



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

2011 JUL 22 P 3 43

July 22, 2011

**MEMORANDUM**

To: The Commission

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From: Patricia Carmona *PC*  
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Audit Division

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Subject: Audit Division Recommendation Memorandum on Nader for President 2008  
(NFP)

Discussed below is NFP's response to the Draft Final Audit Report (DFAR) as well as the Audit Division's comments and recommendations. The Office of General Counsel (OGC) concurs with the recommendations in this memorandum.

NFP declined the opportunity for an audit hearing.

**Finding 1. Net Outstanding Campaign Obligations**

In response to the DFAR, Counsel for NFP (Counsel) reiterated previous assertions regarding the Commission's regulations concerning both the 31-day post-election winding down costs and the Date of Ineligibility (DOI) rules and again noted that these rules and regulations are unfair to small-budget campaigns like NFP who seek to complete the Commission audit quickly. Counsel stated that since the regulations do not allow for primary election winding down costs to occur until 31 days after the general election (December 6, 2008), legitimate primary wind down occurring before that date to deal with the audit are not allowed. Counsel added that if these expenses had been considered primary wind down, "...there would likely be no matching funds repayment issue at all."

In the Statement of Net Outstanding Campaign Obligations (NOCO) presented by the Audit staff in the DFAR, a 70 percent allocation of expenses was applied to determine total primary wind down between December 6, 2008 and March 31, 2011 of \$115,785. The NOCO surplus at DOI (September 4, 2008) was \$75,459. Based on this NOCO, federal funds received in excess of entitlement, and therefore owed to the U.S. Treasury, were determined to be \$56,165.

In response to the DFAR, NFP provided a detailed analysis of its allocation of post December 5, 2008 wind down expenses. NFP officials noted that they began providing records to the Audit staff in August 2008 in preparation for the Commission audit and that audit fieldwork concluded in December 2008. NFP sold all its assets from its headquarters that were unnecessary for the audit and placed all of its records and remaining assets in storage. As of December 31, 2008, NFP had virtually completed its wind down for the general election. A listing of five primary-related staff involved in the NFP audit from December 6 through December 31, 2008 was included along with their roles and responsibilities. A listing of seven additional staff paid during both the primary and general cycles that assisted in shutting down both the primary and general functions from December 6 through December 31, 2008 was also included along with their roles and responsibilities. They also explained that after January 1, 2009, NFP had no offices and the only payroll/consulting payments were to the five primary-related staff. After March 1, 2009, only two of these staff remained on payroll and no one has been on the payroll for more than a year.

NFP officials presented a proposed allocation method in response to the DFAR. All expenses from December 6, 2008 through December 31, 2008 were allocated 70 percent to the primary totaling \$45,938 ( $\$65,625 \times .70$ ). So there was no change in the amount allocated to the primary for this period. However, all expenses from January 1, 2009 through June 30, 2011 were allocated 95 percent (instead of 70 percent) to the primary totaling \$95,862 ( $\$100,907 \times .95$ ). Therefore, primary winding down costs totaled \$141,800 ( $\$45,938 + \$95,862$ ) for the period December 6, 2008 through June 30, 2011. This results in a revised overall primary wind down percentage of 85 percent ( $\$141,800/\$166,532$ ).

Pursuant to 11 CFR §9034.11(c), a candidate who runs in both the primary and general elections may divide winding down costs between the primary and general committees using any reasonable allocation method. The regulation allows for no less than one third of the total winding down costs to be allocated to each committee but can allocate less than one third if it demonstrates such a reasonable method. The Audit staff reviewed NFP's analysis of its allocation of post December 5, 2008 wind down and accepts its calculations. Documentation and explanations regarding allocations of winding down costs support NFP's contention of an increase in the percentage allocated to the primary for expenses from January 1, 2009 to June 30, 2011 to 95 percent. This results in a revised overall percentage of 85 percent for primary wind down allocation from December 6, 2008 through June 30, 2011.

As a result of these revisions, the primary wind down costs increase from \$115,785 to \$141,800. This revision, along with an adjustment to estimated wind down based on additional information on actual winding down costs, results in a decrease to the "federal funds received in excess of entitlement" from \$56,165 to \$33,289.

In addition, NFP Counsel references its previous response to the Preliminary Audit Report relative to its disagreement with the application of the 31-day rule to NFP. The Audit staff and OGC agree that the 31-day "bright line" rule at 11 CFR §9034.11(d) divides expenses based on a date rather than analyzing each expense; and, was set up to improve administrative efficiency, conserve resources and avoid prolonged disputes over the allocation of expenses. The Commission made a number of changes to the wind down rules in the 2003 rulemaking to avoid wind down allocation disputes and so even though expenses were incurred during the 31 days after the general election which were related to the audit fieldwork, the Audit staff and OGC do not recommend allowing primary wind down until after December 5, 2008.

The Audit staff recommends that the Commission find that Mr. Nader received matching funds of \$33,289 in excess of his entitlement and that \$33,289 is repayable to the U.S. Treasury.

### **Finding 2. Misstatement of Financial Activity**

In response to the DFAR, NFP Counsel reiterated that clarifications were agreed upon with the Audit staff and corrective amendments were filed.

The Audit staff recommends that the Commission find that for the time period January 4, 2008 through August 31, 2008, Nader for President 2008 misstated its financial activity.

### **Finding 3. Disclosure of Loans**

In response to the DFAR, NFP Counsel stated that corrective amendments were filed as soon as NFP was made aware of its inadvertent omission.

The Audit staff recommends that the Commission find that for a line of credit secured by NFP, the required Schedule C-P-1 and a copy of the line of credit agreement were not filed until it was made aware of the omission by the Audit staff.

If the above recommendations are approved, the Audit staff will prepare a Proposed Final Audit Report within 30 days of the Commission's vote. Should an objection be received, Directive No. 70 states that the Audit Division Recommendation Memorandum will be placed on the next regularly scheduled open session agenda.

Documents related to this audit report can be viewed in the Voting Ballot Matters folder. Should you have any questions, please contact Sheraline Thomas or Marty Favin at 694-1200.

#### **Attachments:**

- Draft Final Audit Report on Nader for President 2008
- Office of General Counsel Analysis of DFAR (June 13, 2011)

cc: Office of General Counsel



# Draft Final Audit Report of the Audit Division on Nader for President 2008

January 4, 2008 – August 31, 2008

## Why the Audit Was Done

Federal law requires the Commission to audit every political committee established by a candidate who receives public funds for the primary campaign.<sup>1</sup> The audit determines whether the candidate was entitled to all of the matching funds received, whether the campaign used the matching funds in accordance with the law, whether the candidate is entitled to additional matching funds, and whether the campaign otherwise complied with the limitations, prohibitions, and disclosure requirements of the election law.

## Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

## About the Campaign (p. 2)

Nader for President 2008 is the principal campaign committee for Ralph Nader, a candidate for the Independent Party's nomination for the office of the President of the United States. The committee is headquartered in Washington, DC. For more information, see the chart on the Campaign Organization, p. 2.

## Financial Activity (p. 3)

### • Receipts

○ Contributions from Individuals	\$1,761,530
○ Matching Funds Received	753,535
○ Candidate Contributions	40,000
○ Loans Received	300,000
○ Offsets to Operating Expenditures	4,339
○ <b>Total Receipts</b>	<b>\$ 2,859,404</b>

### • Disbursements

○ Operating Expenditures	\$ 2,058,691
○ Transfers to Nader General	103,408
○ Fundraising Disbursements	85,606
○ Loan Repayments	300,000
○ Refunds of Contributions	13,485
○ <b>Total Disbursements</b>	<b>\$ 2,561,190</b>

## Findings and Recommendations (p. 3)

- Net Outstanding Campaign Obligations (Finding 1)
- Misstatement of Financial Activity (Finding 2)
- Disclosure of Loans (Finding 3)

<sup>1</sup> 26 U.S.C. §9038(a).

# **Draft Final Audit Report of the Audit Division on Nader for President 2008**

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January 4, 2008 – August 31, 2008



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# **Part I**

## **Background**

### **Authority for Audit**

This report is based on an audit of Nader for President 2008 (NFP), undertaken by the Audit Division of the Federal Election Commission (the Commission) as mandated by Section 9038(a) of Title 26 of the United States Code. That section states, "After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received [matching] payments under section 9037." Also, Section 9039(b) of the United States Code and Section 9038.1(a) (2) of the Commission's Regulations state that the Commission may conduct other examinations and audits from time to time as it deems necessary.

### **Scope of Audit**

This audit examined:

1. The receipt of excessive contributions and loans.
2. The receipt of contributions from prohibited sources.
3. The receipt of transfers from other authorized committees.
4. The disclosure of contributions and transfers received.
5. The disclosure of disbursements, debts and obligations.
6. The recordkeeping process and completeness of records.
7. The consistency between reported figures and bank records.
8. The accuracy of the Statement of Net Outstanding Campaign Obligations.
9. The campaign's compliance with spending limitations.
10. Other campaign operations necessary to the review.

### **Inventory of Campaign Records**

The Audit staff routinely conducts an inventory of campaign records before it begins the audit fieldwork. NFP records were materially complete and the fieldwork began immediately.

## Part II

### Overview of Campaign

#### Campaign Organization

<b>Important Dates</b>	
• Date of Registration	March 4, 2008
• Eligibility Period <sup>2</sup>	July 15, 2008 – September 4, 2008
• Audit Coverage	January 4, 2008 - August 31, 2008
<b>Headquarters</b>	
	Washington, DC
<b>Bank Information</b>	
• Bank Depositories	Four
• Bank Accounts	Seven checking accounts
<b>Treasurer</b>	
• Treasurer When Audit Was Conducted	Carl J. Mayer
• Treasurer During Period Covered by Audit	Carl J. Mayer
<b>Management Information</b>	
• Attended FEC Campaign Finance Seminar	No
• Who Handled Accounting and Recordkeeping Tasks	Paid staff

#### Overview of Financial Activity (Audited Amounts)

<b>Cash-on-hand @ January 4, 2008</b>	<b>\$ 0</b>
o Contributions from Individuals	1,761,530
o Matching Funds Received	753,535 <sup>3</sup>
o Candidate Contributions	40,000
o Loans Received	300,000
o Offsets to Operating Expenditures	4,339
<b>Total Receipts</b>	<b>\$ 2,859,404</b>
o Operating Expenditures	\$ 2,058,691
o Transfers to Nader General	103,408
o Fundraising Disbursements	85,606
o Loan Repayments	300,000
o Refunds of Contributions	13,485
<b>Total Disbursements</b>	<b>\$ 2,561,190</b>
<b>Cash-on-hand @ August 31, 2008</b>	<b>\$ 298,214</b>

<sup>2</sup> The Candidate was eligible for matching funds beginning on the date of certification of eligibility and ending on the date the Candidate announced his withdrawal from the campaign. See 11 CFR §9033.

<sup>3</sup> NFP received an additional \$127,959 after September 4, 2008 for a total of \$881,494. This represents four percent of the maximum entitlement (\$21,025,000) a Presidential candidate was eligible to receive in 2008.



## **Part III**

### **Summaries**

### **Findings and Recommendations**

#### **Finding 1. Net Outstanding Campaign Obligations**

The Audit staff's review of NFP's financial activity through August 31, 2008 and estimated winding down costs indicated that the Candidate received matching funds of \$62,698 in excess of his entitlement. In the Preliminary Audit Report (PAR), the Audit staff recommended that NFP provide evidence that the Candidate did not receive matching fund payments in excess of entitlement. Absent such evidence, Audit staff stated that it would recommend that the Commission determine that \$62,698 is repayable to the U.S. Treasury.

In response to the PAR recommendation, NFP Counsel noted that some adjustments were necessary to the actual winding down costs category presented by the Audit staff in the Net Outstanding Campaign Obligations (NOCO) statement. The Audit staff made the necessary adjustments and updated this category by replacing estimated costs with actual costs. As a result, the NOCO deficit was revised from \$68,926 to \$75,459, resulting in a reduction to the federal funds received in excess of entitlement figure from \$62,698 to \$56,165. NFP Counsel further contends that (1) 11 CFR §9034.11(d) is not fair to minor party or independent committees such as NFP because it does not allow qualified, primary-related winding down costs until 31 days after the general election and NFP incurred \$90,479 in costs related to the Commission's audit during this period, and (2) 11 CFR §9032.6 is unfair to Mr. Nader because it results in his Date of Ineligibility (DOI) being September 4, 2008, the last day of the last major convention, as opposed to a later date.

The Audit staff further notes that if NFP can document a reasonable allocation method for primary and general winding down costs incurred after December 5, 2008, the Commission will consider allowing a larger primary allocation than the 70 percent agreed upon during audit fieldwork. (For more detail, see p. 5.)

#### **Finding 2. Misstatement of Financial Activity**

A comparison of NFP's reported figures with its bank records revealed that from January 4, 2008 through August 31, 2008, NFP overstated receipts by \$17,106, understated disbursements by \$74,599 and overstated ending cash by \$91,705. The majority of the disbursements understatement was due to transfers NFP made to its General committee, that were not reported. The Audit staff recommended that NFP amend its disclosure reports to correct the misstatements. In response to the PAR, NFP Counsel stated that clarifications with the Audit staff were made for some differences and that NFP filed amended reports, correcting the remaining misstatements. The Audit staff notes that NFP representative made some clarifications and that NFP filed all requested amendments. (For more detail, see p. 14.)

