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MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson
Deputy General Counsel - Law *LJS*

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Assistant General Counsel
Compliance Advice

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Attorney

SUBJECT: Request for Consideration of a Legal Question Submitted by Cantor for Congress (LRA # 980)

I. INTRODUCTION

On December 23, 2014, the Commission received a Request for Consideration of a Legal Question (“Request”) from counsel on behalf of Cantor for Congress (the “Committee”), the principal campaign committee of former Representative Eric Cantor.¹ *See* Attachment 1.

The Request addresses a determination by the Reports Analysis Division, based on informal guidance provided by the Office of General Counsel (OGC), that the Committee must refund certain contributions designated for the general election that it accepted and spent before the date of the primary election, which the Candidate ultimately lost. The Candidate sought re-election to the House of Representatives during the 2013-14 election cycle, and participated in a primary election on June 10, 2014.² Before the primary election took place, the Committee

¹ At least two or more Commissioners agreed to consider this Request pursuant to the Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 78 Fed. Reg. 63203 (Oct. 23, 2013).

² In its Request, the Committee represents that it established separate records for its primary and general election contributions; that at all times before the primary election its recorded cash on hand equaled or exceeded the total of the general election contributions it received less the total general election disbursements that it made; and that it never used general election contributions to pay its primary election expenses. *See* Attachment 1, at 2. We have no reason to dispute the Committee’s representations at this time, nor has the Reports Analysis Division indicated that it has information in its possession that contradicts these representations. Consequently, for the

accepted general election contributions totaling nearly two million dollars and spent approximately \$230,000 on expenses incurred in anticipation of the general election.³ Upon losing the primary election, the Committee reattributed some contributions from the general to the primary election, and refunded all but \$230,000 of the remaining general contributions, representing the amount that the Committee contends it had already spent. The Committee argues that it is not required to refund this remaining amount because it was spent on expenses relating to the Candidate's anticipated participation in the general election. The Committee relies upon 11 C.F.R. §102.9(e)(2), which it interprets to require a refund only of the net difference between the total amount of general election contributions received and the amount of general election contributions spent.

We have considered the Committee's arguments and the law that governs this area, and we recommend that the Commission conclude that the Committee is required to refund all general election contributions that it received, including those it already spent on general election expenses.

II. A COMMITTEE MUST REFUND ALL GENERAL ELECTION CONTRIBUTIONS WHEN THE CANDIDATE DOES NOT PARTICIPATE IN THE GENERAL ELECTION

Under the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations implementing the Act, no person may make contributions to candidates and their authorized political committees with respect to any election that, in the aggregate, exceed certain limits. *See* 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1). A primary election and a general election are each considered a separate "election" for the purpose of applying these limits. *See* 52 U.S.C. § 30101(1)(A); 11 C.F.R. §§ 100.2, 110.1(j)(1).

Candidates and their authorized committees may accept contributions designated for the general election before the date of the primary election. 11 C.F.R. § 102.9(e)(1). If a committee or its candidate does so, it must use an acceptable accounting method to distinguish the primary election contributions from the general election contributions. *Id.* Regardless of the accounting method used, the committee's records must show that at all times before the primary election, the committee's recorded cash on hand equaled or exceeded the difference between the total amount of general election contributions received and the total amount of general election disbursements made. 11 C.F.R. § 102.9(e)(2).

If the candidate does not participate in the general election, however, the law is clear - the committee cannot retain these general election contributions. Rather, the committee must either: (1) refund any contributions made for the general election; (2) redesignate such contributions in

purpose of analyzing the issue raised by the Committee in its Request, we will assume that these representations are accurate.

³ We are assuming for the purpose of analyzing the issue raised in this Request that all of the Committee's expenditures were advance payments for the general election.

accordance with 11 C.F.R. §§ 110.1(b)(5) or 110.2(b)(5); or (3) reattribute such contributions in accordance with the procedures set forth in 11 C.F.R. § 110.1(k)(3). 11 C.F.R. § 102.9(e)(3); Advisory Opinions 2008-04 (Dodd for President) and 1992-15 (Russo).

