

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

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4 In the Matter of )  
5 )  
6 Zeldin for Senate ) MUR 6985  
7 Lee M. Zeldin )  
8

9 **SECOND GENERAL COUNSEL'S REPORT**

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11 **I. ACTIONS RECOMMENDED**

12 We recommend that the Commission: (1) take no further action as to Zeldin for Senate  
13 ("State Committee") and Lee M. Zeldin (collectively "Respondents"); (2) approve the  
14 appropriate letters; and (3) close the file.

15 **II. BACKGROUND**

16 On March 23, 2017, the Commission found reason to believe that former New York state  
17 senator and federal candidate Lee Zeldin and his state senate committee violated 52 U.S.C.  
18 § 30125(e)(1)(B) by spending federally impermissible funds to make state and local political  
19 contributions and by accepting corporate contributions after Zeldin became a federal candidate.<sup>1</sup>

20 The Commission authorized pre-probable cause conciliation

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22 The Commission made these findings based on the State Committee's disclosure reports,  
23 which revealed that after October 7, 2013, the date Zeldin declared his federal candidacy, the

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<sup>1</sup> See Certification, MUR 6985 (Mar. 23, 2017) and Factual & Legal Analysis ("F&LA").

<sup>2</sup> Shortly after receiving notification of the Commission's findings, Respondents submitted a letter asking that the Commission rescind its findings and dismiss the matter. See Letter from James E. Tyrrell III, Counsel, to Chairman Steven T. Walther, FEC (June 13, 2017). Respondents argued that the Commission lacked authority to make the findings, and that Zeldin and the State Committee permissibly accepted corporate contributions because he was a state candidate at the time. See *id.* at 6-7. This Office informed Respondents that the Federal Election Campaign Act of 1971, as amended (the "Act"), and regulations do not provide a procedure for such a request. See Memorandum to the Commission (Aug. 7, 2017), MUR 6985; Letter from Elena Paoli, OGC, to James E. Tyrrell III, Counsel (Aug. 15, 2017).

1 State Committee received \$1,000 from corporate entities and contributed or transferred \$99,655  
2 to 39 state and local political committees through December 23, 2015, the date the State  
3 Committee spent its last funds.<sup>3</sup>

4 In response to the Commission's findings, Respondents have provided detailed financial  
5 information, and an affidavit from the State Committee's treasurer containing new information,  
6 in support of its position that the State Committee used permissible funds to make the state and  
7 local political contributions and transfers at issue.

8 Based on our close examination of this information, we recommend that the Commission  
9 take no further action in this matter and close the file.

10 **III. ANALYSIS**

11 Pursuant to 52 U.S.C. § 30125(e)(1)(B), the Act prohibits federal candidates, federal  
12 officeholders, their agents, and entities established, financed, maintained, or controlled  
13 ("EFMC'd") by federal candidates or officeholders from soliciting, receiving, directing,  
14 transferring, or spending funds in connection with any election other than an election for Federal  
15 office unless the funds are in amounts and from sources permitted by the Act.

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<sup>3</sup> F&LA at 3.

1           **A. State Committee Contributions and Transfers After Zeldin Became a Federal**  
2           **Candidate**

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4           The State Committee — an entity subject to 52 U.S.C. § 30125(e)(1)(B) — donated to  
5 state and local candidates and parties while Zeldin was a federal candidate and subsequently  
6 while he was a federal officeholder, thus transferring, spending, or disbursing funds in  
7 connection with a nonfederal election.<sup>5</sup> Therefore, any funds the State Committee transferred,  
8 spent, or disbursed after Zeldin became a federal candidate or officeholder were required to be  
9 federally permissible.<sup>6</sup>

10           Notwithstanding the prohibitions of section 30125(e), the Commission has allowed a  
11 state officeholder and federal candidate to donate federally permissible funds in a state account  
12 to other state and local political committees if the state committee uses a “reasonable accounting  
13 method” to separate permissible from impermissible funds, and it makes the contributions with  
14 the permissible funds.<sup>7</sup>

15           The Commission’s reason-to-believe finding was premised on the State Committee’s  
16 disclosure reports showing that at least 39% of its funds during 2013 (\$99,725) consisted of  
17 demonstrably impermissible federal funds, and the lack of information that the State Committee  
18 used a reasonable accounting method and thus only used federally permissible funds to make the

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<sup>5</sup> F&LA at 4; *see* Advisory Op. 2009-26 (Coulson) at 5; Advisory Op. 2007-01 (McCaskill) at 3; F&LA at 9, MUR 6601 (Oelrich).

