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December 6, 2018

VIA ELECTRONIC AND CERTIFIED MAIL.

Mr. Jeff S. Jordan, Esq.
Assistant General Counsel
Complaints Examination &
Legal Administration
Federal Election Commission
Attn: Christal Dennis, Paralegal
1050 First Street, NE
Washington, DC 20463

Re: MUR 7493—Response of Suraj Patel, Committee to Elect Suraj Patel, and Nayna Patel, Treasurer

Dear Mr. Jordan:

I write on behalf of Mr. Suraj Patel, Committee to Elect Suraj Patel (the "Committee"), and Nayna Patel, Treasurer, in response to MUR 7493. Mr. Patel was a candidate for the U.S. House of Representatives in New York's 12th Congressional District in the 2018 Democratic Primary on June 26, 2018. Despite being a first-time candidate, Mr. Patel was only narrowly defeated in the primary by a 13-term incumbent.

The Complaint alleges that the Committee impermissibly used general election contributions for the primary election by failing to maintain, pursuant to 11 C.F.R. § 102.9(e)(2), recorded cash on hand that was at all times equal to or in excess of the sum of the Committee's general election contributions received minus general election disbursements made.¹ Mr. Patel and the Committee deny this allegation and urge the Commission to find no reason to believe a violation occurred, or alternatively, to dismiss the allegation as an exercise of prosecutorial discretion.²

The Committee maintained at its disposal at all times funds in excess of all general election contributions received. From the start of the campaign, Mr. Patel, who is a successful businessman and entrepreneur, pledged to support his candidacy and made various contributions and loans to the Committee. Mr. Patel's finances were arranged in a manner that provided sufficient liquidity to permit him to make contributions and loans to the Committee on short notice and at all times throughout the course of the campaign. Because personal funds of the candidate were at all times available to the Committee, there was simply no motive to use

¹ Fed. Election Comm'n, MUR 7493, Complaint of Joanna Saccone (Aug. 31, 2018) ("Complaint").

² Heckler v. Chaney, 470 U.S. 821 (1985).

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general election contributions to cover primary election expenses. Mr. Patel and the Committee were aware of their obligation to refund, redesignate, or reattribute all general election contributions received if he did not win the primary election. They fully complied with this requirement as demonstrated by the Committee's October Quarterly 2018 report, which disclosed the timely refund of general election contributions.

The Federal Election Campaign Act of 1971, as amended, (the "Act"), prohibits an individual from making a contribution to a candidate's campaign committee with respect to any given election in excess of the limits established by 2 U.S.C. § 30116(a)(1)(A), which were \$2,700 per election during the 2018 election cycle. A primary election and a general election are each considered to be a separate election for these purposes, and contribution limits are applied separately to each election.³

The Committee was permitted to solicit and accept contributions designated for the general election prior to the June 26th primary election.⁴ Commission regulations provide that if a candidate's authorized committee raises general election funds prior to the primary election, but the candidate does not become a candidate in the general election, such as here, the committee has 60 days to refund the general election contributions, redesignate them in accordance with Commission regulations, 11 C.F.R. §§ 110.1(b)(5) or 110.2(b)(5), or reattribute them in accordance with 11 C.F.R. § 110.1(k)(3).⁵ Commission regulations also provide that if a candidate's authorized committee receives contributions designated for the general election prior to the primary election, the committee must use an acceptable accounting method to distinguish between general and primary election contributions, such as either separate bank accounts or the establishment of separate books and records for each election.⁶ In this instance, the Committee used separate books and records to distinguish between general and primary election contributions. Commission regulations further provide that regardless of the method used to distinguish between general and primary election contributions, "an authorized committee's records must demonstrate that, prior to the primary election, recorded cash on hand was at all times equal to or in excess of the sum of general election contributions received less the sum of general election disbursements made."⁷

The requirement that a committee's records demonstrate a "recorded cash on hand" equal to or exceeding the sum of general election contributions less the sum of general election disbursements made was adopted by the Commission in 2002 to enhance committee

³ 52 U.S.C. §§ 30101(1)(A) and 30116(a)(6); 11 C.F.R. §§ 100.2 and 110.1(j).