The Commission has made it clear that the requirement to refund, redesignate, or reattribute general election contributions when a candidate does not participate in the general election applies even in those limited circumstances where the committee has expended the general election contributions for advance payments for the general election. Since 1986, the Commission has allowed candidates and their authorized committees to use general election contributions accepted before the date of the primary election “exclusively for the purpose of influencing the prospective general election in those limited circumstances where it is necessary to make advance payments or deposits to vendors for services that will be rendered, or goods that will be provided, to [the] committee after [the candidate has] established [his or her] candidacy with respect to the general election”. Advisory Opinion 1986-17 (Green). However, in so permitting, the Commission emphasized the following:

[T]he 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, *whether or not your committee has made any expenditure from these contributions, since a separate contribution limitation will not be available to these contributors with respect to the general election. See 11 C.F.R. [§] 103.3(b); Advisory Opinion 1986-12.*⁴

Id. (emphasis added).

Thus, while candidates may choose to spend some or all of the general election contributions they collect before the primary election takes place, they do so at the risk that if they do not participate in the general election, the committee will be required to refund the general election contributions.⁵ A general election contribution limit does not exist for a candidate who does not participate in the general election, and a committee’s spending cannot create a legal contribution limit where one would otherwise not exist.

⁴ Advisory Opinion 1986-12 (Ferraro) also concluded that contributions to a candidate with respect to an election in which she does not participate as a candidate must be refunded to the contributors.

⁵ The Commission has similarly determined in matters involving special elections that a candidate who had both accepted and spent contributions designated for an anticipated special election that did not in fact occur was required to refund, redesignate or reattribute all such contributions. See Advisory Opinion 2009-15 (Bill White for Texas); *Certification In the Matter of Request for Commission Consideration of a Legal Question by the Michael Williams for U.S. Senate Committee* (LRA # 872) (April 12, 2012); *Certification In the Matter of Request for Commission Guidance on the Michael Williams for U.S. Senate Committee* (LRA # 872) (Feb. 7, 2012); See also OGC Memorandum to Commission on Request for Commission Consideration of a Legal Question by the Michael Williams for U.S. Senate Committee (LRA # 872), at 5 (Mar. 19, 2012) (discussing AO 2009-15 (Bill White for Texas)).

III. SECTION 102.9(e)(2) DOES NOT EXEMPT GENERAL ELECTION CONTRIBUTIONS SPENT BEFORE THE PRIMARY ELECTION FROM THE REFUND OBLIGATION.

In its Request, the Committee acknowledges the legal authorities discussed above, but argues that the Commission's promulgation in 2002 of section 102.9(e)(2) altered the approach previously adopted by the Commission so as to definitively limit the refund obligation imposed by section 102.9(e)(3) to unspent general election contributions.⁶ The Committee notes that paragraph (e)(2) requires a committee's records to show only that the committee's cash on hand exceeds its "net" general election contributions (contributions collected less contributions disbursed), rather than its "gross" general election contributions (all contributions, whether or not disbursed). Because paragraph (e)(2) requires only that cash on hand exceed "net" general election contributions, the Committee argues that the refund obligation must also now similarly be limited to "net" general election contributions. Attachment 1, at 6-8. The Committee posits that if this were not the case, paragraph (e)(2) would be rendered meaningless since if the refund obligation continues to apply to "gross" general election contributions, then committees would be forced to maintain additional cash on hand to exceed the "gross" and not merely the "net" general election contributions. Attachment 1, at 7-8.

