FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA ELECTRONIC & CERTIFIED MAIL

JUL 13 2016

Dan Backer, Esq.
Joseph Lilly, Esq.
DB Capitol Strategies
203 South Union Street, Suite 300
Alexandria, VA 22314

Re: Governor Gary Johnson and Gary Johnson 2012, Inc.

Dear Messrs. Backer and Lilly:

The Commission has considered the Petition for Rehearing ("Petition") of the Commission's April 4, 2016 Repayment Determination After Administrative Review that you submitted on behalf of Governor Gary Johnson and Gary Johnson 2012, Inc. (the "Committee") on April 25, 2016. On July 6, 2016, the Commission denied the Petition. We are enclosing for your reference a memorandum that sets forth the basis for the Commission's decision on the Petition.[1]

Since the Commission has denied the Petition, Governor Johnson and the Committee must repay the sum of $333,441[2] to the United States Treasury within 30 calendar days after service of this decision on the Petition. 11 C.F.R. §§ 9038.2(d)(2), 9038.5(a)(2).

In the Petition, you requested an extension of 90 days within which to pay the $1,250 associated with the Commission's uncontested determination that certain submitted contributions did not meet the matching requirements. Insofar as both the uncontested and the contested repayment determinations are on the same payment schedule, this extension request was premature. The filing of the Petition suspended the time to pay both repayment determinations. *See* 11 C.F.R. § 9038.5(a)(2). You may

---

[1] We have not also enclosed the attachments to that memorandum, but we can provide you with attachments upon request.

[2] This sum combines the amounts associated with two separate repayment determinations: first, a total of $332,191 associated with the use of public funds for non-qualified campaign expenses, and second, a total of $1,250 representing contributions submitted for matching later determined not to have met the matching requirements. *See* Final Audit Report of the Commission on Gary Johnson 2012, Inc[.] (approved July 6, 2015), at 7.

submit a new request for an extension of up to 90 days to make repayment if you wish to do so. 11 C.F.R. § 9038.2(d)(2).[3]

Judicial review of the Commission's repayment determination is available pursuant to 26 U.S.C. § 9041. Should you elect judicial review, you have the option of seeking a stay of all or a part of the Commission's repayment determination pending appeal. 11 C.F.R. § 9038.5(c). Requests for stays under this section must be filed within 30 calendar days after service of the Commission's decision on a petition for rehearing. 11 C.F.R. § 9038.5(c)(1)(ii). If you have any questions regarding the Commission's determination, you may contact Joshua Blume, the attorney assigned to this matter, at (202) 694-1533.

Sincerely,

Adav Noti

Adav Noti
Acting Associate General Counsel
Policy Division

Enclosure

[3] If you do elect to submit such a request, please note that the request must be submitted at least seven calendar days before the expiration of the time within which to make repayment. 11 C.F.R. § 9038.4(c). If a request for extension were to be submitted less than seven calendar days before the relevant deadline, then you would be required to show that the delay was occasioned by excusable neglect in addition to showing good cause for the extension. 11 C.F.R. § 9038.4(d).

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

2016 JUN 17 P 12:23

MEMORANDUM

JUN 17 2016

TO: The Commission

FROM: Adav Noti AN
Acting Associate General Counsel
Policy Division

Lorenzo Holloway
Assistant General Counsel for
Compliance Advice

Joshua Blume JB
Attorney

SUBJECT: Petition for Rehearing on the Commission's Repayment Determination for Gary Johnson 2012, Inc. (LRA #905)

I. INTRODUCTION

The Commission determined, on April 4, 2016, that Governor Gary Johnson and Gary Johnson 2012, Inc. (the "Committee") must repay $332,191 to the United States Treasury. Statement of Reasons in Support of the Repayment Determination After Administrative Review (approved April 4, 2016) (Attachment 1). The Committee submitted a petition for rehearing of the Commission's repayment determination. *See* Petition for Rehearing of Repayment Determination from Dan Backer, dated Apr. 25, 2015 (sic. "2016) (Attachment 2). We recommend that the Commission deny the Committee's petition.

The Committee requests a rehearing on three grounds: (1) the Committee's oversight in not amending the designation language on its contribution solicitation forms amounts to a scrivener's error and the Commission should apply a principle of contract law to reform that language retroactively to conform to the Committee's and the contributors' true intent; (2) the Committee lacks sufficient funds to make the repayment; and (3) the Committee acted in good faith in holding its public and private funds in separate accounts and in using its post-primary election contributions in the manner that it did.

Before addressing the Committee's petition, we first address a separate matter that the Committee also raises in its petition: the Committee's request for an extension of time to repay

an amount to the U.S. Treasury in consequence of a second repayment determination that the Committee does not contest.

II. THE REQUEST TO EXTEND TIME TO REPAY $1,250 TO U.S. TREASURY IS PREMATURE

The Committee requests a 90-day extension of time to repay a second repayment determination in the amount of $1,250 that the Committee is not contesting. This repayment determination also arises from the Commission's July 6, 2015 Final Audit Report, and represents the amount of contributions submitted for matching that were later found to have been ineligible to be matched. *See* Final Audit Report on Gary Johnson 2012, Inc (approved July 6, 2015), at 19.

Because the Committee did not request administrative review of this repayment determination, repayment would ordinarily have been due within 90 calendar days following service upon the Committee of the Commission's Final Audit Report, or October 5, 2015. 11 C.F.R. § 9038.2(d)(1). However, the Committee indicated in a letter on that day that it wished to await the resolution of the other, contested, repayment determination on administrative review in order to have the benefit of a complete accounting of all repayment obligations. Because the amount of the uncontested obligation is much smaller than that of the contested obligation, we advised the Commission in an informational memorandum that we intended to place both obligations on the same payment schedule. *See* [redacted]

Consistent with this approach, we regard the Committee's extension request as premature. Because the Committee's time to pay the amount assessed in the Commission's contested repayment determination is suspended by virtue of the filing of the petition for rehearing, 11 C.F.R. § 9038.5(a)(2), the Committee's time to pay the $1,250 assessed in the Commission's uncontested repayment determination is also suspended pending the Commission's resolution of the petition. We will advise the Committee accordingly.

III. THE COMMISSION SHOULD DENY THE PETITION

We recommend that the Commission deny the Committee's petition for rehearing of the repayment determination. The Commission's regulations permit a candidate to petition the Commission for a rehearing of a final repayment determination. 11 C.F.R. § 9038.5(a). To be considered by the Commission, the petition must: (1) be filed within 20 calendar days after service of the Commission's final repayment determination; (2) raise new questions of law or fact that would materially alter the Commission's final determination; and (3) set forth clear and convincing grounds why such questions were not, and could not have been, presented during the original determination process. *Id.*

Because the Committee filed its petition for rehearing on April 25, 2016 – the 20th day following service of the Statement of Reasons after Administrative Review on the Committee on April 5, 2016 – the petition is timely. Nevertheless, the Office of the General Counsel

recommends that the Commission deny the petition on all three grounds cited by the Committee. We expound upon each of these recommendations below.

A. The Contributor-Intent Argument Is Not a New Question of Law or Fact

The Committee takes issue with the Commission's statement in the Statement of Reasons that the Committee's written designation statement appearing on its contribution forms, accompanied by the contributor's signature, constitutes the best evidence of the contributor's intentions regarding designation. *See* Attachment 1 ("SOR on Repayment"), at 14-15. The Committee states to the contrary that its written designation rule did not reflect the Committee's and the contributors' intentions. The Committee argues that its failure to modify its designation statement to conform to its intent was a drafting error that should be disregarded according to a principle of contract law that allows a court to modify the written terms of a contract when those terms do not adequately reflect the intent of the contracting parties.

The Committee also argues that the designation rule as written, accompanied by the signatures of the contributors, is actually inadequate evidence of contributor intent for two reasons: (1) generally, contributors do not actually read the designation statements placed on the contribution forms and the actual manner in which their contributions are designated is a matter of indifference to them, and (2) contributors were not given any option to modify the terms stated in the designation rule.[1]

The Committee asserts that the questions it raises could not have been raised during the original determination process because they are a response to the aforementioned statement in the Commission's Statement of Reasons, which was not available to the Committee until it received that document. *See* Attachment 2, at 3.

The Commission has stated that the intent underlying the creation of the petition for rehearing process is to provide a "mechanism under which a candidate may respond to Commission arguments he or she did not previously have an opportunity to respond to." *See Explanation and Justification of Final Rule on Public Financing of Presidential Primary and General Election Candidates*, 52 Fed. Reg. 20864, 20873 (Jun. 3, 1987). In spite of this, the Committee does not raise a new question of law or fact, and, further, does not show that it could not have raised these questions earlier.

First, the Committee has consistently asserted throughout the audit process that the actual wording of its designation statements did not conform to its intended wording, and that at all times it acted out of a good-faith, albeit inadvertently mistaken, belief that its intentions and the actual language of the designation statement coincided. *See* Letter from Dan Backer to Commission Regarding Draft Final Audit Report on Gary Johnson 2012 Inc (Apr. 14, 2015) (Attachment 4), at 1-2; Letter to Commission from Joseph Lilly Regarding Repayment

[1] There appears to be some tension between these two rationales, insofar as if contributors truly do not read the designation statements, then it would seem to follow that they could not be disadvantaged by the absence of an option to modify them.

Determination for Gary Johnson 2012 Inc (Sept. 4, 2015) (Attachment 5), at 4. Accordingly, these arguments do not raise new legal or factual questions, but rather constitute merely a revised version of the longstanding assertion that the Commission should relieve the Committee of its repayment obligation in light of what the Committee describes as a good faith error.

Second, even if the Committee's argument respecting the application of contract law principles should be construed as raising a new question of law, the Committee has not provided a clear and convincing ground for its failure to raise this question during the original determination proceedings.

The Committee contends that it could not have raised this question during the original determination proceedings because it is directly responsive to a new argument in the Commission's April 5 Statement of Reasons. However, this contention exaggerates the novelty of the Commission's statement. The Commission's statement in fact states nothing new, but merely articulates in another form the policy judgment embodied in the underlying regulation that it cites, 11 C.F.R. § 110.1(b)(4)(ii). That provision states the rule that both committees and the Commission must follow to determine how contributors intended to allocate their contributions between different elections. It allows a committee's designation statement to be used as the rule, so long as a contributor returns a contribution with his or her written signature, which is evidence of the contributor's affirmative endorsement of the designation statement that accompanied the contribution solicitation. 11 C.F.R. § 110.1(b)(4)(ii). *See also See Explanation and Justification of Final Rule on Contribution and Expenditure Limitations and Prohibitions[,] Contributions by Persons and Multicandidate Political Committees*, 52 Fed. Reg. 760, 763 (Jan. 9, 1987). This being the case, the Commission's statement that contributions meeting these criteria are the best evidence of the contributors' intentions adds nothing new to the substance of the regulation itself: rather, it is the express articulation, in a different form, of the essence of the regulation.

Here, the Commission has relied upon 11 C.F.R. § 110.1(b)(4)(ii) since November 2013, when it issued a Statement of Reasons explaining its determination to terminate the candidate's and the Committee's entitlement to receive future matching funds. *See* Statement of Reasons in Support of Final Determination on Entitlement in the Matter of Governor Gary Johnson (LRA 905), Nov. 14, 2013 ("SOR on Entitlement") (Attachment 6), at 9-10 (Commission applied section 110.1(b)(4)(ii) to calculate amount of primary contributions). Further, from the inception of the audit, and throughout the original determination process, the Commission has consistently relied upon this calculation. *See* Preliminary Audit Report of the Audit Division on Gary Johnson 2012, Inc. (Nov. 11, 2014), at 14 (Commission identified primary and general election contributions by using list of contributions derived from the SOR on Entitlement).

The argument that the Commission should not, in this case, apply that regulation on account of the various considerations outlined in the petition does not raise or involve specific facts or circumstances that were unknown to the Committee earlier in the audit process. The Committee could have advanced these legal contentions against the application of the regulation at any time during the original determination process because that regulation was known to the Committee throughout that process. The Commission's SOR on Entitlement, in particular, which preceded and formed the background for the subsequent Preliminary Audit Report,

contains detailed discussion of the Commission's obligation to apply its designation regulations and rejects the Committee's statement of its own conflicting practice to consider only the first $250 of each contribution as designated for the primary election. *See* Attachment 6. Therefore, the availability of the Committee's contentions and legal theories did not depend upon the Committee receiving the Commission's statement in the SOR on Repayment.