<sup>6</sup> F&LA at 4. A concurrent state candidate is permitted to raise and spend non-federal funds in certain circumstances. *See* 52 U.S.C. § 30125(e)(2).

<sup>7</sup> *Id* at 4-5; Advisory Op. 2007-26 (Schock) at 3-5; Advisory Op. 2006-38 (Casey) at 4; *see also* 11 C.F.R. § 110.3(c)(4) (Committees may transfer funds in certain situations when they can demonstrate that their “cash on hand contains sufficient funds at the time of the transfer that comply with the limitations and prohibitions of the Act to cover the amount transferred,” cited as authority for AOs 2007-26 and 2006-38).

1 contributions and transfers.<sup>8</sup> In response, Respondents assert that, under a reasonable accounting  
2 method, the State Committee had \$154,829.54 in permissible funds as of October 7, 2013, the  
3 date Zeldin became a federal candidate, which was more than the amount the State  
4 Committee spent after that date on donations and transfers to state and local political  
5 committees.<sup>9</sup>

6 According to Respondents, when Zeldin became a federal candidate, the State  
7 Committee, following its accountant's recommendations, used "General Accounting Principles,  
8 such as using three (3) accounts – (1) Primary; (2) General; and, (3) Non-Permissible."<sup>10</sup> In  
9 support, the State Committee provided a spreadsheet its treasurer prepared. That spreadsheet  
10 was based on the State Committee's disclosure reports, and it designates each contribution  
11 received during 2013 as federally permissible or not based on source and amount.<sup>11</sup> The  
12 spreadsheet divides the State Committee's contributions received up to October 7, 2013, into  
13 three groups: "Primary 2014" (contributions up to \$2,600 from permissible sources); "General  
14 2014" (contributions between \$2,600 and \$5,200 from permissible sources);<sup>12</sup> and "Non

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<sup>8</sup> F&LA at 3-5, n.14.

<sup>9</sup> See email from James E. Tyrrell III, Counsel, to Elena Paoli, OGC (Mar. 15, 2018) (avail. in VBM); Affidavit of Nancy Marks, State Committee treasurer, at ¶ 5 (Aug. 31, 2018) (attached to this Report) ("Marks Aff."); Resp. at 3-4 (Oct. 13, 2017). Marks also has been the treasurer for Zeldin's federal committee, Zeldin for Congress, since its initial registration with the Commission. See Zeldin for Congress, Statement of Organization (dated by treasurer Oct. 7, 2013, but not filed with Commission until Nov. 26, 2013).

<sup>10</sup> Marks Aff. ¶ 6.

<sup>11</sup> See Spreadsheet (attach. to Mar. 15, 2018 email from James E. Tyrrell III, Counsel, to Elena Paoli, OGC) (avail. in VBM). The Spreadsheet also categorizes contributions received by the State Committee during the 2010 and 2012 election cycles. When we reviewed the State Committee's contributions in connection with the Commission's consideration of the reason-to-believe recommendation, we used a shorter timeline of 60 days back, not all of 2013 up to Zeldin's candidacy declaration. See email from Elena Paoli to Commissioners, Jan. 23, 2017 (containing analysis of State Committee's contributions).

<sup>12</sup> This range is based on the \$2,600 per-election federal contribution limit during the 2014 cycle and Zeldin's participation in the primary and general elections. See 52 U.S.C. § 30116(a)(1)(A).

1 Perm[issible].”<sup>13</sup> As of October 7, 2013, the amounts in the three groups were \$250,635,<sup>14</sup>  
2 \$13,050, and \$93,590, respectively.<sup>15</sup> In its calculations, Respondents deemed certain  
3 contributions from LLCs, PCs, PLLCs, and LLPs as “permissible,” based on the State  
4 Committee’s practice, which dated to 2009, of “communicat[ing] with a representative from the  
5 contributing entity to determine whether it filed its taxes as a corporation or partnership.”<sup>16</sup> The  
6 Committee assigned these contributions to one of the three groups based on the entities’ answers  
7 to this question.<sup>17</sup>

8 Subtracting disbursements the Committee had made, the account balances as of  
9 October 7, 2013, shown on the spreadsheet are \$141,779.64 in “Primary 2014,” \$13,050.00 in  
10 “General 2014,” and \$0.00 in “Non Perm[issible],” for a total of \$154,829.64 in federally

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<sup>13</sup> The non-permissible group includes contributions from federally impermissible sources and amounts above \$5,200 from permissible sources.

