal Financial Disclosure Rules Under Committee Precedent.

The Ethics in Government Act requires candidates to file financial disclosure statements with the Clerk of the House of Representatives.[43] Once a financial disclosure statement has been filed with the clerk, the Committee has a general policy of accepting amendments filed in good faith.[44] As the Committee recently explained:

> Where the Committee's review indicated that a filed Statement or PTR was deficient, the Committee requested an amendment from the filer. ***Such amendments are routine and, without evidence of a knowing or willful violation, the Committee will usually take no further action after the amendment has been filed.*** Amendments are made publicly available in the same manner as other financial disclosure filings.[45]

The Committee has noted that there are

> hundreds or thousands of errors and omissions corrected by amendment at the requirement of the Committee every year. Such errors and omissions occur frequently but rarely result in Committee action other than requests for amendments which will be publicly filed, and, in certain cases, late fees when the amendments are not timely filed after notification . . . In fact, between 30% and 50% of all Financial Disclosure Statements reviewed by the Committee each year contain errors or require a corrected statement. For over 95% of these inaccurate Financial Disclosure Statements, the filer appears to be unaware of the errors until they are notified by the Committee. Some filers also appear to become aware of errors after being notified by members of the media or outside groups who review the statements and other public records. Generally, unless there is some evidence that errors or omissions are knowing or willful, or appear to be significantly related to other potential violations, the Committee notifies the filer of the error and requires that he or she submit an amendment, which is then publicly filed.

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[42] *See* Lori Trahan for Congress Committee, 2018 October Quarterly Report (amended Dec. 15, 2018). The referral claims that Representative Trahan should have reported her spouse as secondarily liable for the loan. *See* OCE Findings ¶ 48. But the FEC specifically instructs committees to identify only endorsers and guarantors as secondarily liable parties. *See* Federal Election Commission Campaign Guide, Congressional Candidates and Committees (2014) at 111.

[43] *See* 5 U.S.C. app. § 101.

[44] *See* Policy Regarding Amendments to Financial Disclosure Statements, Committee on Standards of Official Conduct (April 23, 1986).

[45] *See* House Committee on Ethics, *Summary of Activities of the One Hundred Fifteenth Congress,* H.R. Rep. 115-1125, at 12 (January 2, 2019) (emphasis added). *See also* House Committee on Ethics, *In the Matter of Allegations Relating to Rep. Vernon G. Buchanan,* H.R. Rep. 112-588 (July 10, 2012) (acknowledging inconsistency in personal financial disclosure report found by OCE in referral but taking no further action).

> Once the amendment is properly submitted, the Committee takes no further action. Accordingly, errors and omissions in Financial Disclosure Statements are an ordinary part of the process for many filers, and in the normal course of review and amendment of Financial Disclosure Statements, the fact of errors and omissions are typically not the subject of an investigation or Report by the Committee, but rather are disclosed publicly by the filing of the amendment itself.[46]

With Representative Trahan—a first-time candidate—having been required to file two financial disclosure reports during the middle of her first campaign, and having also had substantial financial resources, it is not surprising that her initial filings needed to be amended. Immediately upon identifying inadvertent or technical errors in the original Candidate Reports, Representative Trahan voluntarily filed a series of amendments:

- On June 4, 2018, she amended the Candidate Reports to include her ownership interest in Concire LLC on Schedule A. Because she had already disclosed her earned income from Concire LLC on Schedule C, she did not realize at the time the Candidate Reports were initially filed that she also needed to list the same company as an asset on Schedule C. As soon as she became aware of this requirement, she amended the Candidate Reports to disclose her ownership interest in the company.

- On November 16, 2018, she amended the Candidate Reports to separately disclose a joint checking account she holds with her husband at Enterprise Bank. Although she had disclosed Enterprise Bank on the original Candidate Reports as a spousal asset, she had not separately itemized their joint account in the same bank. In the same amendments, Representative Trahan adjusted the amount of her earned income from Concire LLC on Schedule C to match her interest in the business's net profits.

- On February 19, 2019, she amended her Candidate Reports to disclose her ownership interest in Stella Connect, a software company. Because she had not earned any income from the company, the investment was inadvertently omitted from her original Candidate Reports.

- On March 21, 2019, Representative Trahan amended her Candidate Reports to specify on Schedule J that she had not listed individual clients of Concire LLC as sources of compensation due to the confidentiality provisions in Concire LLC's agreements with its clients.

None of these errors or omissions was knowing or willful, all were voluntarily corrected, and none warrants further action under Committee precedent.