B The Lack-of-Funds Argument Cannot Materially Alter the Repayment Determination

The Committee also seeks rehearing of the administrative determination because the Committee asserts that its financial position and assessment of its continuing capacity to raise funds have changed in the interim, and that these factors suggest that the Committee would be unable to pay the amount owed in the determination. That the Committee may lack funds, however, even if this is a new circumstance that was not apparent during the original determination process,[2] is not a basis for rehearing because a committee's ability or inability to pay a repayment obligation is not a factor that bears on the validity of the repayment determination. This determination is based on the Committee unlawfully using public funds to pay nonqualified campaign expenses. *See* 11 C.F.R. § 9038.2(b)(2)(i); Attachment 1, at 3. The fact that the Committee currently does not have sufficient funds to make the repayment cannot change the amount of public funds that the Committee already used to pay nonqualified campaign expenses. The Committee's argument, therefore, cannot materially alter the final repayment determination. 11 C.F.R. § 9038.5(a)(1)(ii).

C. The No-Abuse-of-System Argument Does Not Raise a New Question of Law or Fact

The Committee's final argument is that even if allowing publicly funded committees to avoid liability for repayment by maintaining their public and their private funds in segregated accounts would be ripe for abuse in general, it should not be deemed so in this case, where the Committee asserts that it acted in accordance with its sincere conviction that its manner of allocating contributions to the primary and the general elections was proper. It argues that in light of this good-faith belief, the Commission may not ignore the fact that no abuse occurred in this case.

This argument also cannot surmount the threshold for rehearing established by 11 C.F.R. § 9038.5 because it does not raise a new question, either of fact or of law, for the Commission to review. The Committee has in fact advanced this argument earlier in the repayment determination process. Specifically, in a letter to the Commission responding to the Commission's Final Audit Report, the Committee argued, *inter alia*, that the Commission's imposition of a repayment obligation was unreasonable, given the Committee's good faith

---

[2] At the time the Committee sought administrative review of the repayment determination, September 4, 2015, the Committee's most recently filed disclosure report showed an ending cash on hand balance of $286.13. *See* FEC Form 3P, Report of Receipts and Disbursements by an Authorized Committee of a Candidate for the Office of President or Vice President, 2nd Quarterly Report (4/1/15-6/30/15), at 2 (filed July 15, 2015).

attempt to comply with the designation statement that it intended to use. *See* Attachment 5, at 4. In the letter, the Committee stated:

> The instant case is not a situation like the one imagined by OGC, where a committee is secretly attempting to circumvent the restrictions on its use of matching funds by using primary [sic "private"] funds in their place. If a committee did attempt to abuse the leeway that OGC fears section 9038(b)(2) offers, it would be easily identified during an audit. The Committee is not such an actor, and cannot equitably be treated like one.

Id. The Committee also stated in the letter that its actions were based on a good faith belief that the primary election funds it spent were actually general election funds. *Id.* The Committee's current argument essentially recapitulates this argument in its September 2015 letter. The fact that the Committee has previously presented this argument in itself warrants rejecting it as an adequate ground to support a petition for rehearing.

IV. RECOMMENDATIONS

For the above reasons, this Office recommends that the Commission:

1. Deny the petition for rehearing, and

2. Approve the appropriate letter.

Attachments

1. Statement of Reasons in Support of the Repayment Determination After Administrative Review ("SOR on Repayment") (approved April 5, 2016).

2. Petition for Rehearing of Repayment Determination from Dan Backer (Apr. 25, 2015) (sic. "2016").

3. [redacted]

4. Letter from Dan Backer to Commission Regarding Draft Final Audit Report on Gary Johnson 2012 Inc (Apr. 14, 2015).

5. Letter to Commission from Joseph Lilly Regarding Repayment Determination for Gary Johnson 2012 Inc (Sept. 4, 2015).

6. Statement of Reasons in Support of Final Determination on Entitlement in the Matter of Governor Gary Johnson (LRA 905) ("SOR on Entitlement") (Nov. 14, 2013).

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
Gary Johnson	)	LRA 905
Gary Johnson 2012, Inc.	)	

STATEMENT OF REASONS IN SUPPORT OF REPAYMENT DETERMINATION AFTER ADMINISTRATIVE REVIEW

I. SUMMARY OF REPAYMENT DETERMINATION AFTER ADMINISTRATIVE REVIEW

Pursuant to 26 U.S.C. § 9038(b)(2), on April 4, 2016, the Federal Election Commission ("the Commission") determined, after administrative review, that Governor Gary Johnson and Gary Johnson 2012, Inc. (collectively, "Johnson" or "the Committee") must repay $332,191 to the United States Treasury for matching funds spent on non-qualified campaign expenses. Therefore, for the reasons set forth below, the Commission orders Gary Johnson to repay $332,191 to the United States Treasury within 30 calendar days after service of this repayment determination. 11 C.F.R. § 9038.2(c)(3), (d)(2).

II. PROCEDURAL BACKGROUND

Gary Johnson sought the Libertarian Party's 2012 nomination for the Office of President of the United States. Gary Johnson 2012, Inc., his principal campaign committee, registered with the Commission in January 2012. Johnson applied for matching funds, and the Commission determined that he was eligible to receive matching funds on May 3, 2012. Johnson received a total of $632,016.75 in matching funds from the United States Treasury.

The Commission determined that Johnson was no longer eligible to receive public funds to seek his party's nomination as of May 5, 2012. This date is referred to as his date of ineligibility

("DOI"),[1] and it is the day the Libertarian Party nominated him to be its presidential candidate at its national nominating convention. *See* 11 C.F.R. §§ 9032.6(a), 9033.5(c).

Following the conclusion of Governor Johnson's campaign, the Commission conducted a mandatory audit of the Committee's finances, and, as a part of that audit, determined that Johnson must repay $332,191 to the United States Treasury because the Committee used matching funds to defray non-qualified campaign expenses. *See* Attachment 1. As a publicly-financed committee for the 2012 presidential primary election, the Committee had two sources of financing for that election: (1) public matching funds from the United States Treasury, and (2) private contributions from individual contributors that were designated for the primary election. The Commission has consistently considered these funds a mixed pool of public and private funds. *See e.g.*, *Explanation and Justification for Final Rule on Public Financing of Presidential Primary and General Election Candidates*, 56 Fed. Reg. 35898, 35905 (July 29, 1991) (". . . *all funds in a publicly funded committee's accounts* are considered to be commingled.") (emphasis added). Publicly-financed committees may only use these funds for qualified campaign expenses. 26 U.S.C. § 9038(b)(2)(A); 11 C.F.R. §§ 9034.4(a); 9038.2(b)(2)(i). A qualified campaign expense is a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value incurred by or on behalf of a publicly-financed candidate or his or her authorized

---

[1] While the DOI marks the end of the period within which an eligible presidential candidate may receive matching payments to pay for qualified primary campaign expenses generally, presidential candidates may receive matching payments after the DOI to the extent that they continue to have net outstanding campaign obligations arising from the primary campaign. 11 C.F.R. § 9033.5. *See also* 11 C.F.R. § 9034.5 (defining "net outstanding campaign obligations"). On November 14, 2013, the Commission made a final determination that Johnson was no longer eligible to receive matching payments after his DOI because the Committee could not demonstrate that it had net outstanding campaign obligations. *See* Statement of Reasons in Support of Final Determination on Entitlement in the Matter of Governor Gary Johnson, LRA 905 (Nov. 14, 2013). After conducting the subsequent mandatory audit of the Committee, the Commission determined that Johnson continued to have net outstanding campaign obligations. *See* Final Audit Report of the Commission on Gary Johnson 2012, Inc., at 8 (July 6, 2015).

committee through the last day of eligibility that is made in connection with the campaign for nomination and is not made in violation of Federal or State law. 11 C.F.R. § 9032.9. *See also* 26 U.S.C. § 9032(9).

If a committee uses these funds to defray nonqualified campaign expenses, then the committee may owe a repayment to the United States Treasury. 11 C.F.R. § 9038.2(b)(2)(i). Only public funds are subject to repayment, 26 U.S.C. § 9038(b)(2), but the committee's funding source is considered a mixed pool of private contributions and public funds. To determine the amount of public funds that were used to defray the nonqualified campaign expenses, the Commission uses a pro-rata repayment formula found at 11 C.F.R. § 9038.2(b)(2)(iii).

The Commission found that the Committee incurred $1,194,425 in nonqualified campaign expenses because they were expenses incurred in connection with the general election rather than in connection with the primary election. *See* Attachment 1, at 17, n.14. Using the appropriate pro-rata formula, the Commission made an initial determination that the Committee must repay $332,191 to the United States Treasury on July 6, 2015. The Committee submitted a written response to the Commission's initial repayment determination on September 4, 2015 and requested an oral hearing. Attachment 2. An oral hearing was conducted on November 2, 2015. Following the oral hearing, the Committee submitted supplementary comments on November 9, 2015. Attachment 3.

III. AFTER ADMINISTRATIVE REVIEW, THE COMMISSION DETERMINES THAT THE COMMITTEE MUST REPAY PUBLIC FUNDS THAT WERE USED TO DEFRAY NONQUALIFIED CAMPAIGN EXPENSES

The Committee disputes the initial determination in administrative review, primarily contending that the use of the pro-rata formula in this case is not consistent with the Matching Payment Act. The Committee argues that the pro-rata formula was not properly applied in this

case because the Committee maintained its public and private funds in separate accounts and the funds that were used to defray the nonqualified campaign expenses were only disbursed from the account that was used to hold the private contributions. *See* Attachments 2-3.

The Commission disagrees with the Committee's legal interpretation. This review boils down to the simple question of how the Commission determines how much, if any, public funds were improperly used when a committee uses its primary funds to defray nonqualified campaign expenses. Under the governing Commission regulations, the Commission relies on a pro rata formula set forth in the regulations at 11 C.F.R. § 9038.2(b)(2)(iii) to make that calculation, rather than attempting to recreate the originating source of funding for each dollar spent on nonqualified campaign expenses. Under this formula, the amount of repayment is in the same ratio to the total amount spent on non-qualified campaign expenses as the ratio of matching funds certified to the candidate bears to the candidate's total deposits. *Id.* "Total deposits," for the purpose of applying this formula, means "*all deposits to all candidate accounts* minus transfers between accounts, refunds, rebates, reimbursements, checks returned for insufficient funds, proceeds of loans, and other similar amounts." 11 C.F.R. § 9038.3(c)(2) (emphasis added). The regulations, therefore, require that the Commission apply the formula to all of the candidate's primary funds in all of his election-related accounts.[2] There is no exception for a separate account that solely holds private contributions.

---

[2] Thus, the Commission excluded the Committee's general election contributions deposited in its general election account, but included the Committee's primary election contributions deposited in the same account. The Committee could not use general election contributions to finance primary election activity, *see Explanation and Justification for Final Rule on Public Financing of Presidential Primary and General Election Candidates*, 60 Fed. Reg. 31854, 31866 (June 16, 1995), and so not counting general election contributions in the mixed pool of private primary contributions and public funds is proper. The Commission, therefore, disagrees with the Committee's suggestion that the Committee is acting inconsistently by departing from the literal language of its definition of "total deposits" in 11 C.F.R. § 9038.3(c)(2) by excluding the general election contributions while being unwilling to similarly exclude the primary election contributions. Attachment 3, at 3.

The Commission adopted this formula following the decision of the United States Court of Appeals for the District of Columbia Circuit in *Kennedy for President Committee v. Federal Election Commission*, 734 F.2d 1558 (D.C. Cir. 1984). The *Kennedy* court invalidated a prior Commission regulation governing repayment determinations, which required repayment of the total amount of a committee's spending on non-qualified campaign expenses regardless of whether that amount consisted of private or public funds. *See Kennedy for President Committee v. Federal Election Commission*, 734 F.2d at 1559-60 ("The Commission's regulation, however, on its face and as applied to [the *Kennedy* committee] in this case, indulges the unreasonable presumption that *all* unqualified expenditures are paid out of federal matching funds.") (emphasis in original). In invalidating this approach, the court concluded that the Commission is required to make a reasonable determination that the sum to be repaid reflects the public funds used for non-qualified purposes. *Kennedy*, 734 F.2d at 1562. At the same time, because 26 U.S.C. § 9038(b)(2) does not specify a particular method for calculating the amount of money to be repaid, the *Kennedy* court concluded that Congress granted the Commission discretion to devise a method for calculating this repayment amount.

The Commission exercised this discretion when it adopted the repayment ratio in 11 C.F.R. § 9038.2(b)(2)(iii). The Committee argues, however, that 11 C.F.R. § 9038.2(b) purportedly establishes a two-step procedure that the Commission must follow but has failed to follow in this case: first, the Commission must make a determination that matching payments were in fact used as a source of funds inappropriately pursuant to 11 C.F.R. § 9038.2(b)(i), and, second, once that determination has been made, the Commission must calculate the amount of repayment to be sought using the repayment ratio set forth in 11 C.F.R. § 9038.2(b)(2)(iii). *See* Attachment 3. By proceeding straight to the second step, the Committee argues that the Commission has

neglected its predicate responsibility to make a determination that matching funds were in fact used – a determination that it presumably could not make in the Committee's view because the Committee physically separated the private and public funds in separate accounts.

