



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 28, 2018

MEMORANDUM

TO: The Commission

FROM: Erin Chlopak *EC*
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Compliance Advice

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SUBJECT: Request for Consideration of a Legal Question Submitted by Jill Stein for President (LRA # 1021)

I. INTRODUCTION

On January 19, 2018, the Commission received a Request for Consideration of a Legal Question (“Request”) from Jill Stein for President (the “Committee”), the principal campaign committee of former presidential candidate Dr. Jill Stein. *See* Attachment 1.

The Request raises two questions: (1) whether the Commission’s original determination of Dr. Stein’s date of ineligibility (“DOI”) was proper, and (2) whether committees should be permitted to incur winding down expenses and other primary expenses after the DOI if they are clearly incurred to improve compliance with existing laws and regulations or if they are clearly required in the course of seeking the qualification for the ballot in various states.¹ A DOI marks the formal end of the period of time within which an otherwise eligible presidential candidate may receive public funds for use during the candidate’s campaign for the nomination of a party (or parties).

¹ Although the Request purports to identify three separate questions for review, two of the questions raise the same essential issue, which is whether the Commission’s original DOI determination was proper. We have therefore consolidated those two questions in a single question addressed by this memorandum.

The Committee presents no argument in its Request regarding the second question, however, the response to this question is addressed directly in the Commission's regulations. The regulations provide for the payment of winding down costs, *i.e.* costs associated with the termination of political activity, including compliance with statutory post-election requirements and other specifically defined administrative costs. 11 C.F.R. §§ 9034.4(a)(3); 9034.11. Because the regulations directly address the payment of winding down costs, there is no need for the Commission to reach a determination on the second question in the Request. We will, however, inform the Committee of the applicable regulations in the letter that notifies the Committee of the Commission's decision regarding the first question.

Regarding the first question, the Commission has already determined that Dr. Stein's DOI is August 7, 2016. *See* Attachment 2. The Committee argues, however, that the DOI should be a later date, because it had to incur expenses to support Dr. Stein's efforts to obtain a position on the general election ballot of several states after August 7th. The deadlines for obtaining ballot access in these states ranged from August 10, 2016 to September 9, 2016. *See* Attachment 1, at 2. The Committee argues that Commission advisory opinions have concluded that the efforts of non-major party presidential candidates to obtain positions on the general election ballot are considered expenses relating to the primary election, *see, e.g.*, Advisory Opinion 1995-45 (Hagelin for President), and that because of this, such expenses should be considered qualified campaign expenses.

We have considered the Committee's arguments and the relevant law regarding the first question, and we recommend that the Commission reaffirm its determination that the candidate's DOI is August 7, 2016.

II. THE COMMISSION SHOULD REAFFIRM ITS EARLIER DETERMINATION THAT AUGUST 7, 2016 IS THE CANDIDATE'S DATE OF INELIGIBILITY

A candidate eligible to receive public matching funds to use for the purpose of seeking nomination may receive them, but only for only a limited amount of time. This time is known as the "matching payment period."² *See* 26 U.S.C. § 9032(6). While this period always begins on the start of the calendar year during which the general election will occur, the end of the period, otherwise known in Commission regulations as the "date of ineligibility" or "DOI," *see* 11 C.F.R. § 9033.5(c), depends upon the nomination process the candidate undergoes. If a party nominates a candidate during a national convention, then the matching payment period ends on the date the candidate is nominated. 26 U.S.C. § 9032(6); 11 C.F.R. § 9032.6(a). If a party does not use a national nominating convention to nominate its candidate, then the period ends either on the date the party nominates the candidate or on the last day of the last national convention

² Candidates may continue to receive matching payments after this period for the sole purpose of paying debt incurred during the matching payment period. 11 C.F.R. §§ 9033.5, 9034.5.

held by a major party during the election year, whichever is earlier.³ 26 U.S.C. § 9032(6)(A), (B).

The Request questions the manner in which the Commission applied this standard to the facts presented by Dr. Stein's campaign. Dr. Stein planned to seek not only the nomination of the national committee of the Green Party at its national convention, but also that of several unaffiliated state Green parties lacking positions on their states' ballots for their candidates. She also planned to seek the nomination of a separate state party at a separate national convention to be held on a later date than the Green Party national convention. Attachment 3, at 3. In the case of the independent state Green parties, nomination was to be achieved by an independent petitioning process, and certain of these states maintained ballot access deadlines later than the date of the Green Party's national convention.

