



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 17, 2016

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2016-16

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

Dear Mr. Backer:

We are responding to your advisory opinion request on behalf of Gary Johnson 2012 (the “Committee”) concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (“FECA”), the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-42 (the “Public Funding Act”), and Commission regulations to the Committee’s proposed fundraising to satisfy obligations to the United States Treasury and to the Commission. The Commission concludes that the Committee may use its cash on hand and may raise additional funds to fulfill those obligations consistent with the restrictions set forth in the Public Funding Act regulations, as described below.

***Background***<sup>1</sup>

Gary Johnson 2012, Inc., is the primary campaign committee for Gary Johnson, a candidate for the Libertarian Party nomination for president in 2012.<sup>2</sup> In May 2012, the Commission certified Governor Johnson as eligible for public matching funds from the United

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<sup>1</sup> The facts and questions presented in this advisory opinion are based on your letter dated September 23 and email dated October 4, 2016, as well as public disclosure reports filed with the Commission and publicly available Commission audit reports and determinations collected at [http://www.fec.gov/audits/2012/AuditReport\\_2012\\_GaryJohnson2012Inc.shtml](http://www.fec.gov/audits/2012/AuditReport_2012_GaryJohnson2012Inc.shtml).

<sup>2</sup> Governor Johnson’s campaign committee for the 2016 election, Gary Johnson 2016, is not a party to this request.

States Treasury for the 2012 presidential primary election.<sup>3</sup> After the mandatory audit of candidates and committees receiving public funds, the Commission determined that Governor Johnson and the Committee must repay \$333,441 to the United States Treasury.<sup>4</sup> The Commission also made two audit findings for which it states it “may initiate an enforcement action.”<sup>5</sup> These findings concerned the Committee’s use of general election contributions for primary election expenses (Finding 3) and the Committee’s reporting of debts and obligations (Finding 4).

The Committee’s most recent report filed with the Commission shows cash on hand of \$276.28, though it does not specify whether those funds are in the Committee’s primary account or general election account.<sup>6</sup>

The Committee now asks several questions regarding the sources and amounts of funds it may raise and use to meet its “Obligations,” which it defines as: (1) the repayment to the United States Treasury of \$333,441 as discussed in the Repayment Determination; and (2) any civil penalties in connection with Findings 3 and 4 of the Final Audit Report. Advisory Opinion Request (“AOR”) at AOR004.

### ***Questions Presented***

*Question 1: May the Committee solicit and accept funds to pay its Obligations from persons whose foreign national or federal contractor status has changed since 2012 and, if so, is the legality of the solicitation, contribution, or other payment of funds determined based on the person’s status in 2012 or the time of the solicitation, contribution, or other payment of funds?*

*Question 2: May the Committee use cash on hand from previously reported contributions to pay its Obligations?*

*Question 3: May the Committee solicit and accept funds to pay its Obligations and, if so, are such funds subject to amount limitations? Are funds the Committee accepts to pay its Obligations “contributions” to the Committee? How should such funds be reported?*

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<sup>3</sup> See Final Audit Report on Gary Johnson 2012, Inc. (July 13, 2015) (the “Final Audit Report”), [http://www.fec.gov/audits/2012/Gary\\_Johnson\\_2012\\_Inc/FinalAuditReportoftheCommission1317336.pdf](http://www.fec.gov/audits/2012/Gary_Johnson_2012_Inc/FinalAuditReportoftheCommission1317336.pdf). Governor Johnson did not receive public funds for the 2012 general election.

<sup>4</sup> See Notification of Decision on Petition for Rehearing of Repayment Determination (July 13, 2016) (the “Repayment Determination”), [http://www.fec.gov/audits/2012/Gary\\_Johnson\\_2012\\_Inc/PetitionRehearingDocument.pdf](http://www.fec.gov/audits/2012/Gary_Johnson_2012_Inc/PetitionRehearingDocument.pdf).

<sup>5</sup> Final Audit Report at Summary.

<sup>6</sup> See *id.* at 1-2 (describing Committee’s use of primary and general election accounts); Gary Johnson 2012, Inc., FEC Form 3 at 2 (Oct. 6, 2016), <http://docquery.fec.gov/pdf/043/201610069032194043/201610069032194043.pdf>.