Contrary to the Committee's characterization, both of these steps are accounted for in the pro rata formula adopted by the Commission. The Commission's regulations, particularly the Commission's definition of "total deposits" as that term is to be construed when applying the repayment ratio formula, presume that all accounts of a candidate constitute a single, mixed pool of monies containing both private and public funds. Therefore, under the Commission's regulations, any spending on non-qualified campaign expenses necessarily means that matching funds were spent on non-qualified campaign expenses. The ratio represents a portion of "the total amount determined to have been used for non-qualified campaign expenses." 11 C.F.R. § 9038.2(b)(2)(iii). This "total amount" necessarily includes both public and private primary funds used for such expenses in all of the candidate's accounts. *See, e.g.*, 11 C.F.R. § 9034.4(a) The repayment ratio is applied collectively to a publicly-funded committee's total deposits up to the point at which public funds are no longer deemed to be in the accounts. 11 C.F.R. § 9038.2(b)(2)(iii)(B).

A. THE COMMISSION HAS CONSISTENTLY APPLIED A "MIXED POOL" ANALYSIS WHEN DETERMINING A COMMITTEE'S REPAYMENT OBLIGATION FOR NON-QUALIFIED CAMPAIGN EXPENSES

The Commission has consistently rejected arguments similar to the Committee's in previous audits of publicly-funded committees and has concluded that a publicly-funded committee's segregation of its public funds from its private funds has no impact in the application

of the pro-rata formula and calculation of the repayment obligation.[1] *See* Final Report of the Audit Division on LaRouche Democratic Campaign (approved May 17, 1990), at 8 (rejecting committee's argument that no repayment required because segregated federal funds account not used);[2] Final Report of the Audit Division on Albert Gore, Jr. for President Committee, Inc. (approved July 13, 1989), at 11 (separate bank account for deposit of matching funds would still require repayment); Final Report of the Audit Division on The Tsongas Committee, Inc. (approved Dec. 16, 1994), at 65-66 (rejecting argument that *Kennedy* decision disallows repayment determination where specific account used did not contain matching funds);[3] Statement of

---

[1] In 1987, the Commission voted to decline to seek repayment, and to exempt from the operation of the "mixed pool" principle, the private funds used in connection with a candidate's continuation of his campaign after having become ineligible to receive public funds because of a failure to receive 10 percent or more of the vote in two consecutive primary elections. *See Proposed Statement of Reasons In the Matter of Lyndon H. LaRouche; The LaRouche Campaign*, at 17, *Certification In the Matter of Final Repayment Determination and Draft Statement of Reasons - The LaRouche Campaign, Agenda Document # 87-87* (Aug. 20, 1987) (approving Draft Statement of Reasons by vote of 5-0). *See also* 11 C.F.R. § 9033.5(b) (failure to obtain 10 percent of vote in two consecutive primary elections renders candidate ineligible). The Commission specifically addressed this issue and cited *Kennedy for President* when it revised its regulations to allow candidates to use private funds to continue to campaign after DOI. *See Explanation and Justification for Final Rule on Public Financing of Presidential Primary and General Election Candidates*, 56 Fed. Reg. 35898, 35905 (July 29, 1991). 11 C.F.R. § 9034.4(a)(3)(ii). This is consistent with the Commission's mixed pool theory because a candidate who continues to campaign after DOI is no longer eligible for public funds for the purpose of campaigning. Those candidates, therefore, can only receive and use private contributions for that purpose. 11 C.F.R. § 9034.4(a)(3)(ii).

[2] The LaRouche committee sought administrative review of the portion of the Commission's repayment determination finding that the LaRouche committee received matching funds that, when combined with its private contributions, exceeded the amount necessary to retire its debts. *See Proposed Final Repayment Determination and Statement of Reasons - Lyndon H. LaRouche, Jr. and the LaRouche Democratic Campaign (LRA #326)* ("SOR") (Sept. 3, 1992), *Certification In the Matter of Proposed Final Repayment Determination and Statement of Reasons - Lyndon H. LaRouche Democratic Campaign (LRA # 326)*, Agenda Document # 92-119 (Sept. 18, 1992) (approving SOR). *See also* 26 U.S.C.§ 9038(b)(1) (receiving matching funds exceeding entitlement). The Commission noted that the LaRouche committee through its actions revealed that it considered its private and public funds commingled despite their relegation to separate bank accounts. *Proposed Final Repayment Determination and Statement of Reasons - Lyndon H. LaRouche, Jr. and the La Rouche Democratic Campaign, supra*, at 20 ("[s]ubmitting the funds for matching renders all of the money in the [LaRouche committee's] accounts a part of the same pool."). Given the context discussed, the Commission does not regard this last statement as placing its general position regarding presumptive commingling of private and public funds into question. Rather, the Commission's statements here were made in the context of evaluating whether the LaRouche committee, in the context of the continuing to campaign regime, should be deemed eligible to receive the benefit of the exception to the presumption of commingling that the Commission created in its August 20, 1987 Statement of Reasons, discussed in footnote 3, *supra*.

[3] In the Tsongas audit, the Commission ultimately declined to seek repayment with respect to amounts disbursed from a separate account, known as the "Andover account," opened by a principal fundraiser, Mr. Nicholas

Reasons, Senator Robert Dole and the Dole for President Committee, Inc. (approved Feb. 6, 1992), at 24-25 (rejecting argument that expenditures of third party on behalf of committee causing committee to exceed spending limitations not subject to repayment because third party never received public funds, and stating "[o]rdinarily, federal matching funds and private contributions are commingled in a committee's accounts"). Thus, the Commission has consistently followed the principle that a committee's public funds and private primary contributions are commingled, even if a committee has more than one account, and applied the pro rata formula to "all deposits to all candidate accounts" in audits of publicly-financed committees, just as it has applied it here to the Johnson Committee. 11 C.F.R. § 9038.3(c)(2).

The Commission has also consistently applied the principle that the public funds and private contributions are treated as being in a mixed pool in and across all accounts in similar contexts under the Matching Payment Act. In revising 11 C.F.R. § 9038.2(b)(2), the Commission could have chosen to segregate private contributions received by a publicly-funded committee after the candidate's DOI and to exclude those private contributions from the repayment ratio calculation. *Explanation and Justification for Final Rule on Public Financing of Presidential Primary and General Election Candidates*, 60 Fed. Reg. 31854, 31870 (June 16, 1995). Instead, the Commission elected to capture the private contributions received after the DOI as a mixed pool

---

Rizzo, without the committee's knowledge. *See Certification In the Matter of The Tsongas Committee, Inc. – Report of the Audit Division*, Agenda Document # 94-128 (Dec. 8, 1994) (voting to revise repayment recommendation "relating to the amounts raised and spent by Mr. Rizzo"). *See also* Final Report of the Audit Division on The Tsongas Committee, Inc. (approved Dec. 16, 1994), at 66. The Commission's discussion of the audit indicates that it deemed the audit to present a unique situation warranting departure from the application of the mixed pool theory, but was not a rejection of the theory itself. Specifically Mr. Rizzo had embezzled the committee's funds; the benefit of the disbursements from the Andover account had accrued solely to Mr. Rizzo and not to the committee; and the Andover account did not contain public funds, nor were the funds in the account used to obtain public funds. *See, e.g.* Audio Recording: Commission Open Meeting on the Matter of the Tsongas Committee, Inc. – Report of the Audit Division, Agenda Doc. # 94-128 (Dec. 8, 1994) ("Audio Recording"), Audio File # 2, at 1:26:11-1:26:35; at 37:45-42:10; at 49:14-54:34.

ATTACHMENT 1
Page 8 of 15

with public funds so as to "more accurately reflect[] the mix of public funds and private contributions received during the campaign, particularly for a candidate who receives significant amounts of private contributions after his or her [DOI]. By taking private contributions received within 90 days of DOI into account when determining a candidate's repayment ratio, the new rule will likely reduce the ratio, thereby reducing the amount of the candidate's repayment." *Id.*

Similarly, the Commission elected not to separate public funds and private contributions based on the accounts holding those funds in the context of general election public financing.[6] When a publicly-financed candidate in the general election accepts private contributions, the committee may opt to deposit them into separate accounts, or may deposit both types of funds into the same account. 11 C.F.R. §§ 9003.3(b)(2), (c)(3), 9005.2(c). Although the regulations explicitly allow for the possibility that a publicly-funded committee will physically segregate its public from its private funds, the repayment ratio still applies to all of the accounts. *See* 11 C.F.R. § 9007.2(b)(2)(iii).

If the Commission did not consider "all deposits to all candidate accounts" as adopted in its regulation, but rather merely examined which account disbursed public funds when accounts are separated, as the Committee argues, such an approach, although simple, would be ripe for abuse. The Committee's interpretation would permit publicly-funded committees generally to avoid incurring repayment obligations by simply resorting to the expediency of depositing their public funds and their private funds in separate accounts and only spending private contributions on

---

[6] While candidates are generally not permitted to accept private contributions in this context, 26 U.S.C. § 9003(b)(2), there are two exceptions to this rule. First, major party candidates receiving public funds may raise private contributions to the extent necessary to compensate for a deficiency in public funds. 11 C.F.R. § 9003.3(b)(1). Second, minor and new party presidential candidates may supplement their receipt of public funds with private contributions to defray qualified campaign expenses exceeding the amount of public funds disbursed by the government fund. 11 C.F.R. § 9003.3(c).

non-qualified campaign expenses. The United States Court of Appeals has already rejected the approach that all nonqualified campaign expenses are paid from public funds. *Kennedy for President Committee v. Federal Election Commission*, 734 F.2d at 1559-60. Similarly, the Commission, by adopting the mixed-pool theory, has consistently rejected the approach that all non-qualified campaign expenses are paid from private contributions.[7]

B. THE APPLICATION OF THE REPAYMENT RATIO TO ALL OF THE CANDIDATE'S PRIMARY FUNDS DEPOSITS IN BOTH ACCOUNTS IS CONSISTENT WITH THE MATCHING PAYMENT ACT AND WITH THE *KENNEDY* DECISION.

The Commission's interpretation of the Matching Payment Act is consistent with the Act's requirement of repayment only of public funds that were used to pay for non-qualified campaign expenses. *See* 26 U.S.C. §§ 9038(b)(2) (Commission authorized to seek repayment of funds paid to candidate from matching payment account used to defray expenses other than qualified campaign expenses); 9032(5) ("matching payment account" means the Presidential Primary Matching Payment Account established under section 9037(a)). *See also Kennedy for President Committee v. Federal Election Commission*, 734 F.2d 1558, 1561 (D.C. Cir. 1984) (section 9038(b)(2) limits repayment determination to the amount of public funds spent on non-qualified campaign expenses).

Congress has, in fact, already prescribed the use of a repayment ratio as the means to determine the amount that a publicly-funded campaign must repay to the U.S. Treasury in cases where the publicly-funded committee completes the campaign with surplus funds. *See* 26 U.S.C. § 9038(b)(3). This provision directs the Commission to require repayment of "*that portion of any unexpended balance remaining in the candidate's accounts which bears the same ratio to the total*

---

[7] The Commission's regulations also forbid the use of private primary contributions to defray non-qualified campaign expenses. 11 C.F.R. § 9034.4(a)(1).

ATTACHMENT 1
Page 10 of 15

unexpended balance as the total amount received from the matching payment account bears to the total of all deposits made into the candidate's accounts." *Id.* (emphasis added). The Commission's implementation of this command in 11 C.F.R. 9038.3(c) uses the same definition of "total deposits" as does the repayment ratio for non-qualified campaign expenses. *See* 11 C.F.R. §§ 9038.2(b)(2)(iii)(A), 9038.3(c)(1), (2).

In exercising the discretion afforded it by Congress and confirmed in the *Kennedy* decision[8] to devise a method for computing a publicly-funded candidate's repayment obligation in the event that the candidate spends public funds on non-qualified campaign expenses, *see* 26 U.S.C. § 9038(b)(2), the Commission did not invent a whole new approach, but rather adopted the same method that Congress had already mandated for the repayment of public funds in the event of a surplus under 26 U.S.C. § 9038(b)(3). *See Notice of Proposed Rulemaking on Repayments by Publicly Financed Presidential Candidates*, 49 Fed. Reg. 26596 (June 28, 1984) ("In addition, the proposed formula would essentially adopt the pro-rata approach found in 26 U.S.C. [§] 9038(b)(3), concerning repayment of surplus funds").