[46] House Committee on Ethics, *In the Matter of Allegations Relating to Rep. Vernon G. Buchanan,* H.R. Rep. 112-588 (July 10, 2012). at 2, 5. *See also* House Committee on Ethics, *In the Matter of Allegations Relating to Rep. Gregory Meeks,* H.R. Rep. 112-709 (Dec. 20, 2012); House Committee on Ethics, *In the Matter of Allegations Relating to Gregory Hill,* H.R. Rep. 112-194 (August 5, 2011); House Committee on Ethics, *In the Matter of Allegations Relating to Rep. Jean Schmidt,* H.R. Rep. 112-195 (Aug. 5, 2011).

III. OCE'S REFERRAL REPEATEDLY DISREGARDED HOUSE RULES AND COMMITTEE PRECEDENT

A. OCE Lacked Jurisdiction to Initiate a Review of Representative Trahan's Conduct Before She Became a Member.

OCE's review of Representative Trahan was an unprecedented audit of a newly-arrived Member's first-time campaign. Under H. Res. 895, OCE may only "undertake a preliminary review of any alleged violation by a Member, officer, or employee of the House of any law, rule, regulation, or other standard of conduct *applicable to the conduct of such Member, officer, or employee in the furtherance of his duties or the discharge of his responsibilities[.]"*[47] OCE's own rules are even more explicit on this point: The Office may only investigate alleged violations of standards *"in effect at the time the conduct occurred and applicable to the subject in the performance of his or her duties or the discharge of his or her responsibilities."*[48] At the time of the conduct under review, Representative Trahan was not yet a Member, and therefore not subject to OCE's jurisdiction.

OCE claims authority to conduct this audit nonetheless, citing this Committee's jurisdiction over allegations of supposed "misconduct relating to a successful campaign for election to the House."[49] This statement confuses OCE's jurisdiction with the Committee's. However broad the Committee's authority may be, nothing indicates that the House meant to turn OCE loose on newly arrived Members over the conduct of their first campaigns. Until this Congress, during its eleven-year history, OCE appears never to have claimed that authority.[50] This review represents a radical sea-change in the OCE process.

In its turn, while this Committee indeed reserves the right to review potential violations of law which occurred during an initial campaign for the House, it has only rarely done so, and then only on aggravated facts.[51] Initially, the Committee appeared to disclaim jurisdiction over newly-elected Members' campaigns altogether. In 1968, Representative Melvin Price, its chairman, explained: "In the case . . . involving a candidate for office . . . we felt we did not have the jurisdiction on that."[52] However, the Committee ultimately reserved the right to "deal with any given act, or accumulation of acts which, in the judgement of the committee, *are severe enough to reflect discredit on the Congress*."[53] Thus, the Committee has investigated pre-Member candidate conduct when the issues involved were severe enough potentially to reflect discredit

[47] H. Res 895, 110th Cong. § 1(c)(1)(A) (2008) (emphasis added).
[48] Office of Congressional Ethics, Rules for the Conduct of Investigations, Rule 1(3).
[49] *E.g.*, OCE ¶ 5, n.2 (citing *In the Matter of Allegations Relating to Representative Ruben Kihuen*, H.R. Rep. No. 115-1041, at 5, n.24 (2d Sess. 2018)).
[50] *See* Statement of the Chairman and Ranking Member of the Committee on Ethics Regarding Representative Michael Grimm (Nov. 26, 2012), https://ethics.house.gov/press-release/statement-chairman-and-ranking-member-committee-ethics-regarding-representative-2 (reversing OCE's recommendation of dismissal for want of jurisdiction).
[51] *See id.*
[52] *See* 114 Cong. Rec. 8779 (1968).
[53] *See id.*

on the House, and not as a general matter.[54] The allegations here, involving a first-time candidate's use of her own personal funds to finance activity protected by the First Amendment, does not in any way approach the type of pre-Member candidate conduct the Committee has investigated.

Indeed, in past instances where the FEC affirmatively found that a pre-Member candidate's interfamilial transfers resulted in apparent campaign finance violations, this Committee did not exercise its jurisdiction over the underlying conduct—a strong demonstration of the Committee's exacting approach to pre-Member campaign allegations. For example, when a sitting Member agreed to a six-figure penalty imposed by the FEC over funds he received from his parents during the campaign in which he was elected, there was no record of any Committee investigation or adverse action.[55] Likewise, when the FEC concluded that another Member accepted excessive contributions from his parents during his campaign, there was no record that OCE referred those allegations to the Committee—even after receiving a public complaint requesting that it do so.[56] Unlike this case, these were settled FEC matters where the agency conclusively determined that a campaign finance violation had occurred. And still, the public record shows no sign that these matters were addressed through the ethics process.