The Committee's arguments are misplaced and misinterpret section 102.9(e)(2). First, the plain language and context of paragraph (e)(2) demonstrate that its intended purpose is to mandate an additional accounting method that committees must use to show that they did expend general election contributions to pay their primary election expenses. *See Notice of Proposed Rulemaking on Contribution Limitations and Prohibitions*, 67 Fed. Reg. 54366, 54371 (Aug. 22, 2002) (the Commission proposed to amend section 102.9(e) out of concern that some committees were using general election contributions to pay primary election expenses in spite of the requirement that the two types of contributions be distinguished). Paragraph (e)(2) states only that a committee's records must demonstrate that its cash on hand exceeded its net general election contributions. It does not otherwise specify how much cash on hand a committee must, should, or may retain to meet its refund obligations under paragraph (e)(3). Nor did the 2002 promulgation modify the language in (e)(3) which imposes a refund obligation for "any contributions made for the general election." In other words, the requirement that a committee's cash on hand always exceed its net general election contributions was adopted as an additional safeguard against a committee's inappropriate use of general election contributions to pay primary election expenses, in excess of contribution limitations. *See Advisory Opinion 1992-15 (Russo)*.

Second, there is no indication in the language of paragraph (e)(2), nor in the explanation and justification accompanying the 2002 Final Rules amending section 102.9(e) generally, that the Commission intended to supersede Advisory Opinion 1986-17 (Green), in whole or in part,

⁶ The Committee emphasizes the Commission's statement in the E&J for the 2002 Final Rules that paragraph (e)(2) "makes the standard for accounting methods explicit". Attachment 1, at 9. The Committee argues that what the Commission made explicit is that from that time forward committees would no longer be required to have enough cash on hand to refund amounts spent on the general election and, therefore, committees would no longer be required to refund those amounts. *Id.* As discussed above, that argument is meritless.

or intended to achieve this effect by promulgating paragraph (e)(2). The Commission's usual practice when promulgating regulations that conflict with previous advisory opinions is to declare its intention to supersede those advisory opinions or those portions of the advisory opinions that conflict with the new rule.⁷ The Commission made no such declaration here.

Finally, the Commission has continued to cite to Advisory Opinion 1986-17 (Green) since 2002 for the proposition that all general election contributions must be refunded in the event the candidate does not participate in the general election. In its Factual and Legal Analysis for MUR 6057 issued in 2009, for example, the Commission stated:

Further, general election contributions may be used to make advance payments for general election purposes, but should the candidate not win the primary election, the committee must have enough cash on hand to refund all general election contributions. *See* MUR 5388 (Jim Treffinger for Senate), Factual and Legal Analysis, at 2;⁸ *see also* Advisory Opinion 1986-17 (Friends of Mark Green), at 4 (concluding that the Act did not prohibit a committee from making expenditures for the general election before the primary election, such as advance payments or deposits in connection with the general election).

MUR 6057 (Jennifer Horn for Congress), Factual and Legal Analysis, at 3-4 (Feb. 13, 2009).⁹

The Committee argues MUR 6057 merely restates what the Committee characterizes as the "uncontroversial" requirement expressed in section 102.9(e)(3) that every general election contribution must be refunded. Attachment 1, at 10. The Committee contends, without any support, that this principle does not resolve the *amount* of the general election contributions that

⁷ *See, e.g.*, E&J for Final Rules on Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. 24375, 24382 (May 5, 2010) (discussing new rule's impact on several preceding advisory opinions and superseding them in whole or in part); E&J for Final Rules on Internet Communications, 71 Fed. Reg. 18589, 18604 n.46, 18605 n.49 (Apr. 12, 2006).

⁸ In MUR 5388, the Commission stated: "While general election contributions may be used to make advance payments for general election purposes, if the candidate does not win the primary election, the committee must have enough cash on hand to refund all general election contributions, including those already used for such payments. AO 1986-17 at 5." MUR 5388 (Jim Treffinger for Senate, Inc.), Factual and Legal Analysis, at 2 (July 8, 2004). While the Factual and Legal Analysis is dated after 2002, the violations alleged in the MUR occurred before the enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), and the Commission stated that it was applying the pre-BCRA Act and regulations to the alleged misconduct in the MUR. *Id.*, at 1, n.1. However, the fact that the Commission cited this passage in MUR 6057 suggests that it considered this statement to be an accurate reflection of the law after 2002.