The Committee nevertheless argues that the *Kennedy* court would not endorse the application of the pro rata formula here, where the private and public funds are separated, as reasonable. Attachment 2. It cites material from the *Kennedy* decision criticizing the Commission's rationale for its previous regulation, which required 100 percent repayment of all primary funds spent on non-qualified campaign expenses, without regard to the distinction

---

[8] There is some indication in the *Kennedy* dissenting opinion that the question of the traceability of the use of public funds may have been an issue in the litigation. *See Kennedy for President*, 734 F.2d at 1567 (Starr, J. dissenting) ("Both the Commission and the Committee acknowledge that the commingling of private and federal funds precludes tracing to determine which federal funds were used for unqualified expenditures"). There is no indication, however, that the majority's endorsement of a ratio approach was based on the physical commingling of funds.

between private and public funds, to support this proposition. *See Kennedy*, 734 F.2d at 1564-65, n. 8-10. Attachment 2. However, as noted above, in each of these citations, the *Kennedy* court was addressing the propriety of adopting a 100 percent repayment formula. The *Kennedy* court at the same time indicated that the adoption of a pro rata formula in lieu of a 100 percent repayment formula would be the better course given these criticisms. *See, e.g., Kennedy*, 734 F.2d at 1564, n. 8 ("We find it considerably difficult to understand, then, why an expenditure, paid out of a pool of funds at least half of which was comprised of *private* money, should be deemed to have been comprised solely of *federal* money) (emphasis in original); *Kennedy*, at 1564 ("Of course, an unqualified expenditure, like any other expenditure, will reduce the campaign's overall available funds, and thus cause more federal monies to be spent than otherwise would have been spent. The relevant question, however, is *how much* extra federal money be spent as a result of the unqualified expenditure?"); *Kennedy*, at 1565 ("Accordingly, insofar as the FEC's repayment formula for unqualified expenditures looks to the "net result" of the unqualified expenditures, [citation omitted] it appears that a *pro rata* formula, such as the one proposed by the Committee, would be reasonable."); *Kennedy*, at 1565, n.10 ("Therefore, the FEC's rationale would still justify at most a *pro rata* repayment formula, insofar as the formula looks to the overall "net result" of the unqualified spending [citation omitted]").

Thus, the Commission concludes that its use of the repayment formula of 11 C.F.R. § 9038.2(b)(2)(iii) to calculate Johnson's repayment obligation is reasonable, is consistent with the command of the Matching Payment Act, and does not transgress the limitations on the Commission's discretion to seek repayment identified by the *Kennedy* court.

C. THE COMMITTEE'S FAILURE TO CHANGE THE WORDING OF ITS CONTRIBUTION SOLICITATIONS, EVEN IF INADVERTENT, CANNOT EXEMPT IT WHOLLY OR PARTIALLY FROM ITS REPAYMENT OBLIGATION

Contrary to the Committee's argument, the Committee's failure to alter its contribution solicitation language in accordance with its intent does not exempt Johnson from his repayment obligation. The Committee included language in its solicitations of contributions that had the effect of designating portions of each contribution toward the primary and the general elections, respectively.[9] Throughout both election periods, this language indicated that the first $2,500 of each contribution would be considered as designated for the primary election. However, the Committee contends that it had intended to change this language so that only the first $250 of each contribution would be considered designated toward the primary election, and that during the election periods it acted in accordance with this understanding. *See* Statement of Reasons in Support of Final Determination of Entitlement in the Matter of Governor Gary Johnson (LRA 905) (Nov. 14, 2013); Memorandum from Audit Division to the Commission on Audit Division Recommendation Memorandum on Gary Johnson 2012, Inc., at 2 (June 4, 2015).

The Committee argues that had it not committed this error, it would not have used its primary funds to defray general election expenses. This argument focuses on the amount of nonqualified campaign expenses. The Committee argues that if it applied the designation of only allowing the first $250 to be for the primary election, then it would have had more general election

---

[9] Commission regulations allow, and, indeed, encourage, contributors to designate their contributions for specific elections, and one way that a contributor may designate his or her contribution is to submit it along with a writing, signed by the contributor, which clearly indicates the particular election for which the contribution is made. 11 C.F.R. § 110.1(b)(4)(ii). This requirement is fulfilled if the contributor signs a statement providing for the designation of the contribution supplied by the recipient committee. *Explanation and Justification for Final Rule on Contribution and Expenditure Limitations and Prohibitions[,] Contributions by Persons and Multicandidate Political Committees*, 52 Fed. Reg. 760, 763 (Jan. 9, 1987).

funds to spend on general election expenses. Thus, there would have been less primary election funds used to defray general election expenses and there would be less nonqualified campaign expenses. The Committee argues, therefore, that the repayment determination, grounded as it was upon this unintentional oversight, represents a disproportionate and punitive response to this purported error.

The Commission disagrees. The Commission's repayment determination is based strictly upon its application of the repayment ratio in 11 C.F.R. § 9038.2(b)(2)(iii) to the facts of the case. It is not intended, nor does it operate, as punishment. A repayment determination made under the auspices of the Presidential Primary Matching Payment Account Act is not considered to involve a violation of law, and sanctions would only be appropriate if the Commission were to find, as it has not in this case, that the Committee willfully and knowingly violated the qualified spending limitation. *See John Glenn Presidential Committee, Inc. v. Federal Election Commission*, 822 F.2d 1097, 1100 (D.C. Cir. 1987); *Reagan Bush Committee v. Federal Election Commission*, 525 F.Supp. 1330, 1337 (D.D.C. 1981). *See also Larouche v. Federal Election Commission*, 28 F.3d 137, 142 (D.C. Cir. 1994) ("... the request that [petitioners] repay the post-July 22, 1988, matching funds was not a sanction [provided by FECA or by chapter 95 or chapter 96 of title 26].").

Although the Committee may have erred in neglecting to change the language of its designations in accordance with its intentions, the Commission is obliged by its regulations to categorize the Committee's contributions in accordance with the evidence of record, which consists of signed contributor statements endorsing the designation formula as actually written. 11 C.F.R. § 110.1(b)(4)(ii). It is the *contributors'* declared intentions respecting the designation of their contributions to which the Commission must attend, rather than the Committee's

undeclared intentions, and the fact that the contributors' signatures appear on writings containing the rule that the first $2,500 of each contribution is considered a primary election contribution is the best evidence of the contributors' intentions.[10] *See Explanation and Justification for Final Rule on Contribution and Expenditure Limitations and Prohibitions[,]Contributions by Persons and Multicandidate Political Committees*, 52 Fed. Reg. 760, 761 (Jan. 9, 1987) ("Written designations ensure that the contributor's intent is clearly conveyed to the recipient candidate or committee.").

IV. CONCLUSION

The Commission determines that, within 30 days of service of this Repayment Determination After Administrative Review, Gary Johnson and Gary Johnson 2012, Inc. must repay $332,191 to the United States Treasury for matching funds spent on non-qualified campaign expenses. 26 U.S.C. § 9038(b)(2); 11 C.F.R. § 9038.2(b)(2)(iii).

ATTACHMENTS

1. Final Audit Report of the Commission, approved July 6, 2015
2. Committee's Request for Administrative Review, dated Sept. 4, 2015
3. Committee's Post-Hearing Supplementary Comments, dated Nov. 9, 2015

[10] The Commission notes as well that while the Committee deposited most of the contributions it received after the DOI into its general election account, some of the funds that the Committee characterized as general election funds, according to its understanding that amounts after the first $250 of each contribution were general election contributions, were in fact used for primary election expenses.

ATTACHMENT 1
Page 15 of 15

April 25, 2015

SENT VIA EMAIL AND FIRST CLASS MAIL

Federal Election Commission
999 E Street NW
Washington, DC 20463
audit@fec.gov

Dear Commissioners:

Pursuant to 11 C.F.R. § 9038.5(a), I request a rehearing with respect to Gary Johnson 2012, Inc.'s ("GJ2012" or "Committee") repayment obligation. Pursuant to § 9038.2(d)(1), I also request a 90-day extension of time to repay the $1,250 found to be owed that is not being disputed.[1]

I. RELIEF DESIRED

The Committee seeks an abatement of the repayment obligation, or a finding that the Federal Election Campaign Act ("FECA") and the holding in *Kennedy for President Committee v. FEC*, 734 F.2d 1558 (D.C. Cir. 1984) do not permit the Commission to treat a committee's public matching funds and private primary contributions as commingled, when such funds are in fact segregated in separate accounts, and a recalculation of the repayment obligation.

II. LEGAL AND FACTUAL BASIS IN SUPPORT

A. Scrivener's Error and Contributor Intent

The Committee's oversight in not updating the disclaimer language on its contribution page after the primary election amounted to nothing more than a scrivener's error, and should be treated accordingly. When a written agreement does not properly reflect the intent of the parties due to a drafting error, the contract may be reformed to bring its language in line with that intent. 27 *Williston on Contracts* § 70:93 (4th ed.). In the instant case, the Commission should retroactively read the post-primary disclaimer language to properly reflect what was both the Committee's and the contributors' intent.

The Committee's intent was to allocate the first $250 of all contributions to the primary election, and any remaining amount, up to $2,500, to the general election. This has been extensively discussed throughout this proceeding, and never disputed by the Commission. As to the contributors who actually made the private contributions at issue, the Committee agrees that it is their intentions, and not the Committee's, that matters. The Commission argues that the disclaimer as-written is the best evidence of how the contributors intended to designate their contributions, Statement of Reasons at 14-15, but this is clearly incorrect for a number of reasons.

[1] Pursuant to § 9038.5(a)(2), the timely filing of this petition suspends repayment of the $332,191 being disputed until the Commission has acted on the petition. However, since the Committee lacks sufficient funds to repay even the much smaller amount properly due, it is separately requesting an extension of time for that amount.

First, and most plainly, is that contributors do not read disclaimers. The allocation formula, along with the other "fine print" on the Committee's contribution page, was skimmed over like so much boilerplate legalese – which it was. The contributors were on that page in order to support a candidate that they liked, not to read about the minutiae of campaign finance law or make designation decisions between elections. Not a single contributor would have cared what the disclaimer said if they had read it; whether their contribution was for the general instead of the primary matters about as much to the average contributor as whether their contribution is used to pay for campaign signs instead of coffee creamer. Contributors know that candidates need money for a wide variety of campaign activities, and contribute to the campaign overall. If paying for coffee creamer would be more helpful than paying for campaign signs, then that is how the contributors would want the campaign to use their contributions, but in general they defer entirely to the committees they support to decide how best to maximize whatever contribution they can make.

Further, contributors were not given any option to change how their contributions were designated. There were no sliders to adjust or box to fill in with the contributor's preferred designation; the only options were to contribute or not to contribute. Only the Committee had the ability to change the allocation formula given on the page. Indeed, this entire repayment issue came about as a result of inaction by the Committee, not because of any act or omission on the part of the contributors. If anything, the disclaimer as-written is at most reflective of what the Committee's intentions were, and, as established above, even that is not the case.

The Committee can appreciate the difficult position that this puts the Commission in, not having any clear indicator of contributor intent as to designation, but instead of relying on clearly unreliable indicators, it should look at the two clear indicators that are available: the contributors' desire to support the candidate and the specific way in which the Committee treated and used those funds. Designating the first $2,500 to the primary election is clearly not in the best interest of the candidate in this case, so ascribing that intent to contributors requires a powerful justification – one that is clearly lacking here. In the end, the Commission's decision may end up working more harm against the contributors than against the Committee.

B. Lack of Funds

A more practical consideration, and one that the Commission has not yet addressed, is that the Committee has no funds available with which to make a repayment. As seen on the Committee's most recent periodic report, the Committee had a negative cash on hand balance as of March 31, 2016, as a result of monthly bank fees overdrawing the account. Though the Committee anticipates securing sufficient contributions to cover that shortfall before the next report, the amount needed is orders of magnitude less than what would be necessary to cover the full repayment amount, as it is currently calculated.

It is not reasonable to expect the Committee to be able to raise funds in that amount within the time allotted for repayment, even accounting for the extensions available. In fact, the Committee has such poor prospects of raising funds it is doubtful it could ever obtain the necessary amount.

In light of this reality, it would seem imprudent of the Commission to spend limited administrative resources pursuing this matter. The Commission, to the extent it wishes to affirm precedent for its argument in this matter, could both make the finding and still abate the penalty, which in all likelihood could never be paid.

C. Abuse of System

Finally, though the Commission argues that the Committee's proposed method – treating federal matching funds and private primary contributions as separate when they are in fact maintained in separate bank accounts – would be "ripe for abuse," Statement of Reasons at 9-10, the fact remains that the Committee only ever acted in a good faith belief that its allocation and use of post-primary contributions was lawful. Even if the Committee's method would be open to abuse – a notion which the Committee strongly rejects – that does not permit the Commission to ignore the facts of the case that no abuse in fact occurred. The Committee is simply asking that the Commission consider the totality of the circumstances in what is a peculiar situation unlikely to reoccur.

III. QUESTIONS NOT RAISED DURING ORIGINAL HEARING

The questions of law and fact raised here were not and could not have been raised during the original repayment dispute because they are directly responsive to the arguments presented in the Commission's Statement of Reasons, not made available to the Committee until April 5, 2016. Further, the Committee's financial position and its assessment of its fundraising prospects have changed since the original hearing, presenting novel considerations relevant to the case.