B. By Opening a Review on a Muddled Question of FEC Rules, OCE Breached Committee Guidance and House Rules.

The Committee says that "FECA is enforced primarily by the Federal Election Commission[.]"[57] OCE claims that it "has an independent and parallel authority to investigate potential violations of the Federal Election Campaign Act."[58] OCE's position means that there is no effective limit on the sort of FEC allegations—which arise in virtually every campaign—which the Committee may have to review. OCE would become a shadow FEC, with no standards to identify the cases to consider, and the cases to decline. The ethics process would become grossly politicized, and OCE would become the preferred destination for campaign finance complaints of any partisan

[54] *See In the Matter of Allegations Relating to Representative Ruben Kihuen*, Committee on Ethics, 115th Congress, 2d Session (2018) (involving a pattern of unwanted sexual advances that continued into Congressional service*); In the Matter of Representative Earl F. Hilliard*, Committee on Ethics, 107th Congress, 1st Session (2001) (involving a sustained pattern and practice of personal use extending into Congressional service); *In the Matter of Representative Jay Kim*, Committee on Ethics, 105th Congress, Second Session (1998) (involving aggravated crimes to which the Member had already pled guilty). *See also* Statement of the Chairman and Ranking Member of the Committee on Ethics Regarding Representative Michael Grimm (Nov. 26, 2012), https://ethics.house.gov/press-release/statement-chairman-and-ranking-member-committee-ethics-regarding-representative-2. As a general matter, the Committee has recognized that some types of campaign conduct are inappropriate for the full investigative process: for example, alleged violations of House Rule V, which restricts the use of House floor footage during campaigns. *See In the Matter of Allegations Relating to Representative Ben Ray Lujan*, Committee on Ethics, 115th Congress, 1st Session (2017).

[55] FEC Matter Under Review 5138 (Ferguson for Congress), Conciliation Agreement (June 13, 2003).

[56] *See* FEC Matter Under Review 6440 (Guinta), Conciliation Agreement (May 6, 2015); Letter from Noah Bookbinder to Omar Ashmawy (June 16, 2015), *available at* https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2016/07/20021949/6-16-15_Guinta_OCE_Complaint.pdf.

[57] House Ethics Manual at 122 (2008).

[58] Letter from Omar S. Ashmawy to Rep. Lori Trahan (June 10, 2019).

motivation, seriousness or stripe. H. Res. 895's mandatory review and release processes would place the Committee entirely at the sufferance of OCE's "judgment."

OCE's position presents a specific problem in Representative Trahan's case. Under House rules, neither OCE nor the Committee may "take any action that would deny any person any right or protection provided under the Constitution of the United States."[59] However, as discussed above, a candidate's financing of her own campaign is a right guaranteed by the First Amendment, and FEC Commissioners have said that enforcement against interfamilial transfers under the current, muddled legal framework presents due process concerns.[60] If experts charged with exclusive civil jurisdiction for interpreting and enforcing FECA have said that due process requires further rulemaking before enforcement can occur, then it is hard to see how OCE has followed the due process obligations to which House rules bind it.

C. By Taking the Trahans' Personal Financial Information Without Their Consent and Putting It into a Document Created for Public Release, OCE Abused Its Authority.

H. Res. 895 authorizes OCE to seek documents solely through voluntary requests. The resolution provides that OCE may transmit a report, findings and "supporting documentation" to the Committee upon the conclusion of the review,[61] and that the Committee would release the report and findings—but not the "supporting documentation."[62] OCE regularly plays fast-and-loose with these rules, scanning images of documents into its findings to sensationalize its claims against the Member, and bootstrapping those same documents into compelled public release. In some cases, this has resulted in prima facie breaches of OCE's obligation to avoid disclosing the identities of cooperative witnesses—where the findings refer to them by pseudonyms, but the images identify them by name.[63]

In this case, OCE's longstanding practice of seeking and publishing documents resulted in a clear breach of the Trahan family's privacy. Without notice to the Trahans, OCE appears to have gone directly to their financial institutions and gotten copies of their personal checks, deposit slips, bank statements and other private financial information.[64] Following its long-standing but still dubious practice, OCE then scanned these documents into the findings and sent them to the Committee for public release—making some redactions, but keeping the Trahans' addresses and images of their signatures in the documents.[65]

Obtaining and transmitting these documents in this way presents issues of compliance with federal privacy laws. Under the Right to Financial Privacy Act (RFPA), a federal government authority generally may not access personal bank records unless: the customer authorizes access;

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[59] H. Res. 6, 116th Cong. § 104(c)(7) (2019); House Rule 11, cl. 3(s).
[60] *See* Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Statement of Reasons, FEC Matter Under Review 5724 (Dec. 11, 2009) at 2.
[61] H. Res. 895, 110th Cong. § 1(c)(2)(C)(i) (2008).
[62] *See* House Rule XI, cl. 3(b)(8).
[63] *See* H. Res. 895, 110th Cong. § 1(c)(2)(C)(i).
[64] *See* OCE Findings ¶¶ 22, 24, 26, 27, 28, 30, 31, 32, 33, 41.
[65] *See id.* ¶ 24, 26, 28, 32, 33.

the access is pursuant to an administrative subpoena, search warrant, or judicial subpoena; or the government authority has requested the records in writing and the customer has been provided with notice and an opportunity to object.[66] The RFPA provides exceptions to this prohibition—but none that would appear to apply to OCE in this review.[67] OCE's treatment of the Trahans' bank records is characteristic of the cavalier way in which it approached a first-time candidate and her spouse, who tried in good faith to comply with the complex rules affecting her core First Amendment right to spend in support of her own election.

