

For Meeting of 11-14-13



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 13, 2013

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *JB for LJS*
Deputy General Counsel – Law

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COMMISSION
SECRETARIAT

SUBJECT: Final Determination on Entitlement to Primary Election Public Funds –
Governor Gary Johnson, Gary Johnson 2012 Inc.
(LRA# 905)

Based on the reasoning set forth in the attached Statement of Reasons, we recommend that the Commission make a final determination that Governor Johnson is not entitled to receive any further payments of public funds for the primary election (“matching funds”).

The Commission made an initial determination that the candidate is not entitled to receive further matching fund payments under 11 C.F.R. § 9034.5(g), and temporarily suspended further payments, on April 24, 2013. After considering Governor Johnson’s response to the Notice of Initial Determination, we recommend that the Commission make a final determination that the candidate is not entitled to receive further matching fund payments. We further recommend that the Commission approve the attached draft Statement of Reasons, which supports the final determination.¹ 11 C.F.R. § 9033.10(c).

If the Commission accepts our recommendations and approves the Statement of Reasons in Support of Final Determination, Governor Johnson has the option of filing a petition for rehearing in accordance with 11 C.F.R. § 9038.5(a). 11 C.F.R. §§ 9033.10(e), 9034.5(g)(4). He may, in the alternative, seek judicial review of the Commission’s final determination. 26 U.S.C. § 9041(a).

¹ The Statement of Reasons contains several attachments, including spreadsheets. The spreadsheets are not included in paper form in the attachments accompanying the Statement of Reasons. We, however, will make these spreadsheets available to the Commission in Voting Ballot Matters. We will make these spreadsheets available to the Committee electronically.

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission:

1. Make a final determination that Governor Johnson is not entitled to receive any further payments of matching funds pursuant to 11 C.F.R. § 9034.5(g).
2. Approve the attached Statement of Reasons in Support of Final Determination.
3. Approve the appropriate letter.

Attachment

1. Statement of Reasons in Support of Final Determination

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of
Governor Gary Johnson

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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 [DATE] 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*

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. 11 C.F.R. § 9034.5(g)(1).

Attachment 1. This Statement of Reasons sets forth the legal and factual basis for the Commission's final determination.

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,

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.

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 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

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).

Matching Fund payments.⁴ See 11 C.F.R. §§ 9033.5, 9034.1(b). As part of each of its 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

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 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).

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 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 cycle⁷ in the general election account and used these funds only to pay general election debt. *Id.* Finally, the Committee contends that

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.

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 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 certifi[ies] that [he or she] compl[i]es 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

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.)").

\$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).

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.*

⁹ The Commission will refer to this language hereafter as the Committee’s “designation rule” or its “designation rule language.”

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.

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 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).

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.

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.

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.

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.

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. 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,

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

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. § 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

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 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

See Attachment 12.

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

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).

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.

\$2,500, toward the general election. The Committee's reported designation practice is 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))

Gary Johnson 2012, Inc
Statement of Net Outstanding Campaign Obligations (Audited)
As of May 5, 2012
Prepared May 8, 2013

Assets

Cash in bank	\$ (10,855.63)	
Cash on Hand	\$ -	
Accounts Receivable	\$ -	
Capital and Other Assets	\$ -	
Total Assets		\$ (10,855.63)

Liabilities

Accounts Payable for Qualified Campaign Expenses	(1,550,934.27)	
Estimated Winding Down Costs	(100,000.00)	
Total Liabilities		\$ (1,650,934.27)

Net Outstanding Campaign Obligations as of May 5, 2012 \$ 1,661,789.90

Less:

Primary Contributions received between 5/6/12 and 12/18/12	\$ (1,213,640.97) ¹
Matching Funds Post Date of Ineligibility 5/5/2012	\$ (632,016.75)

Matching funds received by the candidate in excess of his entitlement and repayable pursuant to 11 CFR §9038.2(b)(1) \$ (183,867.82)

ATTACHMENT
Page 1 of 1

¹ Includes Primary contributions deposited into the Committee's General Election Account and erroneously reported by the Committee as designated for the General Election.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 25, 2013

VIA ELECTRONIC & CERTIFIED MAIL

The Honorable Gary Johnson
850 C. Camino Chamisa
Santa Fe, NM 87501

Re: Gary Johnson 2012, Inc. (LRA 905)

Dear Governor Johnson:

On April 24, 2013, the Commission made an initial determination pursuant to 11 C.F.R. § 9034.5(g) that you are no longer entitled to receive matching fund payments under 11 C.F.R. §§ 9033.5 and 9034.1(b), because you no longer have net outstanding campaign obligations.

Enclosed is a Notice of Initial Determination on Entitlement that sets forth the factual and legal basis for the Commission's initial determination. *See* 11 C.F.R. §§ 9033.10(b), 9034.5(g)(2). Pursuant to 11 C.F.R. § 9034.5(g)(2), you have 15 business days from the date you receive this letter to submit any written legal or factual materials to demonstrate that you still have remaining net outstanding campaign obligations that entitle you to receive additional matching fund payments. The Commission will consider any written legal or factual materials you submit in a timely manner before making a final determination. If you have any questions regarding the Commission's determination, you may contact Joshua Blume, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Lisa J. Stevenson
Deputy General Counsel - Law

Enclosure

ATTACHMENT 2
Page 1 of 14

1 was nominated by the Libertarian Party as that political party's presidential candidate at
2 the Libertarian Party's nominating convention. For a candidate seeking the nomination of
3 a party that nominates its candidate at a national convention, the date of nomination is
4 considered, under Commission regulations, to mark the conclusion of that candidate's
5 eligibility to continue to receive Matching Funds. *See* 26 U.S.C. § 9032(6) and 11 C.F.R.
6 § 9032.6 (a) (defining the "matching payment period"). Thus, the Commission
7 determined that Governor Johnson's date of ineligibility was May 5, 2012. *See* Letter
8 from Vice Chair Ellen L. Weintraub to the Honorable Gary Johnson, dated May 29, 2012;
9 11 C.F.R. § 9033.5(c).

10 Although Governor Johnson's date of ineligibility had passed, Commission
11 regulations permit presidential candidates to receive Matching Fund payments after the
12 candidate's date of ineligibility, but only to the extent that they have net outstanding
13 campaign obligations on the date(s) of payment. *See* 11 C.F.R. §§ 9033.5, 9034.1(b). A
14 candidate's net outstanding campaign obligations equal the difference between the total
15 of all outstanding obligations for qualified campaign expenses as of the candidate's date
16 of ineligibility, plus estimated necessary winding down costs, less the total of cash on
17 hand, capital assets, other assets, and receivables. 11 C.F.R. § 9034.5(a); *see also*
18 Advisory Opinion 2000-12 (Bradley/McCain).

19 On June 13, 2012, Governor Johnson submitted a Statement of Net Outstanding
20 Campaign Obligations ("NOCO Statement"), which showed that he had \$134,625 in net

1 outstanding campaign obligations as of May 5, 2012, his date of ineligibility.¹ *See*
2 Attachment 2. To date, the Commission has certified, and the United States Treasury has
3 paid, \$632,016.75 in public funds.

4 The Matching Payment Act and Commission regulations require the Commission
5 to audit all presidential campaign committees that receive Matching Funds after the
6 matching payment period ends to ensure that the committees used public funds only for
7 the purpose of defraying qualified campaign expenses. *See* 26 U.S.C. § 9038(a) and 11
8 C.F.R. § 9038.1(a). Consequently, the Commission began to request records of the
9 Committee on December 3, 2012, and, pursuant to Commission regulations, conducted
10 fieldwork from February 26, 2013 to March 15, 2013. 11 C.F.R. § 9038.1(b). The
11 Commission, however, has not yet approved a Preliminary Audit Report.

12 In the meantime, the Commission first received the Committee's eleventh, and
13 most recent, submission for Matching Funds on March 1, 2013, and this submission was
14 accompanied by a revised NOCO Statement in accordance with 11 C.F.R. § 9034.5(f)
15 (requiring committee to submit a revised statement that reflects the financial status of the
16 campaign as of the close of business three business days before due date). The
17 Commission rejected the submission for review, pursuant to its authority under

¹ Candidates are normally obligated to submit an initial NOCO Statement within fifteen days of the date of ineligibility. 11 C.F.R. § 9034.5(a). In this case, because the Commission made its initial determination of ineligibility after the date of ineligibility had passed, the Commission gave Governor Johnson fifteen days from the date of his receiving notice of the Commission's determination to submit a NOCO Statement. *See* Letter from Vice Chair Ellen L. Weintraub to the Honorable Gary Johnson, dated May 29, 2012.

1 11 C.F.R. §§ 9036.2(d)(2) and 9036.4(a)(2), because the projected dollar value of non-
2 matchable contributions in the submission exceeded fifteen percent of the amount
3 requested. The Committee then filed corrected submissions on March 25 and on
4 April 10, 2013. On each of these dates it also re-filed its revised NOCO Statement. The
5 Commission accepted the April 10 submission for review and has determined that the
6 submission would, if the Committee had net outstanding campaign obligations, entitle the
7 Committee to receive an additional \$46,685 in public funds.

8 However, during the course of the audit, the Commission reviewed the
9 Committee's NOCO Statement and compared the amounts disclosed on that statement
10 with its own calculations of the amounts that are relevant to determining the Committee's
11 net outstanding campaign obligations. This review indicates that the Committee has no
12 remaining net outstanding campaign obligations, and therefore the Committee is not
13 entitled to receive any further Matching Funds requested. 11 C.F.R. § 9034.1(b).

14 Under section 9034.1(b), a committee with net outstanding campaign obligations
15 as of the date of ineligibility may continue to receive matching payments for matchable
16 contributions "provided that on the date of payment there are remaining net outstanding
17 campaign obligations, *i.e.*, the sum of the contributions received on or after the date of
18 ineligibility plus matching funds received on or after the date of ineligibility is less than
19 the candidate's net outstanding campaign obligations." 11 C.F.R. § 9034.1(b).

20 Here, the audit of the Committee's NOCO statement found that, contrary to the
21 Committee's most recent revised NOCO statement, the Committee should not have any
22 remaining net outstanding campaign obligations. To be precise, the Commission's

1 calculation of the Committee's net outstanding campaign obligations as of the date of
2 ineligibility is actually greater than what the Committee itself reported, the Commission's
3 calculation being \$1,619,393.38. From this corrected campaign obligation total, the
4 Commission then subtracted its calculation of the private contributions for the primary
5 election that the Committee received, totaling \$1,288,583.94, and the total amount of
6 public funds that the Committee has received to date, which is \$632,016.75, as noted
7 above. This yields a result of \$-301,207.31, indicating that the Committee no longer has
8 net outstanding campaign obligations.

9 The Committee's most recent revised NOCO statement, submitted April 10, 2013,
10 however, reflects continuing net outstanding campaign obligations. As described in
11 greater detail in the Audit Division's memorandum, *see* Attachment 1, the Commission
12 has initially concluded, based on the information from the audit of the Committee, that
13 the Committee's revised NOCO statement either (1) understates its assets because its
14 statement does not accurately reflect either private primary contributions or the public
15 funds that it has received, or (2) overstates its outstanding obligations because the
16 Committee's statement does not reflect that public funds or contributions have already
17 been used to pay the Committee's obligations to date.