<sup>14</sup> This figure includes \$100,212.17 as a balance forward on January 1, 2013. For 2012, the State Committee’s Spreadsheet shows a total of \$510,640.11 in “Primary” funds received during that year, \$51,400 “General,” and \$294,570.75 “Non Perm[issible].”

<sup>15</sup> Treasurer Marks avers that certain contributors listed in the “corporate contributions” section of the State Committee’s disclosure reports were state and local political committees that are allowed under the Act to contribute up to \$1,000 from permissible funds to a federal candidate in a calendar year. Marks Aff. ¶ 8. The committees at issue are not registered with the Commission. The \$1,000 threshold Marks appears to be referring to relates to the definition of a political committee under the Act. *See* 52 U.S.C. § 30101(4)(A); *see also* MUR 6170 (Tuscola Democratic Party) (contributions by group totaling less than \$1,000 did not require group to register as federal political committee). Marks attests that any amount up to \$1,000 the State Committee accepted and placed in the permissible account were from permissible funds, and if committees donated more than \$1,000, the remainder was placed in the “impermissible” group. Marks Aff. ¶ 8. Thus, these self-described corporate contributions totaling \$9,200 appear in the “Primary 2014” account. Our review of those unregistered political committees revealed that one of the fourteen contributors appears to have had only corporate funds available, but because the State Committee appears to have had substantially more federally permissible funds than it contributed to state and local political committees, deducting that \$9,200 from the “permissible” group does not change our recommendation.

<sup>16</sup> Marks Aff. ¶ 4. Prior to Zeldin’s federal candidacy, the State Committee organized its receipts into distinct categories based on the requirements of New York’s campaign finance reports, which separate contributions into three schedules: Individual/Partnerships, Corporate, and Other Monetary. *Id.*; *see, e.g.*, Zeldin for Senate 2014 January Report (showing three separate contribution schedules).

<sup>17</sup> Marks Aff. ¶ 4.

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1 permissible funds at the time Zeldin became a federal candidate.<sup>18</sup> From that date forward, the  
2 State Committee shows nearly all of its spending, and all of the contributions to state and local  
3 political committees, coming from the Primary and General accounts.<sup>19</sup>

4 Thus, the State Committee argues that it did not violate 52 U.S.C. § 30125(e) because it  
5 employed a reasonable accounting method to show that it had sufficient federally compliant  
6 funds and made state and local political contributions from “particular accounts” after Zeldin  
7 became a federal candidate.<sup>20</sup> Although the State Committee did not employ the particular  
8 methods identified in Advisory Opinions, “last in, first transferred”<sup>21</sup> or “first in, first out,”<sup>22</sup> the  
9 Commission determined that a state committee of a federal candidate was not precluded from  
10 using a different reasonable accounting method that employs generally accepted accounting  
11 principles when identifying remaining donations in its campaign account and determining which  
12 funds are federally permissible.<sup>23</sup>

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<sup>18</sup> The State Committee calculated these figures as the total contributions received from January 1 through October 7, 2013, minus disbursements, most of which were subtracted from the Non-Permissible account until that account was zeroed out; the remainder were subtracted from the Primary account. (We note that the total of permissible funds differs by \$0.10 from the amount of permissible funds Marks cited in her affidavit. *See id.* ¶ 5.) But even if the State Committee had subtracted disbursements *pro rata* from all three accounts, it still would have had enough “permissible” funds to make the \$99,655 in donations to state and local committees.

<sup>19</sup> *See* Marks Aff. ¶ 6 (“[W]hen a check was issued, it was issued from a particular account.”). The spreadsheet shows the State Committee’s receipt and disbursement of \$1,000 in corporate contributions in early 2014. *See id.* (“When a check arrived, the check was designated to a particular account...”).

<sup>20</sup> *See* Marks Aff. ¶ 5.