Sincerely,
/s/
Dan Backer
(202) 210-5431 Direct
dbacker@dbcapitolstrategies.com

CC: jblume@fec.gov
lholloway@fec.gov

DB CAPITOL STRATEGIES

PAC • CAMPAIGN • NON-PROFIT • POLITICAL LAW

April 14, 2015

SENT VIA EMAIL AND FIRST CLASS MAIL
Federal Election Commission
Audit Division
Mr. Marty Favin
999 E Street, NW
Washington, DC 20463
Audit@fec.gov

RE: Draft Final Audit Report on Gary Johnson 2012 Inc

Dear Mr. Favin:

I am writing on behalf of my client, Gary Johnson 2012 Inc ("GJ2012"), in response to the Draft Final Audit Report of the Audit Division ("DFAR").

I. Request for a Hearing before the Commission

GJ2012 requests a hearing to discuss its responses to Findings 1-5 in the DFAR, and to the comments on those same Findings in the March 18, 2015 Office of General Counsel memo ("OGC Memo").

II. Finding 1. Net Outstanding Campaign Obligations

GJ2012 accepts the Audit Division finding that GJ2012 did not receive matching fund payments in excess of its entitlement. Any changes to the Statement of Net Outstanding Campaign Obligations ("NOCO") to account for debt settlement or asset valuation can only be properly addressed if and when such actions are actually taken.

The Audit Division requested copies of invoices from this firm to corroborate the expenses added to the NOCO. Those fees listed are estimates of total cost for our services in relation to the audit, and, given the unpredictable nature of that process, will not be invoiced for until the work has been completed. Once GJ2012 has been invoiced for the work, copies of the invoices will be provided.

III. Finding 2. Amounts Owed to the U.S. Treasury

It should be noted from the outset that during the campaign, GJ2012 acted on a good faith basis that contributions received were subject to its understanding of what the disclaimer should have been had it been properly updated, and that were this the case its intended allocation formula for contributions received after the candidate's date of ineligibility ("DOI"), with the first $250 of each contribution being designated to the primary, was permissible. As the *Kennedy* court noted, "the violation of campaign spending limitations is often, if not usually, inadvertent." *Kennedy for President Committee v. FEC*, 734 F.2d 1558, 1560 (D.C. Cir. 1984). But for the failure to update the disclaimer on the campaign's donation page, this repayment issue would never have arisen, because the campaign acted in a manner consistent with what it intended the disclaimer to be, notionally the optimal format of such disclaimer. While the Commission has already ruled on the

203 South Union Street • Suite 300
Alexandria, VA 22314
202-210-5431(office) 202-478-0750(fax)
www.DBCapitolStrategies.com

ATTACHMENT 4
Page 1 of 4

impact of the failure to change the disclaimer, it does not change that the outcome was an unintentional one, and that the Committee acted in good faith – if incorrectly – despite the error, and that its lack of intent is precisely the kind of inadvertent error the *Kennedy* court noted.

It is improper to base the committee's repayment obligation on the repayment ratio of 11 C.F.R. § 9038.2(b)(2)(iii), which is not a "reasonable method for determining the extent to which matching funds, rather than private contributions, were used for unqualified purposes." *Id.* at 1563. The OGC Memo's reliance on *Kennedy* to support the Audit Division's application of the repayment ratio seems misplaced, as that case clearly supports the committee's position on this issue.

While a committee is prohibited from spending both matching funds and comingled primary funds on non-qualifying expenses, the penalty is limited to repayment of the amount of matching funds that can be reasonably determined to have been spent on such expenses. *Id.* at 1562. As the court recognized, 26 U.S.C. § 9038(b)(2) "expressly limits the repayment obligation to . . . the amount of matching funds 'so used'"; "the statute plainly allows the Commission to take back only the amount of *federal funds* used for unqualified purpose." *Id.* at 1561, 1562 (emphasis in original).

The OGC Memo correctly notes that the *Kennedy* court left it to the Commission to decide on a method to determine the amount of matching funds used for non-qualifying purposes, but the court did impose limits on what that method could be – it must produce a reasonable estimation of the amount of matching funds spent on non-qualifying expense. *Id.* at 1563. The court stated that section 9038(b)(2) "delegates to the Commission the task of estimating the amount of federal funds, rather than private contributions, that were spent for unqualified purposes," and that the Commission had "the responsibility to make a reasonable determination that the repayment sum represents the matching funds used for unqualified purposes." *Id.* at 1562.

In *Kennedy*, a pro rata share of the total amount spent on non-qualifying expenses may well have been a reasonable estimate of the matching funds so spent, but that is not the case here. There, the matching funds were deposited into the same bank account as the funds used to pay for the non-qualifying expenses, but in the instant case, the matching funds were held in a separate account, and, at most, only a small fraction of the non-qualifying expenses were paid out it. The intentional segregation of funds was based on the Committee's belief that it operated under what was intended to be the correct disclaimer language, and consequently it is easy to determine that no federal funds were spent on non-qualifying campaign activity. Only by the disclaimer error, and artificial post-hac comingling of funds contained in separate accounts, does the Audit Division arrive at (notionally) additional funds being included in these calculations. Even if that is the case, it does not mean that actual federal funds were spent on non-qualifying campaign activity.

As the Audit Division's own findings indicate, matching funds were all deposited into GJ2012's primary election account, and the overwhelming majority of private contributions received post-DOI were deposited into the general account. *See* Calculation of unqualified expenses worksheet. GJ2012 considered these general contributions, and intended to spend them on general expenses. GJ2012 believed that its disclaimer had been updated, and operated on that assumption, treating contributions as general or primary based on the intended terms of the disclaimer. This detailed accounting resulted in the matching funds in the primary account only being used for qualified campaign expenses, and the Audit Division's own analysis supports this.

Of the total $1,199,701 that the Audit Division claims was spent on non-qualifying expenses, it identifies a total of $2,510.32 that was paid out of the primary account. Although GJ2012 maintains that even these amounts were not paid for with matching funds, this figure is the maximum possible amount of matching funds that could have been used to pay for non-qualifying expenses. The remaining $1.1 million in non-qualifying expenses was paid out of the general account, which none of the matching funds were ever deposited into.

As in *Kennedy*, the Commission is vastly overestimating the amount of matching funds that were spent on non-qualifying expenses, and, as in that case, its methodology must be rejected. The Audit Division's calculation of when matching funds were no longer in the account is fundamentally flawed, since those funds were only ever in the primary account, and their analysis uses both accounts. The repayment ratio therefore estimates in an incongruent manner GJ2012's repayment obligation from the activity of a bank account that never contained matching funds, and, as the *Kennedy* court said, the Commission's discretion in choosing a methodology of calculating repayment "does not legitimate such a clearly unreasonable formula as the one used by the FEC in this case." *Id.* (footnote omitted).

The OGC Memo states that the repayment ratio was intended to avoid forcing the Commission to conduct in-depth analyses of committee finances in order to determine the appropriate repayment obligation. Considering imitation on agency time and resources, that is certainly an admirable goal. However, that does not relieve the Commission of its obligation to reasonably estimate the amount of matching funds to be repaid, and should not prevent the committee from conducting its own analysis to show that its repayment obligation is lower than that calculated by whatever method the Commission uses. In this case, the Commission has already conducted a sufficiently in-depth analysis of GJ2012's finances to determine that the repayment ratio vastly overstates GJ2012's repayment obligation, and, having done so, it cannot willfully ignore those results.

Finally, with respect to the funds submitted for matching that were identified as being ineligible, GJ2012 has not found any indication that the funds were misattributed. The $1,250 total will be included in any amount repaid to the US Treasury.

IV. Finding 3. Use of General Election Contributions for Primary Election Expenses

GJ2012 urges the Commission to reconsider its arguments regarding the use of general election funds as an advance against matching funds.

V. Finding 4. Reporting of Debts and Obligations

The Audit division specifically found that the $300,000 contractual win bonus was a primary expense, and should have been paid from primary funds. Consequently, in order to comply with Commission directive here, NSON reallocated the $171,200 in payments from GJ2012 to NSON during the 30 days subsequent to the DOI (5/5/14 – 6/4/12) to what would have been the earlier invoices based on the reasonable preference of the time-limited win bonus over other pre-DOI expenses.. The remaining balance of the $300,000 win bonus would be a non-qualified campaign

expense and will be addressed through the ultimate debt settlement negotiation between NSON and GJ2012, subject to Commission approval.

VI. Finding 5. Extension of Credit by a Commercial Vendor

The Audit Division objects to redaction of the NSON contracts submitted with GJ2012's response to the Preliminary Audit Report. However, it would work an unreasonable burden on NSON to be forced to disclose its other clients – including being in violation of relevant contract or trade custom – in order to demonstrate the similarity of terms here, and neither the statute nor regulations require such. The client identity–redacted contracts clearly demonstrate that NSON was conducting its services in a manner consistent with its ordinary course of business for other clients.

With respect to NSON's regular invoicing for services it provided the committee, the Audit Division points to a small number of invoices out of a great many from the campaigns principle vendor that were invoiced late as evidence that NSON is not attempting to collect on its outstanding debts. Although some invoices were received "late" relative to the services performed, these are the exceptions rather than the rule. Moreover, it is not obviously outside the ordinary course of business for an enterprise to be sluggish in its own invoices, particularly where such a substantial number of invoices were issued. Mistakes happen in business, as in government, and it is patently unreasonably to draw the inference that this constitutes a pattern of intentional unlawful conduct.

The Audit Division notes that, other than the balance of its bank accounts, GJ2012 did not include any assets on the NOCO, but referred in its response to the Preliminary Audit Report to the possibility of settling its debts with NSON in exchange for certain committee assets. The assets referred to are currently intangible and not readily susceptible to easy valuation. For example, the use of the name, likeness, and/or signature of the candidate for fundraising, or a copy of the committee's mailing and email lists might be worth a great deal, but the time and resources required to convert these intangible assets into a tangible form with a readily identifiable fair market value is substantial, and the Committee must first resolve its audit matter to understand what resources and obligations it still has.

With respect to the remaining outstanding debt of GJ2012 to NSON, the parties have agreed to defer resolution of that matter until conclusion of the audit process. The outcome of the audit bears directly on the scope of committee assets – and potentially the amounts owed to NSON. Consequently, providing a comprehensive debt settlement plan to the Commission for its approval must necessarily wait until conclusion of the audit process for the parties to possess all materially relevant facts to such negotiation.

Sincerely,
/s/
Dan Backer
(202)-210-5431 Direct
dbacker@dbcapitolstrategies.com

CC: mfavin@fec.gov
creminsky@fec.gov

September 4, 2015

SENT VIA EMAIL AND FIRST CLASS MAIL
Federal Election Commission
Audit Division
Mr. Tom Hintermister
999 E Street NW
Washington, DC 20463
audit@fec.gov

RE: Repayment Determination for Gary Johnson 2012 Inc

Dear Mr. Hintermister:

Pursuant to 11 C.F.R. § 9038.2(c)(2), I am writing to dispute the repayment determination in the Commission's Final Audit Report ("FAR") on Gary Johnson 2012 Inc ("GJ2012" or "Committee").

I. Request for a Hearing Before the Commission

The Committee requests an opportunity to address the Commission to discuss the issues raised in this submission, and any others that may be relevant to the Committee's repayment obligation.

II. The Commission's Presumption of Commingling is Inconsistent with FECA and with the Holding in *Kennedy*

In the FAR, the Commission adopted the Audit Division's finding that $332,191 was repayable to the U.S. Treasury for federal matching funds spent on non-qualified campaign expenses. It arrived at this figure by applying its repayment ratio to Committee expenditures on such expenses from both of the Committee's back accounts. Since only one of the Committee's bank accounts ever contained federal matching funds, this methodology is not consistent with the Federal Election Campaign Act ("FECA"), or with *Kennedy for President Committee v. FEC*, 734 F.2d 1558 (D.C. Cir. 1984), and must be rejected.

A. The Court in *Kennedy* did not Hold that all Private Primary and Federal Matching Funds are Commingled as a Matter of Law

In *Kennedy*, the court held that the Commission has a duty to determine the amount of federal matching funds spent on non-qualified campaign expenses, and to limit any repayment obligation to that amount. *Kennedy*, 734 F.2d 1558. The court acknowledged that it may be difficult to determine precisely what amount of matching funds, as opposed to primary funds, was spent on non-qualified campaign expenses, and therefore left it to the Commission to choose a method to estimate that amount. *Id.* at 1563. However, the Commission's discretion in this matter is limited to those methods that produce a *reasonable* estimate of the amount. *Id.* Although the difficulty in determining the amount of matching funds improperly spent may be caused in part by the commingling of primary and matching funds, the court did not hold, as the Office of General Counsel ("OGC") concluded, in its March 18, 2015, memo ("DFAR Memo"), that all primary and

matching funds are considered commingled "as a matter of law." DFAR Memo at 2. This is not supported by the language of the opinion, and in fact clearly violates the court's express limitation of the Commission's discretion in choosing a method to estimate the amount of matching funds improperly spent. 734 F.2d at 1563.