⁴ 11 C.F.R. § 102.9(e)(1).

⁵ 11 C.F.R. § 102.9(e)(3); Fed. Election Comm'n, Adv. Op. 1992-15 (Russo for Congress Committee). Contributions are considered "refunded" when "the recipient committee sends the contributor a check for the amount of the contribution which has been previously deposited." Fed. Election Comm'n, Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 768 (Jan. 9, 1987).

⁶ 11 C.F.R. § 102.9(e)(1).

⁷ 11 C.F.R. § 102.9(e)(2).

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recordkeeping and prevent the use of general election funds for primary election expenses.⁸ In doing so, the Commission specifically rejected a proposal to require candidates or their authorized committees to maintain separate depository accounts for each election, seeking instead to preserve flexibility in how they distinguish between primary and general election funds.⁹

The Commission has never provided detailed guidance on precisely which amounts are included in a candidate or authorized committee's "records" for the purposes of complying with 11 C.F.R. § 102.9(e)(2). The key phrase "recorded cash on hand" is not defined under Commission regulations, and it does not appear that the Commission has ever expressly stated that "cash on hand" for the purposes of maintaining these records is equivalent to a committee's cash on hand for other reporting purposes.¹⁰ It also does not appear that the Commission has ever concluded that personal funds of the candidate set aside by the candidate for contribution or loan to their campaign must be excluded from such records. In fact, 11 C.F.R. § 102.9(e) refers to candidates and their authorized committees interchangeably in discussing the provision's recordkeeping requirements, stating that an "acceptable accounting method" must be used by "such candidate or such committee(s)." A reasonable interpretation of this requirement is that a campaign's records for the purposes of 11 C.F.R. § 102.9(e)(2) includes not only the authorized committee's cash on hand for reporting purposes, but also the permissible personal funds set aside by the candidate for loan or contribution to their authorized committee.

Even if the Commission does not accept this argument, the allegation raised in the Complaint is based on nothing more than a snapshot-view of the Committee's finances at the close of its Pre-Primary reporting period on June 6, 2018. That report, which was filed with the Commission on June 14, 2018, reported \$40,526.70 in cash on hand.¹¹ At that time, the Committee had received approximately \$192,756.65 in general election contributions.¹² As with any hotly-contested federal election, the Committee experienced a high volume of receipts and disbursements in the final days of the primary campaign. As soon as the Committee perceived that primary election disbursements were substantially outpacing primary election receipts, the candidate promptly made a sizeable no-interest loan of \$215,000 to the Committee. This loan was made by Mr. Patel to the Committee on June 25, 2018 and prior to the primary election.¹³

⁸ Fed. Election Comm'n, Contribution Limitations and Prohibitions, 67 Fed Reg. 69928, 69934 (Nov. 19, 2002) ("New paragraph (e)(2) makes the standard for acceptable accounting methods explicit by stating that the committee's records must demonstrate that, prior to the primary election, recorded cash on hand was at all times equal to or in excess of the sum of general election contributions received less the sum of general election disbursements made.").

⁹ *Id.*

¹⁰ 11 C.F.R. § 104.3(a)(1).

¹¹ Committee to Elect Suraj Patel, *Pre-Primary 2018 Report* (June 14, 2018).

¹² The Complaint incorrectly asserts that the Committee had received "over \$200,000 in contributions designated for the general election" by this point in time, but that is incorrect. The complainant appears to have mistakenly double counted earmarked contributions or simply relied on an inaccurate media report.

¹³ Committee to Elect Suraj Patel, *July Quarterly 2018* (July 15, 2018).

Throughout the course of the campaign, the Committee received a total of \$210,887.93 in general election contributions. The Committee reported \$211,108.71 in cash on hand in its July Quarterly 2018 report that closed just four days following the June 26th primary election.¹⁴

Following the June 26th primary election, the Committee refunded and redesignated the general election contributions it had received in a timely fashion, with the last general election refund being issued on August 3, 2018, more than 20 days prior to the mandatory 60-day deadline. The complaint fails to mention these pertinent facts, despite such information being made publicly available in the Committee's filings prior to the submission of the Complaint. Additionally, although the Committee did not report making any disbursements for the general election, the Committee believes that certain amounts previously reported as primary election disbursements could possibly be redesignated to the general election—such as advance rental payments for a general election campaign office—further reducing any difference between cash on hand and the sum of general election contributions raised minus the sum of general election disbursements made.