### **Finding 3. Disclosure of Loans**

NFP secured a line of credit in the amount of \$500,000 on June 25, 2008, but did not file the required Schedule C-P-1, or a copy of the line of credit agreement, until November 21, 2008, after the Audit staff made NFP officials aware of this omission. The Audit staff recommended that NFP provide any relevant comments it has on this issue. In response to the PAR, NFP Counsel stated that staff was unaware of the requirement to file a Schedule C-P-1 and a copy of the line of credit agreement, in addition to filing a Schedule C-P, and that as soon as it was made aware of this omission, it filed the missing items. (For more detail, see p. 16.)

### **Summary of Amounts Owed to the U.S. Treasury**

Finding 1	Federal Funds Received in Excess of Entitlement	\$56,165
	<b>Total Due U.S. Treasury</b>	<b>\$56,165</b>

## Part IV

# Findings and Recommendations

### Finding 1. Net Outstanding Campaign Obligations

#### Summary

The Audit staff's review of NFP's financial activity through August 31, 2008 and estimated winding down costs indicated that the Candidate received matching funds of \$62,698 in excess of his entitlement. In the Preliminary Audit Report (PAR), the Audit staff recommended that NFP provide evidence that the Candidate did not receive matching fund payments in excess of entitlement. Absent such evidence, Audit staff stated that it would recommend that the Commission determine that \$62,698 is repayable to the U.S. Treasury.

In response to the PAR recommendation, NFP Counsel noted that some adjustments were necessary to the actual winding down costs category presented by the Audit staff in the Net Outstanding Campaign Obligations (NOCO) statement. The Audit staff made the necessary adjustments and updated this category by replacing estimated costs with actual costs. As a result, the NOCO deficit was revised from \$68,926 to \$75,459, resulting in a reduction to the federal funds received in excess of entitlement figure from \$62,698 to \$56,165. NFP Counsel further contends that (1) 11 CFR §9034.11(d) is not fair to minor party or independent committees such as NFP because it does not allow qualified, primary-related winding down costs until 31 days after the general election and NFP incurred \$90,479 in costs related to the Commission's audit during this period, and (2) 11 CFR §9032.6 is unfair to Mr. Nader because it results in his Date of Ineligibility (DOI) being September 4, 2008, the last day of the last major convention, as opposed to a later date.

The Audit staff further notes that if NFP can document a reasonable allocation method for primary and general winding down costs incurred after December 5, 2008, the Commission will consider allowing a larger primary allocation than the 70 percent agreed upon during audit fieldwork.

#### Legal Standard

**A. Net Outstanding Campaign Obligations (NOCO).** Within 15 days of the candidate's date of ineligibility (see definition below), the candidate must submit a statement of "net outstanding campaign obligations." This statement must contain, among other things:

- the total of all committee assets including cash-on-hand, amounts owed to the committee and capital assets listed at their fair market value;
- the total of all outstanding obligations for qualified campaign expenses; and
- an estimate of necessary winding-down costs. 11 CFR §9034.5(a).

**B. Date of Ineligibility (DOI).** The date of ineligibility is whichever of the following dates occur first:

- the day on which the candidate ceases to be active in more than one state;

- the 30th day following the second consecutive primary in which the candidate receives less than 10 percent of the popular vote;
- the end of the matching payment period, which is generally the day when the party nominates its candidate for the general election; or
- in the case of a candidate whose party does not make its selection at a national convention, the last day of the last national convention held by a major party in the calendar year. 11 CFR §§9032.6 and 9033.5.

**C. Qualified Campaign Expense.** Each of the following expenses is a qualified campaign expense.

- An expense that is:
  - incurred by or on behalf of the candidate (or his or her campaign) during the period beginning on the day the individual becomes a candidate and continuing through the last day of the candidate's eligibility under 11 CFR §9033.5;
  - made in connection with the candidate's campaign for nomination; and
  - not incurred or paid in violation of any federal law or the law of the state where the expense was incurred or paid. 11 CFR §9032.9.
- An expense incurred for the purpose of determining whether an individual should become a candidate, if that individual subsequently becomes a candidate, regardless of when that expense is paid. 11 CFR §9034.4.
- An expense associated with winding down the campaign and terminating political activity. 11 CFR §9034.4(a)(3).

**D. Value of Capital Assets.** The fair market value of capital assets is 60 percent of the total original cost of the assets when acquired, except that assets that are received after the date of ineligibility must be valued at their fair market value on the date received. A candidate may claim a lower fair market value for a capital asset by listing the asset on the NOCO statement separately and demonstrating, through documentation, the lower fair market value. 11 CFR §9034.5(c)(1).

**E. Entitlement to Matching Payments after Date of Ineligibility.** If, on the date of ineligibility (see above), a candidate has net outstanding campaign obligations as defined under 11 CFR §9034.5, that candidate may continue to receive matching payments provided that he or she still has net outstanding campaign debts on the day the matching payments are made. 11 CFR §9034.1(b).

**F. Allocation of Primary and General Election Winding Down Costs.** A candidate who runs in both the primary and general election may divide winding down expenses between his or her primary and general election committees using any reasonable allocation method. An allocation method is reasonable if it divides the total winding down costs between the primary and general election committees and results in no less than one third of total winding down costs allocated to each committee. A candidate may demonstrate that an allocation method is reasonable even if either the primary or the general election committee is allocated less than one third of the total winding down costs. 11 CFR §9034.11(c)

**G. Primary Winding Down Costs During the General Election Period.** A primary election candidate who does not run in the general election may receive and use matching funds for those purposes either after he or she has notified the Commission in writing of his or her withdrawal from the campaign for nomination or after the date of the party's nominating convention, if he or she has not withdrawn before the convention. A primary election candidate who runs in the general election, regardless of whether the candidate receives public funds for the general election, must wait until 31 days after the general election before using any matching funds for winding down costs related to the primary election. No expenses incurred by a primary election candidate who runs in the general election prior to 31 days after the general election shall be considered primary winding down costs. 11 CFR §9034.11(d).

## **Facts and Analysis**

### **A. Facts**

The Candidate registered with the Commission on March 4, 2008 and received his first matching funds payment on July 17, 2008. The Candidate's DOI was September 4, 2008.<sup>4</sup> After becoming ineligible due to the application of 11 CFR §9033.5(b), the Candidate continued to campaign in the general election. For purposes of determining NOCO, the Audit staff considered only winding down costs incurred after December 5, 2008, the end of the general election expenditure report period, and 31 days after the general election. In accordance with 11 CFR §9034.11(d), that date begins the period in which NFP was eligible to use matching funds for winding down costs related to the primary election. Winding down costs were allocated between NFP (Primary Committee) and Nader for President 2008 General Committee (Nader General) using a 70/30 ratio, respectively, as agreed upon between NFP and the Audit staff during audit fieldwork. The Audit staff reviewed NFP's financial activity through March 31, 2011, analyzed estimated winding down costs and prepared the Statement of Net Outstanding Campaign Obligations that appears on the next page:

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<sup>4</sup> This was the last day of the last national convention held by a major party.