18 Commission regulations state that if the Commission receives information
19 indicating that substantial assets of the candidate's authorized committee have been
20 undervalued or not included in the NOCO Statement, or that the amount of outstanding
21 campaign obligations has been overstated in relation to Committee assets, then the
22 Commission may decide to temporarily suspend further matching payments pending a

1 final determination on the candidate's entitlement to receive all or a part of the matching
2 funds requested. 11 C.F.R. § 9034.5(g)(1).

3 In this case, given the amount of public funds and private contributions available
4 to pay the net outstanding campaign obligations, the Committee no longer has net
5 outstanding campaign obligations that would entitle the candidate to further public funds.
6 11 C.F.R. § 9034.1(b). The Commission, therefore, has made an initial determination to
7 suspend further payments of matching funds to Governor Johnson pursuant to the
8 authority granted by 11 C.F.R. § 9034.5(g).

9 **III. CONCLUSION**

10 Based on the foregoing, the Commission makes an initial determination pursuant
11 to 11 C.F.R. § 9034.5(g) that Governor Johnson is not entitled to further payments of
12 matching funds because the Committee has no net outstanding campaign obligations.
13 The Commission has, therefore, decided to temporarily suspend further payments of
14 matching funds under section 9034.5(g)(1).

15

16 **Attachments**

- 17 1. Audit Division Memorandum Re: Gary Johnson 2012, Inc., dated April 22, 2013.
18 2. NOCO Statement of Governor Johnson as of May 5, 2012, submitted on June 13,
19 2012.



April 22, 2013

MEMORANDUM

TO: Anthony Herman
General Counsel

THROUGH: Alec Palmer
Staff Director

FROM: Patricia C. Orrock
Chief Compliance Office. *Patricia C. Orrock*

Digitally signed by Patricia C. Orrock
DN: cn=Patricia C. Orrock, o=FEC,
ou=Office of Compliance,
email=porrock@fec.gov, c=US
Date: 2013.04.22 15:26:18 -0400

Thomas Hintermister
Assistant Staff Director
Audit Division
Thomas
Hintermister

Digitally signed by Thomas Hintermister
DN: cn=Thomas Hintermister, o=FEC,
ou=Commission on Audit Division,
email=thintermister@fec.gov, c=US
Date: 2013.04.22 15:18:42 -0400

Zuzana Pacious
Audit Manager
Zuzana O.
Pacious

Digitally signed by Zuzana O.
Pacious
DN: cn=Zuzana O. Pacious, o=FEC,
ou=Commission on Audit Division,
email=zpacious@fec.gov, c=US
Date: 2013.04.22 15:13:22 -0400

SUBJECT: Gary Johnson 2012, Inc. – Challenge to Statement of Net Outstanding
Campaign Obligations

On April 10, 2013, the Audit Division received the attached Amended Statement of Net Outstanding Campaign Obligations (NOCO) as part of a re-submission of matching funds from the Gary Johnson 2012, Inc. (the Committee). The Committee prepared the NOCO on February 28, 2013 and the Audit staff reviewed the re-submission (#11) and determined that \$46,685 is eligible to be matched from the re-submission. In addition, the Audit Division is currently reviewing another re-submission (#8-9) totaling \$73,995. Therefore, the Committee currently has the potential to receive up to \$120,680 in matching funds from these latest re-submissions. However, as a result of the Audit Division's review of financial activity during the recent mandatory Title 26 audit of the committee, it appears that the Committee may have already received matching funds in excess of the Candidate's entitlement and may no longer be entitled to receive additional public funds. Given the current available information, the Audit staff therefore recommends the Commission temporarily suspend further matching payments pending a final determination of whether the Candidate is entitled to receive all or a portion of the matching funds requested.

As a result of information received from the mandatory Title 26 audit and the review of NOCO statements submitted by the Committee, it appears the Committee may have overstated assets and understated liabilities on those NOCO statements filed early in the matching fund submission process. The most recent NOCO statements prepared by the Committee on February 28, 2013 also appear to not have sufficient net outstanding campaign obligations for the primary

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ATTACHMENT 2
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election to warrant the continued receipt of primary matching funds after private contributions and matching funds received to date are applied to the obligations. Specifically, the Audit staff calculates that the net outstanding campaign obligations as of DOI to be \$1,619,393. However, upon applying private contributions for the Primary election (\$1,288,584) and matching funds payments for the Primary election (\$632,017) received by the Committee since the Candidate's date of ineligibility, it appears that matching funds totaling \$301,207 may have already been received by the Committee in excess of the Candidate's entitlement.

The Audit Division would like to highlight the following differences between the NOCO prepared by the Committee and the NOCO prepared by the Audit staff which resulted in a greater audited amount of Net Outstanding Campaign Obligations related to the Primary election. These adjustments as well as the application funds received after DOI to the Primary election debt are the basis for the Audit Division's conclusion that the Committee is no longer entitled to additional public funds.

Cash Balance- The audited cash amount represents a decrease by \$20,219 when compared to the cash figure used by the Committee in its NOCO. This is most likely due to the Committee not excluding general campaign contributions deposited into its Primary bank account when calculating its NOCO cash balance.

Accounts Payable- During audit fieldwork testing of disbursements, the Audit staff identified additional accounts payable related to the Primary election owed by the Committee totaling \$323,141 when compared to the payables figure used by the Committee in its NOCO. The majority of this difference represents invoiced amounts from the Committee's largest vendor. The vendor originally invoiced the Committee in mid-2012, however, provided revised invoices with larger amounts owed in December 2012.

Application of Post DOI Contributions to Debt- In addition to the differences related to figures presented in the NOCO noted above, it is also important to note the difference in how the Audit staff and the Committee applied funds received by the Committee (Primary contributions and matching funds) to the Primary debt outstanding as of the Candidate's DOI. The Audit staff first applied private contributions designated for the Primary election (\$1,288,584) before applying the public funds (\$632,017) towards extinguishing the Primary debt. These private contributions were considered designated to the Primary election based on the election designation on the contributor's donor card or, for online credit card contributions, the contributor attesting to the designation language on the Committee's website that indicates that the first \$2,500 of each contribution would be designated towards the Primary election. It is also noted that many of these contributions were actually submitted to be matched for Primary matching funds despite the fact that the Committee deposited the contributions in their bank account established for General election activity and were reported as General election contributions on FEC reports. The Committee has not provided the Audit staff with information for how or if it applied post DOI contributions to the net outstanding campaign obligations of \$1,276,033 that it presented in its NOCO prepared on February 28, 2013.

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Page 9 of 14

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2 of 5

Pursuant to FEC Directive 24, the Audit Division is forwarding this matter to the Office of General Counsel for review. Given that the Committee has already apparently received matching fund payments in excess of the Candidate's entitlement, the Audit Division plans to recommend to the Commission that it temporarily suspend further matching payments pending a final determination of whether the candidate is entitled to receive all or a portion of the matching funds requested.

All workpapers and related documentation are available for review in the Audit Division. Should you have any questions regarding this matter, please contact Zuzana Pacious at 694-1347.

Attachments:

- Amended NOCO prepared February 28, 2013 by the Committee
- Preliminary NOCO prepared by the Audit Staff

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Page 10 of 14

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Page 3 of 5

Gary Johnson 2012, Inc.
Amended Statement of Net Outstanding Campaign Obligations
As of May 5, 2012
Prepared February 28, 2013

Assets

Cash on bank	\$ 11,510
Cash on hand	-
Accounts receivable	-
Capital and other assets on hand	-
Total Assets	<u>11,510</u>

Obligations

Accounts payable for qualified campaign expenses	1,227,793
Estimated winding down costs	<u>59,750</u>
Total obligations	<u>1,287,543</u>

Net Outstanding Campaign Obligations

\$ 1,276,033

Gary Johnson 2012, Inc

Preliminary Calculations of Net Outstanding Campaign Obligations at DOI

Preliminary Calculation of Entitlement

As Audited (Preliminary Calculations)

Assets as of DOI

Cash in bank	\$	(8,709.11) [a]
Cash on Hand	\$	-
Accounts Receivable	\$	-
Capital and Other Assets	\$	-
Total Assets	\$	(8,709.11)

Liabilities as of DOI

Accounts Payable to Political Advisors	\$	1,056,033.40
Late-billed Accts Payable to PA	\$	309,764.04
All other Accounts Payable	\$	170,064.27
Late-billed Accts Payable to PA	\$	15,072.56
Estimated Winding Down Costs (per the Committee)	\$	59,750.00 [b]
Total Liabilities	\$	1,610,684.27

Net Outstanding Campaign Obligations (Debt) **\$ (1,619,393.38)**

Less: Post-DOI Primary Ctrbs Designated to General **\$ 1,288,583.94**

Less: Total Matching Funds Received Post DOI **\$ 632,016.75**

Less: Proceeds from Sale of Capital Assets **\$ -**

Less: Underevaluation of Assets on NOCO **\$ -**

Adjusted NOCO/MF Entitlement as of 4/22/13 **\$ 301,207.31**

MF Received in Excess of Entitlement **\$ 301,207.31**

Footnotes to NOCO Statement

- [a] Committee's bank statements did not show a negative cash-on-hand balance at May 5, 2012, due to the general campaign contributions deposited into the Committee's primary account.
- [b] Committee's estimated winding down costs will be compared to actual winding down costs and adjusted accordingly in the course of an on-going audit.

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Page 5 **of** 5

Gary Johnson 2012

850 C Camino Chamisa
Santa Fe, NM 87501

Transmitted Via Facsimile and Electronic Mail June 13, 2012

June 13, 2012

Mr. Marty Kuest
Federal Election Commission
Audit Division
999 E Street, NW
Washington, DC 24063

RE: The Honorable Gary Johnson
850 C Camino Chamisa
Santa Fe, NM 87501
Statement of Net Outstanding Campaign Obligations (NOCO)

Dear Mr.

Pursuant to the letter from the Federal Election Commission dated May 29, 2012 we are submitting the enclosed Statement of Net Outstanding Campaign Obligations (NOCO) as of May 5, 2012 in accordance with 11 C.F.R. § 9034.5(a).

If you have any questions please do not hesitate to call.

Sincerely,



Chet S. Goodwin
Treasurer

Enclosure as stated

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Page 1 of 2

ATTACHMENT 2
Page 13 of 14

Gary Johnson 2012, Inc.
Statement of Net Outstanding Campaign Obligations
As of May 5, 2012
Prepared June 11, 2012

Assets

Cash on bank	\$ 11,510
Cash on hand	-
Accounts receivable	-
Capital and other assets on hand	-
Total Assets	<u>11,510</u>

Obligations

Accounts payable for qualified campaign expenses	146,135
Estimated winding down costs	-
Total obligations	<u>146,135</u>

Net Outstanding Campaign Obligations	<u>\$ 134,625</u>
--------------------------------------	-------------------

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Page 14 of 14

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~~Page 14 of 14~~ 2



Suspension of Matching Funds

Joshua Blume to cgoodwin

04/25/2013 04:55 PM

cc kimblanton, apollopezell, Thomas Hintermister, Zuzana O Pacious,
Lorenzo Holloway

Hello, Mr. Goodwin:

I am sending you this e-mail to let you know that the Commission made an initial determination yesterday to temporarily suspend payments of matching funds to Governor Johnson because of its conclusion that he no longer has net outstanding campaign obligations. We have sent the Commission's Notice of Initial Determination to both Governor Johnson and to Gary Johnson 2012, Inc (the "Committee"), through certified mail. The Notice contains the factual and legal basis for the Commission's conclusion. I am also taking the liberty of enclosing in this e-mail, below, an electronic copy of the documents that we sent to both Governor Johnson and the Committee through certified mail.

