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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 22-21-A
AGENDA ITEM
For meeting of June 8, 2022

June 1, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

Robert Knop *RMK*
Assistant General Counsel

Joseph P. Wenzinger *JPW*
Attorney

Subject: Draft AO 2022-04 (Jill Stein for President) – Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on June 7, 2022.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2022-04

2

3 Harry Kresky, Esq.
4 Law Office of Harry Kresky
5 128 Binner Road
6 Shushan, New York 12873

DRAFT A

7

8 Dear Mr. Kresky:

9

10 We are responding to your advisory opinion request on behalf of the Jill Stein for
11 President Committee (“Committee” or “requestor”) concerning the application of the
12 Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (“FECA”), the Presidential
13 Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-42 (the “Public Funding
14 Act”), and Commission regulations to various questions concerning the use of Committee
15 funds raised after the general election in 2016 to pay outstanding administrative fines to
16 the Commission or to make repayments to the United States Treasury. The Commission
17 concludes that (1) the Committee need not establish a separate, segregated account to
18 raise funds designated as “other receipts” to pay administrative fines, (2) the Committee
19 may not use funds designated as primary contributions to pay administrative fines, and
20 (3) the Committee may use funds designated as primary contributions to make
21 repayments to the United States Treasury.

21 ***Background***¹

22

23

The Committee is the principal campaign committee for Dr. Jill Stein, a candidate
for the Green Party nomination for president in 2016.² In April 2016, the Commission

¹ The facts presented in this advisory opinion are based on your letter dated March 14 and email dated April 15, 2022, as well as public disclosure reports filed with the Commission and publicly available audit reports and determinations collected at <https://www.fec.gov/legal-resources/enforcement/audit-reports/publicly-financed-committee-audit-reports/jill-stein-for-president-2016/>.

² Jill Stein for President, Statement of Organization, FEC Form 1 (June 4, 2021), <https://docquery.fec.gov/pdf/401/202106049448814401/202106049448814401.pdf>.

1 certified Dr. Stein as eligible for public matching funds from the United States Treasury
2 for the 2016 presidential primary election.³ After the mandatory audit of candidates and
3 committees receiving public funds for that election, the Commission determined that
4 Dr. Stein and the Committee must repay \$175,272 to the United States Treasury.⁴
5 Dr. Stein and the Committee have challenged this determination in the United States
6 Court of Appeals for the D.C. Circuit,⁵ and that litigation is pending.⁶ In addition to the
7 repayment determination, the Commission has assessed several administrative fines for
8 the late filing of certain Committee disclosure reports.⁷

9 The Committee's most recent report filed with the Commission shows cash on
10 hand of \$39,195.95,⁸ which the Committee explains is housed in a bank account at the
11 Summit Credit Union in Madison, Wisconsin.⁹ Although the funds in this account were
12 solicited and accepted after the 2016 general election, the Committee designated them as
13 either (1) "primary contributions" raised "to pay for current legal and administrative

³ Final Audit Report on Jill Stein for President (Apr. 22, 2019) (the "Final Audit Report") at 3 n.7, https://www.fec.gov/resources/legal-resources/enforcement/audits/2016/Jill_Stein_for_President/JillStein_FARC_2016.pdf. The period during which Dr. Stein was eligible for matching funds ended on August 6, 2016. *Id.* Dr. Stein did not receive public funds for the 2016 general election.

⁴ Repayment Determination After Administrative Review (Sept. 30, 2021), https://www.fec.gov/resources/cms-content/documents/JillStein_SOR_Repayment_Determination_After_Administrative_Review_2016.pdf.

⁵ *Stein v. FEC*, No. 21-1213 (D.C. Cir. Oct. 29, 2021) (Petition for Review of Agency Action), https://www.fec.gov/resources/cms-content/documents/stein_pet_for_rev_of_action_10-29-2021.pdf.

⁶ Documents related to the litigation may be found at <https://www.fec.gov/legal-resources/court-cases/stein-v-fec-21-1213/>.

⁷ See Advisory Opinion Request (AOR) at AOR001 (listing administrative fines).