**Nader for President 2008**  
**Statement of Net Outstanding Campaign Obligations**  
**As of September 4, 2008**  
**Prepared on March 31, 2011**

**Assets**

Cash-on-Hand	\$ 893	[a]
Cash in Bank	123,908	
Accounts Receivable	8,921	
Capital Assets	10,298	
Inventory – Merchandise	<u>500</u>	

**Total Assets** **\$144,520**

**Liabilities**

Accounts Payable for Qualified Campaign Expenses @ 9/4/08	\$ 98,884	
Winding Down Costs (9/5/08 – 12/4/08)	-0-	[b]
Actual Winding Down Costs (12/5/08 – 3/31/11)	115,785	
Estimated Winding Down Costs (4/1/11 – 6/30/11)	<u>5,310</u>	[c]

**Total Liabilities** **\$ 219,979**

**Net Outstanding Campaign Obligations (Deficit) as of September 4, 2008** **(\$75,459)**

**Footnotes to NOCO Statement:**

- [a] Amount includes contributions dated prior to DOI and deposited after DOI.
- [b] Winding down costs were not allowed during this period because a candidate running in the general election must wait until 31 days after the general election (12/5/08) before using any matching funds for winding down costs related to the primary election, pursuant to 11 CFR §9034.11(d).
- [c] Estimated winding down costs will be compared to actual winding down costs and adjusted accordingly.

Shown below are adjustments for funds received after September 4, 2008, through December 31, 2009, based on the most current financial information available at the close of fieldwork:

Net Outstanding Campaign Obligations (Deficit) as of 9/4/08	(\$75,459)
Private Contributions and Other Receipts Received 9/5/08 through 10/3/08	3,665
Matching Funds Received on 10/3/08	127,959
<b>Federal Funds Received in Excess of Entitlement</b>	<b>\$56,165</b>

As presented above, NFP received matching funds totaling \$56,165 in excess of the amount to which the Candidate was entitled.

The Audit staff prepared a Statement of Net Outstanding Campaign Obligations and provided it to NFP at the exit conference. In response, the NFP Counsel stated that NFP takes issue with the NOCO statement because of how the Commission currently interprets the winding down rules as applied to a candidate who receives primary matching funds and goes on to the general election, but does not receive general election public funding. He noted that the bright line cut-off rule regarding post-DOI expenditures, which does not count primary expenditures from DOI through the end of the general expenditure report period (December 5, 2008), was unfair to a minor party candidate who received primary matching funds and who had to go through ballot access hurdles, even after the major parties held their nominating conventions. Counsel added that primary-related expenses incurred after DOI are disqualified solely according to when they were incurred, whereas state-determined ballot access requirements for minor party candidates result in indisputably primary-related expenses, i.e. ballot access expenditures, being incurred after the nomination date of the last major party to hold its convention.

NFP Counsel pointed out that the Nader 2000 Primary Committee argued this issue in its response to the Preliminary Audit Report, which the Commission rejected in part at the time. Counsel contended that if the Commission were to reconsider its bright line rule, NFP could identify and submit documentation for expenses that should be considered primary expenses, incurred from September 5 through November 4.

As noted in the Legal Standard section above, the Commission's regulations specify that qualified campaign expenses must be incurred between the date the individual becomes a candidate and the last day of the candidate's eligibility under 11 CFR §9033.5. In Mr. Nader's case, he has been given the benefit of the longest possible primary period (26 U.S.C. 9036.2(6)). Therefore, expenses between September 5 and November 4, 2008 cannot be considered primary election expenses.

Counsel also noted that NFP followed 11 CFR 9034.11(d), and as a result, did not use primary matching funds or private monies for any expenses incurred in the "general election" period through December 5. However, Counsel noted, "clearly-identifiable primary winding down expenses were incurred during this period, especially after November 4 and through December 5." He stated that even if NFP is not given credit for any primary expenses through November 4, it should be given credit for obvious winding

down expenses incurred November 5 through December 5, 2008, and that the expenses related to the Commission's audit on NFP's premises from November 13 through December 9, 2008, were undeniably primary winding down expenses.

NFP calculated at least \$88,137 in winding down expenses from November 5 through December 5, 2008, which it believes should be considered legitimate winding down expenses. Apart from its request for the Commission to reconsider the bright line rule in NFP's situation, NFP proposed two solutions to adjust the NOCO:

- (1) Apply full credit in the amount of \$88,137 for November 5 through December 5, 2008 for expenses NFP can document as primary winding down expenses, due to the timing of the audit. At a minimum, 70 percent, or \$61,696, should be allowed.
- (2) If the Commission does not accept the first proposal, all actual expenses from December 5 through termination should be credited on the NOCO 100 percent as primary expenses, as opposed to the 70/30 percent primary/general allocation.

NFP Counsel stated that based on 11 CFR 9004.11(c) [note: identical to 11 CFR 9034.11(c)], the Audit staff has the flexibility to allow a candidate who runs in both the primary and general to divide winding down expenses between the primary and general using any reasonable allocation method and there is nothing in 11 CFR 9034.11(d) that prohibits crediting NFP as having its general election winding down costs during the post-general election period within 31 days of the general election. He added that the regulation solely refers to not using primary matching funds for winding down costs related to the primary election.

The Audit staff notes that the Explanation and Justification for 11 CFR 9034.11(d) – *Candidates Who Run in Both Primary and General Elections* states that:

...a candidate who runs in the general election must wait until the day following the date 30 days after the general election before using matching funds for primary winding down costs, regardless of whether the candidate receives public funds for the general election. This rule clarifies that no expenses incurred prior to 31 days after the general election by candidates who run in the general election may be considered primary winding down costs or paid with matching funds.

The Explanation and Justification also notes the following:

Although this revised rule may result in general election campaigns incurring a small amount of administrative costs related to terminating the primary campaign during the general election period, in practice, these expenses are offset by general election start up costs that are incurred and paid by the primary committee prior to the candidate's DOI. This approach is also consistent with the Commission's bright line rules for allocating expenses between primary and general campaigns at 11 CFR 9034.4(e), which allow some primary related expenses to be paid by the general election committee and *vice versa*.



With respect to the 70 percent primary 30 percent general election allocation ratio, it is already less than the suggested minimum ratio in the regulation and was the allocation agreed upon between NFP and the Audit staff during audit fieldwork. The ratio reflects that the primary winding down effort was the major share of the activity, but also recognizes that there was a general election campaign that required attention at the same time.

