



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

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September 15, 2021

Via email to [reiff@sandlerreiff.com](mailto:reiff@sandlerreiff.com)

RE: MUR 7927  
Kennedy for Massachusetts

Dear Mr. Reiff:

In the normal course of carrying out its supervisory responsibilities, you informed the Federal Election Commission (the "Commission") of information suggesting that Kennedy for Massachusetts and Keith D. Lowey in his official capacity as treasurer (the "Committee") may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"). On September 2, 2021, the Commission found reason to believe that the Committee violated 52 U.S.C. § 30116(f), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is enclosed for your information.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519. This matter will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.<sup>1</sup>

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Pre-probable cause conciliation is not mandated by the Act or the Commission's regulations but is a voluntary step in the enforcement process that the Commission is offering to the Committee as a way to resolve this matter at an early stage and without the need for briefing the issue of whether or not the Commission should find probable cause to believe that the Committee violated the

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<sup>1</sup> The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

law. Enclosed is a conciliation agreement for your consideration

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

If you are interested in engaging in pre-probable cause conciliation, please contact Elena Paoli, the attorney assigned to this matter, at (202) 694-1548 or [epaoli@fec.gov](mailto:epaoli@fec.gov), within seven days of receipt of this letter. During conciliation, you may submit any factual or legal materials that you believe are relevant to the resolution of this matter. Because the Commission only enters into pre-probable cause conciliation in matters that it believes have a reasonable opportunity for settlement, we may proceed to the next step in the enforcement process if a mutually acceptable conciliation agreement cannot be reached within sixty days. *See* 52 U.S.C. § 30109(a), 11 C.F.R. Part 111 (Subpart A). Conversely, if you are not interested in pre-probable cause conciliation, the Commission may conduct formal discovery in this matter or proceed to the next step in the enforcement process. Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding.

Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at [http://www.fec.gov/em/respondent\\_guide.pdf](http://www.fec.gov/em/respondent_guide.pdf).

We look forward to your response.

On behalf of the Commission,



Shana M. Broussard  
Chair

Enclosures  
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 RESPONDENT: Kennedy for Massachusetts and MUR 7927  
4 Keith D. Lowey in his official capacity as treasurer  
5

6 **I. INTRODUCTION**

7 Kennedy for Massachusetts and Keith D. Lowey in his official capacity as treasurer  
8 (“Committee”) submitted a *sua sponte* submission (“Submission”) acknowledging that it  
9 accepted excessive contributions by spending general election contributions before the primary  
10 election for primary election expenses.<sup>1</sup> As set forth below, the Federal Election Commission  
11 finds reason to believe that Respondent violated 52 U.S.C. § 30116(f) by accepting excessive  
12 contributions.

13 **II. FACTUAL SUMMARY**

14 The Committee is the authorized committee for Kennedy’s 2020 Senate campaign. In  
15 2020, Kennedy, a Member of the House of Representatives for 10 years, was a candidate for the  
16 United States Senate. Kennedy lost the Democratic primary election to incumbent Senator  
17 Edward Markey.

18 According to the Committee’s Submission, starting in early August 2020, Kennedy’s  
19 campaign manager decided to use general election funds to pay expenses during the primary.<sup>2</sup>  
20 The Committee states that the campaign manager, a staffer, and its former treasurer and  
21 compliance manager believed that general election funds could be used in the pre-primary  
22 period, even if Kennedy lost the primary, if contributors received refunds later if they wanted

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<sup>1</sup> See generally Kennedy for Massachusetts, *Sua Sponte* Submission (October 9, 2020), Pre-MUR 643 (Kennedy for Massachusetts) (“Submission”).

<sup>2</sup> Submission at 2.

1 them.<sup>3</sup> The staffer stated that the former treasurer conveyed this misinformation to her, and then  
2 she told the campaign manager.<sup>4</sup> These three campaign staffers did not confirm their  
3 understanding on the use of general election funds with legal counsel.<sup>5</sup>

4 The Committee states that as of the date of the September 1, 2020, primary election, it  
5 had received \$1,662,000 in general election contributions, for which it kept separate records, and  
6 it had spent all of its primary election contributions, plus \$1,502,000 of its general election  
7 contributions.<sup>6</sup> In total, the Commission received \$10,740,280 in the 2020 election cycle  
8 through September 30, 2020.<sup>7</sup>

9 At a campaign staff meeting two days after the candidate's primary loss, campaign staff  
10 discussed the need to raise money to make refunds to the general election contributors; it was at  
11 this point that the Committee's fundraising director first learned that the Committee had spent  
12 general election funds.<sup>8</sup> The fundraising director raised concerns about the Committee's use of  
13 general election funds for primary expenses.<sup>9</sup> The campaign then sought advice from outside  
14 counsel and began an investigation.<sup>10</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1-2.

