

September 23, 2016

Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Advisory Opinion Request

To the Commission:

Pursuant to 52 U.S.C. § 30108, Gary Johnson 2012, Inc. (“GJ2012”) seeks an advisory opinion from the Commission regarding the permissible sources and amounts of funds it may use to make any repayments of presidential matching funds under Title 26, and/or to pay any civil penalties to which it may be subject in connection with, or otherwise relating to, the Commission’s July 13, 2015 Final Audit Report (collectively, “Obligations”). GJ2012 wishes and intends to solicit funds from persons and political committees to be used for the sole purpose of repaying its Obligations, including from persons who were not federal contractors or U.S. citizens in 2012 but have subsequently become, and presently are, federal contractors and/or U.S. citizens. It also wishes and intends to ask such persons and political committees to make payments directly to the Commission and/or U.S. Treasury for the purpose of defraying its Title 26 presidential matching funds repayment obligations and/or any civil penalties to which GJ2012 may be subject in connection with, or otherwise relating to, the Commission’s July 13, 2015 Final Audit Report.

QUESTIONS PRESENTED

1. In determining whether GJ2012 may solicit and accept funds from a person for the purpose of paying such an Obligation, which arose in connection with the 2012 election, and that person’s status as a U.S. citizen, foreign national, or federal contractor has changed between 2012 and the present, 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?

2. May GJ2012 use funds it previously accepted, received, and reported as contributions to pay civil penalties to which it may be subject under the Federal Election Campaign Act (“FECA”) or Bipartisan Campaign Reform Act (“BCRA”), including those arising from or related to any Title 26 matching funds repayment obligations or the Commission’s July 13, 2015 Final Audit Report?

3. May GJ2012 solicit and accept funds to pay any civil penalty to which it may be subject under FECA and/or BCRA, including those arising from or related to Title 26 matching funds repayment obligations or the Commission’s July 13, 2015 Final Audit Report? If so:

a. Do funds GJ2012 solicits, accepts, and uses to pay any such civil penalties qualify as contributions?

b. If such funds are not contributions, how should the sources of the funds and/or GJ2012 report them to the FEC?

- c. If such funds are not contributions, are there any limits on the amount an individual, political committee, or other entity may provide to GJ2012 for the purpose of satisfying such civil penalties and, if so, what are those limits? *Cf.* 52 U.S.C. § 30116(a)(1)-(a)(2) (imposing limits only on “contributions”).
4. May persons make payments directly to the Commission or U.S. Treasury toward any civil penalties to which GJ2012 may be subject, including those arising from or related to Title 26 matching funds repayment obligations or the Commission’s July 13, 2015 Final Audit Report?
5. Is a Title 26 matching funds repayment obligation imposed pursuant to 26 U.S.C. § 9038(b) a “civil penalty” for purposes of 52 U.S.C. § 30109(a)(5)-(6) to which 11 C.F.R. § 9034.4(b)(4) applies?

DISCUSSION

It is unclear how presidential campaign committees subject to the Commission’s regulations concerning matching funds may repay any matching funds they may owe to the Commission or the Treasury, and pay any related civil penalties that are, or may be, imposed in connection with any such obligation.

For several reasons, it appears presidential campaign committees that received matching funds may neither solicit, accept, nor use “contributions” to pay civil penalties. FEC regulations provide, “Civil . . . penalties paid pursuant to the Federal Election Campaign Act . . . cannot be defrayed from contributions.” 11 C.F.R. § 9034.4(b)(4). The regulation further reiterates, “Any amounts received or expended to pay such penalties shall not be considered contributions.” *Id.*