⁸ Report of Receipts and Disbursements, FEC Form 3P (Apr. 13, 2022) at 2, <https://docquery.fec.gov/pdf/874/202204139496093874/202204139496093874.pdf>.

⁹ AOR002.

1 costs,” or (2) “other receipts” raised to pay administrative fines. According to the
2 request, these funds comply with the Act’s source restrictions, amount limitations, and
3 reporting requirements. Further, the Committee states that the funds designated as “other
4 receipts” were raised and reported pursuant to Advisory Opinion 2016-16 (Gary Johnson
5 2012) at 5 (addressing the reporting of funds raised by a publicly funded committee to
6 pay civil penalties).

7 The Summit Credit Union account is the sole active account and contains only
8 funds received by the Committee after the 2016 general election and does not contain any
9 funds transferred from any predecessor account held by the Committee.¹⁰ Although the
10 Committee has already raised contributions and designated them as “other receipts” to
11 pay administrative fines, the Committee is continuing to raise funds and seeks an
12 advisory opinion “as to whether this procedure is satisfactory for the payment of
13 outstanding administrative fines, or if a separate segregated account should be established
14 to receive contributions intended for the payment of these fines.”¹¹

15 ***Questions Presented***

16 1. *Is the Committee required to establish a separate, segregated bank*
17 *account to receive funds designated as “other receipts” for the payment of administrative*
18 *fines?*

19 2. *May funds designated as primary contributions be used to pay*
20 *administrative fines?*

¹⁰ *Id.*

¹¹ AOR001.

1 3. *May funds designated as primary contributions be used to make*
2 *repayments to the United States Treasury if the Committee’s legal challenge to the*
3 *repayment determination is unsuccessful?*

4 ***Legal Analysis***

5 1. *Is the Committee required to establish a separate, segregated bank*
6 *account to receive funds designated as “other receipts” for the payment of administrative*
7 *finances?*

8 The Committee is not required to establish a separate, segregated bank account to
9 receive funds designated as “other receipts” for the payment of administrative fines.

10 As a condition of receiving public funds under the Public Funding Act, a
11 candidate must agree that the “candidate and the candidate’s authorized committee(s) will
12 pay any civil penalties included in a conciliation agreement or otherwise imposed” under
13 the Act.¹² But civil penalties, which include administrative fines, may not be paid from
14 “contributions or matching payments” that the committee received for its publicly
15 financed primary campaign.¹³ The funds received by a publicly funded committee to pay
16 civil penalties are “subject to the prohibitions of the Act” and “shall be reported” in
17 accordance with 11 C.F.R. § 110.20.¹⁴ Applying that regulation, the Commission, in
18 Advisory Opinion 2016-16 (Gary Johnson 2012) at 5, explained that a committee that
19 received primary election public matching funds may raise funds outside of the Act’s

¹² 11 C.F.R. § 9033.1(b)(11).

¹³ *Id.* § 9034.4(b)(4).

¹⁴ *See id.*

1 amount limitations to pay civil penalties, as long as they are received from permissible
2 sources and reported as “other receipts” in its regular disclosure reports.

3 Here, in accordance with Advisory Opinion 2016-16 (Gary Johnson 2012), the
4 Committee has raised funds to pay administrative fines and reported them as “other
5 receipts” on disclosure reports. Nothing in the Act, the Public Funding Act, or the
6 Commission’s regulations require establishing a separate, segregated account for “other
7 receipts.”¹⁵ Therefore, the Committee is not required to establish a separate, segregated
8 fund for “other receipts” raised to pay administrative fines.

9 2. *May funds designated as primary contributions be used to pay*
10 *administrative fines?*

11 No, funds the Committee designated as primary contributions may not be used to
12 pay administrative fines.

13 As discussed above, civil penalties (including administrative fines) may not be
14 paid from “contributions or matching payments” that the committee received for its
15 publicly financed primary campaign.¹⁶ Here, although you state that the Committee’s
16 sole, active account contains only funds received after the 2016 general election and does

¹⁵ In the context of making repayment determinations, private primary contributions and public funds are, as a matter of law, considered a “commingled pool of federal and private monies.” *Kennedy for President Comm. v. FEC*, 734 F.2d 1558, 1564 (D.C. Cir. 1984); see Public Financing of Presidential Primary and General Election, 56 Fed. Reg. 35,898, 35,905 (July 29, 1991) (explaining that “all funds in a publicly funded committee’s accounts are considered to be commingled”). On the other hand, “other receipts” raised to pay for civil penalties are “not considered contributions or expenditures.” 11 C.F.R. § 9034.4(b)(4). If the Committee chooses not to create a separate, segregated account for “other receipts” used to pay administrative fines, it is reminded to use a reasonable accounting method to ensure proper identification of “other receipts” as opposed to private contributions or public funds. See *id.* § 102.9(a).