⁹ Moreover, the Commission has continued to cite Advisory Opinion 1986-17 (Green) as authority in post-2002 advisory opinions for the general proposition that contributions designated for the general election are not usable or are to be refunded in the event of the candidate's non-participation in that election. *See* Advisory Opinions 2003-18 (Smith), 2009-15 (Bill White for Texas). *See also* MUR 6230 (Wynn for Congress), Factual and Legal Analysis, at 5. These authorities lend further support for the fact that the Commission's promulgation of 11 C.F.R. § 102.9(e)(2) did not modify the scope of a committee's refund obligation.

must be refunded, which is controlled by section 102.9(e)(2) rather than section 102.9(e)(3).¹⁰ *Id.* It is not clear, however, why a requirement to refund “every” general election contribution does not simultaneously resolve the question of the amount of general election contributions that must be refunded.

IV. RECOMMENDATION

For the reasons noted above, we recommend that the Commission conclude that the Committee was required to refund all general election contributions it accepted before the primary election, including general election contributions it expended on advance expenditures relating to the anticipated general election.

Attachment 1 – Request for Legal Consideration from Cantor for Congress, dated December 23, 2014.

¹⁰ The Committee also characterizes the Commission’s statement in the Factual and Legal Analysis in MUR 6057 as dicta because the candidate in that MUR did participate in the general election. Attachment 1, at 10. Although the central issue in MUR 6057 was whether the candidate used general election contributions to pay for primary election expenses before the primary election, which is not at issue here, nevertheless, the general statement of the law supports the fact that the Commission’s position on the scope of a committee’s refund obligation has remained the same after the 2002 amendment to the regulation at issue. *See* MUR 6057 (Jennifer Horn for Congress), Factual and Legal Analysis, at 3-4



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December 23, 2014

**BY HAND DELIVERY AND E-MAIL
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Chairman Lee E. Goodman; Vice Chair Ann M. Ravel; and Commissioners Ellen L. Weintraub, Matthew S. Petersen, Caroline C. Hunter, and Steven T. Walther
 Federal Election Commission
 c/o Ms. Shawn Woodhead Werth, Secretary
 999 E Street, NW
 Washington, DC 20463

Re: Request for Consideration of Legal Questions by the Commission

Dear Commissioners:

On behalf of our client, Cantor for Congress (the "Committee"), we request Commission consideration of a determination by the Reports Analysis Division ("RAD") that the Committee take certain action with respect to contributions it received for the 2014 general election.¹

This matter is appropriate for Commission consideration because, as discussed below, RAD's determination – specifically, that the Committee must refund 100% of each contribution regardless of amounts paid for general election expenses – is contrary to the Commission's regulations.²

The Commission has long permitted authorized committees to make disbursements for general election expenses prior to the primary election using contributions raised for the general election. In 2002, the Commission amended its regulations to

¹ RAD notified counsel for the Committee by telephone on December 5, 2014, of RAD's determination, as well as the legal analysis by the Office of General Counsel ("OGC") supporting RAD's determination. See Fed. Election Comm'n. Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 78 Fed. Reg. 63203 (Oct. 23, 2013).

² See Policy Statement *supra* note 1. ("Any request for consideration by a Committee during the report review process . . . shall be limited to questions of law on material issues, when . . . the request to take corrective action is contrary to or otherwise inconsistent with prior Commission matters dealing with the same issue."). Alternatively, to the extent OGC's analysis fails to justify RAD's determination in this matter, and to the extent RAD's determination is contrary to the policy clearly set forth in the Commission's regulatory approach to this issue, this matter is "novel, complex, or pertains to an unsettled question of law." See *id.*



Federal Election Commission
December 23, 2014
Page 2

"explicit[ly]" provide an accounting method for this practice that allows authorized committees to maintain a "recorded cash on hand" balance that, prior to the primary, is "at all times equal to or in excess of the sum of general election contributions received *less the sum of general election disbursements made.*" 11 C.F.R. § 109.2(e)(2) (emphasis added). The Committee abided by this regulatory allowance. It identified a limited number of expenses that were clearly for the general election, deducted those amounts from general election contributions, and refunded the remaining net amount of its general election contributions to donors. The Commission should instruct RAD that no further action is required and to accept the Committee's termination filing.