As you will see from the attached Notice, Governor Johnson has the opportunity to submit factual and legal materials to demonstrate why he continues to be entitled to matching funds, and the Commission will consider these materials before making a final determination.

Please feel free to contact me if you have any questions.




GARY JOHNSON LTR-4.25.13.pdf

Sincerely,

Joshua Blume
Attorney, Compliance Advice
Federal Election Commission
999 E Street, N.W., Room 453
Washington, D.C. 20463
(202) 694-1533
jblume@fec.gov

ATTACHMENT 3
Page 1 of 6

 RE: Gary Johnson 2012 response re Notice and suspension of matching funds
aliciadearn@bellatrixlaw.com
to:
jblume@fec.gov
05/20/2013 09:44 PM
Hide Details
From: "aliciadearn@bellatrixlaw.com" <aliciadearn@bellatrixlaw.com>
To: "jblume@fec.gov" <jblume@fec.gov>,
History: This message has been forwarded.

1 Attachment



FEC - Gary Johnson Letter - May 20.pdf

It would be helpful if I attached the letter! Apologies!

Alicia Dearn

From: alicidearn@bellatrixlaw.com
Sent: Monday, May 20, 2013 6:40 PM
To: 'jblume@fec.gov'
Subject: Gary Johnson 2012 response re Notice and suspension of matching funds

Dear Mr. Blume,

Attached is Gary Johnson 2012 Inc's response to the suspension of matching funds and the April 25 Notice of Initial Determination. This letter went out in the mail today, May 20, from my office in San Diego. I will contact you in a few days to confirm receipt.

I look forward to working with you on this matter.

Very truly yours,

Alicia I. Dearn
CEO & Managing Attorney
Bellatrix PC
3990 Old Town Avenue, Ste A200
San Diego, CA 92110
Telephone: (619) 677-5608
Facsimile: (619) 677-5684
aliciadearn@bellatrixlaw.com

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Page 2 of 6

** Please note our new email address **

The preceding email message contains information that is confidential, may be protected by the attorney-client or other applicable privileges, and may constitute non-public information. It is intended to be conveyed only to the designated recipient and is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521. If you receive this message in error, please notify us and destroy all hard and electronic copies of the transmission immediately. Unauthorized use, dissemination, distribution, or reproduction of this message is strictly prohibited and may be unlawful.

The Missouri Bar requires Missouri attorneys to notify all email recipients that (1) email communication is not a secure method of communication; (2) any email that is sent to you or by you may be copied and held by any or all computers through which it passes as it is transmitted; and (3) persons not participating in our communication may intercept our communications by improperly accessing either of our computers or another computer unconnected to either of us through which the email is passed. By sending communications by email, you are consenting to communicate with Bellatrix PC by email. If you do not wish to use email to communicate with us, please contact us by telephone, fax or mail.

ATTACHMENT 3
Page 3 of 6

BELLATRIX P.C.
3990 Old Town Avenue #A-200
San Diego, CA 92110
T: (619) 677-5608
F: (619) 677-5684

ALICIA I. DEARN
AliciaDearn@BellatrixLaw.com

VIA EMAIL AND U.S. MAIL

May 20, 2013

Lisa J. Stevenson, Esq.
Deputy General Counsel - Law
Joshua Blume, Esq.
Attorney, Compliance Advice
Federal Election Commission
999 E Street, N.W., Room 453
Washington, D.C. 20463

RE: Gary Johnson 2012, Inc. (LRA 905)
Notice of Initial Determination on Entitlement

Dear Ms. Stevenson and Mr. Blume:

I represent Governor Gary Johnson and Gary Johnson 2012, Inc. ("the Committee") in this matter. I am writing to respond to your Notice of Initial Determination on Entitlement ("Notice") dated April 25, 2013. The Committee requests that the Federal Election Commission ("the Commission") reconsider its determination and engage in additional discussions and fact-finding with the Committee regarding the allocation and crediting of donations to the campaign accounts related to the Primary Election and donations to the campaign accounts related to the General Election. The Committee submits that the designation of certain funds as donations related to the Primary Election was erroneous and that those funds were properly designated as donations for the General Election. Further, the Committee respectfully submits that it is still eligible for matching funds on the grounds that it is still paying off verifiable Primary campaign debt as the expenditures were already verified by auditors for the Commission.

As set forth in the Notice, the Commission has undertaken an audit of the Committee's expenditures to verify that only qualifying expenditures were counted in determining debt. Although no Preliminary Audit Report has been approved or shared with the Committee yet, the Commission states in its Notice that it was able to verify that the expenditures were appropriate and documented. Indeed, the Commission allocated more money to the expenditures than even the Committee.

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Page 4 of 6

Federal Election Commission

RE: Gary Johnson 2012 Inc. (LRA 905) Notice of Initial Determination of Entitlement

May 20, 2013

Page 2

Thus, the gravamen of the Commission's conclusion that there is no more outstanding debt related to the Primary Election campaign is the conclusion that more donations should have been designated to the Primary Election campaign, and that those donations were erroneously designated as towards the General Election campaign. Specifically, the April 22, 2013 Memorandum regarding "Challenge to Statement of Net Outstanding Campaign Obligations" on Page 2 states that there is a difference in how the Audit staff applied contributions as compared to the Committee.

Based on the explanation in the Memorandum, it appears that the Commission's Audit staff designated more funds to the Primary campaign based on disclaimer language on the Committee's website. Although the audit report has not been shared yet, it appears that all (or the vast majority of) donations made *after* the primary campaign was completed (excluding wind down and payments to debt), and the general election campaign commenced, were credited to the primary election accounts by the Audit staff (whereas that was not the case by the Committee). The Audit staff cited language on the website that states that contributors consent to up to the first \$2500 of their donations being designated as primary campaign donations in support for this reallocation.

The Audit staff's conclusion does not appear to take into account several facts (although the Commission emphasizes that it is responding to this somewhat in the blind, having received no oral or written Audit Report or findings as of yet, except for the Notice). Please consider:

1. The Committee's procedure when obtaining donations through the website was to apply the first \$250 of the donation to the primary debt, which was also submitted for matching funds. This explains why a portion of the money was submitted to the Commission as eligible for matching funds. The Committee was transparent about this procedure to both donors and the Commission.
2. Donations above the maximum amount allowed for the General Election campaign were also applied to the Primary Election campaign, which was the intent and purpose of any disclaimers on the website.
3. Frequently, notwithstanding any language in the fine print on the website, specific donor intent was made clear to the Committee. When donor intent required specific designation of funds to either the General Election campaign or the Primary Election campaign's debt, the Committee complied and so designated the funds.

Federal Election Commission

RE: Gary Johnson 2012 Inc. (LRA 905) Notice of Initial Determination of Entitlement

May 20, 2013

Page 3

4. In addition to the website, donations were solicited and processed through a variety of means. For example, the Committee held fundraisers where both online and paper donations were collected. The Committee held "money bombs" for General Election funds, which were collected through the merchant processor on the website. The Committee used Fundly.com to solicit and collect donations. These are a smattering of the activities engaged in by the Committee during which a myriad of donor transactions and manifested intent could have been communicated and honored in the designation of funds.
5. In the logistical handling of the various fundraising activities and collection of donations, the website merchant services processor was not always used (in fact, there was a period of months when it delivered constant errors and so donations were processed through Fundly.com and PayPal, primarily). Moreover, when the processor page on the website was used, the disclaimer was not always present on the direct link. The disclaimer was also not on the website until towards the end of the general election campaign.
6. Funds donated specifically to the primary election that exceeded the \$2500 maximum donation amount were automatically moved to the general election account and held until the primary election was completed and donor intent could be verified.

Given these general facts, which may be expanded upon in detail as necessary, the Committee reasserts that it properly allocated funds from donors between the primary election accounts and general election accounts. The Committee respectfully requests the Commission to reconsider its decision to cease entitlement and payment of matching funds as improvidently made. It further requests the Commission to provide information supporting the conclusions, reallocations and concerns from its Audit staff, so that these may be fully addressed by the Committee.

As counsel for the Committee, I look forward to a fruitful conversation regarding the designation of donations so that the Commission and the Committee can arrive at verified figures that agree.

Very truly yours,



Alicia I. Dearn

ATTACHMENT

3

Page

6

of

6



RE: Gary Johnson 2012 Response to Notice of Initial Determination

aliciadearn@bellatrixlaw.com

to:

JBlume@fec.gov

05/24/2013 06:03 PM

Cc:

"thintermister@fec.gov", "zpacious@fec.gov", "lholloway@fec.gov"

Hide Details

From: "aliciadearn@bellatrixlaw.com" <aliciadearn@bellatrixlaw.com>

To: "JBlume@fcc.gov" <JBlume@fec.gov>,

Cc: "thintermister@fec.gov" <thintermister@fec.gov>, "zpacious@fec.gov"

<zpacious@fec.gov>, "lholloway@fec.gov" <lholloway@fec.gov>

History: This message has been replied to.

Dear Mr. Blume:

Thank you for your email and I will respond in due course to your questions. Preliminarily, however, I would like to respond to the following sentence:

"In the letter you generally assert without any cited support that the Commission's auditors erroneously treated certain contributions that the Committee received as primary election contributions when, in the Committee's view, these contributions would more properly be characterized as general election contributions."

The Committee's assertion with respect to the auditor's classification of received funds is, essentially, an educated guess based on the auditors' statements in your memoranda. The Committee is not entirely sure how the auditors treated the contributions, frankly, because that information is in the possession of the auditors and have never been provided to the Committee. The lack of an exit conference with the auditors regarding findings – or any conversation about the deposit side of the books at all – left the Committee blindsided by the conclusions in the memoranda. It would be much easier for the Committee to respond to these conclusions with evidence if they could have an exit conference and some explanation of the foundation of the auditor's conclusions. Would the FEC be willing to present the audit report and allow for an exit conference?

Very truly yours,

Alicia I. Dearn
CEO & Managing Attorney
Bellatrix PC
3990 Old Town Avenue, Ste A200
San Diego, CA 92110
Telephone: (619) 677-5608
Facsimile: (619) 677-5684
aliciadearn@bellatrixlaw.com

** Please note our new email address **

ATTACHMENT 4
Page 1 of 3

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From: JBlume@fec.gov [mailto:JBlume@fec.gov]
Sent: Friday, May 24, 2013 9:18 AM
To: aliciadearn@bellatrixlaw.com
Cc: thintermister@fec.gov; zpacious@fec.gov; lholloway@fec.gov
Subject: Gary Johnson 2012 Response to Notice of Initial Determination

Dear Ms. Dearn:

This is to acknowledge receipt of your e-mail containing the Committee's response to the Commission's Notice of Initial Determination to suspend the payment of matching funds.

In the letter you generally assert without any cited support that the Commission's auditors erroneously treated certain contributions that the Committee received as primary election contributions when, in the Committee's view, these contributions would more properly be characterized as general election contributions. You also state a number of reasons why the Committee believes this to be the case.

Pursuant to 11 C.F.R. 9034.5(g)(2), the candidate may submit written factual or legal materials "to demonstrate" continuing entitlement to matching payments. In order to be able to evaluate the assertions in your letter, we need documentation that supports those assertions. Consequently, the Committee must identify specifically the contributions that the Committee believes the Commission's auditors characterized incorrectly, and also provide evidence to support the letter's assertions regarding the factual circumstances of those contributions. Without adequate documentation to support the assertions in your letter, we may have no alternative but to recommend to the Commission that it proceed to a final determination that the Committee is not entitled to matching funds.

