FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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SUBJECT: Preliminary Audit Report on Jill Stein for President (LRA # 1021)

I. INTRODUCTION

The Office of the General Counsel ("OGC") has reviewed the proposed Preliminary Audit Report ("PAR") on Jill Stein for President ("the Committee"). The PAR contains three findings: Finding 1 – Matching Funds Received in Excess of Entitlement, Finding 2 – Misstatement of Financial Activity, and Finding 3 – Reporting of Debts and Obligations. The Audit Division has requested that we specifically review and comment upon three aspects of Finding 1, and accordingly we comment on these and other aspects of that finding. We also comment on Finding 2. We otherwise concur with the recommendations in the PAR. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

II. COMMENTS ON AUDIT'S FINDINGS

A. Repayments to the United States Treasury

Dr. Jill Stein (the "candidate") received public funds for the primary election phase of the campaign under the terms and conditions set forth in the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031 et seq. ("Matching Payment Act") and Commission regulations implementing those provisions. The PAR concludes that the Committee must repay a total of $360,811 to the United States Treasury. The amount reflects the Audit Division's calculation that the Committee's net outstanding campaign obligations ("NOCO") show a surplus of $225,911 as of the candidate's date of ineligibility ("DOI"). The amount further reflects that the candidate received an additional $134,900 in public funds despite its surplus, *i.e.* an amount exceeding the amount the candidate was entitled to receive.

The Audit Division asks OGC to review three aspects of Finding 1, two of which concern specific items in the PAR's NOCO statement, and the third of which concerns the accuracy of the PAR's calculation of the total repayment amount owed by the candidate. First, the Audit Division is seeking OGC's guidance on the PAR's conclusion that $144,334 in general election ballot access expenses should be excluded from the Committee's NOCO. Second, the Audit Division raises a question about the propriety of its calculation of the Committee's actual and estimated winding-cost over three periods of time. Third, the Audit Division questions whether the Commission may simultaneously seek a surplus repayment and a repayment for receiving public funds in excess of entitlement.

1. Ballot Access Expenses Incurred After DOI and Ballot Access Expenses Without a Documented Date of Incurrence Should Not Be Reflected on the NOCO Statement as Qualified Campaign Expenses

With respect to the first issue, the Committee raised the question of the status of the disputed ballot access costs in a Request for Consideration of a Legal Question ("Request") filed with the Commission on January 19, 2018, and OGC construed the question as a request that the Commission reconsider its earlier determination of the candidate's DOI,[1] and recommended that the Commission reaffirm its earlier determination that the candidate's DOI was the date the candidate received the Green Party's nomination for President. The Commission approved our revised recommendation on May 2, 2018.[2] Consequently, we agree with the Audit Division's

[1] Throughout the PAR, the Audit Division characterizes questions raised by the Committee in the Request differently than how we characterized the questions in our memorandum. We recommend that the PAR's characterization of the questions presented in the Request be revised to be consistent with how we characterized the questions.

[2] OGC's original February 28 recommendation memorandum to the Commission erroneously identified the date Dr. Stein received the Green Party's nomination for President, and thus her DOI, as August 7, 2016. In a subsequent memorandum dated April 24, OGC corrected this error to clarify that the DOI was actually August 6, 2016, but did not otherwise alter the substance or reasoning of its original recommendation. See Attachment 1. On May 2, 2018, the Commission approved OGC's recommendation that the Commission revise its prior determination and conclude that August 6, 2016 was the candidate's DOI in this matter.

decision not to consider ballot expenses incurred after the DOI to be qualified campaign expenses.

To determine when the Committee incurred the ballot access expenses, the Audit Division examined the Committee's related invoices and identified three categories of invoices that cover ballot access expenses:

1) **Invoice shows all services were performed before DOI** - The Audit Division allocated the costs between the primary and the general elections according to the date of incurrence as provided in the invoice.

2) **Invoice shows services were performed before and after DOI** - The Audit Division allocated a portion of the costs to the primary election according to the ratio of the number of days that the cost was incurred before the DOI to the total number of days reflected on the invoice.

3) **Invoice does not show date services were performed** - The Audit Division allocated the expenses equally between the primary and the general elections.