FACTS

Cantor for Congress is the principal campaign committee of former Representative Eric Cantor. Prior to Representative Cantor's June 10, 2014 primary, the Committee had accepted \$1,817,375 in contributions designated for the 2014 general election. The Committee established separate records for all contributions it received for the primary and general elections, and its 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." At no point did the Committee use any contributions designated for the general election for any expenses related to the primary election.

After the primary, Representative Cantor was not a candidate in the general election. Accordingly, the Committee began winding down and making arrangements to terminate. First, the Committee identified all outstanding primary election bills to be paid with primary election contributions. It then obtained written redesignations and reattributions from general election contributors in the amount of \$93,550 to be used to settle its primary election obligations. This decreased the amount of the Committee's general election contributions to \$1,723,825.

Next, the Committee identified the following limited number of disbursements made prior to the primary election that were indisputably general election expenses:

(1) \$116,090 for commissions paid to commercial fundraisers specifically for general election contributions; and



Federal Election Commission
December 23, 2014
Page 3

(2) \$113,846.75 in administrative expenses that were retained by joint fundraising committees – and never in the Committee’s possession – to collect general election contributions on behalf of the Committee.

The Committee deducted this \$229,936.75 “sum of general election disbursements made” from its remaining \$1,723,825 “sum of general election contributions received” to determine that it must refund net general election contributions of \$1,493,888.25. The Committee then processed those refunds.³

The Committee reported all of these transactions on its July and October 2014 quarterly reports.

On October 1, 2014, the Committee received a Request for Additional Information (“RFAI”) from Mr. Bradley Matheson of RAD regarding the Committee’s July quarterly report.⁴ The RFAI stated, in relevant part:

While it is permissible for a person to make a contribution for the general election prior to the primary election, the recipient committee must employ an acceptable accounting method to distinguish between primary and general election contributions. (11 CFR § 102.9(e)) This general election amount must be maintained in the committee’s account.

Since the candidate will not participate in the general election, any contribution received for the general election must be returned to the donors or redesignated to the primary if your committee has net debts outstanding for the primary election.

The letter concluded:

Any subsequent report(s) filed with the Commission must disclose the refund or redesignation of any general election contribution.

³ The exact amounts refunded to contributors depended on whether their general election contributions were subject to the above-described commissions or joint fundraising committee expenses. If they were, then each refunded contribution was reduced by the amount of the commission or expense paid for that contribution. All other general election contributions were refunded with no deduction for general election expenses.

⁴ The RFAI is available at http://docquery.fec.gov/pdf/738/14330061738_14330061738.pdf.



Federal Election Commission
December 23, 2014
Page 4

Refunds or redesignations must be done within 60 days after the 2014 Primary Election.

Although the Commission may take further legal action, your prompt action to refund these contributions will be taken into consideration.

The Committee provided the following timely response on October 15, 2014: "Cantor for Congress has refunded and/or redesignated all contributions received for the 2014 General election. All refunds and/or redesignations were completed within 60 days of the Primary election (by August 9, 2014)."⁵

On October 28, 2014, the Committee filed its termination report.⁶ On November 10, 2014, counsel for the Committee participated in a conference call with Mr. Matheson, during which RAD questioned why the Committee did not refund the \$229,936.75 that the Committee had incurred for general election expenses. In this and subsequent calls with Mr. Matheson, the Committee's counsel explained that the Commission's regulations do not require the Committee to maintain or, therefore, refund any portion of a general election contribution used to pay a general election expense.

On November 13, 2014, the Committee received another RFAI informing the Committee, among other things, that it could not terminate until "outstanding issues previously cited in a letter referencing the 2014 July Quarterly Report" have been resolved.⁷

On December 5, 2014, RAD notified the Committee's counsel of RAD's final determination and OGC's concurrence – which Mr. Matheson read to the Committee's counsel over the telephone – that the \$229,936.75 in general election expenses should have been refunded.