In addition, the definition of “contribution” is “anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A)(i). In this case, any payments to GJ2012 to repay presidential matching funds or to pay civil penalties to which GJ2012 may be subject could not possibly influence the only election with which GJ2012 is concerned: the 2012 presidential election. Moreover, the present payment of such funds to GJ2012 would not be for the purpose of influencing the long-completed 2012 presidential election, but rather would be for the sole purpose of allowing GJ2012 to repay Title 26 matching funds and/or any related civil penalty levied against GJ2012 in connection with its activities in the 2012 presidential election (including any penalties levied in connection with the Commission’s July 13, 2015 Final Audit Report). Additionally, if such funds are conveyed to GJ2012 after the November 2016 election, there would not be *any* elections whose outcomes could potentially be influenced as a result. For these reasons, it appears any funds GJ2012 solicits, accepts, or uses for the purpose of paying any civil penalties resulting from any matching funds repayment obligation to which it may be subject (including penalties arising from or relating to the Commission’s July 13, 2015 Final Audit Report) cannot be considered “contributions,” thereby raising the question of how any such funds should be reported to the FEC, either by GJ2012 or the sources of the funds.

Furthermore, if such funds are not considered “contributions,” it is not clear whether they are subject to any limits. The limits set forth in 52 U.S.C. § 30116(a)(1)-(a)(2) expressly apply only to “contributions.” *Cf. id.* § 30125(a)(1) (distinguishing a committee’s receipt of “contributions” from other “donation[s], transfer[s] of funds, or any other thing[s] of value”).

Furthermore, 11 C.F.R. § 9034.4(b)(4) provides that funds used to pay civil penalties “shall be subject to the *prohibitions* of the [Federal Election Campaign] Act” and must be reported consistent with FEC regulations, but that regulation does not state such funds are subject to FECA’s “limitations.” *Id.* (emphasis added); *cf.* 52 U.S.C. § 30101(8)(B)(ix)(2), (8)(B)(x), (8)(B)(xi)(2), (9)(B)(viii)(2), (9)(B)(ix)(2) (distinguishing between FECA’s “limitations” and “prohibitions”); 52 U.S.C. § 30125(a)(1), (b)(1), (b)(2)(A)(i)-(ii), (c), (e)(1)(A), (f)(1) (distinguishing among FECA’s “limitations, prohibitions, and reporting requirements”); *id.* § 30143(b) (same); 11 C.F.R. § 9038.2(a)(4) (specifying money raised to repay presidential matching funds are “subject to the *limitations and* prohibitions of the Federal Election Campaign Act” (emphasis added)). Contribution limits, as their name suggests, are typically deemed “limitations” of FECA, *see* 52 U.S.C. § 30116, rather than “prohibitions,” *see, e.g., id.* § 30118(b) (“[p]rohibit[ion]” on contributions by national banks, corporations, and labor unions); *id.* § 30119(a) (“[p]rohibition” on contributions by government contractors); § 30121(a) (“[p]rohibition” on contributions by foreign nationals); *id.* § 30122 (prohibition on contributions in the name of another). Thus, it appears funds solicited, accepted, and used exclusively to pay for civil penalties under FECA and/or BCRA, including civil penalties arising from matching funds repayment obligations, may not be subject to FECA’s contribution limits.

It is likewise unclear whether funds a third party pays directly to the Commission or the U.S. Treasury in connection with any civil penalties arising under FECA and/or BCRA as a result of any repayment obligation to which GJ2012 may be subject (or arising from, or otherwise relating to the Commission’s July 13, 2015 Final Audit Report) are subject to 52 U.S.C. § 30116(a)(1)-(a)(2)’s limits.

Finally, as noted above 11 C.F.R. § 9034.4(b)(4) appears to provide that funds GJ2012 receives to satisfy “civil penalties” do not qualify as contributions, are subject only to the “prohibitions” of FECA (and not “limitations” set forth in FECA), and therefore need not be reported as contributions and are not subject to contribution limits. 52 U.S.C. § 30109(a)(5) and (a)(6) appear to provide monetary liability incurred as a result of violations of Chapter 96 of the Internal Revenue Code (which governs repayment obligations concerning the Presidential Primary Matching Payment Account) constitutes a “civil penalty.” Consequently, it appears repayment obligations imposed pursuant to 26 U.S.C. § 9038(b) may constitute civil penalties to which 11 C.F.R. § 9034.4(b)(4) applies. If so, GJ2012 would be permitted to accept funds without limitation from any individual or political committee for the purpose of satisfying any Title 26 presidential matching funds repayment obligation, including any obligation arising from or relating to the Commission’s July 13, 2015 Final Audit Report. Moreover, GJ2012 would be neither required nor permitted to report any such funds it receives as contributions. *See* 11 C.F.R. § 9034.4(b)(4).