In addition to providing supporting documentation and evidence, please also clarify the following matters in the letter:

(1) In point 1 of the letter, the Committee states that its procedure when obtaining donations through the website was to apply the first \$250 of the donation to the primary debt, which was also submitted for matching funds. Please clarify whether the Committee intended to state that it applied the first "\$250" of the donation to primary debt, or whether it applied the first "\$2,500" of the donation this way.

(2) In points 2 and 6 of the letter, the Committee indicates how it treated donations exceeding the contribution limitations for the general election, and for the primary election, respectively. Please indicate whether the Committee presumptively redesignated the excessive donations in each of these cases, and, if so, please delineate the steps that the Committee followed in doing so.

In addition to the above, the Committee should address and show how, if its factual assertions and arguments are correct, the Committee would remain entitled to receive matching funds. In addressing this, you should be aware that, in order to submit contributions for matching successfully, those contributions must, among other things, be made for the purpose of influencing a primary election. See 11 C.F.R. 9034.2(a)(1) and 9034.3(i). If it is the case that certain contributions that were previously submitted for matching, and that were matched, were actually made for the purpose of influencing a general election, then this may indicate that such contributions were in fact non-matchable. If such contributions were non-matchable, then this would constitute a basis for a repayment determination. See 11 C.F.R. 9038.2(b)(1)(iii). The Committee may wish to address this concern at the same time as it submits the aforementioned documentation and evidence.

You should note as well that, in addition to what we are specifically requesting of you, the Committee is free to submit any factual and legal materials it wishes to submit that it believes will support its assertions.

ATTACHMENT 4
 Page 2 of 3

Please provide all of the above by June 3, 2013. Please also be aware that it is our intention to close the administrative record after June 3, so that we may make a recommendation to the Commission regarding the appropriate disposition of this matter.

Thanks very much for your prompt attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

Joshua Blume
Attorney, Compliance Advice
Federal Election Commission
999 E Street, N.W., Room 453
Washington, D.C. 20463
(202) 694-1533
jblume@fec.gov

ATTACHMENT 4
Page 3 of 3



Gary Johnson 2012 Initial Determination

Joshua Blume to: aliciadearn

05/31/2013 11:35 AM

Cc: Thomas Hintermister, Zuzana O Pacious, Lorenzo Holloway
Bcc: Camilla Reminsky, Martin Favin, Gary Hache, Lisa Stevenson

Ms. Dearn:

I am writing to let you know that we have met with the auditors to discuss the concern that you raised in your e-mail of May 24 about not having access to the auditors' methodology for assigning the Committee's contributions to either the primary or the general election periods. In response, we have attached a spreadsheet, prepared by the Audit Division, which documents how the auditors made those assignments, and the sources of information upon which the auditors relied in order to do so. We believe that this should be helpful to you and to the Committee in formulating the Committee's response to the initial determination notice.

You also asked whether it would be possible to present the audit report and to hold an exit conference. We are not inclined to do so at this time. The entitlement determination process, conducted under the auspices of 11 C.F.R. 9033.10(b), (c) and 9034.5(g), is intended to focus upon the narrow question of whether a committee receiving public funds continues to have outstanding primary election debt that would permit it to continue to receive such funds in the future. The audit process, conducted under 11 C.F.R. 9038.1, in contrast, is more wide-ranging, covering a much broader array of issues. Because of these different emphases, we believe it would be best, and is necessary, to keep these two processes separate.

To give the Committee an opportunity to consider the data in the spreadsheet, we are extending the deadline for the Committee's response to June 10.

Thanks very much. Please don't hesitate to contact me if you have any questions or concerns.



GJ2012 Primary Contributions for NOCO.xlsx

Sincerely,

Joshua Blume
Attorney, Compliance Advice
Federal Election Commission
999 E Street, N.W., Room 453
Washington, D.C. 20463
(202) 694-1533
jblume@fec.gov

ATTACHMENT 5
Page 1 of 1

Gary Johnson 2012 Inc. supplement submission of facts

aliciadearn@bellatrixlaw.com

to:

jblume@fec.gov

06/12/2013 10:21 PM

Hide Details

From: "aliciadearn@bellatrixlaw.com" <aliciadearn@bellatrixlaw.com>

To: "jblume@fec.gov" <jblume@fec.gov>,

History: This message has been forwarded.

4 Attachments



donations after 5.5.12 for FEC matching funds-breakdowns.xlsx FEC matching funds wire payments.xlsx



donations after 5.5.12 for FEC matching funds.xlsx Scan_20130612_191451.pdf

Dear Mr. Blume:

Attached is a courtesy copy of the submission made today by mail from Gary Johnson 2012 Inc. In addition, the attached Excel spreadsheets had to be submitted electronically because they could not print on standard or legal sized paper. These spreadsheets constitute the Exhibit A to Ms. Blanton's declaration.

Please do not hesitate to contact me with questions.

Alicia I. Dearn

CEO & Managing Attorney

Bellatrix PC

9724 Chesapeake Drive, Ste B

San Diego, CA 92123

Telephone: (619) 677-5608

Facsimile: (619) 677-5684

aliciadearn@bellatrixlaw.com

**** We've moved! Please note our new address. ****

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ATTACHMENT 6
Page 1 of 10

BELLATRIX P.C.
9475 Chesapeake Drive, Suite B
San Diego, CA 92123
T: (619) 677-5608
F: (619) 677-5684

Alicia I. DEARN
AliciaDearn@BellatrixLaw.com

VIA EMAIL AND U.S. MAIL

June 12, 2013

Lisa J. Stevenson, Esq.
Deputy General Counsel - Law
Joshua Blume, Esq.
Attorney, Compliance Advice
Federal Election Commission
999 E Street, N.W., Room 453
Washington, D.C. 20463

RE: Gary Johnson 2012, Inc. (LRA 905)
Notice of Initial Determination on Entitlement
Supplemental Information Per Request

Dear Ms. Stevenson and Mr. Blume:

This letter responds to your email correspondence dated May 24, 2013. Specifically, the Commission requested additional information on the Committee's process of designating funds to either primary or general campaign accounts, what was intended by the Committee and the donors in this process, and a citation to donations that the Committee asserts were properly submitted for matching funds (as well as a citation to donations it believes were improperly classified by the auditors).

1. Additional Facts

Beginning May 5, 2012, when Governor Johnson received the nomination of the Libertarian Party, virtually all donations began to immediately and automatically be deposited in the bank account designated for General Election funds. On that day, Ms. Kim Blanton at NSON Opinion, who was managing most day-to-day activities related to the receipt and bookkeeping of the donations, switched all online donations (merchant account, Fundly and PayPal) to be deposited in the General Election bank account. Prior to that, all funds (up to the \$2500 donor limit) were maintained in the bank account designated for the Primary Election.

Federal Election Commission

RE: Gary Johnson 2012 Inc. (LRA 905) Notice of Initial Determination of Entitlement

June 12, 2013

Page 2

Ms. Blanton would receive cash and checks for the Committee as well. She deposited all cash into the General Election account and none of it was ever submitted for matching. She deposited checks into the General Election account, so long as no donor intent was otherwise expressed to have the funds designated to influence the primary. There were only a few such checks.

On September 28, 2012, Ms. Blanton, had a conference call with FEC officials, Marty Kuest, Gary Huche and Tom Hintermister, and with Ron Neilson, Apollo Pazell and Paula Edwards. The purpose of that call was to discuss whether the first \$250 of donations contributed after May 5, 2012 could be designated towards the Primary Election and submitted for matching funds. After that discussion, it was the Committee's understanding that this would be an acceptable course of action.

Accordingly, language was appended to the website, which stated: "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."

What was intended by the Committee as part of this language was that, any donations after the May 5, 2012 date: (1) the first \$250 would be re-designated to the primary campaign so that it may be submitted for matching funds in order to pay down primary debt; (2) that the next \$2500 would go to the general election fund; and (3) that any funds over and above the \$2500 donation limit for the general election would then be designated to the primary election. And, in fact, that is what the Committee did.

Further, and more saliently, that language was meant to signify that the "first" \$2500 obtained by the Committee, including donations prior to May 5, 2012 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 \$2500, for a penultimate amount of \$5000 in 2012 (the first going to the primary and the second going to the general). In fact, the language states in the very same sentence that the primary and general elections are technically two separate elections with separate fundraising. This information was communicated to donors, additionally, by word of mouth through the campaign's grassroots and volunteer efforts. Accordingly, the Committee believes that it was designating donations according to the wishes of each individual donor.

Because of the mechanism for automatic deposits by the merchant account, all funds that were received after May 5, 2012 automatically went to the general election bank account. The Committee then calculated out which amounts would be designated to the primary election based on the above criteria. They submitted the first \$250 of a donation to the Commission for matching funds. The Committee took into account any donations up to \$250 by a donor that were already submitted and did

Federal Election Commission

RE: Gary Johnson 2012 Inc. (LRA 905) Notice of Initial Determination of Entitlement

June 12, 2013

Page 3

not double submit. Any funds counted in this bucket were used to pay off primary campaign debts, although they were not passed through the primary election bank account first.

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. The fact that these funds were used to influence the General Election therefore means that they cannot be designated by the Auditors to pay off the primary debts

Finally, for any post May 5, 2012 donations above \$2500 designated to the General Election, up to the lawful limits, were considered designated to the primary and were also used to pay off primary debts, although they were not passed through the primary election bank account first.

2. Findings and Assertions

The Committee submits the following with respect to the accountings provided by the Auditors when compared to the accountings prepared by the Committee's CPAs and bookkeepers.

- The Auditors re-designated \$1,307,199.50 from the general election account to the primary account.
- After comparison of the numbers, the Committee agrees that \$21,555.56 of funds designated to the general election campaign account should have been re-designated to the primary election account for being in excess of \$2,500 and donated after May 5, 2012. The Committee disputes that the rest of the funds re-designated by the Commission from the general to the primary account was correct.
- After comparison of the numbers, the Committee found that donations made after May 5, 2012 with illegible donor cards, but which the auditors re-designated as to the primary election accounts is \$69,965.97. The Committee asserts that these funds should not have been re-designated because donor eligibility and intent could not have been ascertained by the cards, and therefore they were appropriately counted in the General Election account because they were submitted after May 5, 2012.

If the Commission finds that donor intent after May 5, 2012 is unclear, the Committee requests and opportunity to seek individualized clarification from donors on which election their donations were intended to influence.

Federal Election Commission

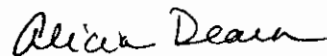
RE: Gary Johnson 2012 Inc. (LRA 905) Notice of Initial Determination of Entitlement

June 12, 2013

Page 4

The Committee has attached to this letter their accountings, spreadsheets and declarations of Brent Daines and Kim Blanton to support its assertions that additional debt exists with respect to the primary and that it is entitled to further payout of matching funds as submitted in its NOCO.

