



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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

I. INTRODUCTION

The Office of the General Counsel (“OGC”) has reviewed the proposed Draft Final Audit Report (“DFAR”) on Jill Stein for President (“the Committee”). The DFAR contains four findings: Finding 1 - Net Outstanding Campaign Obligations - Surplus, Finding 2 – Matching Funds Received in Excess of Entitlement, Finding 3 – Misstatement of Financial Activity, and Finding 4 - Disclosure of Debts and Obligations. We concur with these findings, but we comment on an argument presented by the Committee that implicates Findings 1 and 2. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

II. BALLOT ACCESS EXPENSES INCURRED AFTER THE DOI CANNOT BE CONSIDERED QUALIFIED CAMPAIGN EXPENSES EVEN THOUGH THEY ARE RELATED TO THE PRIMARY ELECTION

The DFAR finds that the Candidate and the Committee had a \$213,435 surplus as of the date of ineligibility (“DOI”).¹ *See* 11 C.F.R. § 9033.5(c) (date of ineligibility is last day of matching payment period). *See also* 26 U.S.C. § 9032(6); 11 C.F.R. § 9032.6(a) (defining “matching payment period” to end on date of candidate’s nomination). The DFAR finds that of this total surplus, the Committee must repay \$42,900, having applied a repayment ratio calculated in accordance with 11 C.F.R. § 9038.3(c)(1). Further, because a surplus existed as of the DOI, a matching fund payment of \$134,900 that the Candidate received after the DOI exceeded her entitlement to such funds. *See* 11 C.F.R. § 9033.5 (candidates may receive matching funds after the DOI only to satisfy net outstanding campaign obligations). Based upon these two findings, the Audit Division concludes that the Candidate must repay a total of \$177,800² to the United States Treasury.

The Committee argues that the costs the Committee incurred after the DOI, totaling \$310,477.48, was for the purpose of obtaining access for the Candidate to the general election ballots of several states and thus should be considered qualified campaign expenses. The Committee argues that the ballot access expenses should be considered qualified campaign expenses because the Commission has previously determined that costs incurred by a candidate to obtain general election ballot status are related to a primary election. *See, e.g.*, Advisory Opinion 1995-45 (Hagelin for President). The Committee also argues that, under Commission regulations, Jill Stein, as a non-major party or independent candidate, may choose one of three dates to be the date of the primary election. Under one option, the candidate may choose “[t]he day prescribed by applicable State law as the last day to qualify a position on the general election ballot” as the primary election date for that state. 11 C.F.R. § 100.2(c)(4)(i).

The Commission already considered and rejected these arguments made by the Committee. *See* Memorandum from Erin Chlopak to Commission on Request for Consideration of a Legal Question Submitted by Jill Stein for President (LRA # 1021), Attachment 1 (Feb. 28, 2018) (“Legal Consideration Memorandum”) (approved April 11, 2018). The Legal Consideration Memorandum concluded that the DOI is the date of the nomination during the party convention, in this case August 6, 2016. It further concluded that ballot access expenses cannot be deemed qualified campaign expenses if they were incurred after the DOI because such expenses must be incurred during the candidate’s period of eligibility.³ *Id.* at 4-5; *see also* 11

¹ The Audit Division had concluded in the PAR that the surplus was \$225,911, but reduced this sum to \$213,435 based upon consideration of certain additional expenses incurred before the DOI.

² This total is derived from adding, \$42,900, reflecting the portion of the surplus that must be repaid, and \$134,900, the full amount that the Candidate received after the DOI.

³ The Commission concluded that the DOI is the date of nomination during the party convention. The Commission also reasoned, as reflected in the approved Legal Consideration Memorandum, that even ballot access expenses incurred in relation to the primary election cannot be deemed qualified campaign expenses if they are

C.F.R. § 9032.9(a)(1). Thus, the date upon which the ability of a candidate to use taxpayer funds to finance the primary election campaign is fixed and must end on the DOI.⁴

Under certain circumstances in which a candidate seeks both nomination by a party convention and subsequent qualification for placement on the general election ballot of one or more states, the candidate's matching payment period, and hence, his or her DOI, may be extended beyond the national party nominating convention date. However, in Advisory Opinion 1984-25 (Johnson), the Commission concluded that, in situations like the Candidate's here, the DOI may coincide with later independent State party nomination dates rather than the earlier date of the national nominating convention *only where those dates are not later than the date of the last day of the last major party nominating convention*. Advisory Opinion 1984-25 (Johnson), at 2. Applying this principle here, the Commission determined that the matching payment period ended with the Candidate's nomination during the national party convention, August 6, because the last date of the last major party nominating convention in 2016 was July 28. *See* Memorandum from Adav Noti to the Commission on Date of Ineligibility – Jill Stein for President (LRA 1021), at 2 (Jul. 29, 2016). Taxpayer funds therefore cannot be used for ballot access expenses incurred after August 6.⁵

incurred after the DOI. *Id.* We notified the Committee of the Commission's decision on the Request for Legal Consideration. The Committee's position appears not to have changed since that time and does not appear to be further supported by new argument(s).

⁴ In one specific circumstance, the Commission allows a presidential candidate to continue to campaign with *private funds* after losing eligibility for public funding by reason of having failed to garner a sufficient percentage of the popular vote in two consecutive primary elections without incurring a repayment obligation for doing so. 11 C.F.R. §§ 9033.5(d), 9034.4(a)(3).

⁵ The Committee appears to have incurred additional expenses that were not qualified campaign expenses that ordinarily would be grounds for assessing a repayment obligation apart from the two bases for repayment obligations already assessed in the DFAR. *See* 26 U.S.C. § 9038(b)(2); 11 C.F.R. § 9038.2(b)(2) (identifying use of matching funds to defray expenses other than qualified campaign expenses as ground for assessing repayment obligation separate from existence of receipt of matching funds exceeding entitlement or surplus). However, we do not recommend the assessment of a third, separate repayment obligation based on this ground in this matter because any public funds that the Committee would have spent on ballot access expenses would necessarily have derived from either the Committee's surplus on the DOI or from the single matching fund payment the Committee received after the DOI and the Commission would be reclaiming all of these amounts by virtue of the repayment obligations already being assessed. The addition of a third, separate repayment obligation would therefore, on these facts, be duplicative and unnecessary.