The Commission's guidance, advisory opinions, and enforcement actions related to 11 C.F.R. § 102.9(e)(2) have focused not on a committee's cash on hand during each moment of the primary election period, but instead on whether the committee ultimately makes all necessary refunds, redesignations, and reattributions within 60 days. The portion of the Commission's 2014 *Campaign Guide for Congressional Candidates and Committees* addressing primary and general election fundraising simply states that "candidates should ensure they have enough cash on hand to make those refunds if needed," without mentioning in that section any requirement to maintain recorded cash on hand at a certain level at all times during the primary election period.¹⁵ The Commission's advisory opinions similarly focus on the requirement to "make a full refund" of general election contributions raised in the event that a candidate loses the primary election.¹⁶

The Commission's enforcement actions have similarly focused on a committee's compliance with the 60-day refund, redesignation, and reattribution requirement rather than on the committee's cash on hand at any given moment in time prior to the primary election. The

¹⁴ *Id.*

¹⁵ Fed. Election Comm'n, *Campaign Guide for Congressional Candidates and Committees* at 21 (June 2014).

¹⁶ See Fed. Election Comm'n, *Adv. Op. 2015-16 (Niger Innis for Congress)* at 3-4 ("The Commission has consistently noted that if the candidate does not become a candidate for the general election, the Act requires the authorized committee to 'make a full refund' of general election contributions."); *Adv. Op. 2009-15 (Bill White for Texas)* at 7 ("Contributions designated for an election . . . in which a person is not a candidate . . . must be refunded . . ."); *Adv. Op. 2003-18 (Smith)* at 2-3 ("A candidate who fails to qualify for the general election must either refund all such contributions, or obtain redesignations of those contributions . . . or a combination of reattributions and redesignations of the contributions . . ."); *Adv. Op. 1992-15 (Russo for Congress Committee)* at 2 ("if a candidate is not a candidate for the general election, any contributions made for the general election shall be refunded to the contributors, redesignated . . . or reattributed . . ."); *Adv. Op. 1986-17 (Friends of Mark Green)* at 4 ("the Commission concludes that if you do not establish your candidacy with respect to the general election, your committee must refund within a reasonable time contributions designated for the general election . . .").

allegation made in the Complaint is very similar to allegations that the Commission unanimously dismissed as an exercise of its prosecutorial discretion in 2017 in MURs 7093 and 7145 (Friends of Frank Guinta) and in 2010 in MURs 6295 and 6307 (Sue Lowden for US Senate).

In MURs 7093 and 7145 (Friends of Frank Guinta), the Commission unanimously found that although a \$355,000 disbursement made prior to the primary election resulted in the committee having cash on hand that was approximately \$75,800 less than general election contributions received, the matter warranted the Commission's exercise of its prosecutorial discretion, because "there was no issue of the Committee having enough cash on hand to refund its general election contributors" because the candidate won the primary election.¹⁷ This complaint should similarly be dismissed, because the candidate ensured that the Committee was positioned to make and that it did make all necessary refunds, redesignations, and reattributions within the 60-day period.

In MURs 6295 and 6307 (Sue Lowden for US Senate), the Commission unanimously found that although a "cash-flow accounting error" resulted in the committee spending \$18,000 in general election contributions on the primary election, the committee had made all necessary refunds within the 60-day period following the primary election and therefore the Commission found no reason to believe a violation occurred.¹⁸ The allegations made in the Complaint raise at most such an inadvertent "cash-flow accounting" situation that was quickly identified and addressed before the primary election by a committee that ultimately made all necessary refunds, redesignations, and reattributions in a prompt and timely.