Very truly yours,



Alicia I. Dearn

1 BELLATRIX PC
2 Alicia I. Dearn, Esq. (SBN: 235169)
3 *aliciadearn@bellatrixlaw.com*
4 9475 Chesapeake Drive Suite B
5 San Diego, CA 92123
6 Tel: (619) 677-5608
7 Fax: (619) 677-5684

8 Attorneys for Gary Johnson 2012 Inc.

9 **BEFORE THE FEDERAL ELECTION COMMISSION**

10 In the Matter of
11 Governor Gary Johnson

Case No.: LRA 905

12 **DECLARATION OF BRENT W.**
13 **DAINES**
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DECLARATION OF BRENT DAINES

1 I, Brent W. Daines, declare as follows:

2 I am a CPA and partner at Daines Goodwin & Co. CPAs in Salt Lake City, Utah. I am
3 familiar with the audited financials of Gary Johnson 2012 Inc. and have personal knowledge of
4 the following facts.

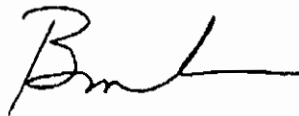
5 On June 12, 2013, after reviewing the Committee's books and the auditors' numbers
6 related to the redesignation of funds from the general campaign's account to the primary
7 campaign's account, I calculated that the contributions that are in excess of \$ 2,500 which have
8 been moved back to the primary by the auditors was \$ 21,555.56.

9 I further calculated that contributions made after May 5, 2012 with illegible donor cards
10 which the auditors have moved back to the primary is \$ 69,965.97.

11 The amount that the auditors redesignated from the general election account to the
12 primary election account was \$1,307,199.50.

13 I declare under penalty of perjury under the laws of the United States that the foregoing is
14 true and correct. Sworn this 12th day of June, 2013 in Salt Lake City, Utah.

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Brent W. Daines

DECLARATION OF BRENT W. DAINES- 1

1 BELLATRIX PC
2 Alicia I. Dearn, Esq. (SBN: 235169)
3 *aliciadearn@bellatrixlaw.com*
4 9475 Chesapeake Drive, Suite B
5 San Diego, CA 92123
6 Tel: (619) 677-5608
7 Fax: (619) 677-5684

8 Attorneys for Gary Johnson 2012 Inc.

9 **BEFORE THE FEDERAL ELECTION COMMISSION**

10 In the Matter of
11 Governor Gary Johnson

Case No.: LRA 905

12 **DECLARATION OF KIM**
13 **BLANTON**
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DECLARATION OF KIM BLANTON

1 I, Kim Blanton, declare as follows:

2 I am an employee of NSON Opinions and during the primary and general election
3 campaigns for Governor Gary Johnson, was managing most day-to-day activities related to the
4 receipt and bookkeeping of donations.

5 Beginning May 5, 2012, when Governor Gary Johnson received the nomination of the
6 Libertarian Party, virtually all donations began to immediately and automatically be deposited in
7 the bank account designated for General Election funds. On that day, I switched all online
8 donations (merchant account, Fundly and PayPal) to be deposited in the General Election bank
9 account. Prior to that, all funds (up to the \$2500 donor limit) were maintained in the bank
10 account designated for the Primary Election.

11 I would also receive cash and checks for the Committee as well. I deposited all cash into
12 the General Election account and none of it was ever submitted for matching. I deposited checks
13 into the General Election account, so long as no donor intent was otherwise expressed to have
14 the funds designated to influence the primary. There were only a few such checks.

15 On September 28, 2012, I had a conference call with FEC officials, Marty Kuest, Gary
16 Huche and Tom Hintermister, and with Ron Neilson, Apollo Pazell and Paula Edwards. The
17 purpose of that call was to discuss whether the first \$250 of donations contributed after May 5,
18 2012 could be designated towards the Primary Election and submitted for matching funds. After
19 that discussion, it was the Committee's understanding that this would be an acceptable course of
20 action.

21 What was intended by the Committee, and discussed on that call, was that, for any
22 donations after the May 5, 2012 date: (1) the first \$250 would be re-designated to the primary
23 campaign so that it may be submitted for matching funds in order to pay down primary debt; (2)
24 that the next \$2500 would go to the general election fund; and (3) that any funds over and above
25 the \$2500 donation limit for the general election would then be designated to the primary
26 election. And, in fact, that is what the Committee did.

27
28
DECLARATION OF KIM BLANTON - 1

1 Further, that language was meant to explain to the donors that they could indeed donate
2 again for another \$2500, for a penultimate amount of \$5000 in 2012 (the first going to the
3 primary and the second going to the general).

4 Because of the mechanism for automatic deposits by the merchant account, all funds that
5 were received after May 5, 2012 automatically went to the general election bank account. The
6 Committee then calculated out which amounts would be designated to the primary election based
7 on the above criteria. They submitted the first \$250 of a donation to the Commission for
8 matching funds. The Committee took into account any donations up to \$250 by a donor that
9 were already submitted and did not double submit. Any funds counted in this bucket were used
10 to pay off primary campaign debts, although they were not passed through the primary election
11 bank account first.

12 The Committee next maintained any funds submitted during the general cycle in the
13 general accounts and used them strictly for expenses related to that election.

14 Finally, any post-May 5, 2012 donations above \$2500 designated to the General Election
15 (up to the lawful limits) were considered designated to the primary and used to pay off primary
16 debts, although they were not passed through the primary election bank account first.

17 Attached as Exhibit A are spreadsheets that I prepared showing funds that were submitted
18 for matching, including amounts that the Committee asserts are still eligible for matching.

19 I declare under penalty of perjury under the laws of the United States that the foregoing is
20 true and correct. Sworn this 12th day of June, 2013 in Salt Lake City, Utah.

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23 Kim Blanton
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DECLARATION OF KIM BLANTON - 2



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 29, 2012

The Honorable Gary Johnson
850 C. Camino Chamisa
Santa Fe, NM, 87501

Dear Governor Johnson:

The Libertarian Party nominated you as its candidate for the office of President at its convention on May 5, 2012; thus, that date is the end of the matching payment period for your candidacy. See 11 C.F.R. §§ 9032.6 and 9033.5(c); 26 U.S.C. §§ 9032(2), 9033(c). Therefore, the Commission determined that May 5, 2012 is your date of ineligibility. 11 C.F.R. § 9033.5(c).

Within 15 days of your receipt of this letter, you must submit to the Commission a statement of net outstanding campaign obligations ("NOCO statement"). 11 C.F.R. § 9034.5(a). Such a statement must be submitted for the Commission to determine if you are entitled to receive matching payments for the purpose of winding down your campaign. 11 C.F.R. § 9034.1(a). With each additional submission for matching funds that you make, you must certify that your net outstanding campaign obligations equal or exceed the amount submitted for matching. 11 C.F.R. § 9034.5(f)(1). Subsequently, you will be required to submit revised NOCO statements before the next regularly scheduled payment date. 11 C.F.R. § 9034.5(f)(2).

You will be notified of when the Commission intends to commence fieldwork on the audit and examination required by 26 U.S.C. § 9038(a). The Commission may use the information obtained during the audit as a basis, or partial basis, for any entitlement or repayment determination it may make under 26 U.S.C. §§ 9036 and 9038(b) and 11 C.F.R. §§ 9036.2 and 9038.2.

If you have any questions concerning this matter or you disagree that May 5, 2012 is your date of ineligibility, you may contact Lorenzo Holloway, Assistant General Counsel for Public Finance and Audit Advice at (202) 694-1650, or Thomas Hintermister, Assistant Staff Director, Audit Division at (202) 694-1200 or (800) 424-9530.

Sincerely,

Ellen L. Weintraub
Vice Chair



THE FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 13, 2013

MEMORANDUM

To: Lisa J. Stevenson
Deputy General Counsel - Law

Through: Alec Palmer
Staff Director

From: Patricia C. Orrock
Chief Compliance Officer

Patricia C. Orrock

Digitally signed by Patricia C. Orrock
DN: cn=Patricia C. Orrock, o=FEC,
ou=Office of Compliance,
email=porrock@fec.gov, c=US
Date: 2013.09.13 15:37:32 -0400

Thomas E. Hintermister
Assistant Staff Director
Audit Division

Thomas
Hintermister

Digitally signed by Thomas Hintermister
DN: cn=Thomas Hintermister, o=Federal
Election Commission, ou=Audit Division,
email=thintermister@fec.gov, c=US
Date: 2013.09.13 15:18:01 -0400

Marty Favin Martin L.
Audit Manager Favin

Digitally signed by Martin L. Favin
DN: cn=Martin L. Favin, o=FEC,
ou=Audit Division,
email=mfavin@fec.gov, c=US
Date: 2013.09.13 15:05:09 -0400

Zuzana Pacious
Audit Manager Zuzana O.
Pacious

Digitally signed by Zuzana O. Pacious
DN: cn=Zuzana O. Pacious, o=FEC,
ou=Audit Division,
email=zpacious@fec.gov, c=US
Date: 2013.09.13 15:07:12 -0400

By: Camilla Reminsky Camilla
Lead Auditor Reminsky

Digitally signed by Camilla Reminsky
DN: cn=US, ou=U.S. Government,
ou=FEC, cn=Camilla Reminsky
Date: 2013.09.13 14:59:56 -0400

Subject: Audit Analysis of Gary Johnson 2012, Inc Response to Notice of Initial
Determination on Entitlement

This memorandum serves to analyze the response submitted by Gary Johnson 2012, Inc (the Committee) to the Notice of Initial Determination on Entitlement from the Office of General Counsel dated April 25, 2013. Specifically, this analysis clarifies the methodology used by the Audit Division with respect to the designation of private contributions submitted by the Committee for the purpose of receiving federal matching funds. Second, this analysis provides further reasoning to refute the findings and assertions of the Committee in its response to the Notice of Initial Determination of Entitlement.

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Audit Staff's methodology in designation of contributions

In its response, the Committee claims the Audit staff (AS) erroneously re-designated \$1,307,199.50 from the General election to the Primary election in its calculation for determining whether the Committee should receive further matching funds. As supported by the disclaimers on solicitation materials on the Committee's website as of at least June 25, 2012 (see Attachment A), contributors themselves designated the first \$2,500 of a contribution for the 2012 Primary election, and any additional amount over \$2,500 to the 2012 General election. The Committee also provided solicitation materials with the same information in response to the September 28, 2012 conference call with Committee representatives.¹ The AS appropriately recognized the contributor's designation of their contributions to the Primary election and treated them as such in its determination of the Committee's entitlement to federal matching funds for the Primary election.

The specific process of how the AS determined the proper election designation is as follows:

1. The AS uploaded the database file received from the Treasurer to an Access database. Using Access, AS ran a search for all contributors that gave contributions that aggregated over \$2,500. AS individually checked each of these contributor records. Contributions that aggregated under \$2,500 were designated to the Primary election, and those that aggregated over \$2,500 were designated to the General election. In cases where part of a contribution aggregated over \$2,500 (e.g.: one \$5,000 contribution), the contribution was split, and that split was noted on both the Primary and General contribution lists.
2. For all contributions received by check or cash after the candidate's DOI (May 5, 2012), AS checked all documentation submitted by Committee staff for each contribution. Contributions where donors had clearly indicated that a contribution was meant for the General election were removed from the list of Primary contributions. Likewise, where donor intent was not clear because of illegible writing, since the contribution was received during the General election period,

¹ A teleconference was held on September 28, 2012 with participants from the Audit Division, the Office of General Counsel and Committee representatives to clarify the designation of contributions submitted for matching funds. During the review of submission 3-4 received on September 4, 2012, the AS identified many contributions submitted for matching funds which were reported by the Committee as being designated for the general election. As a result, the AS arranged a teleconference and the Committee subsequently provided a copy of the solicitation webpage with the necessary election designation instructions. After analysis and guidance of the solicitation by OGC, the AS informed the Committee that the contributions would be designated to the Primary election, and thus, would be matchable.

the contribution was removed from the Primary contribution list and added to the General contribution list.