We concur with the Audit Division's approach to the first category. An expense must be incurred from the date the individual becomes a candidate through the last day of the candidate's eligibility to be a qualified campaign expense. 11 C.F.R. § 9032.9(a)(1). While the invoices in this category do not show when the expenses were actually incurred, these invoices show that all of the services were performed before the DOI. We believe it is reasonable to assume that if a service was performed before the DOI, then the expense was incurred before that date. Therefore, these expenses should be considered qualified campaign expenses.

We do not agree with the Audit Division's approach to the second and third categories. The second category of invoices is similar to the first category in that some of the services were performed before the DOI. However, some of the services were performed *after* the DOI. An expense will not be considered a qualified campaign expense even when it is incurred before the DOI if the related service is delivered after the DOI. 11 C.F.R. § 9034.4(b)(3). Although these expenses may have been incurred before the DOI, we do not know the value of the services that were delivered before the DOI. We need to know the value of these services to determine the amount that should be considered qualified campaign expenses. Absent this information, we should not make the same assumption that we made with the first category of expenses and conclude that any amount of these expenses is a qualified campaign expense. Instead, the Committee must demonstrate when these expenses were incurred and indicate how much of the expenses are attributable to services that were performed before the DOI. 11 C.F.R. § 9033.1(b)(1).

For the third category, the Committee has not documented when it incurred the expenses or when the vendors performed the services. The Committee has the burden of demonstrating that an expense is a qualified campaign expense. 11 C.F.R. § 9033.1(b)(1). We, therefore,

recommend that the Audit Division revise the PAR to conclude that the Committee has failed to demonstrate that the undocumented expenses are qualified campaign expenses.[3]

2. Actual Winding-Down Costs Should Be Limited to the Amount the Committee Has Documented and Estimated Winding-Down Costs May Be Projected

The Audit Division calculated $252,134 in actual and estimated winding-down costs, broken down into three time periods for when the expenses were and will be incurred:

1) **December 9, 2016 – July 31, 2017** – The Audit Division allows $138,644 in actual winding-down costs that were incurred during this period. The Committee documented this amount of actual winding-down costs.

2) **August 1, 2017 – January 31, 2018**[4] – The Audit Division does not allow for any actual winding-down costs because the Committee has not reported and documented any actual winding-down costs incurred during this period.

3) **February 1, 2018 – July 31, 2019 –** The Audit Division calculates $113,490 in estimated winding-down costs.

We concur with the Audit Division's calculation of actual and estimated winding-down costs. Winding down costs are qualified campaign expenses, 11 C.F.R. § 9034.11(a), but the Committee must document its actual winding-down costs as qualified campaign expenses. 11 C.F.R. § 9033.1(b)(1). The Committee has not documented that it incurred actual winding-down expenses beyond July 31, 2017. Therefore, we agree with the Audit Division's conclusion to limit actual winding-down costs to the amount that the Committee has documented up to July 31, 2017.

While the Commission's regulations do not address estimated winding-down costs, the Commission has traditionally accepted estimated winding-down costs that are projected into the future on the NOCO Statement as qualified campaign expenses. *See* Public Financing of Presidential Primary and General Election Candidates, 60 Fed. Reg. 31854, 31868 (Jun. 16, 1995) ("The committee must provide estimates of quarterly or monthly [winding-down] expenses from the date of the NOCO statement until the expected termination of the committee's political activity."); *see also* Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47386, 47390 (Aug. 8, 2003) (referring to estimated "future" winding-down costs). Therefore, we agree with the Audit Division's conclusion to project the estimated winding-down costs.

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[3] The Committee may document when the expenses were incurred in the second and third categories of invoices with a dated contract or any other dated instrument that shows a commitment to arrange or receive services.

[4] Evaluating a committee's actual and estimated winding-down cost is a dynamic process that changes as time progresses. The Audit Division selected January 31, 2018 as the cutoff date to allow for the processing of the PAR. The Audit Division will establish a new cutoff date once the Commission approves the PAR.

3. The Commission May Simultaneously Seek a Repayment for Receiving Public Funds in Excess of Entitlement and for a Surplus of Public Funds

We believe that the Commission may simultaneously seek a surplus repayment and a repayment for receiving public funds in excess of entitlement. The PAR concludes that the Committee owes a $225,911 surplus repayment and a $134,900 repayment for receiving funds in excess of the candidate's entitlement.