NFP Counsel's final point was that "...public policy should not penalize a political committee through the application of the FEC's regulations for being extraordinarily efficient, for being prepared for immediate audit, for paying its bills in a timely fashion, and for being able to terminate quickly." Both NFP Counsel and the Audit staff agree that applying the regulations as written to NFP's situation, allowing no primary winding down costs until December 6, 2008, and considering all expenses incurred after September 4, 2008, to be general election expenses, would produce the result shown on the NOCO presented above.

#### **B. Preliminary Audit Report and Audit Division Recommendation**

In the preliminary audit report (PAR), the Audit staff recommended that NFP provide evidence that it did not receive matching fund payments in excess of entitlement. Absent such evidence, Audit staff stated that it would recommend that the Commission determine that \$62,698 is repayable to the U.S. Treasury.

#### **C. Committee Response to the Preliminary Audit Report**

In response to the PAR recommendation, NFP noted that some adjustments were necessary for the winding down costs category on the NOCO. The Audit staff discussed these revisions with NFP representatives and made the necessary adjustments. In addition, the Audit staff updated the winding down costs total in the NOCO statement contained in the PAR by replacing estimated costs with actual costs through March 31, 2011, from subsequent reports filed with the Commission and by obtaining updated financial data from NFP. As a result, the NOCO deficit was revised from \$68,926 to \$75,459. This revision resulted in a reduction to the federal funds received in excess of entitlement figure from \$62,698 to \$56,165.

NFP Counsel reiterated in his written response to the PAR that "[t]he Commission should not apply the 31-day rule, which excludes clearly identified, primary-related winding down costs incurred by the Committee while the audit was being conducted." He stated that he understands that pursuant to 11 CFR 9034.11(d), the NOCO should not contain primary election winding down costs for the 31-day period after the general election, but proposed that the Commission should reconsider the "bright-line" rule in NFP's case. He added that of the \$252,475 in expenses incurred during this period for both primary and general expenditures, all were paid with general funds as required by the rule, but that \$90,479 (36 percent) of this total were actually primary-related costs.

NFP Counsel contended that the application of this rule resulted in punishing NFP for quickly and efficiently dealing with the Commission audit. He pointed out that NFP provided preliminary records to the Audit staff in September 2008, and provided space for the Audit staff to conduct audit fieldwork between November 17, 2008, and

December 9, 2008. He added that “[d]uring both the general election period of September 4, 2008 to November 4, 2008 and the post general period from November 5, 2008 to December 5, 2008, the Committee incurred substantial expenses for primary election winding down compliance including office space, overhead, phones, fax and compliance related personnel, counsel, and support staff expenses.” Counsel stated that “[i]t is because of the reality that such primary election winding costs are incurred by a general election candidate during the general election campaign that the Commission should revisit the rule prohibiting primary winding down expenses until 31 days after the general election. It makes little policy sense to prohibit a general election candidate from promptly settling primary matters until 31 days *after* the general election (italics in original); such practice merely delays the settlement of primary related issues.”

NFP Counsel noted that as the Explanation and Justification for 11 CFR 9034.11(d) discussed by the Audit staff in the PAR indicates, the reason for the 31-day rule is two-fold. First, a small amount of administrative costs related to terminating the primary campaign during the general election would be offset by general campaign start-up costs incurred by the primary committee. Second, the rule is consistent with other Commission bright-line rules for allocating expenses between the primary and general campaigns. He further stated that neither of these applies to the NFP scenario because 36 percent of the total expenditures within the period cannot be characterized as de minimis administrative costs offset by general election start-up costs. And although the costs “...may be de minimis in the context of a major party campaign they represent a far larger and more burdensome proportion of an independent candidate’s total campaign expenditures and the operation of the rule imposes a material hardship on minor party or independent committees.”

NFP Counsel noted that in October 2009, NFP submitted records in support of \$90,479 in primary winding down expenses spent during the 31-day period after the general election and that if not given full credit for these costs, NFP should at least be given 70 percent of this total as primary winding down costs. He argued that these expenses were related to the audit fieldwork and should therefore be considered primary-related. If not, he concluded that “...the Committee could be put in the untenable position of having to raise funds to make a repayment for not being credited for expeditiously seeking to terminate.”

Another argument put forth by NFP Counsel in response to the PAR is that the rule on setting the DOI date as the last day of the last national convention held by a major party is unfair to minor party and independent candidates such as Mr. Nader who receive primary matching funds and run in the general election, but do not receive general election public funding. He agreed with the DOI date of September 4, 2008 but contended that this date is unfair because state law imposes continuing ballot access hurdles that last beyond that date. He cited as an example that seven states had ballot access deadlines of September 5, 2008 or later and six more states had a deadline of September 2, 2008. He said it is unfair that a committee such as NFP incurs primary-related ballot access expenses that the DOI rule disqualifies because the major parties’ conventions are over. He noted that NFP spent almost \$4,000 on primary ballot access expenses between September 5 and November 4, 2008. Counsel referred to Advisory Opinion 1995-45, which treats ballot access expenditures as primary qualified

expenditures and he respectfully urges the Commission to establish a fairer DOI policy that captures a larger percentage of such costs.

NFP Counsel also contended that primary-related expenses incurred after December 5, 2008 should be credited 100 percent to the primary as opposed to the 70 percent primary expense allocation agreed upon by NFP and the Audit staff during audit fieldwork. He agreed that for the entire campaign, NFP spent approximately 70 percent of its funds on the primary election, but that the \$90,479 spent on primary expenses during the 31-day period after the general election was allocated as general despite being spent on the primary because of the 31-day rule. He added that if one applies 70 percent of the \$301,593 spent by the primary and general committees combined from November 5, 2008 forward, the amount allocable to the primary is \$211,115. NFP is credited only with \$132,000 due to the DOI and 31-day rules, which results in only 30 percent being applied for primary winding down costs. NFP Counsel further noted that in the Nader 2000 Audit Report, all expenditures after June 1, 2001 were credited 100 percent for the primary because the Commission audit began in August 2001 and that precedent should be carried forward to the 2008 situation by allowing primary winding down expenses during November 2008. He added that any expenses incurred after December 5, 2008 should therefore be considered primary winding down costs based on such precedent.

The Audit staff notes that 11 CFR §9034.11(d) provides that a primary election candidate who runs in the general election, regardless of whether the candidate receives general funds for the general election, must wait until 31 days following the general election before using matching funds for winding down costs related to the primary election and no expenses incurred prior to 31 days after the general election shall be considered primary winding down costs. The fact that the audit of the primary campaign began during the 31-day period has little bearing on this issue because the majority of the \$90,479 in costs incurred during this period would have been incurred even if audit fieldwork had begun after December 5, 2008. The Audit staff notes that 66 percent of the \$90,479 went toward payroll-related costs and 17 percent towards headquarters rent. The determination of when audit fieldwork is to begin is agreed upon between committee officials and the Audit staff. In this case, we agreed to begin fieldwork early after NFP officials requested an early start to enable members of the NFP staff to shut down their headquarters so they could relocate to their respective homes prior to the upcoming holidays.