*Question 4: If persons other than the Committee may make payments directly to the Commission or U.S. Treasury to satisfy the Commission's Obligations, must the Commission treat these payments as contributions or otherwise report them to the Commission?*

### ***Legal Analysis and Conclusions***

*Question 1: May the Committee solicit and accept funds to pay its Obligations from persons whose foreign national or federal contractor status has changed since 2012 and, if so, is the legality of the solicitation, contribution, or other payment of funds determined based on the person's status in 2012 or the time of the solicitation, contribution, or other payment of funds?*

Yes, the Commission may solicit and accept funds to pay its Obligations from individuals who are currently allowed to contribute to candidates but who were prohibited sources (either federal contractors or foreign nationals) at the time of the 2012 election.

The Public Funding Act states that a "candidate shall pay to the Secretary [of the Treasury]" the amount of any public fund overpayments or payments that the candidate used for purposes other than qualified expenses. 26 U.S.C. § 9038(b)(1)-(2); *see also* 11 C.F.R. § 9038.2(a)(1). Commission regulations further specify that such repayments "may be made only from the following sources: personal funds of the candidate . . . , contributions and federal funds in the committee's account(s), and any additional funds raised subject to the limitations and prohibitions" of FECA. 11 C.F.R. § 9038.2(a)(4).

Additionally, as a condition of receiving public funds, a candidate must agree that the "candidate and the candidate's authorized committee(s) will pay any civil penalties included in a conciliation agreement or otherwise imposed" under FECA. 11 C.F.R. § 9033.1(b)(11). But such civil penalties may not be paid from "contributions or matching payments" that the committee received for its publicly financed primary campaign. 11 C.F.R. § 9034.4(b)(4). Thus, in order for committees that receive primary election public matching funds to pay civil penalties, Commission regulations allow those committees to raise funds to pay civil penalties without the funds being considered "contributions." 11 C.F.R. § 9034.4(b)(4). Such amounts received by a publicly funded committee to pay civil penalties are "subject to the prohibitions of [FECA]" and "shall be reported" in accordance with 11 C.F.R. part 104, but they are not subject to contribution limits. *See* 11 C.F.R. § 9034.4(b)(4).

FECA provides that no foreign national may make a contribution in connection with a federal election and that no person may "solicit, accept, or receive" a contribution from a foreign national. *See* 52 U.S.C. § 30121(a); *see also* 11 C.F.R. § 110.20. Similarly, FECA states that no federal contractor may make a contribution and that no person may knowingly solicit a contribution from a federal contractor. *See* 52 U.S.C. § 30119; *see also* 11 C.F.R. § 115.2.

For purposes of these prohibitions, neither foreign national status nor federal contractor status is permanent. To the contrary, Commission regulations specify the time period during which the federal contractor prohibition applies: It extends from the commencement of the contract negotiations until the completion of the contract performance or the termination of negotiations. 11 C.F.R. §§ 115.1(b), 115.2(b). Outside of the time period established in section

115.1(b), neither FECA nor Commission regulations prohibit an individual who has been or might become a federal contractor from making a contribution. Similarly, FECA provides that a person who was at one point a foreign national ceases to be so upon becoming a lawful permanent resident of the United States. *See* 52 U.S.C. § 30121(b)(2); 11 C.F.R. § 110.20(a)(3)(ii). Indeed, the Commission recently recognized that an individual’s nationality status may change over time and clarified that if a person has actual knowledge that individuals were foreign nationals at some point in the past, that person may not solicit those individuals for contributions unless the person is able to determine through a reasonable inquiry that they are no longer foreign nationals. Advisory Opinion 2016-10 (Parker) (citing 11 C.F.R. § 110.20(a)(4)(iii)).

Consistent with these provisions, the Commission concludes that the prohibitions on “making,” “soliciting,” “receiving,” and “accepting” contributions from federal contractors and foreign nationals are applied at that time the contributions are made, solicited, received, or accepted. The Committee may therefore solicit, receive, and accept contributions from individuals who are now neither federal contractors nor foreign nationals.

*Question 2: May the Committee use cash on hand from previously reported contributions to pay its Obligations?*

Yes, the Committee may use its cash on hand to pay its Obligations, subject to the caveat below with respect to the payment of civil penalties.

As discussed above, Commission regulations specify that repayments to the United States Treasury may be made only from three sources, including “contributions and federal funds in the committee’s account(s).” 11 C.F.R. § 9038.2(a)(4). The Committee’s reported cash on hand consists of “contributions and federal funds in the committee’s account(s).” As such, the cash on hand may be used to satisfy that part of the Obligations.

