



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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**AGENDA DOCUMENT NO. 16-61-A**  
**AGENDA ITEM**  
**For meeting of November 17, 2016**

November 10, 2016

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *LJS by AN*  
Acting General Counsel

Adav Noti *AN*  
Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Jessica Selinkoff *JS by RMK*  
Attorney

Subject: AO 2016-16 (Gary Johnson 2012) – Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on November 16, 2016.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2016-16  
2  
3 Dan Backer, Esq.  
4 DB Capitol Strategies PLLC  
5 203 South Union Street, Suite 300  
6 Alexandria, VA 22314  
7

**DRAFT A**

8 Dear Mr. Backer:

9 We are responding to your advisory opinion request on behalf of Gary Johnson 2012 (the  
10 “Committee”) concerning the application of the Federal Election Campaign Act, 52 U.S.C.  
11 §§ 30101-46 (“FECA”), the Presidential Primary Matching Payment Account Act, 26 U.S.C.  
12 §§ 9031-42 (the “Public Funding Act”), and Commission regulations to the Committee’s  
13 proposed fundraising to satisfy obligations to the United States Treasury and to the Commission.  
14 The Commission concludes that the Committee may use its cash on hand and may raise  
15 additional funds to fulfill those obligations consistent with the restrictions set forth in the Public  
16 Funding Act regulations, as described below.

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

18 Gary Johnson 2012, Inc., is the primary campaign committee for Gary Johnson, a  
19 candidate for the Libertarian Party nomination for president in 2012.<sup>2</sup> In May 2012, the  
20 Commission certified Governor Johnson as eligible for public matching funds from the United  
21 States Treasury for the 2012 presidential primary election.<sup>3</sup> After the mandatory audit of

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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.

<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.

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

7 The Committee’s most recent report filed with the Commission shows cash on hand of  
8 \$276.28, though it does not specify whether those funds are in the Committee’s primary account  
9 or general election account.<sup>6</sup>

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

15 ***Questions Presented***

16 *Question 1: May GJ2012 solicit and accept funds to pay its Obligations from persons whose*  
17 *foreign national or federal contractor status has changed since 2012 and, if so, is the legality of*  
18 *the solicitation, contribution, or other payment of funds determined based on the person’s status*  
19 *in 2012 or the time of the solicitation, contribution, or other payment of funds?*

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<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>.

1 *Question 2: May GJ2012 use cash on hand from previously reported contributions to pay its*  
2 *Obligations?*

3 *Question 3: May GJ2012 solicit and accept funds to pay its Obligations and, if so, are such*  
4 *funds subject to amount limitations? Are funds GJ2012 accepts to pay its Obligations*  
5 *“contributions” to GJ2012? How should such funds be reported?*

6 *Question 4: If persons other than GJ2012 may make payments directly to the Commission or*  
7 *U.S. Treasury to satisfy GJ2012’s Obligations, must GJ2012 treat these payments as*  
8 *contributions or otherwise report them to the Commission?*

9 ***Legal Analysis and Conclusions***

10 *Question 1: May GJ2012 solicit and accept funds to pay its Obligations from persons whose*  
11 *foreign national or federal contractor status has changed since 2012 and, if so, is the legality of*  
12 *the solicitation, contribution, or other payment of funds determined based on the person’s status*  
13 *in 2012 or the time of the solicitation, contribution, or other payment of funds?*

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

17 The Public Funding Act states that a “candidate shall pay to the Secretary [of the  
18 Treasury]” the amount of any public fund overpayments or payments that the candidate used for  
19 purposes other than qualified expenses. 26 U.S.C. § 9038(b)(1)-(2); *see also* 11 C.F.R.

20 § 9038.2(a)(1). Commission regulations further specify that such repayments “may be made  
21 only from the following sources: personal funds of the candidate . . . , contributions and federal  
22 funds in the committee’s account(s), and any additional funds raised subject to the limitations  
23 and prohibitions” of FECA. 11 C.F.R. § 9038.2(a)(4).

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

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

17           For purposes of these prohibitions, neither foreign national status nor federal contractor  
18 status is permanent. To the contrary, Commission regulations specify the time period during  
19 which the federal contractor prohibition applies: It extends from the commencement of the  
20 contract negotiations until the completion of the contract performance or the termination of  
21 negotiations. 11 C.F.R. §§ 115.1(b), 115.2(b). Outside of the time period established in section  
22 115.1(b), neither FECA nor Commission regulations prohibit an individual who has been or  
23 might become a federal contractor from making a contribution. Similarly, FECA provides that a

1 person who was at one point a foreign national ceases to be so upon becoming a lawful  
2 permanent resident of the United States. *See* 52 U.S.C. § 30121(b)(2); 11 C.F.R.  
3 § 110.20(a)(3)(ii). Indeed, the Commission recently recognized that an individual’s nationality  
4 status may change over time and clarified that if a person has actual knowledge that individuals  
5 were foreign nationals at some point in the past, that person may not solicit those individuals for  
6 contributions unless the person is able to determine through a reasonable inquiry that they are no  
7 longer foreign nationals. Advisory Opinion 2016-10 (Parker) (citing 11 C.F.R.  
8 § 110.20(a)(4)(iii)).

9 Consistent with these provisions, the Commission concludes that the prohibitions on  
10 “making,” soliciting,” “receiving,” and “accepting” contributions from federal contractors and  
11 foreign nationals are applied at that time the contributions are made, solicited, received, or  
12 accepted. Gary Johnson 2012 may therefore solicit, receive, and accept contributions from  
13 individuals who are now neither federal contractors nor foreign nationals.