Intention of Committee to designate first \$250 of a contribution to the 2012 Primary election

In its response, the Committee further explains its intention for the election designation language on the Committee's website. In contrast to the language on the website, the Committee explains that it intended the designation of the contributions received post-DOI as 1) the first \$250 would be re-designated to the Primary election so that it was eligible to be submitted for matching funds in order to pay down Primary debt; 2) that the next \$2,500 of a contribution will be designated for the 2012 General election, and any additional amount, up to \$2,500 will be designated for the 2012 Primary election.

By designating only the first \$250 (instead of the first \$2,500) of a contribution to the Primary election, the amount of private contributions available for the Committee to pay Primary expenses and debt is reduced, thereby increasing its entitlement to matching funds.

The AS offers the following points for why the Commission should not accept the Committee's arguments to receive further entitlement to matching funds.

1. **Contributor Intent** - No Committee solicitations include language stating the first \$250 is to be designated to the Primary election. The contributor was therefore not specifically informed that only the first \$250 was being attributed to the Primary. In addition, no solicitation materials containing the language of the first \$250 designated to the Primary was ever made available to the Audit staff. As such, the Audit staff cannot verify that the contributor was ever adequately informed that only the first \$250 of their contribution was being designated by the Committee to the Primary election. During both the matching funds process and the audit of the Committee's NOCO statement, the Audit staff applied the first \$2,500 of the contribution to the Primary election as evidenced in the Committee's solicitation of contributors. Based on the AS's most recent calculations, the Committee is not entitled to further matching funds and the Preliminary Audit Report will include a finding for the repayment of some of the matching funds already received.
2. **Notice to the Audit Staff for Committee's designation of first \$250 to the Primary** - The Committee's most recent interpretation regarding the first \$250 being designated to the Primary election was not discussed in the teleconference held on September 28, 2012 and was only shared with the AS as part of this response to the Initial Determination of Entitlement. The sole purpose of the September 28, 2012 meeting was to discuss a question that had arisen concerning

the designation of contributions submitted for matching funds but reported by the Committee as designated for the general election. In response to that meeting and to clarify the amount of each contribution designated to the Primary election, the Committee provided a copy of its solicitation containing the language which designated the first \$2,500 of the contribution to the Primary election. In that same email dated October 3, 2012, Kim Blanton states that each contributor was notified that their contributions were applied to the Primary election (Attachment B). The AS has documentation that this solicitation was used by the Committee on its website starting no later than June 25, 2012. OGC and the Audit Division reviewed the solicitation provided in response to the meeting and concluded the first \$2,500 of a post-DOI contribution could be considered designated to the Primary and submitted for matching funds. The Committee was notified of this decision on October 15, 2012. (Attachment C)

3. **Reporting of post-DOI Contributions** - Despite the most recent claim by the Committee that only the first \$250 was designated for the Primary election, the Committee actually reported most contributions received after DOI as designated for the General election. This would seem to indicate that the Committee themselves did not initially consider these post-DOI contributions as Primary contributions. In fact, the reporting of the contributions as General election contributions served as the basis for the AS to question the designation of the contributions submitted for matching funds since any contribution designated for the General election is considered not matchable.
4. **Depositing of Post-DOI Contributions** - As explained by the Committee, most contributions received post-DOI were actually deposited into a bank account specifically established to handle transactions related to the General election. At the time, had the committee considered these contributions or a portion of the contributions as for the Primary election, it would seem that the contribution would have been deposited into the bank account established for the Primary election or transfers would have been made from the General account to the Primary account for the portion of the contributions designated for the Primary election. Such transfers between the General and Primary account were very limited. In fact, the Committee transferred only a total of \$2,200 from the General account to the Primary account between August and November 2012, and only \$2,073 was transferred from the Primary account to the General account in November 2012. Based on the Committee's reporting and deposit of contributions post-DOI, it appears that the post-DOI private contributions were initially considered and accounted for solely as General election contributions. Despite the Audit Division's concerns regarding the proper designation of these

contributions during the review of matching funds after consultation with the Office of General Counsel, it was decided to accept the Committee's representation that the first \$2,500 of post-DOI contributions was for the Primary election for purposes of qualifying for further matching funds.

5. **Intention of the Committee to use the first \$250 of contributions received after DOI to pay Primary election debts** - In its response, the Committee asserts that contributions were all automatically deposited into the General election account beginning May 5, 2012. The Committee states that they accounted for contributions submitted for matching funds and used those funds to pay off Primary campaign debts. They further stated that these debts were paid from the General account and funds were not transferred to the Primary account.

Examination of both the bank account activity and documentation received from the Committee shows that the Committee did not use post-DOI private contributions submitted for matching to pay off Primary debt, but rather to pay for General election expenses.

To analyze the use of funds by the Committee for each election, the AS created a monthly schedule of the Committee's post-DOI activity for the Primary and General accounts (Attachment D). This analysis clearly indicates that the Committee likely applied private contributions deposited in the General account (which were also designated by contributors to the Primary election and submitted by the Committee for matching funds) to pay expenses related to the General election and not expenses related to the Primary election. For example, in the month of August 2012 the Committee's General election account had a beginning balance of approximately \$11,000 and received deposits of private contributions of approximately \$277,500. However, based on the AS's examination of invoices related to expenses paid from the General for August 2012, the available private funds received were actually used to pay approximately \$236,000 in General election expenses. Expenses identified as relating to the Primary election were actually paid solely from the Committee's Primary election account and which maintained a balance comprised mostly with the public funds received from the Primary Matching Fund.

The Committee's largest vendor was Political Advisors and most of the debt owed by the Committee during both the Primary and General elections was to this vendor. The Committee's accounting staff gave AS a copy of their reconciliation of the Political Advisors invoices received and paid (Attachment E). In this reconciliation, the Committee's calculations clearly show that Primary election invoices were paid only from the Primary election account. Also, no payments were made from the General election account to pay for Primary election invoices. This further supports the conclusion that funds deposited into the General election account (which were also

submitted for Primary Matching Funds) were ultimately used to pay expenses relating to the General election and not the Primary election as required.

As part of their response to the Notice of Initial Determination on Entitlement, the Committee provided a Declaration from Kim Blanton, who managed the receipt of contributions and matching fund submissions for the Committee.

With respect to the Declaration from Kim Blanton, the AS believes her statement contains significant inaccuracies. Specifically, her recollection of the discussion held on September 28, 2012 and the topic of the first \$250 as being designated for the Primary is not accurate. Second, her statement concerning the post-DOI contributions greater than \$2,500 that were paid directly from the General election bank account to pay off Primary debts is not supported with documentation.

In addition, the Committee provided spreadsheets with the information as described below:

1. "donations after 5.5.12 for FEC matching funds-breakdown.xlsx" – This spreadsheet details the amount of contributions submitted for matching funds from each submission, whether those contributions were received pre- or post-DOI, how much was paid in matching funds total, and an estimate of how much of the matching funds paid were based on contributions received post-DOI.
2. "donations after 5.5.12 for FEC matching funds.xlsx" – This spreadsheet appears to be a list of all contributions received post-DOI that were submitted for matching funds, not all contributions accepted for submission by the FEC.
3. "FEC matching funds wire payments" – This spreadsheet details the date, wire amount, submission number, and date range of contributions submitted for each matching funds payment from the FEC in the first table. The second table details the submission number, the amount submitted, and the date of FEC acknowledgement of the request for matching funds for the submissions that the Commission deemed in excess of entitlement.

These three spreadsheets detail information specific to the submission by the Committee of certain contributions in order to receive matching fund payments from the FEC. These spreadsheets have no bearing on the AS decision to follow contributor intent in the designation of contributions to Primary or General election funds. Most importantly, the spreadsheets do not provide evidence of how the Committee spent the funds submitted for matching.

In summary, AS does not accept the Committee's basis for why it should be entitled to receive further matching funds. Specifically, the AS does not accept the assertions that 1) only the first \$250 of each contribution post-DOI was designated to the Primary election, with the remaining amount up to \$2,500 designated to the General election; and 2) all contributions submitted for matching were segregated in the General election account and used to pay Primary election debts. The documentation submitted by the Committee to date does not support these assertions. In fact, no records were

submitted by the Committee to illustrate the accounting for the Committee's asserted designation of contributions. Therefore, after consideration of the information provided by the Committee in response to the Commission's Initial Determination on Entitlement to Primary Election Public Funds and the review of records provided as a result of the audit, the AS concludes that the Committee currently does not have sufficient net outstanding obligations related to the Primary election and is therefore not entitled to additional matching funds.

Should you have any questions or require any further information, please contact Marty Favin (x1189) or Camilla Reminsky (x1160).

Attachments:

- Attachment A – Online Donation Page
- Attachment B – Email from Kim Blanton
- Attachment C – Email from AS to Committee staff
- Attachment D – Receipts/Expenditures per month
- Attachment E – Committee reconciliation of Political Advisors billing

Click here to print out a
form to contribute by mail

Click here if you're an
American living abroad

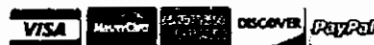
How much would you like to contribute?

- ☒ \$25 ☐ \$500
☐ \$50 ☐ \$1,000
☐ \$100 ☐ \$2,500
☐ \$250 ☐ \$5,000
☐ \$

Make this contribution...

- ☒ Once
☐ Each month for the following _____ months

Payment Information



PAY BY Visa ☒

CREDIT CARD
NUMBER

EXP. DATE 1 - January 2012 ☒

CARD HOLDER
NAME

ADDRESS Number, Street, Apt. #

City State ☒

Zip

EMAIL ADDRESS

PHONE

Finish Up

REFERRAL
CODE

What is this?

OCCUPATION

ATTACHMENT 8
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OCCUPATION

EMPLOYER

* Federal law requires us to use our best efforts to collect and report the information of individuals whose contributions exceed \$200 in an election cycle.

☐ * **REQUIRED: I have read the contribution rules below and certify that I comply with them.**

If you are having problems donating please contact the donation line at 801-303-7922

Contribution Rules:

1. This contribution is made on a personal credit or debit card for which I have the legal obligation to pay, and is made neither on a corporate business entity card nor on the card of another.
2. I am a United States citizen or a lawfully-admitted permanent resident.
3. I am making this contribution with my own personal funds, and I will not be reimbursed by anyone for this contribution.
4. I am not a federal government contractor.
5. I am at least 18 years of age.

Contributions or gifts to Gary Johnson 2012 are not deductible as charitable contributions for Federal income tax purposes.

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.

Re: proof of contribution intent for primary

Marty Kuest to: kimblanton

10/03/2012 05:39 PM

Cc: paula.edwards, "Ronald Nielson", Thomas Hintermister, Delanie Painter, Lorenzo Holloway

Hi Kim,

We will be looking at this in detail tomorrow.