Both NFP officials and the Audit staff agree that applying 26 U.S.C. §9032(6) to Mr. Nader's situation resulted in a September 4, 2008 DOI, the last day of the 2008 Republican convention, which was the second of the two major conventions held. We agree that NFP had ballot access expenses after the date that would have been considered primary qualified expenses if they had been incurred prior to DOI, but that based on this provision; these costs are not allowed to be treated as primary expenses.

The Audit staff notes that the treatment of primary winding down costs was applied consistently to the Commission audits of Mr. Nader in 2000, 2004 and 2008. No primary winding down costs were allowed until 31 days after the general election in all three cases. The only difference is that the audit fieldwork began within 30 days of the general election in 2008, rather than in the year following the election in the other election cycles.

If NFP can demonstrate a reasonable allocation method, pursuant to 11 CFR §9034.11(c), for winding down costs incurred after December 5, 2008, that results in a higher percentage than the 70 percent primary allocation agreed upon during audit fieldwork, the Commission will consider allowing a larger winding down total for NFP. If the total primary winding down costs increase, then adjustments would be made to the NOCO statement, which would result in a corresponding decrease to the federal funds received in excess of entitlement, and the amount owed to the U.S. Treasury. For example, if an 80 percent primary allocation is demonstrated by NFP, the NOCO balance would go from \$75,459 to \$92,000, resulting in a decrease of the amount owed to the U.S. Treasury from \$56,165 to \$39,625. Similarly, if a 90 percent primary allocation is demonstrated by NFP, the NOCO balance would be revised to \$108,541, resulting in \$23,084 owed to the U.S. Treasury.

Documentation should be provided that demonstrates a change to the allocation percentages. Such documentation could include a description of NFP activity after December 5, 2008 related to primary winding down costs, an explanation of which staff worked on primary winding down compared to those who worked on the general winding down, and a list of winding down costs explaining why they were related to the primary rather than the general.

## **Finding 2. Misstatement of Financial Activity**

### **Summary**

A comparison of NFP's reported figures with its bank records revealed that from January 4, 2008 through August 31, 2008, NFP overstated receipts by \$17,106, understated disbursements by \$74,599 and overstated ending cash by \$91,705. The majority of the disbursements understatement was due to transfers NFP made to its General committee, that were not reported. The Audit staff recommended that NFP amend its disclosure reports to correct the misstatements. In response to the PAR, NFP Counsel stated that clarifications with the Audit staff were made for some differences and that NFP filed amended reports, correcting the remaining misstatements. The Audit staff notes that NFP representative made some clarifications and that NFP filed all requested amendments.

### **Legal Standard**

**Contents of Reports.** Each report must disclose:

- the amount of cash on hand at the beginning and end of the reporting period;
- the total amount of receipts for the reporting period and for the calendar year;
- the total amount of disbursements for the reporting period and for the calendar year; and
- certain transactions that require itemization on Schedule A (Itemized Receipts) or Schedule B (Itemized Disbursements). 2 U.S.C. §434(b)(1), (2), (3), (4) and (5)

## Facts and Analysis

### A. Facts

The Audit staff reconciled NFP's reported financial activity with its bank records and determined that there was a misstatement of cash-on-hand, receipts and disbursements. The following chart outlines the discrepancies and succeeding paragraphs explain, to the extent possible, the reasons for the misstatements.

<b>2008 Activity</b>			
	<b>Reported</b>	<b>Bank Records</b>	<b>Discrepancy</b>
Opening Cash Balance @ January 4, 2008	\$0	\$0	\$0
Receipts	\$2,977,570	\$2,960,464	\$17,106 Overstated
Disbursements	\$2,587,452	\$2,662,051	\$74,599 Understated
Ending Cash Balance @ August 31, 2008	\$390,118	\$298,413	\$91,705 Overstated

The overstatement of receipts resulted from the following:

• Earmarked contributions double-counted in receipts total	( 13,725)
• Over-reported receipts	( 4,225)
• In-kind contributions not reported on Schedules A	838
• Unexplained difference	<u>6</u>
<b>Net Overstatement of Receipts</b>	<b><u>\$ (17,106)</u></b>

The overstatement of disbursements resulted from the following:

• Unreported transfers to Nader General	101,391
• Net reported bank debit adjustments, never adjusted (voided checks; contributions returned for insufficient funds; stop payments; over/under reported items)	(22,213)
• In-kind contributions not reported on Schedules B	251
• Unexplained difference	<u>(4,830)</u>
<b>Net Understatement of Disbursements</b>	<b><u>\$ 74,599</u></b>

The overstatement of ending cash-on-hand in the amount of \$91,705 resulted from the misstatements described above.

NFP did not report the majority of transfers of contributions in excess of the limitations it made to the Nader General committee, totaling \$101,391. These transfers were mainly contributions to NFP by contributors who had exhausted their contribution limitation to NFP and the excessive portion of the contribution was properly redesignated to the Nader General.

### **B. Preliminary Audit Report & Audit Division Recommendation**

At the exit conference the Audit staff explained the misstatements and subsequently provided NFP representatives with schedules detailing these discrepancies. In response, the NFP representatives agreed to amend NFP's reports.

The Audit staff recommended that NFP:

- amend its 2008 reports to correct the misstatements; and
- amend the cash balance on its most recently filed report with an explanation that it resulted from audit adjustments from a prior period. Audit staff further recommended that NFP reconcile the cash balance on its most recent report to identify any subsequent discrepancies that may impact adjustments recommended.

### **C. Committee Response to the Preliminary Audit Report**

In response to the preliminary audit report, NFP Counsel correctly noted that clarifications with the Audit staff were made for some differences and NFP filed amended reports, correcting the remaining misstatements. In addition, NFP amended the cash balance on its most recently filed report with an explanation that it resulted from audit adjustments from a prior period.

## **Finding 3. Disclosure of Loans**

### **Summary**

NFP secured a line of credit in the amount of \$500,000 on June 25, 2008, but did not file the required Schedule C-P-1, or a copy of the line of credit agreement, until November 21, 2008, after the Audit staff made NFP officials aware of this omission. The Audit staff recommended that NFP provide any relevant comments it has on this issue. In response to the PAR, NFP Counsel stated that staff was unaware of the requirement to file a Schedule C-P-1 and a copy of the line of credit agreement, in addition to filing a Schedule C-P, and that as soon as it was made aware of this omission, it filed the missing items.