In *Kennedy*, the court concerned itself with the specific facts of the case before it, and did not reach or even consider the issue of whether all primary funds and matching funds of all committees must always be deemed commingled. The court talks only about how the committee in that case, Kennedy for President Committee, handled its finances, and does not generalize the analysis to all committees that receive matching funds. *See* 734 F.2d at 1562, 1564, 1565 n.11. Indeed, it would have been entirely unreasonable of the court to do so, given the huge variety in how different committees manage their finances, and in how much information the Commission will have about those finances when conducting an audit. A repayment determination cannot be conducted using a one-size-fits-all methodology, with the Commission pre-determining the facts before knowing what they are. Rather, it must be a case-by-case analysis based on the facts as they are discovered and the information available to the Commission at the time.

In the instant case, documents create by Audit Division staff in the ordinary course of the audit – as opposed to an idiosyncratic and impracticable analysis that worried the court in *Kennedy* – clearly demonstrate that the federal matching funds that the Committee received were only ever kept in the Committee's primary account, and that only a maximum of $2,510 in non-qualified campaign expenses could possibly have been paid for with those matching funds. *See* FEC Calculation of Unqualified Expenses spreadsheet. This is information already available at no extra cost, and that can hardly be considered suspect, since it was Audit Division staff that prepared it. Nonetheless, the Commission has chosen to ignore it and rely instead on the statutorily unsupported presumption of commingling. The result is a determination that $332,191 in matching funds was improperly spent – which is simply factually erroneous – well over a hundred times as much as the FEC's own analysis says could actually have been spent.[1]

The Committee does not object to the Commission's use of the repayment ratio in determining a repayment obligation, but rather to the way that the ratio was improperly applied to both sets of Committee accounts, instead of only that set which actually contained federal matching funds and from which payments for non-qualified campaign expenses were paid. If matching funds had in fact been commingled with the re-designated primary funds (those originally segregated as general election contributions), then those primary funds should of course be included in the analysis. But if, as in the instant case, there is clear evidence that those funds were not commingled, then there is no reasonable option but to exclude them. The Commission cannot simply opt to ignore evidence that contradicts the results of its chosen method of estimation. Such a method can only be reasonable – and therefore consistent with the requirements of *Kennedy* – if it takes those, and all

[1] The Committee also notes that in its June 3, 2015 memo ("ADRM Memo"), OGC stated that the Commission has "continuously considered a publicly-funded committee's public and private funds to be commingled as a matter of law under the authority of the *Kennedy* decision." ADRM Memo at 3 n.3. This may well be the case, but simply the fact that the Commission has been consistent in its interpretation of *Kennedy* tells us nothing about the validity of that interpretation. If the Commission was wrong when it first interpreted the case – as we maintain it was – then it is just as wrong today when it repeats that interpretation.

other relevant facts into account. If the Commission refuses to do so in this case, its final determination cannot be considered valid.

B. The Commission's Presumption of Commingling is Unreasonable in Section 9038(b)(2) Repayment Cases

In its ADRM Memo, OGC raises a second argument for treating all primary and matching funds as commingled: if there were no such presumption in place, committees could simply segregate their matching funds in a separate account, spend primary funds on non-qualified campaign expenses, and escape a repayment obligation by claiming, accurately, that no matching funds were spent improperly. ADRM Memo at 6. This argument does not in and of itself justify a presumption of commingling. 26 U.S.C. § 9038(b) gives three bases for repayment of matching funds: (1) when a committee receives more matching funds than it was entitled to, (2) when a committee spends matching funds on non-qualified campaign expenses, and (3) when a committee is in a surplus position after the end of the matching funds period.

In the hypothetical OGC presents, it is true that a committee would be able to avoid repayment under section 9038(b)(2), but this is entirely proper. In *Kennedy*, the court made clear that the manner in which primary funds are spent has almost no bearing on a committee's obligations with regard to matching funds. 734 F.2d at 1564, nn.8-9. Section 9038(b)(2) provides for repayment when "any amount of any payment made to a candidate from ***the matching payment account*** was used for any purpose other than . . . [qualified campaign expenses]" (emphasis added). This section makes no mention of private primary funds, or how a committee may spend them. In *Kennedy*, the court explicitly stated that treating primary funds like matching funds in the way the Commission does would be "absurd and utterly dissolve[] the distinction, recognized by statute, between expenses paid out of matching funds and expenses paid out of private contributions." 734 F.2d at 1564 n.9 (internal citation omitted).

There is only one situation where section 9038 would provide for repayment when only primary funds were spent on non-qualified campaign expenses: if, but for the primary funds improperly spent, a committee would be in a surplus position, then repayment of some portion of matching funds would be available under section 9038(b)(3), and potentially 9038(b)(1) as well.

Though the Commission may consider this bad policy, the court in *Kennedy* held that repayments of matching funds are simply not appropriate where only private primary contributions were spent on non-qualified campaign expenses, except in the narrow case where the amount improperly spent exceeds the committee's deficit. 734 F.2d at 1564-65, n.10. The Commission is bound by the law as interpreted by the courts, and therefore must act consistently with this ruling.

In the instant case, the Commission has acknowledged that "the [Committee] did not receive matching fund payments in excess of [its] entitlement," FAR at 12 (footnote omitted), and also that the Committee is in a deficit position, even when accounting for the primary funds spent on non-qualified campaign expenses. *See* FAR at 10. Therefore, the Commission cannot pursue repayment under section 9038(b)(1) or (b)(3). The only alternative is 9038(b)(2), which is strictly limited to matching funds spent on non-qualified campaign expenses; the manner in which primary funds have been spent is therefore not relevant in determining the Committee's repayment

obligation. Any analysis which treats all Committee accounts as commingled runs directly counter to this imperative, and must be rejected.

Therefore, the Commission must apply the repayment ratio to only those accounts which actually contained matching funds and could have spent them on non-qualified campaign expenses – which we know in this case can only be the primary account. Doing otherwise could not result in a reasonable estimation of the amount of matching funds spent on non-qualified campaign expenses, as required by *Kennedy*.

C. The Commission's Analysis is Unreasonable in this Case given the Committee's Good Faith Attempt to Comply with its Intended Disclaimer

The Commission should reject the repayment determination adopted in the FAR because the highly particularized facts of the instant case clearly demonstrate that such a repayment obligation is a disproportionate penalty to what is, at root, a very minor error with respect to disclaimer language.

The instant case is not a situation like the one imagined by OGC, where a committee is secretly attempting to circumvent the restrictions on its use of matching funds by using primary funds in their place. If a committee did attempt to abuse the leeway that OGC fears section 9038(b)(2) offers, it would be easily identified during an audit. The Committee is not such an actor, and cannot equitably be treated like one.

The Committee only ever acted based on a good faith belief that the primary funds it was spending were actually general funds – a belief it maintained until after the election, when the Commission made the determination to the contrary. But for the oversight in updating its disclaimer language after the primary election, those funds would in fact have been general funds, and spending them in the way the Committee did would have been entirely proper and permissible.

Section 9038 was not intended as a remedy for violations of the disclaimer rules. Requiring the Committee to repay such a huge amount, with money it does not have, based on an ex post re-classification of campaign funds – and a repayment determination in violation of FECA and relevant case law – is a clearly unjust result that the Commission must reject.

III. Conclusion

The Commission's policy of treating all of a committee's private primary funds and federal matching funds as commingled, regardless of how the committee actually managed these funds, violates the Commission's statutory obligation to reasonably estimate the amount of matching funds – and matching funds alone – that were spent on non-qualified campaign expenses, as set forth in the *Kennedy* decision.

The Commission may not ignore clear evidence that primary and matching funds were not commingled, regardless of the policy or enforcement ends it seeks to achieve. Similarly, the Commission may not rely on section 9038(b)(2) as justification to presumptively treat all primary and matching funds as commingled, because even in the contrived scenario presented by OGC, an appropriate repayment obligation is only achieved by not treating all funds as commingled.

Finally, irrespective of the approach the Commission decides to adopt going forward, the repayment obligation in the FAR must be rejected due to the facts and circumstances in this case showing that such an amount is wholly disproportionate to the inadvertent Committee error – identified long after the campaign ended – that the Committee properly operated under.

Sincerely,
/s/
Joseph Lilly
(805) 279-3973 Direct
joe@dbcapitolstrategies.com

CC: mfavin@fec.gov
creminsky@fec.gov
lholloway@fec.gov

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of Governor Gary Johnson	)))	LRA # 905

STATEMENT OF REASONS IN SUPPORT OF FINAL DETERMINATION ON ENTITLEMENT

I. SUMMARY OF FINAL DETERMINATION

The Federal Election Commission ("Commission") made a final determination on November 14, 2013 that Governor Gary Johnson ("Candidate") is not entitled to receive any additional payments of public funds for the 2012 primary election ("Matching Funds") pursuant to 26 U.S.C. § 9034(a) of the Presidential Primary Matching Payment Account Act and 11 C.F.R. § 9034.5(g). *See generally* 26 U.S.C. §§ 9031-9042 ("Matching Payment Act"); 11 C.F.R. §§ 9031-9039 ("Matching Fund Regulations"). The Candidate is not entitled to receive any additional Matching Funds because the primary election contributions and the Matching Funds he has received are sufficient to pay all of his net outstanding campaign obligations as of his date of ineligibility, and, therefore, he and his principal campaign committee, Gary Johnson 2012 Inc ("Committee"), do not have net outstanding campaign obligations. *See* 11 C.F.R.§§ 9033.5, 9034.1(b), 9034.5.[1] *See also* Attachment 1. This Statement of Reasons sets forth the legal and factual basis for the Commission's final determination.

---

[1] Section 9034.5(g)(1) authorizes the Commission to temporarily suspend payments of Matching Funds "[i]f the Commission receives information indicating that substantial assets of the candidate's authorized committee(s) have been undervalued or not included in the statement of Net Outstanding Campaign Obligations ("NOCO Statement") or that the amount of outstanding campaign obligations has been otherwise overstated in relation to committee assets. . .". 11 C.F.R. § 9034.5(g)(1). The candidate may submit written legal or factual materials "to demonstrate that he or she has net outstanding campaign obligations that entitle the campaign to further matching payments." 11 C.F.R. § 9034.5(g)(2). The Commission has concluded that the Candidate and the Committee have not successfully demonstrated that the amount of the Committee's outstanding campaign obligations still exceeds the Committee's assets.

In sum, the Commission has determined, through its Audit staff, that as of December 18, 2012, the total amount of private contributions received for the primary election was $1,213,640.97;[2] the total amount of Matching Funds certified to the Committee was $632,016.75; and the amount of the Committee's outstanding obligations for the primary election was $1,661,789.90. *See* Attachment 1. Thus, the Committee has no remaining net outstanding campaign obligations and is not entitled to any further payment of Matching Funds.

The Committee takes issue with the Commission's calculation of the amount of private contributions received for the primary election. The Committee asserts that for contributions received after the Candidate was nominated by the Libertarian Party on May 5, 2012, it treated the first $250 of each contribution (not coincidentally, the maximum matchable amount) as made to retire primary election debt; the next $2,500 of each contribution as made in connection with the general election; and any additional amounts as again made to retire primary election debt.

The Commission rejects the Committee's arguments as to the proper allocation of contributions between the primary and general elections. As discussed in detail below, the designation rules promulgated under the Federal Election Campaign Act of 1971, as amended ("FECA"), require the Committee to follow the written designation of the

---

11 C.F.R. § 9034.5(g)(1).

[2] The revised NOCO Statement, prepared by the Commission's Audit staff, and attached to this Statement of Reasons as Attachment 1, reflects the Commission's most recent calculation of the Committee's net outstanding campaign obligations as of the Candidate's date of ineligibility. Attachment 1. The Audit staff's calculations on that document reflect contributions received through December 18, 2012, the date of the second to last Matching Funds payment the Committee received, because this was the last payment date on which the Committee was still entitled to receive Matching Funds. The details of the Audit staff's method of allocating contributions between the primary and the general elections, which resulted in the calculation of this number, are shown in Attachment 12.

contributors. In this case the Committee's own solicitations contained written designations which expressly stated that the Committee would treat the first $2,500, rather than the first $250, of a contribution as made for the primary election.

