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BY HAND DELIVERY AND E-MAIL
(LEGALREQUESTPROGRAM@FEC.GOV)

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

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[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 Regarding a Program for Requesting Consideration of Legal Questions by the Commission, *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.*

"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

(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(c)) 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.

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[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.

> 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.

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[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.

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

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) <u>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.</u>

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).

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.

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.

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.

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

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[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.").

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

Sincerely,

Jan Witold Baran
Caleb P. Burns
Eric Wang