<sup>7</sup> *See* Committee Amended October 2020 Quarterly Report (Dec. 19, 2020),  
<https://docquery.fec.gov/pdf/797/202012099366441797/202012099366441797.pdf>.

<sup>8</sup> Submission at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

1           Shortly thereafter, on September 14, 2020, Kennedy loaned the Committee \$60,000.<sup>11</sup>  
2           On September 16, he loaned the Committee another \$190,000 and contributed \$5,000.<sup>12</sup> On  
3           September 28, Kennedy contributed \$1,500,000 to his committee.<sup>13</sup> On September 30, the  
4           Committee issued refund checks to every general election contributor, and also paid staff salaries  
5           and some primary election debt.<sup>14</sup> On October 2, the Committee filed an amended statement of  
6           organization naming the current treasurer.

7           The Committee argues that the Commission should take no further action in this matter  
8           because its mistake in spending general election funds was inadvertent, all general election  
9           contributors received quick refunds, well before the 60-day regulatory deadline, and the treasurer  
10          was replaced.<sup>15</sup> The Committee also argues that that campaign gained no strategic advantage by  
11          spending general election funds because the candidate could have similarly transferred funds to  
12          the Committee before the primary election.<sup>16</sup>

### 13   **III.   LEGAL ANALYSIS**

14          The Federal Election Campaign Act of 1971, as amended (“Act”), requires a committee,  
15          through its treasurer, to keep an accurate account of receipts, disbursements, and cash-on-hand

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<sup>11</sup>        See Contribution data for Joseph P. Kennedy III to Kennedy for Massachusetts,  
[https://www.fec.gov/data/receipts/?two\\_year\\_transaction\\_period=2020&min\\_date=01%2F01%2F2019&max\\_date=12%2F31%2F2020&data\\_type=processed&committee\\_id=C00512970&contributor\\_name=Joseph+Kennedy](https://www.fec.gov/data/receipts/?two_year_transaction_period=2020&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020&data_type=processed&committee_id=C00512970&contributor_name=Joseph+Kennedy).

<sup>12</sup>        *Id.*

<sup>13</sup>        *Id.*

<sup>14</sup>        Submission at 2.

<sup>15</sup>        *Id.* at 2-3.

<sup>16</sup>        *Id.*

1 balances.<sup>17</sup> The Commission’s regulations permit a candidate’s authorized committee to receive  
2 contributions for the general election prior to the primary election provided the committee  
3 employs an acceptable accounting method to distinguish between primary and general election  
4 contributions.<sup>18</sup> The committee’s records must demonstrate that prior to the primary election,  
5 the committee’s “recorded cash on hand was *at all times* equal to or in excess of the sum of  
6 general election contributions received less the sum of general election disbursements made.”<sup>19</sup>

7 Commission regulations further provide that if a candidate’s authorized committee raises  
8 general election funds prior to the primary election, but the candidate does not become a  
9 candidate in the general election, the committee must: (1) refund the contributions designated  
10 for the general election; (2) redesignate such contributions in accordance with 11 C.F. R.  
11 §§ 110.1(b)(5) or 110.2(b)(5); or (3) reattribute such contributions in accordance with 11 C.F.R.  
12 § 110.1(k)(3).<sup>20</sup> The committee must do so within 60 days of the date the committee has actual  
13 notice of the need to redesignate, reattribute, or refund the contributions, such as the date the  
14 candidate loses the primary or withdraws from the campaign.<sup>21</sup> The Commission has noted that  
15 “[t]hese regulations are designed to ensure that candidates . . . do not use general election  
16 contributions for the primary election.”<sup>22</sup> As the Commission has explained, “where a general  
17 election is held, but the candidate does not participate in that election, no separate contribution

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<sup>17</sup> 52 U.S.C. §§ 30102(c), 30104(b); 11 C.F.R. §§ 104.3, 104.14(d).

<sup>18</sup> 11 C.F.R. § 102.9(e)(1).

<sup>19</sup> *Id.* § 102.9(e)(2) (emphasis added).

<sup>20</sup> *Id.* § 102.9(e)(3). A committee cannot redesignate general election funds to the primary election if doing so would cause the contributor to exceed the maximum allowable contribution for that election. *Id.*

<sup>21</sup> *Id.* § 110.1(b)(3)(i).

<sup>22</sup> *See* Advisory Op. 1992-15 (Russo for Congress) at 1.