Thanks,

Marty

Marty Kuest
Audit Division
Federal Election Commission
202 694-1194

THIS E-MAIL MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED INFORMATION. IF YOU ARE NOT THE INTENDED RECIPIENT (OR HAVE RECEIVED THIS E-MAIL IN ERROR) PLEASE NOTIFY THE SENDER IMMEDIATELY AND DESTROY THIS MESSAGE. ANY UNAUTHORIZED COPYING, DISCLOSURE OR DISTRIBUTION OF THE MATERIAL IN THIS EMAIL IS STRICTLY FORBIDDEN.
<kimblanton@nsoninfo.com>



<kimblanton@nsoninfo.com>

10/03/2012 05:37 PM

To mkuest@fec.gov

cc "Ronald Nielson" <rtnielson@nsoninfo.com>,
paula.edwards@electionmachine.com

Subject proof of contribution intent for primary

Marty,

See the attached files as we have let each contributor know of donations being applied to primary. Thanks for all your help and let me know if there is anything else needed!

Kim

Kim Blanton
NSON Opinion Strategy
731 E South Temple
Salt Lake City, UT 84102
801-359-3373 phone
214-291-3277 fax[attachment "New Donor Card front & (back no color).pdf" deleted by Marty Kuest/FEC/US] [attachment "GJ2012_Donative Intent Proof_v2-1.docx" deleted by Marty Kuest/FEC/US]

ATTACHMENT 8
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Fw: email to Kim Blanton / Gary Johnson 2012

Marty Kuest to: Thomas Hintermister

10/23/2012 04:02 PM

Fyi

Marty Kuest
Audit Division
Federal Election Commission
202 694-1194

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----- Forwarded by Marty Kuest/FEC/US on 10/23/2012 04:02 PM -----



<kimblanton@nsoninfo.com>

10/16/2012 11:11 AM

To mkuest@fec.gov

cc

Subject RE: email to Kim Blanton / Gary Johnson 2012

Marty,

Ron forwarded it to me when he got it. Thank you so much. Now for our next task..getting the donation cards in order!

I would also like to know when is the last date that we can collect donations that can be used for matching funds? I know we have until March 1st to send in a last submission(which I dont see us waiting until then to do so!)

Kim

Kim Blanton
NSON Opinion Strategy
731 E South Temple
Salt Lake City, UT 84102
801-359-3373 phone
214-291-3277 fax

----- Original Message -----

Subject: email to Kim Blanton / Gary Johnson 2012

From: mkuest@fec.gov

Date: Tue, October 16, 2012 5:47 am

To: kimblanton@nsoninfo.com

Kim,

In my haste to get this out, I failed to correctly address this email. Ron did get it last evening. Didn't

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notice until this morning that I had Delanie rather than you listed.

Marty

Marty Kuest
Audit Division
Federal Election Commission
202 694-1194

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----- Forwarded by Marty Kuest/FEC/US on 10/16/2012 07:46 AM -----

Marty Kuest/FEC/US

10/15/2012 04:41 PM

To Delanie Painter/FEC/US

cc rt Nielson@nsoninfo.com

Subject proposed email to Kim Blanton / Gary Johnson 2012

Hi Kim,

Here is the answer to your question regarding the disclaimer found on your contributor cards and website credit card contribution page.

"Gary Johnson 2012 can accept contributions from an individual 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."

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 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.

If you have any questions, please call.

Thanks,

Marty

Marty Kuest
Audit Division
Federal Election Commission
202 694-1194

THIS E-MAIL MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED INFORMATION. IF YOU ARE NOT THE INTENDED RECIPIENT (OR HAVE RECEIVED THIS E-MAIL IN ERROR) PLEASE NOTIFY

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Page 12 of 18

THE SENDER IMMEDIATELY AND DESTROY THIS MESSAGE. ANY UNAUTHORIZED COPYING,
DISCLOSURE OR DISTRIBUTION OF THE MATERIAL IN THIS EMAIL IS STRICTLY FORBIDDEN.

Be Libertarian with
me for one election.

LIVE FREE

Donate to your freedom.

and for Gov. Gary Johnson 2012

Liberty has a fighting chance. Join U.S.

Washington has made its intentions clear. Whether the Democrat or Republican is elected, the outcome for you, your family and your nation will be the same: increased debt, domestic neglect, the end of the freedoms guaranteed us under the Constitution and continued war and nation-building overseas. The battle for our liberty did not end in 1776. That battle never ends. Like the patriots of old, each of us has a role to play. Our best hope for real change now falls to Governor Gary Johnson. He has the credentials, the credibility and the track record. **Liberty needs all of us. Donate to it.**

Name _____

Country _____

City/State _____

Address _____

City/State _____

Country _____

AMOUNT OF CHECK:

\$

Donate by check or online by credit card:

P.O. Box 1985

Salt Lake City, Utah 84110-1985

Online: www.GaryJohnson2012.com

There are so many important ways to contribute to our freedom. Become a Gary Johnson volunteer. Visit: www.GaryJohnson2012.com or call: 801.303.7922

Gary
Johnson

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Page 1 of 2

LIVE

FREE

Thank you for participating in your **freedom.**

I am a United States citizen or a lawfully-admitted permanent resident.

I am making this contribution with my own personal funds, and I will not be reimbursed by anyone for this contribution.

I am not a corporation, a federal government contractor, a labor union, or a foreign national.

I am at least 18 years of age.

Contributions or gifts to Gary Johnson 2012 are not deductible as charitable contributions for Federal income tax purposes. 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.



<kimblanton@nsoninfo.com>

10/03/2012 05:37 PM

To mkuest@fec.gov

cc "Ronald Nielson" <rtnielson@nsoninfo.com>,
paula.edwards@electionmachine.com

Subject proof of contribution intent for primary

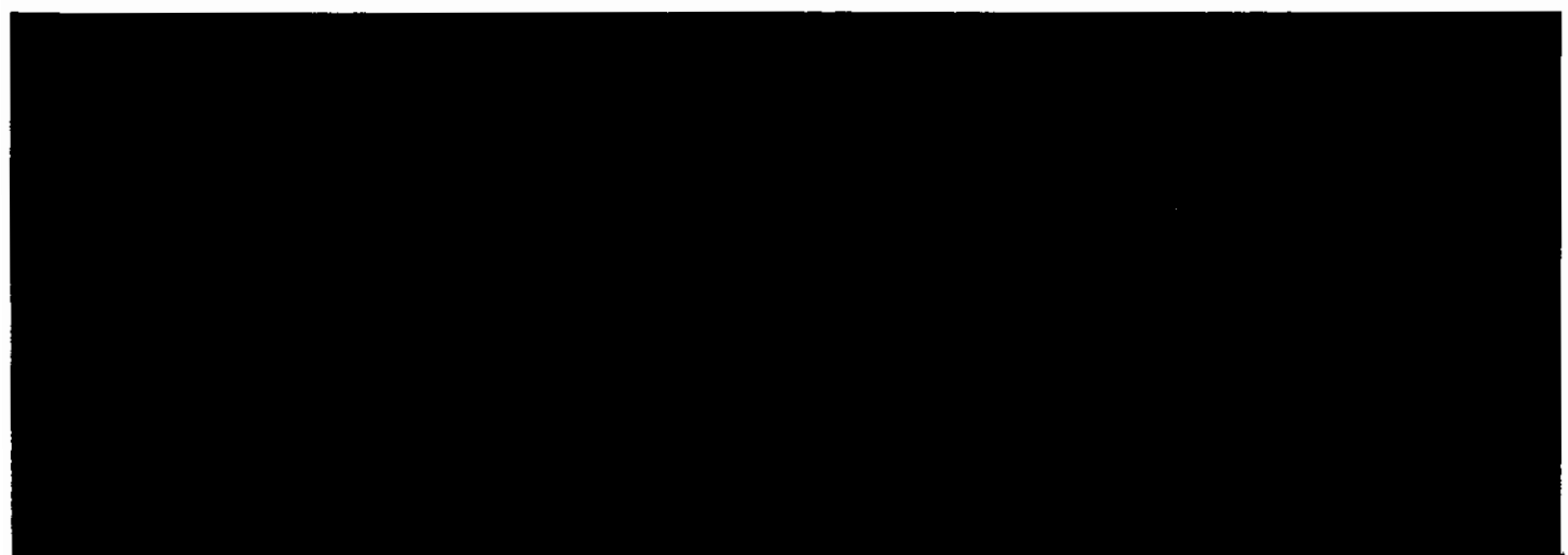
Marty,

See the attached files as we have let each contributor know of donations being applied to primary. Thanks for all your help and let me know if there is anything else needed!

Kim

Kim Blanton
NSON Opinion Strategy
731 E South Temple
Salt Lake City, UT 84102
801-359-3373 phone

ATTACHMENT 10
Page 1 of 4





214-291-3277 fax New Donor Card front & (back no color).pdf GJ2012_Donative Intent Proof_v2-1.docx

Marty Kuest
Federal Election Commission
9th and E Streets NW
Washington, D. C. 20005

Dear Marty:

Subsequent to our conference call on September 28, we have discovered the following:

- A donor card is sent every with every direct mail solicitation. This donor card is returned with check and credit card contributions that are received through direct mail. The following notice is printed on every card (The notice appears in bold print for emphasis in this document only):

Contributions or gifts to Gary Johnson 2012 are not deductible as charitable contributions for Federal income tax purposes. 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.

- The Gary Johnson 2012 contributions donations web page contains a check box that the donor is required to mark before a contribution can be processed. This check box contains the following language with the Contribution Rules appearing beneath it (The notice appears in bold for emphasis in this document only):
 - **REQUIRED: I have read the contribution rules below and certify that I comply with them.**

Contribution Rules:

1. **This contribution is made on a personal credit or debit card for which I have the legal obligation to pay, and is made neither on a corporate business entity card nor on the card of another.**
2. **I am a United States citizen or a lawfully-admitted permanent resident.**
3. **I am making this contribution with my own personal funds, and I will not be reimbursed by anyone for this contribution.**
4. **I am not a federal government contractor.**
5. **I am at least 18 years of age.**

Contributions or gifts to Gary Johnson 2012 are not deductible as charitable contributions for Federal income tax purposes.

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.

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) does not apply.

The Committee intends to resubmit the items contained in your document 002 Gary Johnson S03_4 error summary.docx that were marked with error code A-6. The Committee will provide donation cards or proof of the marking of the required box on the website as evidence of donative intent.

Thank you very much for your assistance in this matter. Please contact me at 801-359-3373 if you have any questions.

Sincerely,

Kim Blanton
Gary Johnson 2012

Enclosures:

Copy of Donor Card

Copy of Donation Web Page with URL

COMMISSION ADJUSTMENTS TO PRIMARY CONTRIBUTIONS FOR INITIAL DETERMINATION

Amount Identified as Total Contributions Shown on Spreadsheet	\$1,307,199.50
Amount Primary Contributions Shown on Spreadsheet	\$1,284,643.94
Less - General Election Contributions and Contributions received before date of ineligibility	(\$69,010.97)
Less Incomplete Designations that are considered undesignated and subject to General Election	(\$790.00)
Less Discrepancy in Commission's Audit Division Calculations	(\$45.00)
Less Contributions Received Between December 18, 2012 and December 31, 2012	(\$1,157.00)
Correct Amount of Contributions for Primary Election	\$1,213,640.97



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

January 29, 2007

MEMORANDUM

TO: Joseph F. Stoltz
Assistant Staff Director
Audit Division

THROUGH: Patrina M. Clark
Staff Director

FROM: James A. Kahl *JAK*
Deputy General Counsel

Thomasenia P. Duncan *TPD*
Associate General Counsel

Lorenzo Holloway *LH*
Assistant General Counsel
for Public Finance and Audit Advice

Margaret J. Forman *MJF*
Attorney

SUBJECT: Report of the Audit Division on Craig Romero for Congress, Inc. (LRA # 698, A05-07)

I. Introduction

The Office of General Counsel has reviewed the proposed Interim Audit Report ("Proposed Report") on Craig Romero for Congress, Inc. ("Romero" or "the Committee") that you submitted to this Office on September 28, 2006. We concur with the findings not discussed in this memorandum.¹ We have comments on the finding that the Committee accepted excessive contributions. While we agree with the Audit Division's proposed finding that the Committee accepted excessive contributions, our comments address whether the contributors designated the excessive portion to other elections. Based on factual information provided by the auditors about who entered the written information on the contributor forms, we conclude that the contributors

¹ The Office of General Counsel recommends that the Commission consider this document in Executive Session because the Commission may eventually decide to pursue an investigation of matters contained in the proposed Finding and proposed Interim Audit Report. 11 C.F.R. §§ 2.4(a) and (b)(6).

did not designate the contributions. We recommend, however, that the Audit Division revise the Proposed Report to seek information that clarifies who entered the written information on the contributor forms. If the contributors entered the written information on the forms, we would recommend that the Commission accept the forms as an effective designation of contributions made at the maximum allowable limit.