⁵ The Committee's response is available at http://docquery.fec.gov/pdf/703_14978249703_14978249703.pdf.

⁶ The Committee's termination report is available at http://docquery.fec.gov/pdf/782_14952553782_14952553782.pdf.

⁷ The second RFAI is available at http://docquery.fec.gov/pdf/382_14330066382_14330066382.pdf.



Federal Election Commission
December 23, 2014
Page 5

THE LAW

The Commission has long recognized that a candidate's authorized committee may accept contributions for use in a general election prior to a candidate's primary election. As explained in the Commission's regulations:

(1) If the candidate, or his or her authorized committee(s), receives contributions that are designated for use in connection with the general election pursuant to 11 CFR 110.1(b) prior to the date of the primary election, such candidate or such committee(s) shall use an acceptable accounting method to distinguish between contributions received for the primary election and contributions received for the general election. Acceptable accounting methods include, but are not limited to: (i) The designation of separate accounts for each election, caucus or convention; or (ii) The establishment of separate books and records for each election . . .

(3) If a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, redesignated in accordance with 11 CFR 110.1(b)(5) or 110.2(b)(5), or reattributed in accordance with 11 CFR 110.1(k)(3), as appropriate.

11 C.F.R. § 109.2(e).

In 1986, the Commission began permitting authorized committees to use "contributions designated for the general election to make expenditures, prior to the primary election, exclusively for the purpose of influencing the prospective general election . . ." AO 1986-17 (Green) at 4; *see also* AO 1992-15 (Russo) at n.5. However, the Commission noted that, regardless of "whether or not [a] committee has made any expenditure from these [general election] contributions," the committee "should make a full refund to those contributors who have made their aggregate allowable contribution to [the committee] with respect to the primary election." *Id.*

In 2002, the Commission amended its regulations to codify the requirements that apply when an authorized committee uses general election contributions for general election expenses. Importantly, the Commission altered the approach suggested by the above-described advisory opinions. Previously, an authorized committee would



Federal Election Commission
December 23, 2014
Page 6

have been required to maintain *additional* funds – to cover those it disbursed for general election expenses – to effect the full general election contribution refunds required by those advisory opinions. The new regulation dispensed with that obligation, stating:

Regardless of the [accounting] method used . . . , 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.*

11 C.F.R. § 102.9(e)(2) (emphasis added).

The Commission explained that the new regulation “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.” Fed. Election Comm’n, Explanation and Justification for Final Rules on Contribution Limitations and Prohibitions (*hereinafter* “2002 E&J”), 67 Fed. Reg. 69928, 69929 (Nov. 19, 2002) (emphasis added). The Commission subsequently explained that the regulation’s original purpose – which had been articulated in Advisory Opinion 1992-15 (Russo) – continues to be served by the new regulation, stating: “These regulations are designed to ensure that candidates in [this] situation do not use general election contributions for the primary election.” MUR 6057 (Horn), F&LA at 3.

DISCUSSION

- A) The Commission’s Regulations Permit an Authorized Committee to Make General Election Expenditures Prior to the Primary, and Do Not Require Refunds of Such Amounts.

The Commission’s 2002 rulemaking was a critical change and maturation in the agency’s approach to how authorized committees are required to account for and maintain general election contributions. The Commission made explicit an allowance permitting authorized committees to account for general election contributions by demonstrating that “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.” 11 C.F.R. § 102.9(e)(2) (emphasis added).



Federal Election Commission
December 23, 2014
Page 7

Thus, the Commission promulgated a rule of general applicability allowing authorized committees to maintain sufficient general election funds of only the net amount – after general election expenses are subtracted – of the general election contributions they received.

Therefore, an authorized committee can only be required to refund that same net amount. That is the plain meaning and application of the regulation which affirmatively permits and contemplates that an authorized committee will spend general election contributions on general election expenses. Accordingly, an authorized committee need only maintain general election contributions sufficient to refund the remaining balance.