### **Legal Standard**

**Loans.** When a political committee obtains a loan from, or establishes a line of credit at, a lending institution as described in 11 CFR 100.82(a) through (d) and 100.142(a) through (d), it shall disclose in the report covering the period when the loan was obtained, the following information on Schedule C-1 or C-P-1:

- (i) the date and amount of the loan or line of credit;
- (ii) the interest rate and repayment schedule of the loan, or of each draw on the line of credit;
- (iii) the types and value of traditional collateral or other sources of repayment that secure the loan or the line of credit, and if that security interest is perfected;.
- (iv) an explanation of the basis upon which the loan was made or the line of credit established, if not made on the basis of either traditional collateral or the other

- sources of repayment described in 11 CFR 100.82(e)(1) and (2) and 100.142(e)(1) and (2); and
- (v) a certification from the lending institution that the borrower's responses to paragraphs (d)(1)(i)-(iv) of this section are accurate, to the best of the lending institution's knowledge; that the loan was made or the line of credit established on terms and conditions (including interest rate) no more favorable at the time than those imposed for similar extensions of credit to other borrowers of comparable credit worthiness; and that the lending institution is aware of the requirement that a loan or a line of credit must be made on a basis which assures repayment and that the lending institution has complied with Commission regulations at 11 CFR 100.82(a) through (d) and 100.142(a) through (d). 11 CFR §104.3(d)(1).

In addition, a political committee shall submit: (1) a copy of the loan or line of credit agreement, which describes the terms and conditions of the loan or line of credit when it files Schedule C-1 or C-P-1; and, (2) a Schedule C-1 or C-P-1 each time a draw is made on a line of credit. 11 CFR §104.3(d)(2) and (3)

## **Facts and Analysis**

### **A. Facts**

NFP secured a line of credit totaling \$500,000 on June 25, 2008. The loan agreement stipulated that repayment was due by September 3, 2008. A total of \$300,000 was drawn against this line of credit, and disclosed on Schedules C-P, in amounts of: \$200,000 on June 27, 2008; \$50,000 on July 10, 2008; and, \$50,000 on August 22, 2008. NFP repaid the first two draws with interest on July 18, 2008 and repaid the third draw with interest on August 29, 2008.

### **B. Preliminary Audit Report & Audit Division Recommendation**

NFP filed Schedules C-P for each of the three lines of credit draws but did not file the required Schedule C-P-1 or a copy of the line of credit agreement until November 21, 2008, after the Audit staff made NFP officials aware of this omission. No further amendments will be necessary for the line of credit disclosure.

The Audit staff recommended that NFP provide any relevant comments it had on this issue.

### **C. Committee Response to the Preliminary Audit Report**

In response to the PAR, NFP Counsel stated that staff was unaware of the requirement to file a Schedule C-P-1 and a copy of the line of credit agreement in addition to filing a Schedule C-P and that as soon as it was made aware of this omission NFP filed the missing items. Counsel added that NFP took immediate corrective action to address this unintentional oversight.



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

June 13, 2011

**MEMORANDUM**

**TO:** Joseph F. Stoltz  
Assistant Staff Director

**FROM:** Christopher Hughey *CH*  
Acting General Counsel

Lawrence L. Calvert, Jr. *LJC*  
Associate General Counsel

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

Delania DeWitt Painter *DWP*  
Attorney

**SUBJECT:** Draft Final Audit Report on Nader for President (LRA # 755)

The Office of the General Counsel has reviewed the Draft Final Audit Report ("DFAR") on Nader for President ("Committee"). We concur with the findings in the DFAR and have specific comments on Finding 1 (Net Outstanding Campaign Obligations) and the proposed repayment. If you have any questions, please contact Delanie DeWitt Painter, the attorney assigned to this audit.

The Proposed Report recommends that the Committee repay \$56,165 to the United States Treasury for receiving funds in excess of the candidate's entitlement. This repayment arises from the calculation of the candidate's remaining entitlement based on the Statement of Net Outstanding Campaign Obligations ("NOCO Statement"). Generally, a committee's net outstanding campaign obligations are the difference between its assets and its liabilities, including winding down costs. 11 C.F.R. § 9034.5(a) and (b)(2).

In response to the Preliminary Audit Report ("PAR") the Committee makes three arguments why the Commission should increase its liabilities for primary winding down costs, thereby increasing the amount of matching funds to which it was entitled and, in turn, reducing or eliminating any amount it would be required to repay the Treasury for funds received in excess of the entitlement. These arguments are: 1) winding down costs should include expenses during the 31-day period between the general election and December 5, 2008; 2) winding down costs should include clearly identifiable primary costs incurred after the candidate's date of



ineligibility ("DOI"); and 3) the ratio of primary to general winding down costs should be increased to 100% primary after December 5, 2008.<sup>1</sup> See PAR Response. We conclude that the Committee's first two arguments are not persuasive, but the third argument has more merit. The Commission could consider whether to increase the percentage of primary winding down expenses after December 5, 2008 from 70% to a higher amount. Increasing the amount of the Committee's winding down expenses could increase the amount of the candidate's entitlement and eliminate the finding that the candidate received federal funds in excess of his entitlement and the consequent repayment. See 11 C.F.R. § 9038.2(b)(1)(i).

First, the Committee contends that \$90,479 of its expenditures between November 5, 2008 and December 5, 2008 should be included as primary winding down costs. PAR Response at 2-6. The Committee acknowledges that the "31 day rule" of 11 C.F.R. § 9034.11(d) does not permit a candidate who runs in the general election to use matching funds for primary winding down costs until 31 days after the general election. *Id.* at 4. But it contends that this rule should not exclude winding down costs obviously related to the primary election during this period, such as the expenses related to the Committee's compliance with the Commission audit. *Id.* at 4-6. The Committee argues that the 31 day rule "operated to punish the Committee for quickly and efficiently meeting its audit obligations," and that it incurred substantial primary winding down costs for compliance through December 5, 2008. *Id.* at 4-6. The Committee states that these expenses were for office space, overhead, phones, fax, compliance personnel, counsel and support staff. *Id.* It states that the auditors were on the Committee's premises between November 14, 2008 and December 9, 2008, and that it provided documents to the auditors in September 2008.<sup>2</sup> *Id.* The Committee asserts that it makes little policy sense to prohibit a general election candidate from winding down primary election matters until 31 days after the general election. *Id.* at 5. It also argues that the rationale for establishing the 31 day bright line rule does not apply here, because its winding down costs were more than a *de minimis* administrative cost, and that the result is unfair and burdensome. *Id.*

The Committee's arguments amount to a request that the Commission ignore the plain language of its own regulation. The regulation clearly states that candidates who run in the general election "must wait until 31 days after the general election before using any matching funds" for primary winding down costs and no expenses incurred "prior to 31 days after the general election shall be considered primary winding down costs." 11 C.F.R. § 9034.11(d). This provision applies "regardless of whether the candidates receive public funds for the general election." *Id.* Because Ralph Nader ran in the general election, the Committee could not incur any primary winding down expenses before December 5, 2008. There is no exception to this rule that would allow the Committee to demonstrate that any expenses during this period, even those associated with the Commission's audit, were primary winding down costs. There is no basis for the Commission to ignore its own regulation and create an exception for the Committee.