As more political participation and speech is better than less, GJ2012 asks the Commission to issue an opinion allowing for the highest permissible and appropriate degree of both.

Sincerely,

/s/

Dan Backer

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From: [Dan Backer](#)
To: [Jessica Selinkoff](#)
Cc: [Robert Knop](#); [Anthony Bell](#)
Subject: RE: Gary Johnson 2012 Advisory Opinion Request
Date: Tuesday, October 04, 2016 1:06:14 PM

Dear Ms. Selinkoff,

We generally agree with your characterization of points 1 through 4. As explained in our original request, we believe that the applicable regulations, and therefore the Commission's answer, may very well be different with regard to payment of civil penalties than for the repayment of presidential matching funds. We simply wish to ensure that framing these questions in terms of "Obligations" -- which lumps together those two very different types of liabilities -- does not cause that distinction to be inadvertently overlooked.

With that understanding, we agree to withdraw Question 5.

Regards,

Dan Backer, Esq.

DB Capitol Strategies PLLC

PAC * CAMPAIGN * NON-PROFIT * POLITICAL LAW

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From: Jessica Selinkoff [<mailto:JSelinkoff@fec.gov>]
Sent: Wednesday, September 28, 2016 6:12 PM
To: Dan Backer <dbacker@dbcapitolstrategies.com>
Cc: Robert Knop <rknop@fec.gov>; Anthony Bell <ABell@fec.gov>
Subject: Gary Johnson 2012 Advisory Opinion Request

Dear Mr. Backer,

On September 26, 2016, we received your letter dated September 23 seeking an advisory opinion on behalf of Gary Johnson 2012 ("GJ2012"). I have set out below our understanding of some of the information that you provided in that letter and some of the questions for which you seek answers. Please confirm the accuracy of the following or correct them if they are not accurate.

1. GJ2012's "Obligations," as discussed in the first paragraph of the advisory opinion request refer to: (1) a repayment of \$333,441 that the Commission determined must be made to the U.S. Treasury as discussed in the July 13, 2016, Notification of Decision on Petition for Rehearing of Repayment Determination, available at http://www.fec.gov/audits/2012/Gary_Johnson_2012_Inc/PetitionRehearingDocument.pdf; and (2) any civil penalties in connection with Findings 3 and 4 of the July 13, 2015, Final Audit Report, available at http://www.fec.gov/audits/2012/Gary_Johnson_2012_Inc/FinalAuditReportoftheCommission1317336.pdf.
2. Question 2 of the advisory opinion request may be construed to ask the following: May GJ2012 use cash on hand from previously reported contributions (most recently reported on the July Quarterly Report as \$246.28) to pay its Obligations?
3. Question 3 of the advisory opinion request (including subparts a-c) may be construed to ask the

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

4. Question 4 of the advisory opinion request may be construed to ask the following: If persons other than GJ2012 may make payments directly to the Commission or U.S. Treasury to satisfy GJ2012’s Obligations, must GJ2012 treat these payments as contributions or otherwise report them to the Commission?

Additionally, Question 5 of the advisory opinion request, which presents a general question of law, is being withdrawn. Nonetheless, you ask the Commission to note in any answer to Questions 1-4 in which 11 C.F.R. 9034.4(b)(4) and 11 C.F.R. 9038.2(a)(4) present conflicting requirements, which of those two provisions applies.

We would appreciate your response by email. Your response may be considered part of your advisory opinion request; if so, it will be posted as such on the Commission's website.

Sincerely,

Jessica

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