II. BACKGROUND

On April 24, 2013, the Commission made an initial determination to suspend the payment of Matching Funds to the Candidate pursuant to 26 U.S.C. § 9034(a) and 11 C.F.R. § 9034.5(g). *See* Attachment 2. The Commission concluded that the Candidate and the Committee no longer had net outstanding campaign obligations. *Id.* In particular, the Commission found that, given the combined sum of private contributions for the primary election and the public funds that the Committee received to pay the net outstanding campaign obligations, the Committee no longer had any outstanding debt. *Id.*

When the Candidate was nominated by the Libertarian Party as its presidential candidate at the Libertarian Party's nominating convention on May 5, 2012, he became ineligible to receive Matching Funds for the purpose of seeking the nomination.[3] Under an exception to the general rule, however, presidential candidates may continue to receive Matching Fund payments after the candidate's date of ineligibility, but only to the extent that they have net outstanding campaign obligations on the date(s) that they receive Matching Fund payments.[4] *See* 11 C.F.R. §§ 9033.5, 9034.1(b). As part of each of its

[3] For a candidate seeking the nomination of a party that nominates its candidate at a national convention, the date of nomination is considered, under Commission regulations, to mark the conclusion of that candidate's eligibility to continue to receive Matching Funds. *See* 26 U.S.C. § 9032(6) and 11 C.F.R. § 9032.6 (a) (defining the "matching payment period"). Thus, the Commission determined that the Candidate's date of ineligibility was May 5, 2012. *See* Attachment 7; 11 C.F.R. § 9033.5(c).

[4] A candidate's net outstanding campaign obligations equal the difference between the total of all outstanding obligations for qualified campaign expenses as of the candidate's date of ineligibility, plus

submissions for Matching Funds throughout 2012, the Committee provided NOCO Statements representing that it had sufficient net debts relating to the primary election. The Commission, therefore, continued to consider the Candidate's requests for Matching Funds and has certified $632,016.75 in Matching Funds payments to date.

The Commission discovered, however, through a mandatory audit of the Committee that the Committee has no remaining net outstanding campaign obligations related to the primary election. To be precise, the preliminary audit of the Committee's NOCO Statement found that the Committee had $301,207.31 more in total assets (here, private primary contributions plus matching payments) than was necessary to pay its net outstanding campaign obligations. The Committee, therefore, was no longer entitled to receive public funds. Accordingly, the Commission made the initial determination to suspend the payment of Matching Funds pursuant to 26 U.S.C. § 9034(a) and 11 C.F.R. § 9034.5(g).

The Commission notified the Candidate and the Committee of the initial determination by letter dated April 25, 2013, to which the Committee responded by letter and e-mail. Attachments 2 and 3. The Committee noted that it had not been privy to the auditors' data and requested an exit conference.[5] Attachment 4. In response, the Commission's Office of the General Counsel sent the Committee spreadsheets prepared by the auditors indicating how the auditors allocated the Committee's contributions in determining the possible amount received in excess of entitlement, and provided the

---

estimated necessary winding down costs, less the sum of cash on hand, capital assets, other assets, and receivables. 11 C.F.R. § 9034.5(a); *see also* Advisory Opinion 2000-12 (Bradley/McCain).

[5] The Commission's Office of General Counsel and the Audit Division denied the Committee's request to hold the exit conference while the suspension of public funds was pending. 11 C.F.R. § 9034.5(g).

Committee with an extension of time to file a substantive response. Attachment 5. *See* 11 C.F.R. § 9034.5(g)(2) (candidate has 15 business days from service of notice of initial determination to respond with factual and legal argument). These initial spreadsheets identified the total amount of primary contributions as $1,284,643.94.[6]

The Committee contends that the Commission characterized too many contributions as primary rather than general election contributions, thereby inflating or overstating the amount of primary contributions that the Committee had available to pay its net outstanding campaign obligations. Attachments 3 and 6. In particular, the Committee states that it initially deposited virtually all contributions it received following the date of ineligibility into its general election account and it then submitted the first $250 of each contribution for primary Matching Funds, using this amount to pay primary campaign debts. Attachment 6. The Committee asserts that it maintained funds submitted during the general election cycle[7] in the general election account and used these funds only to pay general election debt. *Id.* Finally, the Committee contends that amounts exceeding the $2,500 for the general election cycle were considered designated for the primary election and were also used to pay primary election debt. *Id.* The

---

[6] In its June 12, 2013 response, the Committee contends that the Commission's Audit staff "redesignated $1,307,199.50 from the general election account to the primary election account." Attachment 6. The spreadsheets sent to the Committee identify the amount of $1,307,199.50 as "total" rather than as "primary" contributions. The "primary contributions" total was identified as $1,284,643.94. Both of these numbers were incorrect, however, because they inadvertently included some contributions that the Commission's Audit Division should have actually classified as general election contributions as well as some primary election contributions that the Committee received before the date of ineligibility. In considering the Committee's response to the initial determination and the Commission's overall review of the record for the final determination, the Commission has adjusted the amount of primary contributions based on these and other changes detailed in Attachment 11.

[7] The Commission interprets this phrase used by the Committee ("The Committee next maintained any funds submitted during the general cycle in the general accounts and used them strictly for expenses related to that election." Attachment 6, page 3) to describe its practice to refer to amounts above the initial $250, but not exceeding $2,500, that the Committee construed as designated for the general election.

Committee asserts that it interpreted the designation language appearing on its own website and donor cards to authorize this practice,[8] and further, that it understood it could proceed this way as a result of discussions with the Commission's Audit staff that took place on September 28, 2012. *Id.*

As to the Committee's Internet solicitations, the Committee's website solicitation page included a series of proposed dollar amounts for donations; a series of fields inviting the donor to provide the number and expiration date of the credit card used, the donor's name, address, e-mail address, and telephone number, as well as occupation and employer information; and a check box that the contributor must mark for a contribution to be processed. The text accompanying the check box states that the contributor has "read the contribution rules below and certif[ies] that [he or she] compl[ies] with them." The contribution rules included the following statement: "Gary Johnson 2012 can accept contributions from an individual of up to $2,500 per federal election (the primary and general are separate elections). By submitting your contribution, you agree that the first $2,500 of a contribution will be designated for the 2012 primary election, and any additional amount, up to $2,500 will be designated for the 2012 general election."[9] *See* Attachment 8 (Attachment A to Attachment 8).

---

[8] Referring to the designation rule, the Committee also stated: "Further, and more saliently, that language was meant to signify that the "first" $2,500 obtained by the Committee, including donations prior to May 5, 2012 [i.e., the date of eligibility] and intended to apply to the primary, were in fact submitted to the primary election account. In other words, the Committee was explaining to the donors that they could indeed donate again for another $2,500, for a penultimate amount of $5,000 in 2012 (the first going to the primary and the second going to the general)." Attachment 6. *See also* Declaration of Kim Blanton, at 2 (in Attachment 6) ("Further, that language was meant to explain to the donors that they could indeed donate again for another $2500, for a penultimate amount of $5000 in 2012 (the first going to the primary and the second going to the general.)").

[9] The Commission will refer to this language hereafter as the Committee's "designation rule" or its "designation rule language."

The Committee's donor cards contained the identical designation rule language that appeared on its website solicitation page. The donor cards contained spaces for the contributors to fill out their names, addresses, e-mail addresses, telephone numbers, occupations, and employers, but they did not contain signature lines and were not signed.[10] *See* Attachment 9.

The Committee claims that it followed specific donor intent when that intent was made manifest and that there were also a few occasions when the specific language of the designation rule was not used. Attachment 3 (May 20 letter). The Committee also states that it automatically redesignated excessive primary election contributions to its general election account until donor intent with respect to those contributions could be verified.[11] *Id.*

III. FINAL DETERMINATION – THE CANDIDATE IS NOT ENTITLED TO RECEIVE ADDITIONAL MATCHING FUNDS BECAUSE THE PRIVATE CONTRIBUTIONS AT ISSUE WERE RECEIVED FOR THE PURPOSE OF INFLUENCING THE PRIMARY ELECTION

The Commission has considered the Candidate's response to the initial determination and makes a final determination that the Candidate is not entitled to

---

[10] This description applies to the vast majority of donor cards under analysis. A very small number of donor cards contained different language, however. One type of donor card, which also contained the signatures of contributors, states: "I designate my contribution(s) to Gary Johnson for President, to be used towards 2012 primary election debt retirement." The Commission followed the contributors' designations and allocated these contributions to the primary election. Another variety of donor card states: "Gary Johnson can accept contributions from an individual of up to $2,500 per." It appears that the succeeding words were omitted during copying as part of the Committee's submission process, and was likely intended to be "election" or omitted the entirety of the designation rule cited above. Given the uncertainty of these designations, the Commission treated these contributions as undesignated,, and the Commission allocated contributions accompanying these donor cards to the general election. 11 C.F.R. § 110.1(b)(2)(ii).

[11] The Committee requests the opportunity to seek clarification from the donors as to their intent to the extent that their intent for contributions following the date of ineligibility is not clear. As discussed below, the Commission does not consider it necessary to clarify donor intention. *See, infra,* page 12.

receive any additional payments of Matching Funds for the primary election in 2012 because he no longer has net outstanding campaign obligations arising from that primary election.[12] *See* 11 C.F.R. §§ 9033.5, 9034.1(b). Specifically, the amount of private contributions the Candidate raised for the primary election, combined with the amount of public Matching Fund payments received for the primary election, exceed his net outstanding campaign obligations arising from the primary election.

A. Internet Contributions and Donor Card Contributions Received After May 5, 2012, the Date of Ineligibility, Totaling $1,213,640.97 Were Designated for the Primary Election.

The Committee submitted the private contributions at issue for matching under the primary election financing system. To qualify for public funds under this system, "[t]he contribution shall be a gift of money made: By an individual; by a written instrument and *for the purpose of influencing the result of a primary election.*" 11 C.F.R. § 9034.2(a)(1) (emphasis added). *See also* 11 C.F.R. § 9034.3(i) (contributions made for any purpose other than to influence the result of a primary election are not matchable). Therefore, the contributions submitted for matching must be for the purpose of influencing the primary election. The question that the Commission must address is what portion of the private contributions at issue here was made for the purpose of influencing the primary, as opposed to the general, election.

---

[12] The Commission is aware that its audit of the Committee is still pending and that the exit conference has not yet taken place. *See* 11 C.F.R. § 9038.1(b)(2)(iii). The Committee will have the opportunity to respond to the Audit staff's findings (including preliminary calculations regarding repayments to the United States Treasury) both during the exit conference and after the preliminary audit report, 11 C.F.R. § 9038.1(c), has been issued. Thus, the Commission is necessarily basing this final determination upon what the Committee has submitted at this time and the Audit staff's preliminary findings in the context of this determination. The scope of this final determination is limited to the determination of the Committee's *future* entitlement to receive Matching Funds, and does not address whether the Committee has been overpaid public funds entitled to repayment.

The Commission's regulations prescribe the methods to follow for allocating contributions to either the primary or to the general election. When a contribution is designated in writing for a specific election, the committee must treat the contribution as so designated. 11 C.F.R. § 110.1(b)(2)(i). When a contribution is not specifically designated in writing, a committee must treat the contribution as made for the next election for the relevant Federal office occurring after the contribution is made. 11 C.F.R. § 110.1(b)(2)(ii).

Commission regulations provide for two ways in which a contribution may be considered "designated in writing" for the purpose of applying 11 C.F.R. § 110.1(b)(2)(i). First, the contribution may be made by a negotiable instrument that clearly indicates the particular election for which the contribution is made. 11 C.F.R. § 110.1(b)(4)(i). Second, the contribution may be accompanied by "a writing," signed by the contributor, which clearly indicates the particular election for which the contribution is made. 11 C.F.R. § 110.1(b)(4)(ii).

Following the contributors' written designation of the private contributions in this case, the Commission allocated the first $2,500 to the primary election and any remainder to the general election. As described in detail in Section II above, the contributions made through the Committee's website and with donor cards were accompanied by the following designation language: "Gary Johnson 2012 can accept contributions from an individual of up to $2,500 per federal election (the primary and general are separate elections). By submitting your contribution, you agree that the first $2,500 of a contribution will be designated for the 2012 primary election, and any additional amount, up to $2,500 will be designated for the 2012 general election."

Applying this clear designation language, the Commission allocated aggregate contributions of $2,500 or less from each contributor to the primary election, and allocated any portion of aggregate contributions above $2,500 to the general election. This allocation procedure followed the plain language of the Committee's own designation rule. By this method, the Commission concludes that the amount of primary contributions the Committee has received to date from the date of ineligibility is $1,213,640.97.[13] *See* Attachment 1. In arriving at this conclusion, the Commission applied 11 C.F.R. § 110.1(b)(4)(ii), under which contributions accompanying a signed writing that provides for a designation of the contributions are considered designated contributions. Section 110.1(b)(4)(ii) requires a "signed writing" to accompany the contributions to make their designations effective. The contributions received by the Committee by donor card and Internet were not signed by the contributors in the traditional sense. The donor cards do not have a signature line, and the Internet forms do not contain a space for electronic signatures. The Commission, nevertheless, concludes that both represent valid designations for the Committee's primary election.

With respect to the donor cards, the Commission has previously concluded that, so long as donor cards contain name and address information filled out by the contributors themselves, the signature requirement of section 110.1(b)(4)(ii) is satisfied. *See* Final Audit Report, Craig Romero for Congress, Inc. (Approved by Commission Oct.