14 *Question 2: May GJ2012 use cash on hand from previously reported contributions to pay its*  
15 *Obligations?*

16 Yes, Gary Johnson 2012 may use its cash on hand to pay its Obligations, subject to the  
17 caveat below with respect to the payment of civil penalties.

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

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

9 *Question 3: May GJ2012 solicit and accept funds to pay its Obligations and, if so, are such*  
10 *funds subject to amount limitations? Are funds GJ2012 accepts to pay its Obligations*  
11 *“contributions” to GJ2012? How should such funds be reported?*

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

13           As discussed above, funds raised by a publicly funded committee to repay the United  
14 States Treasury (other than funds raised from the candidate him- or herself) are subject to the  
15 amount limitations of FECA. 11 C.F.R. § 9038.2(a)(4). The Commission has previously  
16 concluded that such funds are, for purposes of contribution limits, akin to funds raised for debt  
17 repayment. *See* Advisory Opinion 1998-20 (Fulani) at 3 & n.3. As such, a committee may not  
18 accept funds to repay the United States Treasury that, when aggregated with that contributor’s  
19 prior contributions, exceed that contributor’s contribution limits for the election in which the  
20 debt was incurred. *Id.* (collecting advisory opinions); *see also* Public Financing of Presidential  
21 Primary and General Election Candidates, 52 Fed. Reg. 20864, 20870 (Aug. 18, 1987) (funds  
22 raised to repay Treasury “must be aggregated with any contributions previously received from a

1 contributor”). Such contributions raised to repay the United States Treasury should be reported  
2 on the Committee’s regular reports.

### 3 **Payment of Civil Penalties**

4 As discussed above, funds raised by a publicly funded committee to pay civil penalties  
5 are not “contributions” subject to the amount limitations of FECA, but they are subject to  
6 FECA’s source prohibitions and must be reported in accordance with 11 C.F.R. part 104. 11  
7 C.F.R. § 9034.4(b)(4).<sup>7</sup> Accordingly, Gary Johnson 2012 may raise funds outside FECA’s  
8 amount limitations to pay civil penalties and must report those funds as “Other Receipts” in its  
9 regular reports.

10 *Question 4: If persons other than GJ2012 may make payments directly to the Commission or*  
11 *U.S. Treasury to satisfy GJ2012’s Obligations, must GJ2012 treat these payments as*  
12 *contributions or otherwise report them to the Commission?*

13 As discussed above, funds raised by the Committee to repay the United States Treasury  
14 are subject to FECA’s source and amount restrictions and must be reported to the Commission;  
15 funds raised by the Committee to pay civil penalties are not contributions but are subject to  
16 source restrictions and must be reported to the Commission. 11 C.F.R. §§ 9034.4(b)(4),  
17 9038.2(a)(4).

18 The Commission concludes that a third party’s payment directly to the United States  
19 Treasury or to the Commission to satisfy the Committee’s Obligations is subject to the same  
20 source or amount limitations and the same reporting requirements as payments received by the  
21 Committee for those purposes. As noted above, funds raised for the purpose repaying the United  
22 States Treasury are akin to funds raised for debt repayment. *See* Advisory Opinion 1998-20

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<sup>7</sup> The Commission renders no opinion on the application of 11 C.F.R. §§ 300.60-.61 to the proposed activity.



1 (Fulani) at 3 & n.3. A third party's payment of a committee's debt and other obligations on its  
2 behalf is functionally and legally indistinguishable from making a disbursement to the committee  
3 itself. *See* Advisory Opinion 1985-29 (John Breaux Committee) (third-party payment of interest  
4 owed by campaign committee "would be viewed as a contribution since it defrays an obligation  
5 of the Committee"); Advisory Opinion 1981-42 (Consulting Associates) (consulting firm's  
6 payment of disputed debt owed by it or campaign committee to third party would be contribution  
7 to committee if consulting firm was not required to pay it); *cf.* 11 C.F.R. § 100.54 (providing that  
8 third-party payments for services rendered to committee are contributions to committee).  
9 Because a third party's payment directly to the United States Treasury or to the Commission to  
10 satisfy the Committee's Obligations is akin to providing those funds to the Committee directly,  
11 *see* 11 C.F.R. §§ 9033.1(b)(11) (describing payment of civil penalties as obligation of candidate  
12 and committee), 9038.2(a)(1), (4) (same); *see also* Advisory Opinion 1998-20 (Fulani) at 4  
13 (describing Treasury repayment obligation as belonging to candidate and committee), such a  
14 payment is subject to the same requirements that would apply if the third party provided the  
15 funds to the Committee.

16         This response constitutes an advisory opinion concerning the application of the Act and  
17 Commission regulations to the specific transaction or activity set forth in your request. *See* 52  
18 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or  
19 assumptions presented, and such facts or assumptions are material to a conclusion presented in  
20 this advisory opinion, then the requestor may not rely on that conclusion as support for its  
21 proposed activity. Any person involved in any specific transaction or activity which is  
22 indistinguishable in all its material aspects from the transaction or activity with respect to which  
23 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.

1 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be  
2 affected by subsequent developments in the law including, but not limited to, statutes,  
3 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available  
4 on the Commission's website.

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On behalf of the Commission,

Matthew S. Petersen  
Chairman