This conclusion is apparent from the specific language of the regulation itself, the purpose the regulation is meant to serve, and the regulation's proper fit within the Commission's regulatory framework. First, the regulation's allowance that an authorized committee need only maintain the net amount of its general election contributions includes no limits or qualifications. The regulation applies "at all times" and does not, for example, carve out an exclusion for general election refunds.⁸

Second, the Commission's stated purpose for the regulation – to ensure that authorized committees "do not use general election contributions for the primary election." MUR 6057 (Horn), F&LA at 3 – is fully satisfied here. It is undisputed that the Committee's general election contributions were used for general election expenses, not for primary election expenses. Therefore, the Committee is free to refund "the sum of general election contributions received less the sum of general election disbursements made" as stated in 11 C.F.R. § 102.9(e)(2).

Third, the regulation's affirmative allowance permitting authorized committees to maintain only net general election contribution amounts is rendered meaningless if that allowance does not apply to general election contribution refunds. What

⁸ Had the Commission intended to limit the allowance of 11 C.F.R. § 102.9(e)(2) so that it did not apply to refunds, it would have said so explicitly in order to overcome the regulation's plainly stated comprehensive application. And it is no excuse to say that the Commission may not have considered the regulation's effect on refunds when it promulgated this new regulatory allowance. At the same time the Commission was promulgating the regulation at 11 C.F.R. § 102.9(e)(2), it was simultaneously addressing the general election refund requirement now at subparagraph (e)(3) which does not modify to circumscribe the allowance of subparagraph (e)(2). See 2002 E&J, 67 Fed. Reg. at 69929.



Federal Election Commission
December 23, 2014
Page 8

benefit would there be of maintaining only net general election contribution amounts if the gross amount must be refunded? There would be none. An authorized committee would be forced to maintain gross general election contribution amounts to ensure sufficient funds to make general election refunds. This would nullify the effect of the regulation which, by its clear terms, permits authorized committees to maintain net general election contribution amounts. As with a statute, familiar rules of interpretation instruct that a regulation should be construed in a manner that gives it full effect and does not render it mere surplusage. *See Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

In sum, the Commission's regulatory allowance permits authorized committees to maintain and refund only the net amounts of their general election contributions. The terms of this allowance are comprehensive and contain no exclusions. The fundamental purpose served by the regulation is consistent with this allowance. And to impose any qualifications, for refund or any other purpose, would nullify the allowance's effect.

B) The RAD and OGC Interpretation of the Regulation Fails to Recognize its Plain Significance.

Nonetheless, RAD and OGC assert that the regulation requires an authorized committee to refund the gross amount of its general election contributions. They rely on Advisory Opinions 1986-17 (Green) and 1992-15 (Russo) for the proposition that full refunds – including the portions of general election contributions used to pay general election expenses – are required when an authorized committee does not participate in a general election.⁹ Their reliance on these advisory opinions is critically misplaced: these authorities pre-date the 2002 promulgation of 11 C.F.R. § 102.9(e)(2). As just explained, the Commission clarified and altered the requirements of those advisory opinions to permit an authorized committee to maintain only net general election contributions.

⁹ RAD and OGC emphasize the Commission's statement in Advisory Opinion 1986-17 (Green) that the requester must make a "full refund" of general election contributions should the candidate lose the primary. The Commission notably did not repeat that language in Advisory Opinion 1992-15 (Russo), but simply stated that a committee must "make refunds of general election contributions" after a primary loss.



Federal Election Commission
December 23, 2014
Page 9

RAD and OGC attempt to downplay the significance of this development. Mr. Matheson explained over the phone that the Commission's promulgation of 11 C.F.R. § 102.9(e)(2) did not affect Advisory Opinions 1986-17 (Green) and 1992-15 (Russo). Rather, the 2002 rulemaking merely created a new accounting method intended as an additional safeguard against the use of general election contributions for primary election expenses. These claims do not withstand scrutiny.