Commission enforcement precedent demonstrates that this matter is appropriate for dismissal as an exercise of the Commission's prosecutorial discretion. We were unable to identify even a single complaint pursued by the Commission based on facts similar to those before the Commission in this Matter.¹⁹ We also were unable to identify any Alternative Dispute

¹⁷ Fed. Election Comm'n, MURs 7093 and 7145 (Friends of Frank Guinta), Notification with Factual and Legal Analysis at 7 (Aug. 24, 2017).

¹⁸ Fed. Election Comm'n, MURs 6295 and 6307 (Sue Lowden for US Senate), Notification with Factual and Legal Analysis (Dec. 17, 2010).

¹⁹ See Fed. Election Comm'n, MUR 7007 (Kyle McCarter for Congress Committee) (civil penalty of \$5,300 for knowingly accepting excessive and prohibited contributions totaling \$51,313.69, including \$5,900 in general election contributions that were not refunded within 60 days); MUR 6956 (Espallat for Congress) (civil penalty of \$5,000 for failing to refund \$22,550 in general election contributions within 60 days and accepting excessive primary contributions totaling \$15,790); MUR 6887 (McCotter Congressional Committee) (civil penalty of \$5,000 for failing to refund \$60,500 in general election contributions within or even after 60 days); MUR 6727 (Friends of Weiner) (civil penalty of \$20,000 for failing to refund \$66,700 in general election contributions within or even after 60 days); MUR 6639 (Gary Johnson 2012) (civil penalty of \$10,000 for spending \$12,396 in general election contributions on the primary election and failing to disclose \$447,567 in debts and obligations); MUR 6235 (Cannon for Congress) (civil penalty of \$5,000 for failing to refund \$83,595.50 in general election contributions within or even after 60 days); MUR 6230 (Wynn for Congress) (civil penalty of \$8,000 for failing to refund \$115,100 in general election contributions within or even after 60 days); and MUR 5388 (Treffinger for Senate) (civil penalty of \$57,500 for failing to refund \$227,080 in general election contributions within 60 days and only refunding general election contributions totaling \$6,400 thereafter, as well as for other violations).

Resolution ("ADR") matters in which the Commission imposed a civil penalty on a committee when presented with similar facts.²⁰

The Committee respectfully urges the Commission to find no reason to believe a violation occurred or to dismiss the allegations as an exercise of its prosecutorial discretion. Commission enforcement action based on the allegations raised in the Complaint would appear to be both unprecedented and likely result in further strain on Commission resources by inspiring numerous complaints alleging similar temporary and *de minimis* cash-flow fluctuations.

Respectfully Submitted,



Bryson B. Morgan
Caplin & Drysdale, Chtd.

²⁰ See Fed. Election Comm'n, ADR 830 (Orentlicher for Congress) (civil penalty of \$2,150 for failing to refund \$28,950 in general election contributions within 60 days); ADR 818 (Kumar for Congress) (civil penalty of \$8,300 for failing to refund \$41,201 in general election contributions within 60 days, and failing to disclose \$180,828.04 in financial transactions); ADR 796 (Duckworth for Congress) (civil penalty of \$2,280 for failing to refund \$30,400 in general election contributions within 60 days); ADR 782 (Vanila Singh for Congress 2014) (civil penalty of \$2,300 for failing to refund \$30,755 in general election contributions within 60 days); ADR 755 (Friends of George Demos) (civil penalty of \$1,000 for failing to refund \$46,400 in general election contributions within 60 days); ADR 665 (Friends of Herman Cain) (civil penalty of \$19,000 for failing to refund \$87,780.08 in general election contributions within 60 days in addition to other violations); ADR 540 (McGroarty for Congress) (matter involving a failure to refund \$2,400 in general election contributions within 60 days dismissed); ADR 159 (Battles for Congress) (civil penalty of \$1,000 for failing to refund \$4,425 in general election contributions within 60 days); ADR 150 (Citizens Committee for Gilman for Congress) (civil penalty of \$25,000 for failing to refund \$78,469 in general election contributions within or even after 60 days); ADR 149 (Friends of David Worley) (civil penalty of \$1,000 for failing to refund \$100,950 in general election contributions within 60 days).