---

[13] The Commission's current calculation of the amount of the Committee's outstanding obligations for the primary election as of the date of ineligibility is $1,661,789.90. *See* Attachment 1. The Commission had previously calculated this number as part of the initial determination to be $1,619,383.38. Since the Committee received $632,016.75 in Matching Funds, this means that the Committee received $183,867.82 [($1,213,640.97 + 632,016.75) - $1,661,789.90] in excess of its net outstanding campaign obligations. The Commission may seek a repayment for receiving funds in excess of entitlement when Matching Funds are paid and there are no net outstanding campaign obligations. 11 C.F.R. § 9038.2(b)(1)(i). However, the figure of $183,867.82 does not reflect the ultimate amount that the Committee may owe to the United States Treasury because the audit of the Committee is not complete.

3, 2007), at 9-10; Office of General Counsel Comments on Interim Audit Report, Craig Romero for Congress (LRA # 698).[14] In this case, the donor cards included all of this information, and the Commission does not have any information to suggest that the cards were not completed by the contributors or that the cards do not represent the intent of the contributors.

With respect to the credit card contributions made through the Committee's website, the Commission concludes that the process followed by the Committee, in which it required the contributors to "check off" a box on an electronic contributor form that states that the contributors certify they have read a series of contribution rules, which include the designation rule, and comply with them, represents valid designations of the contributions. *See* Advisory Opinion 1999-09 (Bradley for President) (Commission interprets the FECA, the Matching Payment Act, and the regulations implementing these in a manner that attempts to accommodate technological innovations where possible).

In Advisory Opinion 1999-09, the Commission concluded that the electronic contributor form with the "checking off" of the appropriate boxes, could be the functional equivalent of a "written instrument" as described, and required for matchability, in 26 U.S.C. § 9034(a). *Id.* The Commission more recently arrived at a similar conclusion in the context of its issuance of an interpretive rule regarding electronic redesignations, which also require a written signature.[15] Notice of Interpretive Rule Regarding Electronic Contributor Redesignations, 76 Fed. Reg. 16,233 (Mar. 23, 2011); 11 C.F.R.

---

[14] A copy of this document is included as Attachment 13.

[15] The Commission has noted that additional precautions must be taken when a committee receives contributions via the Internet. *See* Explanation and Justification for Final Rules Regarding Matching Credit Card and Debit Card Contributions in Presidential Campaigns, 64 Fed. Reg. 32,394-32,395 (June 17, 1999). In this case, the Internet forms elicit personal information from the contributors that can be verified

§ 110.1(b)(5).

The Committee requests the opportunity to contact its donors to clarify the election designation of their contributions if the Commission determines that their intent is not clear. *See, supra,* note 11. The Commission, however, using the plain language of the Committee's own designation rule, determines that the intent of the donors was clear, and therefore concludes that no further clarification is necessary.[16]

In summary, the Commission concludes that $1,213,610.97 in private contributions was for the purpose of influencing the primary election because the contributors made effective written designations of the contributions for the primary election, both through the Committee's website, and via its donor cards.[17] *See* Attachment 12.

---

against the Committee's records, such as their names, addresses, e-mail addresses, telephone numbers, occupations, and employers, in addition to their credit card information. This provides a level of assurance as to the contributor's identity and intent analogous to that which the Commission has deemed sufficient in the case of electronic redesignations of contributions, which also require a written signature. Notice of Interpretive Rule Regarding Electronic Contributor Redesignations, 76 Fed. Reg. 16,233 (Mar. 23, 2011); 11 C.F.R. § 110.1(b)(5).

[16] Nor could the Committee seek to redesignate the contributions because the contributions were not excessive and the 60-day deadline for seeking a redesignation has passed 11 C.F.R. § 110.1(b)(5). Nevertheless, the Commission concludes that it cannot countenance additional delay at this point. The procedure for suspending Matching Fund payments is a formal process that requires the Commission to adjudicate and to reach a final agency action. Under this process, the Committee was allowed 15 business days to respond to the initial determination, and, in fact, it has been given additional time. 11 C.F.R. § 9034.5(g)(2). If the Committee had wanted to request changes in designations in this manner, it could have done so upon being notified of the initial determination.

[17] Even if the regulatory requirement for a signed writing accompanying the contributions was somehow not satisfied in this case, this would not assist the Committee in advancing its position. If the contributions received after the date of ineligibility were not accompanied by signed writings, then the entire amount of the contributions would have to be considered undesignated, and therefore would be allocated to the general election pursuant to 11 C.F.R. § 110.1(b)(2)(ii). If that were the case, then it would follow that the contributions submitted by the Committee were not eligible at all for matching because they were not intended to influence the primary election. *See* 11 C.F.R. §§ 9034.2(a)(1), 9034.3(i) (to be matchable, a contribution must be intended to influence the primary election).

B. The Committee's Professed Designation Practice Contradicts Both the Plain Language of Its Designation Rule and Its Contemporaneous Documentation to the Commission.

Contrary to the Audit staff's allocation, the Committee asserts that it had a practice of allocating only the first $250, rather than the first $2,500, of each contribution that it received towards the primary election and submitting that portion for matching while it allocated the remainder of the contribution, up to $2,500, to the general election.[18] The Committee's description of its designation practice is contrary to the plain language of its own publicized designation rule, as well as the Committee's contemporaneous representation to the Commission of the meaning of its designation rule following a September 28, 2012 meeting with the Audit staff.

First, the Committee's professed practice cannot be reconciled with the designation rule language used by the Committee on its website and donor cards. While the designation rule language appearing on the face of the solicitations indicates that the first $2,500 of each contribution would be considered designated for the primary election, the Committee's practice involved designating only the first $250 of each contribution toward the primary election, and designating the remainder of that contribution, up to $2,500, toward the general election. The Committee's reported designation practice is

[18] As detailed above, at pages 5-7, the Committee made a number of assertions about how it allocated deposits and payments between its primary and general election accounts. As noted in greater detail in the Audit Division's Analysis Memorandum of Gary Johnson 2012 Inc, the Commission's analysis of the Committee's activity in this regard does not appear to support these assertions. In particular, the Audit staff's examination shows that there was only minimal transfer activity between the general and primary election accounts and that expenses identified as relating to the primary election were paid from the Committee's primary election account, the balance of which consisted mostly of Matching Funds. *See* Attachment 8, pages 4-5, and Attachment D to Attachment 8.

facially inconsistent with the designation rule language,[19] and only serves to attempt to maximize the Committee's public financing by understating the total amount of funds available to the Committee to retire its primary debt while submitting the maximum amount of $250 available for contribution.

Second, the Committee contends it understood it could proceed to designate contributions in accord with what it now reports as its practice as the result of a September 28, 2012 meeting with the Commission's Audit staff. Yet the Commission's records do not indicate that a practice of deducting the first $250 of each contribution and submitting it for matching was discussed during the September 28 meeting. Rather, the Commission first learned of this reported practice in the Committee's June 12, 2013 response to the Commission's initial determination. *See* Attachment 8.

Further, the Committee's own communications with the Commission's Audit staff immediately following the September 28, 2012 meeting reflect an understanding of the designation language which not only follows the plain meaning and mirrors the allocation methodology applied by Audit staff, but contradicts the Committee's current representation of its designation practice. Shortly after the September 28 teleconference,

---

[19] The Commission recognizes the possibility that the contributors could have instructed the Committee, through a proper designation, to assign only the first $250 to the primary election. The Committee indicated as part of its response that it followed specific designation instructions when it received them, regardless of whether those specific instructions were consistent with its general designation language. The Commission notes, however, that the Committee has presented no specific information or evidence to show that it received specific designation instructions from any contributor, including instructions to designate the first $250 of a contribution toward the primary election and the remainder, up to $2,500, toward the general election. The Commission's own review of the records in its possession shows evidence of only one donor card in which the word "primary" in the standard designation rule language appearing on the card was replaced with the word "general". The Commission considered this one contribution to be designated toward the general election, thereby honoring the specific intent of the contributor even when it was expressed in a manner that conflicted with the standard designation language on the donor card.

the Committee sent an e-mail to the Commission's Audit staff on October 3, 2012. Attachment 10. In that communication, the Committee stated the following:

> The Committee submits that the donation card being returned by the donors and the marking of the required box on the website are both indicative of the donors' having read and understood that their contributions would be applied first to the Primary 2012 election up to a maximum amount of $2,500.00 and afterward to the General 2012 election. As such, these actions demonstrate that the donative intent of the contributor was that the contribution be used for the Primary 2012 election so that 11 CFR § 9034.3(i)[20] does not apply.

Following receipt of this information, the Commission's Audit staff notified the Committee that contributions accompanied by the Committee's designation language would be matchable provided that certain conditions were met. *See* E-mail from Marty Kuest, Audit Division, to Kim Blanton, dated October 16, 2012, in Attachment C to Attachment 8. That e-mail stated the following:

> Based on the information your committee has provided that your web site and contribution materials included language that indicated the first $2,500 of each contributions [sic.] would be contributed to the primary election, the contributions would be designated to the primary election and thus would be matchable; BUT ONLY IF your committee provides 1) evidence that the online credit card contributors checked the box for the contribution rules and 2) the donor cards filled out by the contributors for direct mail contributions, as long as the cards were filled out by the contributors rather than by the Committee.

The October 3 e-mail from the Committee reflects the Committee's contemporaneous understanding of its designation language, which is consistent with the Audit staff's allocation methodology. As the quoted excerpt from this e-mail states, the Committee understood that contributions would first be applied to the primary election up

[20] This section provides that "[c]ontributions which are made by persons without the necessary donative intent to make a gift or made for any purpose other than to influence the result of a primary election" are not matchable. 11 C.F.R. § 9034.3(i).

to a maximum of $2,500. Equally significant is that the Committee did not interpret the language to mean that the contributions would be applied to the primary election up to a maximum of $250, with the remainder going to the general election. Further, the Audit staff's October 16 e-mail restates this understanding of the Committee's designation language. There is no indication in Commission records that the Committee at any time surrounding the September 28 teleconference, or indeed thereafter up to the time that it received notice of the Commission's initial determination, took any action or made any communication to the Commission suggesting that it interpreted these words of designation to mean that the first $250, rather than the first $2,500, of each contribution would be designated toward the primary election.

In summary, by now claiming contributions initially characterized as for the primary under the aegis of its designation rule were in actuality general election funds, the Committee would prolong its entitlement to Matching Funds when there is no proper basis for doing so. The Commission concludes that the Committee may not reap the benefit of asserting two mutually inconsistent positions. Rather, a single, consistent rule must be applied throughout the matching process. The Commission is satisfied that the Committee's original representation to the Audit staff is the proper single, consistent rule to apply, and is consistent with the plain language of the designation rule contained in the Committee's online and donor card solicitations.

Because the Committee's current interpretation of its designation language is corroborated neither by the plain language nor by its own contemporaneous communications, the Commission finds the Committee's arguments unpersuasive. The Commission concludes that the Committee has received a sufficient amount of matching

funds and private contributions to pay its net outstanding campaign obligations. The details of the total amount of primary contributions are set forth in Attachment 11 and this is further supported by the details of how the Commission allocated specific contributions in Attachment 12.

IV. CONCLUSION

Based on the foregoing, the Commission has made a final determination that Governor Johnson is no longer entitled to receive Matching Funds under 11 C.F.R. § 9034.5(g).

Attachments

Attachment 1 (Revised Statement of Net Outstanding Campaign Obligations)
Attachment 2 (Notice of Initial Determination on Entitlement, Dated April 24, 2013)
Attachment 3 (Notification of Initial Determination to Gary Johnson, 2012, Dated April 25, 2013, and May 20, 2013 Response of Committee)
Attachment 4 (Response of Committee to Office of General Counsel E-mail of May 24, 2013, Dated May 24, 2013)
Attachment 5 (E-mail enclosing Auditor Spreadsheet to Committee, Dated May 31, 2013) The spreadsheet is attached as electronic media.
Attachment 6 (Response of Committee to Initial Determination, Dated June 12, 2013) The spreadsheets submitted by the Committee are attached as electronic media.
Attachment 7 (Letter from Vice Chair Weintraub to Committee, Dated May 29, 2012)
Attachment 8 (Audit Analysis Memorandum, with attachments, Dated September 13, 2013). The Memorandum includes spreadsheets that are attached as electronic media.
Attachment 9 (Sample Committee Donor Card)
Attachment 10 (E-Mail from Kim Blanton to Audit staff, Dated October 3, 2012)
Attachment 11 (Commission Adjustments to Primary Contributions For Final Determination)
Attachment 12 (Final Determination Spreadsheet Showing Commission's Allocation of Contributions Between Primary and General Elections). This spreadsheet is attached as electronic media.
Attachment 13 (Office of General Counsel Comments on Report of the Audit Division on Craig Romero for Congress, Inc. (LRA #698), Dated January 29, 2007)