First, 11 C.F.R. § 102.9(e)(2)'s new accounting method included a major substantive change to the amount of general election funds that an authorized committee is required to maintain. The Commission made it "explicit" – to use the Commission's own word – that an authorized committee did not have to maintain general election funds that were used for general election expenses and, therefore, could be under no obligation to refund those amounts. Any requirement in the advisory opinions that an authorized committee must make those refunds no longer applied once the Commission promulgated 11 C.F.R. § 102.9(e)(2).¹⁰

Second, the RAD and OGC characterization of 11 C.F.R. § 109.2(e)(2) as an *additional* safeguard against an authorized committee's inappropriate use of general election contributions is specious. If that were the Commission's intent, it would have written the regulation to require that cash on hand equal the *gross* amount of the general election contributions. But that is not what the regulation says, and the Commission should be wary of a proffered interpretation that conflicts with the regulation's plain meaning and can be justified only as "prophylaxis-upon-

¹⁰ Furthermore, providing greater weight to these advisory opinions than to the regulation inverts the order of the weight of the authorities. A regulation validly promulgated by the Commission must take precedence over the Commission's advisory opinions. *See* 52 U.S.C. § 30108(b) (a "rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section [30111] of this title," and not as an advisory opinion). In addition, advisory opinions are intended to be used only defensively as shields against liability for parties who rely on them, and not as authorities to be used offensively by the Commission against regulated parties. *See id.* § 30108(c). This is even more so when analyzing an advisory opinion against a permissive allowance contained in a subsequently issued regulation.



Federal Election Commission
December 23, 2014
Page 10

prophylaxis” incompatible with campaign finance regulation. *See McCutcheon v. FEC*, 572 U.S. __ (2014), slip op. at 33.¹¹

The only authority cited by RAD and OGC that post-dates the promulgation of 11 C.F.R. § 109.2(e)(2) is MUR 6057 (Horn), which confirms the regulation’s fundamental purpose and basic application, but is otherwise inapposite. As stated there, 11 C.F.R. § 109.2(e)(2) is “designed to ensure that candidates in [this] situation do not use general election contributions for the primary election.” F&LA at 3. An authorized committee that pays general election expenses with general election contributions and then refunds the net amount of its general election contributions is operating entirely consistent with this purpose. In addition, the Commission in MUR 6057 (Horn) restated the rule that “should the candidate not win the primary election, the committee must have enough cash on hand to refund all general election contributions.” *Id.* That statement merely repeats the uncontroversial requirement at 11 C.F.R. § 102.9(e)(3) and § 110.1(b)(3)(i)(C) that *every* general election contribution must be refunded. The *amount* of the general election contribution refunds – to the extent any general election expenses have been incurred – is dictated by 11 C.F.R. § 109.2(e)(2) and its specific allowance permitting an authorized committee to maintain and, therefore, refund only the net amount of its general election contributions.

But aside from these statements, the MUR was not addressing the question at issue here. The candidate there was participating in the general election and was not required to make any general election contribution refunds. Therefore, the Commission did not address what the general election refund amounts might otherwise be. Accordingly, the MUR offers no authority on that point.

CONCLUSION

The plain language of 11 C.F.R. § 102.9(e)(2) permits an authorized committee to maintain only the net amount of its general election contributions for refund or any other purposes. That is what the Committee did. Therefore, the Commission should instruct RAD that the Committee’s refund of all general election

¹¹ The Commission’s restrictions at what are now 11 C.F.R. § 109.2 (e)(1) and (3) already prohibited the use of general election funds for primary expenses and predated the 2002 rulemaking, but were previously numbered as subsections (e)(1) and (2). *See* AO 1992-15 (Russo) at 2 (“These regulations are designed to ensure that candidates . . . do not use general election contributions for the primary election.”).



Federal Election Commission
December 23, 2014
Page 11

contributions, less disbursements made for general election expenses, is consistent with the Commission's regulations and accept the Committee's termination report.

Sincerely,

A handwritten signature in black ink, appearing to read "Baran".

Jan Witold Baran
Caleb P. Burns
Eric Wang

ATTACHMENT 1
Page 11 of 11