1 limit for that general election is available to contributors.”<sup>23</sup> Spending general election  
2 contributions during the primary election when the contributor has made the maximum primary  
3 election contribution and the contribution cannot be redesignated or reattributed, results in the  
4 Committee accepting an excessive contribution.<sup>24</sup>

5 In matters where a committee has failed to keep sufficient general election funds on hand  
6 in violation of section 102.9(e) and failed to timely refund general election contributions within  
7 60 days, the Commission has routinely found reason to believe and sought a civil penalty.<sup>25</sup>  
8 Conversely, the Commission has dismissed some matters where a committee has timely refunded  
9 its general election contributions, even though general election funds were used for primary  
10 expenses in violation of the regulation.<sup>26</sup>

11 Here, when the Committee spent general election funds for the primary election, all of  
12 those funds represented excessive contributions by primary election contributors and the

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<sup>23</sup> *Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees*, 52 Fed. Reg. 760, 761 (Jan. 9, 1987) (internal citations omitted).

<sup>24</sup> *See* Advisory Op. 2007-03 (Obama for America) at 3 (“If a candidate fails to qualify for the general election, any contributions designated for the general election that have been received from contributors who have already reached their contribution limit for the primary election would exceed FECA’s contribution limits.”).

<sup>25</sup> *See e.g.*, Conciliation Agreements, MUR 7007 (Kyle McCarter for Congress Committee) (\$5,300 civil penalty; excessive and prohibited contributions, including \$5,900 of general election contributions refunded after 60 days); MUR 6956 (Espaillat for Congress) (\$5,000 civil penalty; excessive primary contributions and \$22,550 in late refunded general election contributions); MUR 6887 (McCotter Congressional Committee) (\$5,000 civil penalty; failure to refund \$60,500 in general election contributions); MUR 5623 (Florio) (\$75,000 penalty for failing to timely refund \$369,175.88 in general election contributions); MUR 5388 (Treffinger) (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).

<sup>26</sup> *See, e.g.*, MUR 6307 (Lowden) (dismissing allegation that Committee spent \$18,000 in general election contributions during primary election period; committee timely refunded contributions, which equaled approximately 1% of general election contributions); *see also* Factual & Legal Analysis at 5, MUR 6646 (Strickland for Congress 2012) (dismissing a complaint concerning approximately \$5,000 of allegedly excessive contributions in an exercise of prosecutorial discretion).

1 acceptance of excessive contributions by the Committee. The Committee was not able to  
2 redesignate or reattribute any of the \$1.5 million.<sup>27</sup>

3 The Committee argues that this case is analogous to MUR 7493 (Patel), in which  
4 candidate Suraj Patel and his committee spent \$152,230 in general election funds during the  
5 2018 primary in New York, which constituted 78.9% of the candidate's total general election  
6 contributions.<sup>28</sup> Patel lost the primary election but contributed enough funds to the committee to  
7 make timely refunds to all general election contributors.<sup>29</sup> The Kennedy Committee's reliance  
8 on Patel, however, is misplaced. Although the Office of the General Counsel recommended  
9 dismissal of the matter, the Commission ultimately split evenly on whether to dismiss or find  
10 reason to believe that Patel and his committee violated the regulation by spending general  
11 election funds.<sup>30</sup>

12 The facts in this matter, specifically the amount and percentage of general election  
13 contributions the Committee used, support a reason to believe finding. The Committee spent  
14 slightly more than \$1.5 million in general election funds for primary election expenses, which  
15 was just over 90% of the general election funds it received. In comparison, the Patel Committee

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<sup>27</sup> In response to a request from the Office of the General Counsel asking whether the Committee was able to redesignate or reattribute any of the general election contributions, Respondent's counsel advised that the Committee was not able to redesignate or reattribute any contributions. *See* email from Neil Reiff, Esq. to Elena Paoli, Attorney (FEC) (Feb. 16, 2021, 3:42 p m.).

<sup>28</sup> First Gen. Counsel's Rpt. at 7, MUR 7493 (Patel).

<sup>29</sup> *Id.* at 2, 8.

<sup>30</sup> Certification, MUR 7493 (Patel), July 10, 2019. OGC recommended dismissal because the candidate had loaned enough money to the committee one day before the primary to account for the spent general election contributions, and the committee timely refunded all of its general election contributors. First Gen. Counsel's Rpt. at 6-7 (MUR 7493) (noting that Commission has not pursued enforcement actions for violations of 11 C.F.R. § 102.9(e)(2) absent respondent committee's failure to timely refund, redesignate, or reattribute general election contributions). The Commission also notes that Patel appears to have been a first-time federal candidate in 2018, while Kennedy had held federal office as a representative for 10 years.



1 spent about a tenth of that amount (\$152,230), and the percentage of general contributions it used  
2 was smaller, 79%.

3           It is not clear why the Kennedy Committee's former treasurer believed that general  
4 election funds were appropriate to spend without regard to cash-on-hand requirements. Further,  
5 the Committee's argument that no electoral advantage was gained because Kennedy could have  
6 made the same contributions before the primary does not vitiate the violation. Therefore, the  
7 Commission finds reason to believe that Kennedy for Massachusetts and Keith D. Lowey in his  
8 official capacity as treasurer violated 52 U.S.C. § 30116(f) by accepting excessive contributions.