CONCLUSION

For the reasons set forth above, Representative Trahan respectfully requests the Committee on Ethics dismiss Review 19-5449.

Very truly yours,

Kate Sawyer Keane
Brian G. Svoboda
Jonathan S. Berkon
Counsel to Representative Lori Trahan

[66] *See* 12 U.S.C. § 3402.
[67] *See id.* §§ 3408, 3413.

Exhibit A

ATWOOD | CHERNY P.C.
COUNSELLORS AT LAW

DAVID E. CHERNY
MARK T. SMITH
ERIN M. SHAPIRO
MARY BETH L. SWEENEY
DAWN E. YOUNG
CATHARINE V. BLAKE
RACHAEL M. SOUN

THOMAS D. RITTER
GRETEL M. DUFRESNE
JOANA L. STATHI
CASSANDRA P. KENT

JACOB M. ATWOOD
(1933-2008)

October 28, 2019

The Honorable Theodore E. Deutch, Chairman
The Honorable Kenny Marchant, Ranking Member
Committee on Ethics
United States House of Representatives
Washington, DC 20515

Re: Congresswoman Lori Trahan

Dear Chairman Deutch and Ranking Member Marchant:

I am an attorney in good standing and licensed to practice law in Massachusetts and New Hampshire. I am a partner with the law firm of Atwood & Cherny, P.C. The vast majority of my practice is devoted to domestic relations/matrimonial law. I routinely draft prenuptial agreements and also litigate the enforceability of prenuptial agreements at the time of enforcement (i.e., divorce).

Massachusetts is an equitable distribution state, meaning that all assets, regardless of how title is held and regardless of how assets were acquired, is includible in the marital estate. See: Rice v. Rice, 372 Mass. 398 (1977). However, Massachusetts law permits couples, prior to marriage, to enter into contracts (prenuptial agreements) to define their rights and obligations as to the marital estate. M.G.L. c. 209, § 25 specifically provides that "[a]t any time before marriage, the parties may make a written contract providing that, after the marriage is solemnized, the whole or any designated part of the real or personal property or any right of

action, of which either party may be seized or possessed at the time of the marriage, shall remain or become the property of the husband or wife, according to the terms of the contract.

Enforceability and interpretation of prenuptial agreements are governed by state law. Massachusetts has a strong policy in favor of enforcing prenuptial agreements. The Massachusetts Supreme Judicial Court has ruled that people who enter into marriage should have the "freedom to settle their rights in the event their marriage should prove unsuccessful . . . " Osborne v. Osborne, 384 Mass. 591, 598 (1981). It was the Osborne Court that held that prenuptial agreements which settle alimony and property rights in the event of a divorce are "not per se against public policy and may be specifically enforced . . ." Id. at 598-599. The Massachusetts Supreme Judicial Court has held that a prenuptial agreement is a contract and must "comport with the rules governing the formation of all contracts . . ." DeMatteo v. DeMatteo, 436 Mass. 18, 26 (2002).

In 2007, prior to their marriage, the Trahans executed a prenuptial agreement (hereinafter the "Agreement"). The Agreement is a contract that remains valid today. In entering into the Agreement, the Trahans specifically stated that they "intend to define their respective rights in the property of the other **during marriage** . . ." See: Section 1, page 1 (**emphasis added**).

The Agreement defines "Marital Property" as follows:

(1) All property purchased with proceeds of a fund (e.g. joint account) to which equal periodic contributions are made.

(2) All wages, salary, and income of each party earned or received during the marriage, together with property purchased with these funds.

See: Section 11, page 4.

The Agreement also specifically provides that "[e]ach party **shall have equal rights** in regard to the **management of and disposition of all marital property**." See: Section 11, page 4 (**emphasis added**). This is an equitable interest under Massachusetts law. Congresswoman Trahan had (and continues to have) an equitable interest in the wages, salary, and income earned and received by her husband during their marriage. Congresswoman Trahan enjoyed this equitable interest during the marriage, pursuant to Section 11 of the Agreement. Notably, there is a separation section in the Agreement (Section 12), which deals separately with the disposition of marital property in the event of divorce. Inherent in Congresswoman Trahan's right to **manage and dispose** of the marital property is the legal right to **access** the marital property.

Please do not hesitate to contact me with any questions or concerns.

Sincerely,

Catharine V. Blake

CVB/ir