<sup>21</sup> *See* AO 2007-26 (Schock); 11 C.F.R. § 110.3(c)(4).

<sup>22</sup> *See* AO 2006-38 (Casey).

<sup>23</sup> *See* AO 2007-26 (Schock) at 3.

1 We conclude that Zeldin's State Committee has shown a reasonable system of sorting  
2 funds received during 2013 based on its state disclosure reports.<sup>24</sup> In addition, the State  
3 Committee presented new evidence that some of the contributions from LLCs and other similar  
4 entities likely consisted of permissible funds, information the Commission did not have at the  
5 time of the reason-to-believe finding.<sup>25</sup> Further, the overall figures broadly support  
6 Respondents' arguments here: during the nine months preceding Zeldin's federal candidacy, the  
7 State Committee received far more federally permissible contributions — approximately  
8 \$250,000 — than federally impermissible contributions — less than \$100,000 — and the State  
9 Committee's later donations to state and local political committees totaled just under \$100,000.

10 Under these circumstances, we believe that delving deeper into the State Committee's  
11 recordkeeping practices and accounting would not be a prudent use of the Commission's  
12 resources.<sup>26</sup> We therefore recommend that the Commission take no further action as to this  
13 aspect of the Commission's reason-to-believe finding.

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<sup>24</sup> See Marks Aff. ¶¶ 4, 6; cf. MUR 7106 (Chappelle-Nadal) (Commission accepted conciliation agreement with respondent who made state and local political contributions with impermissible funds; respondent did not proffer use of reasonable accounting or sorting method to show that permissible funds were used).

<sup>25</sup> See F&LA n.14.

<sup>26</sup> See F&LA at 12, MUR 7246 (Carter) (Although it was unclear whether Carter's state committee used a reasonable accounting method to identify federally permissible funds, in light of the information indicating that the state committee's accounts appeared to contain sufficient permissible funds, the Commission dismissed the allegations of violations of 52 U.S.C. § 30125(e) by spending soft money after Carter became a federal candidate.).

1           **B. State Committee Receipt of Contributions after Zeldin Became a Federal**  
2           **Candidate**

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4           The Commission also found reason to believe that the State Committee violated  
5 52 U.S.C. § 30125(e)(1)(B) by accepting \$1,000 in corporate contributions after Zeldin became a  
6 federal candidate because he was no longer a candidate for state office.<sup>27</sup> In response,  
7 Respondents argue that Zeldin was a state candidate concurrently with his federal candidacy  
8 when the State Committee accepted \$1,000 in corporate contributions.<sup>28</sup> Respondents assert that  
9 Zeldin intended to run for re-election to the state senate if he lost the June 24, 2014, federal  
10 primary,<sup>29</sup> and thus, the Committee's acceptance of corporate contributions in January 2014 did  
11 not violate the Act.<sup>30</sup> They identify activities that the State Committee continued to undertake in  
12 the first half of 2014, such as maintaining a state senate campaign cell phone, to show that Zeldin  
13 was still a state candidate.<sup>31</sup> Given the small amount at issue and our recommendation to take no  
14 further action regarding the main 30125(e) reason-to-believe finding discussed above, we  
15 recommend taking no further action as to the finding regarding acceptance of corporate  
16 contributions as well.

17           **IV. RECOMMENDATIONS**

- 18           1. Take no further action in this matter;

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<sup>27</sup> F&LA at 3-5. The Act allows concurrent state and federal candidates to raise state-only permissible funds if in connection with their state election. 52 U.S.C. § 30125(e)(2).

<sup>28</sup> See Resp. at 1-3 (Oct. 13, 2017).

<sup>29</sup> The primary election for the New York State Senate took place on September 9, 2014, with the filing deadline on July 11, 2014. See 2014 Election Results, New York State Board of Elections, <https://www.elections.ny.gov/2014ElectionResults.html>; see Political Calendar, New York State Board of Elections, <http://www.elections.ny.gov/politicalcalendar.html>.

<sup>30</sup> See Resp. at 1-3 (Oct. 13, 2017).

<sup>31</sup> See *id.* at 2. Respondents have not provided any evidence that Zeldin ever filed for the state primary election.



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- 2. Approve the appropriate letters;
- 3. Close the file.