To be sure, it is unusual for both of these bases for repayment to be present in the same audit and repayment determination. Prior to the DOI, during the candidate's period of eligibility, a committee may receive public funds to the extent that it has matchable contributions. 11 C.F.R. § 9034.1(a). This, however, changes after the DOI. The committee must still have matchable contributions, but it can only receive additional public funds to the extent that it has net outstanding obligations on its NOCO Statement. 11 C.F.R. § 9034.1(b). The additional public funds must be used to assist the committee in satisfying the net outstanding obligations. *See* 11 C.F.R. § 9034.5(f)(1). Therefore, if a committee shows a surplus on its NOCO Statement on the DOI, it would not receive additional public funds after the DOI. 11 C.F.R. § 9034.1(b).

Here, the Committee's surplus was not apparent until this audit, which occurred well after the Committee received the additional public funds. At the time the Committee received the additional public funds, the Audit Division was not aware that the Committee still had remaining cash on hand.[5] The Committee understated its cash on hand on the NOCO Statement by $312,694, and thus created an apparent deficit with net outstanding campaign obligations. The Commission certified and the United States Treasury paid the Committee $134,900 to assist the Committee in satisfying these ostensible net outstanding campaign obligations.

The surplus repayment is necessary to recover the government's portion of the remaining funds that were available on the DOI since the Committee had the assets to satisfy all outstanding obligations on that date. 11 C.F.R. §§ 9038.3(c) and 9038.2(b)(4). The repayment for receiving funds in excess of the candidate's entitlement is necessary to recover the additional public funds that the government paid to the candidate to cover these outstanding debts when the candidate had more than enough funds available to pay those outstanding debts. 11 C.F.R. § 9038.2(b)(1). Nothing in the Matching Payment Act or in Commission regulations precludes the Commission from seeking repayments on both grounds when a Committee understates it assets on the NOCO Statement.[6]

Although we agree with the Audit Division's approach to seeking repayment for both the surplus and the Committee's receipt of funds in excess of entitlement, we nevertheless recommend two revisions to the PAR. First, the Audit Division should revise the PAR to include

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[5] If the Committee's surplus position had been known on the DOI, the Committee would have been required to repay the surplus within 30 days of the DOI. 11 C.F.R. § 9038.3(c)(1).

[6] Understating assets on the NOCO Statement can be used as a basis to suspend the payment of public funds to a committee. 11 C.F.R. § 9034.5(g)(1)

the facts, explained above, about how the surplus resulted from the Committee's understatement of its assets on its NOCO Statement.[7] Second, the Audit Division should revise the surplus repayment amount to reflect that amount as a pro rata repayment. 11 C.F.R. § 9038.3(c).

B. Misstatement of Financial Activity

The PAR concludes that the Committee misstated its receipts and disbursements in its disclosure reports in both 2015 and 2016. Here, the Committee is said to have understated its receipts by $996,384 and its disbursements by $800,310 in 2016. However, a general footnote appended to the 2016 chart in the PAR detailing the results of the reconciliation analysis explains that the activity analyzed includes general election activity as well as activity connected with a recount of the general election results ("recount activity"). Additional footnotes in the PAR explain that general election and recount activity account for 82 percent of the understated receipts total and 86 percent of the understated disbursements total, the remainder presumably being connected with primary election activity exclusively. The Audit Division's cover letter accompanying the transmission of the PAR to this office explains that the Committee filed reports for its activities with respect to all three activities, *i.e.*, primary election activity, general election activity, and recount activity, using the same committee identification number.

As a general matter, it would not be appropriate to include misstatements attributable to general election or recount activity in the misstatement totals for this finding, since the present scope of this mandatory audit is confined to the primary elections and to the candidate's receipt of public funds during the primary election period. 26 U.S.C. § 9038(a). We understand that the Audit Division cannot evaluate the Committee's financial activity in a manner that would allow for the isolation of the misstatement activity that is only attributable to the primary election period because the Committee structured itself and transacted business as one entity that covered three types of transactions: primary election activity, general election activity, and recount activity. Thus, while we believe that including the general election and recount activity is justified, we recommend that that the Audit Division revise the PAR to explain why it cannot isolate the primary election activity.

Attachments

1. Memorandum from Erin Chlopak to Commission on Correction to Memorandum on Request for Consideration of a Legal Question by Jill Stein for President (LRA # 1021) (Apr. 24, 2018).

[7] Also, insofar as the existence of a surplus on the DOI is a second, separate ground for the repayment obligation, the Audit Division may wish to consider revising the title of the finding, which at present refers only to the other ground for repayment: receipt of matching funds in excess of entitlement.