Furthermore, as discussed above, a publicly funded primary committee may not pay civil penalties from the “contributions or matching payments” that the committee received from the primary but may pay those penalties from other funds raised subject to the prohibitions of FECA and reported in accordance with 11 C.F.R. part 104. 11 C.F.R. § 9034.4(b)(4). Thus, the Committee may not use its cash on hand to pay civil penalties if the cash on hand is from the Committee’s primary election account. It may, however, use cash on hand in its general election account—which was raised subject to FECA’s source restrictions, reported, and not subject to the restrictions of section 9034—to pay the civil penalty part of its Obligations.

*Question 3: May the Committee solicit and accept funds to pay its Obligations and, if so, are such funds subject to amount limitations? Are funds the Committee accepts to pay its Obligations “contributions” to the Committee? How should such funds be reported?*

### **Repayments to United States Treasury**

As discussed above, funds raised by a publicly funded committee to repay the United States Treasury (other than funds raised from the candidate him- or herself) are subject to the

amount limitations of FECA. 11 C.F.R. § 9038.2(a)(4). The Commission has previously concluded that such funds are, for purposes of contribution limits, akin to funds raised for debt repayment. *See* Advisory Opinion 1998-20 (Fulani) at 3 & n.3. As such, a committee may not accept funds to repay the United States Treasury that, when aggregated with that contributor's prior contributions, exceed that contributor's contribution limits for the election in which the debt was incurred. *Id.* (collecting advisory opinions); *see also* Public Financing of Presidential Primary and General Election Candidates, 52 Fed. Reg. 20864, 20870 (Aug. 18, 1987) (funds raised to repay Treasury "must be aggregated with any contributions previously received from a contributor"). Such contributions raised to repay the United States Treasury should be reported on the Committee's regular reports.

### **Payment of Civil Penalties**

As discussed above, funds raised by a publicly funded committee to pay civil penalties are not "contributions" subject to the amount limitations of FECA, but they are subject to FECA's source prohibitions and must be reported in accordance with 11 C.F.R. part 104. 11 C.F.R. § 9034.4(b)(4).<sup>7</sup> Accordingly, the Committee may raise funds outside FECA's amount limitations to pay civil penalties and must report those funds as "Other Receipts" in its regular reports.

*Question 4: If persons other than the Committee may make payments directly to the Commission or U.S. Treasury to satisfy the Committee's Obligations, must the Committee treat these payments as contributions or otherwise report them to the Commission?*

As discussed above, funds raised by the Committee to repay the United States Treasury are subject to FECA's source and amount restrictions and must be reported to the Commission; funds raised by the Committee to pay civil penalties are not contributions but are subject to source restrictions and must be reported to the Commission. 11 C.F.R. §§ 9034.4(b)(4), 9038.2(a)(4).

The Commission concludes that a third party's payment directly to the United States Treasury or to the Commission to satisfy the Committee's Obligations is subject to the same source or amount limitations and the same reporting requirements as payments received by the Committee for those purposes. As noted above, funds raised for the purpose of repaying the United States Treasury are akin to funds raised for debt repayment. *See* Advisory Opinion 1998-20 (Fulani) at 3 & n.3. A third party's payment of a committee's debt and other obligations on its behalf is functionally and legally indistinguishable from making a disbursement to the committee itself. *See* Advisory Opinion 1985-29 (John Breau Committee) (third-party payment of interest owed by campaign committee "would be viewed as a contribution since it defrays an obligation of the Committee"); Advisory Opinion 1981-42 (Consulting Associates) (consulting firm's payment of disputed debt owed by it or campaign committee to third party would be contribution to committee if consulting firm was not required to pay it); *cf.* 11 C.F.R. § 100.54 (providing that third-party payments for services rendered to committee are contributions to committee). Because a third party's payment directly to the United States Treasury or to the

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The Commission renders no opinion on the application of 11 C.F.R. §§ 300.60-.61 to the proposed activity.

Commission to satisfy the Committee's Obligations is akin to providing those funds to the Committee directly, *see* 11 C.F.R. §§ 9033.1(b)(11) (describing payment of civil penalties as obligation of candidate and committee), 9038.2(a)(1), (4) (same); *see also* Advisory Opinion 1998-20 (Fulani) at 4 (describing Treasury repayment obligation as belonging to candidate and committee), such a payment is subject to the same requirements that would apply if the third party provided the funds to the Committee.

This response constitutes an advisory opinion concerning the application of FECA and Commission regulations to the specific transaction or activity set forth in your request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

A handwritten signature in blue ink, appearing to read "Matthew S. Petersen", with a long horizontal flourish extending to the right.

Matthew S. Petersen  
Chairman