The Commission has applied the standard set forth in section 9032(6) to several non-major party and independent presidential candidates in a series of advisory opinions.⁴ Where a candidate seeks the nomination of several non-major parties, the Commission has looked to the last nomination date of those non-major parties not nominating candidates in a national convention and then compared that date to the last day of the last major party presidential convention to determine which date is earlier in order to establish the end of the matching payment period. *See* Advisory Opinions 1984-11 (Serrette), 1984-25 (Johnson), 2000-18 (Nader 2000). The Commission has reasoned that "neither the [Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9031 et seq. ("Matching Payment Act")], nor the Commission's regulations, required that the matching payment period for one non-major party Presidential candidate be shorter than that of another such candidate solely for the reason that one was seeking a national party nomination by national convention, and the other candidate was seeking nomination by several State political parties." Advisory Opinion 2000-18 (Nader 2000). Therefore, the Commission has applied the "same range of alternatives for the determination of their matching payment periods." *Id.* (*quoting* Advisory Opinion 1984-25 (Johnson)).

The Commission has also applied this standard in situations where the candidate seeks the nomination of a party that nominates its candidate at a national convention and also seeks the nomination of other independent parties. In Advisory Opinion 1984-25 (Johnson), like here, the requestor sought the nomination of a political party that nominated its candidates through a national convention and at the same time sought the nomination of other, independent state parties that were scheduled to hold their elections and conventions on later dates. The Commission concluded that the candidate should receive the benefit of the later independent State party nomination dates rather than the earlier date of the of the national nominating

³ The DOI may occur sooner if the candidate publicly announces an intent to cease actively campaigning for the nomination, the Commission has otherwise made this determination, or the candidate garners an insufficient number of votes in two consecutive primary elections. 11 C.F.R. § 9033.5(a), (b). However, these conditions do not apply to the facts of this Request.

⁴ *See* Advisory Opinions 1984-11 (Serrette), 1983-47 (Johnson), 1984-25 (Johnson), 1995-45 (Hagelin for President), and 2000-18 (Nader 2000). Also of some relevance is Advisory Opinion 1975-44 (Socialist Workers 1976 National Campaign Committee), which concludes that contributions made for the purpose of helping the candidate meet expenses incurred to obtain positions on state general election ballots for non-major party presidential candidates are considered related to the primary election rather than to the general election.

convention, *provided that such dates were not later than the date of the last day of the last major party nominating convention.* Advisory Opinion 1984-25 (Johnson), at 2. The proviso is important because we believe that the Commission sought to ensure parity of treatment for all presidential candidates, regardless of the method of nomination, in the application of section 9032(6). *See* Advisory Opinion 1984-25 (Johnson), at 2 (“In the case of presidential candidates seeking political party nominations, other than the nomination of either of the two major political parties, the Matching Payment Act appears to at least contemplate, if not require, that such a candidate have an opportunity to establish eligibility and collect matchable contributions for a period of time that closely approximates the period available to major, party candidates.”).

In this case, Dr. Stein’s DOI was calculated as August 7, 2016, because this is the date upon which she received the nomination of a party that nominates its candidate at a national convention. 26 U.S.C. § 9032(6). Because of the possibility created by Advisory Opinion 1984-25 (Johnson) that a later date might apply on account of Dr. Stein’s simultaneous quest for the nomination of parties that did not use national conventions for the nominating process, the Commission also considered whether she should receive the benefit of any of the later State nomination or ballot access dates. However, that possibility was foreclosed in this case because the last date of the last major party nominating convention in 2016 was July 28. Thus, while Dr. Stein may have incurred primary related expenses after this date, taxpayer funds cannot be used for those expenses because the Committee incurred them after both of the two dates that could have applied here – the date of the national nominating convention, August 7, the date actually fixed by the Commission, and the date of the last major party nominating convention, July 28. Advisory Opinion 1984-25 (Johnson), at 2.⁵ Attachment 2.

The Committee argues that the ballot access costs should be qualified campaign expenses based on Commission advisory opinions concluding that such ballot access expenses are considered primary election-related expenses. *See* Advisory Opinion 1995-45 (Hagelin for President) (noting long-held view of Commission that process undergone by non-major party presidential candidates to obtain general election ballot access status are deemed primary election-related expenses). *See also* Advisory Opinion 1975-44 (Socialist Workers 1976 National Campaign Committee) (concluding that contributions for this purpose are deemed primary election rather than general election contributions under the laws and regulations governing contribution periods). The Committee, therefore, argues that the status of an expense as a primary election-related expense is both a necessary and sufficient condition for it to be considered a qualified campaign expense.