Lisa J. Stevenson  
Acting General Counsel

Kathleen M. Guith  
Associate General Counsel

9.4.18  
\_\_\_\_\_  
Date

Stephen Gura  
Stephen Gura  
Deputy Associate General Counsel

Mark Allen  
Mark Allen  
Assistant General Counsel

Elena Paoli  
Elena Paoli  
Attorney

Attachment  
Nancy Marks Affidavit

18084744001

**BEFORE THE FEDERAL ELECTION COMMISSION**

Affidavit of

Nancy Marks

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MUR 6985

**AFFIDAVIT OF NANCY MARKS**

Nancy Marks, being first duly sworn, on oath says that:

1. I served as Treasurer for Zeldin for Senate ("ZFS"), the former principal state campaign committee for Lee Zeldin ("Mr. Zeldin") for State Senate in New York's Third Senate District.

2. I held the role of Treasurer for ZFS from its inception on August 3, 2009 through its termination on April 28, 2016.

3. As Treasurer for ZFS, I was responsible for documenting all financial transactions for ZFS and drafting and submitting ZFS's financial disclosure reports with the New York State Board of Elections.

4. Since its inception in 2009, it was ZFS's practice to organize receipts into distinct categories based on the requirements of New York's campaign finance reports, which separates contributions into three schedules: (1) Schedule A, Individual/Partnerships; (2) Schedule B, Corporate; and, (3) Schedule C, Other Monetary. When ZFS received a check from a contributor organized as an LLC, PC, PLLC, or LLP, ZFS communicated with a representative from the contributing entity to determine if it filed its taxes as a corporation or partnership. Based on the entity's answer to this question, I was able to determine which Schedule to reflect the contribution on ZFS's New York reports.


5. As reflected on the spreadsheet I prepared and submitted to Elena Paoli via counsel on March 15, 2018, using a reasonable accounting method, I determined that as of October 7, 2013, the date Mr. Zeldin became a federal candidate, there was \$154,829.54 available in federally permissible primary and general election funds in ZFS's bank account.

6. Based on ZFS's accountant's recommendation, when Mr. Zeldin became a federal candidate on October 7, 2013, ZFS's practice was to use General Accounting Principles, such as using three (3) accounts (1) Primary; (2) General; and, (3) Non-Permissible just like a QuickBooks program. When a check arrived, the check was designated to a particular account and when a check was issued, it was issued from a particular account. ZFS's system of dividing contributions between primary, general, and non-permissible piles, and making contributions from specific piles, began when Mr. Zeldin became a federal candidate on October 7, 2013.

7. With respect to determining the tax status of contributors organized as LLCs, PCs, PLLCs, and LLPs, when ZFS received a check from such entities, a phone call was placed to the entity, asking if it filed its taxes as a corporation or partnership. Based on the entity's answer to this question, I was able to determine which account to place the contribution and which pile to reflect the contribution on the spreadsheet referenced in paragraph 5. If the contribution was received at an event, we would ask a representative of the entity in person the same question for the same reason. In all cases, information regarding the tax status of these types of entities came directly from the entities themselves.

8. Some unregistered state political committees disclosed on Schedule B of ZFS's state financial disclosure reports were reflected in the permissible funds pile on the spreadsheet referenced in paragraph 5 because state PACs can donate \$1,000 to a federal candidate in a calendar year. Therefore any state PAC donations received within a calendar year were placed in the permissible funds pile until they reached \$1,000. Upon information and belief, and/or based on representations made to me by the contributing committees, these amounts placed in the permissible pile consisted of federally permissible funds. Any monies received over \$1,000 were placed in the non-permissible pile.

9. I reviewed the list provided by Elena Paoli comprising the state and local committees alleged to have received contributions from ZFS. The following four (4) recipients cited in the list are not state or local candidates, political committees, or parties: Smithtown Women's Republican Club, Islip Young Republicans, NYS Federation of Republican Women, and Suffolk County Young Republicans.

  
\_\_\_\_\_  
Nancy Marks  
Date: 8/31/2018

Sworn to and subscribed before me this 31<sup>st</sup> day of August, 2018.

  
\_\_\_\_\_  
NOTARY PUBLIC

My commission expires: 10/31/21

MADELINE GROSSO  
NOTARY PUBLIC, State of New York  
No. 4832629  
Qualified in Suffolk County  
Term expires 10/31/21