II. Committee Accepted Excessive Contributions as a Result of Contributors' Failure to Designate Contributions

The Committee received \$116,208 in excessive contributions, though the Committee untimely refunded \$46,989 of these contributions, leaving \$69,219 in non-refunded, excessive contributions. The candidate could have received contributions for three elections: primary, general and runoff. The contributions would not have been excessive if the contributors had designated the excessive portion of the contributions for the general and run-off elections.² The Committee did not provide written designations, but the auditors found 38 completed contributor forms, 12 of which were in cursive handwriting, and 25 of which were hand-printed. The 12 contributor forms in cursive writing comprise \$12,000, and the hand-printed forms comprise \$39,354 of the \$69,219 in non-refunded excessive contributions (\$51,354 in contributions reflected on the contributor forms). The remaining \$17,865 in non-refunded excessive contributions did not include contributor forms. The contributor forms specified that individual contributions of \$2,000 may be made to each of the three elections (\$6,000 total), for which contributions may be designated. The issue, therefore, is whether a contributor form containing information written in cursive and hand-printing constitutes an effective designation of the contributor's intent to contribute to each election. We conclude that this is an effective designation as a matter of law. There is a factual question of whether the contributors actually entered the written information on the forms. We recommend that the Audit Division revise the Proposed Report to seek information that clarifies whether the contributors entered the written information on the forms. We begin our comments on these issues with a discussion of the requirements and rationale for written designations. We conclude with a recommendation that the Audit Division clarify its analysis in the finding.

The Commission's regulations make clear that a written designation must include a signature. Designations for an election subsequent to the next election must appear on the signed check, money order or other negotiable instrument which clearly indicates the particular election with respect to which the contribution is made. 11 C.F.R. § 110.1(b)(4)(i). Alternatively, a written designation separate from a check or other negotiable instrument must include the signature of the contributor. 11 C.F.R. § 110.1(b)(4)(ii). The purpose of requiring a written designation, signed by the contributor, to apply to an election subsequent to the next election is to ensure that the contributor makes the designation, and not the committee.³ *Explanation and Justification for Section 110.1(b)(4)*, 52 Fed. Reg. 762 (Jan. 9, 1987).

² Ultimately, the candidate qualified for the primary and general elections, but failed to qualify for a run-off election, so any contributions properly designated for the run-off would have to be returned.

³ The auditors also have no information indicating that the Committee attempted to ask the contributors to redesignate the contributions using a written redesignation, or that the Committee successfully attempted to presumptively redesignate the contributions. 11 C.F.R. §§ 110.1(b)(4)(iii), 110.1(b)(5). Furthermore, the

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In this case, the Committee sent forms to the contributors that included spaces to fill out the contributor's name, address, spouse, and telephone numbers, but the forms did not contain a signature line. The Commission has previously made clear the requirement that the contributor sign the form designating the elections for which the contributor's contribution are to be applied. *Explanation and Justification for Section 110.1(b)(4)*, 52 Fed. Reg. 763 (Jan. 9, 1987); *see also* AO 1990-30. When considering whether to allow contributions received in response to a solicitation for a specific election, the Commission decided to allow a contributor "to effectuate a designation by returning a preprinted form supplied by the soliciting committee that clearly states the election to which the contribution will be applied, provided that the contributor signs the form, and sends it to the committee together with the contribution." *Id.* While this proposed Report suggests that the contributors who sent in completed contributor forms accompanied by signed checks for the aggregate total allowed for all three elections may have intended to designate contributions to all three elections, the Commission has stated that its regulations make clear that a signature must appear "on the same document that contains the words of designation, *i.e.*, the check or contributor slip," to confirm the contributor's intent. AO 1990-30.

The designation regulation and the regulatory history of designations suggest that the contributor must *personally* sign the written designation in the traditional form. The regulation provides two ways to designate a contribution: a check signed by the contributor which clearly indicates the particular election in which the designation is made, or a written designation signed by the contributor. 11 C.F.R. § 110.1(b)(4)(i)&(ii). The Commission stated that "the regulations require a response from the contributor, and thus require the response to be in writing and signed by the contributor in order to prevent fraud and to clearly indicate who is contributing." *Explanation and Justification for Sections 110.1 and 110.2 "Eliminating the Signature Requirements"*, 67 Fed. Reg. 69928, 69934 (Nov. 19, 2002). Thus, the Commission's regulations require the contributor to submit a written designation signed by the contributor personally. *Id.*; *see also* AO 1990-30.

The auditors have concluded that the contributors may not have personally filled out the contributor forms. Many of the contributors responding with apparent excessive contributions may not have included the completed contributor form along with their check or credit card information. According to the auditors, many of the completed contributor forms, including all 12 of the contributor forms written in cursive, appear to have been filled out by the Committee, rather than the contributors, which suggests that the contributors simply mailed in their payments without a separate writing to designate their contributions. The auditors' conclusion is based on their comparison of the handwriting and signatures on the contributor forms and the checks. To address the factual question of who completed the forms, we recommend that the Audit Division revise the Proposed Report to ask the Committee who completed the forms.

If the Committee's response indicates that the contributors submitted the completed forms along with their payments, we would then address the issue of whether a contributor's cursive or hand-printed name as appearing on the form constitutes a signature for designation. We

contributor forms do not contain a notice that the contribution may be refunded, as required for any valid redesignation, written or presumptive. 11 C.F.R. §§ 110.1(b)(5)(ii)(A) and (B).

recognize that this is a close issue because the Commission's regulations do not address what constitutes a signature for the purpose of designating contributions. Ultimately, however, we conclude that these forms constitute a designation because of the Commission's interest in effectuating the intent of the contributors.

There are different standards for what constitutes a signature. The Uniform Commercial Code (UCC) addresses what constitutes a signature for the purposes of commercial transactions. The UCC definition of "sign" "includes using any symbol executed or adopted with present intention to adopt or accept a writing." UCC § 1-201(37). The UCC comments on this provision explain that "no catalog of possible situations can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to adopt or accept the writing." UCC Official Comments, § 1-201(37). The Restatement (Second) of Contracts, which states that a signature is "made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer" describes the traditional form of signature as "the name of the signer, handwritten in ink." Restatement (Second) of Contracts § 134. The Restatement also recognizes that other forms of a signature may be used, including thumbprints, an arbitrary code, and a rubber stamp. *Id.* Neither the UCC nor the Restatement require cursive handwriting, but permit hand-printing as a signature. Courts that have addressed what constitutes a signature often do so in the context of what appears on the signature line. *See e.g., In the Matter of Save-On-Carpets of Arizona, Inc., v. Trend Mills*, 545 F.2d 1239 (9th Cir. 1976); *Webb v. Airlines Reporting Corporation*, 1994 WL 185928 (D. Kan. Apr. 5, 1994) (not reported in F. Supp).

The contributor form never mentions that a signature is required and there is no signature line. Thus, the intention of the contributor whose name appears in cursive on the name line of the contributor form is unclear as to whether the contributor intended to authenticate the form. *See*, Restatement (Second) of Contracts § 134. Nevertheless, if a contributor filled out the form, including a cursive or hand-printed name, the information on the contributor form would be specific and clear enough to make the contributor's intention to designate a \$6,000 contribution to the three elections specified on the form (i.e., primary, general and run-off). *See* AO 1990-30; *Explanation and Justification for Section 110.1(b)(4)*, 52 Fed. Reg. 762-763 (Jan. 9, 1987). We would recommend, therefore, that the Commission accept such a form as an effective designation.

To effectuate the contributors' designations, we must apply a portion of the contribution to each election that the contributor intended to finance, in accordance with the contributor forms. For any individual contribution of \$6,000, accompanied by the contributor form, we would have a reasonable basis to conclude that the contributor intended for the contribution to be applied equally (i.e., \$2,000 per election) between the primary, general and run-off elections. 11 C.F.R. § 110.1(b)(4)(ii). Similarly, for joint contributions of \$12,000, accompanied by a contributor form, we would have a reasonable basis to infer from the amount of the check, the number of individuals listed on the check and the available contribution limitations that the contributors intended for the contribution to be applied evenly (i.e., \$6,000 per individual) and equally (i.e., \$2,000 per election) between the primary, general and run-off elections. 11 C.F.R. § 110.1(k)(2). If we assume otherwise, then we would conclude that at least one of the

contributors intended to make an excessive contribution. We do not have any facts in this case to support that conclusion.

Given, however, that the contributor form only provides guidance for contributors at the maximum allowable limits for individual and joint contributions per election, we do not believe that we can make the same assumptions about designations for contributions returned with the contributor form for any amount under the maximum allowable limit of \$6,000 per contributor for the election cycle (i.e., \$2,000 per election). We would, therefore, consider contributions under the maximum allowable limit for the election cycle undesignated contributions and the rules for undesignated contributions would apply.⁴ See 11 C.F.R. § 110.1(b)(2)(ii). We recommend that the auditors include the amount of these undesignated contributions on the cover memorandum submitted with the Proposed Report to the Commission.

To further assist the Commission in examining this finding, we recommend that the auditors clarify some of the analysis in the finding. The finding states “[h]ad the excessive portion of the contributions been properly designated to the run-off election by the contributors, the refunds would have been timely.” Proposed Report at 8. The language does not make clear, however, how the designations failed to meet the requirements of the regulations. The finding should more clearly explain that the auditors believe the contributions made prior to the primary election cannot be designated to the general and run-off elections, and are, therefore, excessive. The finding also should explain why the refunds for the run-off election are untimely. These refunds were not timely because they were refunded more than 60 days after the contributions were received. If these refunds were from contributions properly designated for the run-off, however, they would have been timely because they were refunded within a few days of the general election date in which the candidate failed to qualify for the run-off election. See AO 1992-15; see also AO 1980-68, 11 C.F.R. § 102.9(e)(3).

⁴ For contributors who submitted contributor forms with contributions multiple times (i.e., two or more separate submissions of contributions made prior to the primary election), we would also consider each submission of a contribution under the maximum allowable limit for the election cycle as undesignated contributions, because the contributor forms only provide for “an individual donor to make a contribution of \$6,000 before [the primary election], designating \$2,000 to each of the three [primary, general and run-off] election cycles.” See Contributor Forms from Audit Division materials.