We disagree. The fact that ballot access expenses are related to the primary election campaign, while a necessary condition of their being qualified campaign expenses, *see* 26 U.S.C. § 9032(9)(A), is not a sufficient condition. The timing of the expense is the other necessary condition. The definition of qualified campaign expense is further conditioned by the constraint that such expenses must be incurred during the candidate’s period of eligibility. 11 C.F.R.

⁵ In assigning the date of nomination at the national nominating convention as the DOI, the Commission was therefore giving the Committee the benefit of the later of the two dates that would have been available to it under section 9032(6).

§ 9032.9(a)(1); Advisory Opinion 1984-11 (Serrette). The Commission has noted that “[s]ince an individual’s candidacy for presidential nomination in essence ends on the date of ineligibility, any expenditures made after that date, except for winding down costs under § 9034.4(c), cannot be considered to be incurred by the candidate “in connection with” his or her campaign for nomination.” Presidential Election Campaign Fund and Presidential Primary Matching Fund, 44 Fed. Reg. 20336-37 (Apr. 4, 1979). Thus, the date upon which the ability of a candidate to use taxpayer funds to finance the primary campaign ends is fixed. That a presidential candidate may need to incur additional expenses historically associated with the primary election cannot amend or alter this determination.⁶ The dates upon which the Committee incurred these additional expenses are after both the dates of Dr. Stein’s nomination at the national nominating convention and that of the last major party nominating convention. Advisory Opinion 1984-25 (Johnson), at 2.

III. RECOMMENDATION

For the reasons noted above, we recommend that the Commission reaffirm its earlier determination that August 7, 2016 is the Candidate’s date of ineligibility in this matter.

Attachments

Attachment 1 – Letter from Matt Kozlowski, Director of Compliance, Jill Stein for President to Federal Election Commission (Jan. 12, 2018).

Attachment 2 – Vote Certification, Jill Stein for President (LRA 1021) (Aug. 12, 2016) and Memorandum from Adav Noti to Commission, Date of Ineligibility – Jill Stein for President (LRA 1021) (Jul. 29, 2016).

Attachment 3 – Letter from Dr. Jill Stein, Candidate, and Steven Welzer, Treasurer, Jill Stein for President, to The Honorable Matthew S. Petersen, Chairman, Federal Election Commission (Apr. 4, 2016).

⁶ In one specific circumstance, the Commission has permitted a presidential candidate to continue to campaign with *private funds* after losing eligibility for public funding by reason of having failed to garner a sufficient percentage of the popular vote in two consecutive primary elections without incurring a repayment obligation for doing so. See Public Financing of Presidential Primary and General Election Candidates, 56 Fed. Reg. 35898, 35905 (Jul. 29, 1991) (discussing ability of candidate to use private funds to continue to campaign after eligibility has been terminated by reason of failure to garner sufficient percentage of popular vote); 11 C.F.R. §§ 9033.5(d), 9034.4(a)(3). In this circumstance, the candidate may continue to submit post-ineligibility contributions for public matching, but the award of public matching funds based on these contributions is contingent upon the candidate’s re-establishing his or her eligibility to receive them.



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WASHINGTON, D.C. 20463

MEMORANDUM

April 24, 2018

TO: The Commission

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SUBJECT: Correction to Memorandum on Request for Consideration of a Legal Question by Jill Stein for President (LRA # 1021)

This memorandum serves to inform the Commission of an error in a recent audit recommendation approved by the Commission, and to recommend Commission action to correct the error.

On February 28, 2018, the Office of General Counsel (“OGC”) circulated a Memorandum regarding the Request for Consideration of a Legal Question Submitted by Jill Stein for President. The memorandum acknowledged the Commission’s prior determination that Jill Stein’s date of ineligibility to receive public matching funds (“DOI”) was August 7, 2016, and recommended that the Commission reaffirm that determination, which was based on the date the candidate received the Green Party’s nomination for President. On April 11, 2018, the Commission voted to approve OGC’s recommendation.¹

We have since clarified that the Green Party nominated Dr. Stein one day earlier, on August 6, 2016. OGC’s February 28 memorandum explains why Dr. Stein’s DOI is the date that

¹ Jill Stein received public funds as a candidate in the 2016 primary elections, and as a result, her committee, Jill Stein for President (“Committee”), was subject to a mandatory audit. At the close of the audit fieldwork, the Committee filed a Request for Consideration of a Legal Question. In this request, the Committee asked whether the Commission’s earlier DOI determination was proper.

she received the Green Party's nomination. Accordingly, OGC is correcting its recommendation in that memorandum to reflect that Dr. Stein's DOI is August 6, 2016, not August 7, 2016.

RECOMMENDATION

We recommend that the Commission revise its prior determination and conclude that August 6, 2016 is the candidate's date of ineligibility in this matter.