¹⁶ *Id.* § 9034.4(b)(4). As discussed above, the “other receipts” received by the Committee are consistent with Advisory Opinion 2016-16 (Gary Johnson 2012) may be used to pay the administrative fines.

1 not contain any funds transferred from any predecessor account held by the Committee,
2 you nevertheless maintain that these funds were designated as primary election
3 contributions. We note that for a committee to receive primary election contributions
4 after a primary election, it must have net debts outstanding from the primary election on
5 the date received.¹⁷ Nevertheless, accepting your representations as true for the purposes
6 of this opinion both that these contributions were designated as primary election
7 contributions and that the Committee had sufficient net primary debts outstanding to
8 permit it to receive post-primary contributions designated for the primary election,¹⁸ such
9 primary election contributions may not be used to pay administrative fines.

10 3. *May funds designated as primary contributions be used to make*
11 *repayments to the United States Treasury if the Committee’s legal challenge to the*
12 *repayment determination is unsuccessful?*

13 Yes, funds the Committee designated as primary contributions may be used to
14 make repayments to the United States Treasury.

15 The Public Funding Act states that a “candidate shall pay to the Secretary [of the
16 Treasury]” the amount of any public fund overpayments or payments that the candidate

¹⁷ 11 C.F.R. § 110.1(b)(3).

¹⁸ You state that the funds designated as primary contributions were raised to pay for “current legal and administrative costs,” which the Commission assumes only includes funds raised to pay net debts outstanding for the 2016 primary election. The Commission notes that “net debts outstanding” includes a limited range of legal and administrative costs under the definition of “net debts outstanding,” which is “debts and obligations incurred with respect to a specific election.” 11 C.F.R. § 110.1(b)(3)(ii). These debts and obligations include repayments to the United States Treasury for a particular election, *see* Advisory Opinion 2016-16 (Gary Johnson 2012) (explaining that funds raised to make repayments to the United States treasury are “akin to funds raised for debt repayment”), as well as “administrative costs associated with winding down the campaign,” *id.* § 110.1(b)(3)(ii).

1 used for purposes other than qualified expenses.¹⁹ Commission regulations further
2 specify that such repayments “may be made only from the following sources: personal
3 funds of the candidate . . . , contributions and federal funds in the committee’s account(s),
4 and any additional funds raised subject to the limitations and prohibitions” of the Act.²⁰
5 Here, the designated primary contributions are contributions, raised subject to the Act’s
6 restrictions, amount limitations, and reporting requirements. Thus, the Committee may
7 use funds designated as primary contributions to make repayments to the United States
8 Treasury.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request.²¹ The Commission emphasizes that, if there is a change in any of the facts or
12 assumptions presented, and such facts or assumptions are material to a conclusion
13 presented in this advisory opinion, then the requestor may not rely on that conclusion as
14 support for its proposed activity. Any person involved in any specific transaction or
15 activity that is indistinguishable in all its material aspects from the transaction or activity
16 with respect to which this advisory opinion is rendered may rely on this advisory
17 opinion.²² Please note that the analysis or conclusions in this advisory opinion may be
18 affected by subsequent developments in the law including, but not limited to, statutes,

¹⁹ 26 U.S.C. § 9038(b)(1)-(2); *see also* 11 C.F.R. § 9038.2(a)(1).

²⁰ 11 C.F.R. § 9038.2(a)(4).

²¹ *See* 52 U.S.C. § 30108.

²² *See id.* § 30108(c)(1)(B).

1 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
2 available on the Commission's website.

3 On behalf of the Commission,

4 Allen J. Dickerson
5 Chairman