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<sup>1</sup> The Committee's fourth argument concerned calculation errors. We understand that the auditors have corrected and updated the amount of winding down costs and the Committee and the auditors agree on the figures that relate to these calculation errors.

<sup>2</sup> The DFAR states that the auditors agreed to start audit fieldwork early at the Committee's request to allow Committee staff to shut down the headquarters and return to their homes for the holidays.

In addition, the Committee's argument ignores the purpose of the regulation. In promulgating this regulation, the Commission acknowledged that the 31 day rule "may result in general election campaigns incurring a small amount of administrative costs related to terminating the primary campaign during the general election period," but determined that "in practice, these expenses are offset by general election start up costs that are incurred and paid by the primary committee prior to the candidate's DOI."<sup>3</sup> Explanation and Justification for 11 C.F.R. 9034.11(d), 68 Fed. Reg. 47,410 (Aug. 8, 2003).

Moreover, the 31 day rule at 11 C.F.R. § 9034.11(d) is a "bright line" rule that divides expenses based on a date rather than considering each particular expense. Bright line rules improve administrative efficiency, conserve resources and avoid prolonged disputes over the allocation of specific expenses. The Commission made a number of changes to the winding down costs rules for both primary and general candidates in the 2003 rulemaking to avoid future disputes over winding down costs like the disputes that had lengthened previous audit and repayment processes. See Explanation and Justification for 11 C.F.R. § 9004.11, 68 Fed. Reg. 47,390-391 (Aug. 8, 2003).

We acknowledge that as a practical matter, it is likely that the Committee incurred some expenses between November 5, 2008 and December 5, 2008 that it would not have incurred until later (or at all) but for the unusually early audit fieldwork. But even if the Commission determined not to apply the regulation in this instance, the documentation provided by the Committee to date does not provide a basis for distinguishing between these expenses and others, such as rent or utilities, which it likely would have incurred in any event. For example, the Committee lists payroll for individual Committee staff as primary winding down without explanation of what the staff did related to the audit fieldwork. These are precisely the type of disputes over the nature of specific expenses that the bright line rule of 11 C.F.R. § 9034.11(d) was intended to prevent. Nevertheless, the Committee will have another opportunity to submit supporting documentation if it decides to seek administrative review of the repayment determination.

The Committee's second argument is that basing the candidate's DOI on the date of the last major party convention is unfair because it does not recognize that independent and minor party candidates incur primary-related state ballot access expenses after the date of the last major party convention. PAR Response at 3, 6-7. The Committee argues that ballot access is equivalent to the primary for independent candidates, and that the Commission has recognized ballot access as a primary expense for non-major party candidates, citing AO 1995-45 (Hagelin). It asserts that state laws impose ballot access petition deadlines well after the last date of a major party nominating convention, and notes that in 2008, seven states had ballot access deadlines after the candidate's September 4, 2008 DOI. *Id.* at 6-7. The Committee contends that after the candidate's DOI, it spent at least \$3,905 for primary-related ballot access expenses, but had to pay for them as general election expenses. *Id.* at 7.

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<sup>3</sup> The Commission explained that this rule is consistent with the Commission's bright line rules at 11 C.F.R. § 9034.4(e) for allocating expenses between primary and general campaigns, which allow some primary expenses to be paid by the general committee and *vice versa*. *Id.*

Here, the Committee asks the Commission to ignore not merely its own regulations, but the statute. The Commission cannot change the candidate's date of ineligibility because it is based on the end of the matching payment period, which is defined by the statute and regulations. *See* 26 U.S.C. § 9032(6); *see also* 11 C.F.R. § 9032.6(b)(2), 9033.5(c). The latest date for the end of the matching payment period for candidates who are not nominated at a national convention is the last day of the last national convention held by a major party during the calendar year. 26 U.S.C. § 9032(6); 11 C.F.R. § 9032.6(b)(2). Thus, the latest possible date for the candidate's DOI was the last day of the last national convention held by a major party in 2008, September 4, 2008. *See* 11 C.F.R. § 9032.6(b)(2), 9033.5(c).

Moreover, while the Committee is correct that the Commission has considered state ballot access expenses for non-major party candidates to be primary-related qualified campaign expenses, those expenses must be incurred before the candidate's DOI. *See* AO 1995-45 (Hagelin) (Ballot access expenses for candidate and party incurred prior to DOI were qualified campaign expenses.) To the extent that the Committee incurred ballot access expenses after the candidate's DOI that would otherwise be primary-related, those expenses are not qualified campaign expenses but are considered general election expenses that cannot be paid with matching funds. More to the point, we understand that the amount of ballot access expenses incurred after the candidate's DOI is minimal, and would have little impact on the calculation of the candidate's entitlement or the repayment. The Committee argues that it spent \$3,905 for primary-related ballot access expenses after DOI, only a small part of the amount in excess of the candidate's entitlement. Most of the Committee's state ballot access expenses were incurred prior to the candidate's DOI and are already included as liabilities in the NOCO Statement.

The Committee's third argument is that the Commission should change the 70/30% winding down cost ratio between the primary and general campaigns to 100/0% after December 5, 2008 because of the timing of the Commission's audit of the Committee. PAR Response at 3, 7-9. The Committee argues that the regulations allow flexibility in determining a reasonable allocation and that 11 C.F.R. § 9034.11(c) does not prohibit crediting the Committee for expending general funds during the 31 day period after the general election to pay for primary winding down costs. *Id.* at 8. The Committee argues that it spent more than 2/3 of its total expenditures on the primary election and allowing a 100% allocation would help to address the imbalance caused by the 31-day and DOI rules. *Id.* They note that there is precedent for allowing a 100% allocation in the Nader 2000 audit report. *Id.* Finally, they state that the Committee's "early cooperation to make an expeditious audit in November 2008 should not operate to deprive it of proper credit for primary winding down expenses." *Id.* at 9.

We recommend that the auditors raise for the Commission's consideration the possibility of increasing the percentage of the Committee's primary winding down expenses after December 5, 2008 from 70% to a higher amount. Unlike the Committee's other two arguments, raising the primary winding down percentage would not contradict the express language of the Commission's regulations.

The regulations allow some flexibility in dividing winding down costs between a candidate's primary and general campaigns. A candidate who runs in both the primary and

general election may divide winding down costs between his primary and general committees "using any reasonable allocation method." 11 C.F.R. § 9034.11(c), *see* 11 C.F.R. § 9004.11(c). An allocation method is presumptively reasonable if it divides the total winding down costs between the primary and general election committees and results in no less than one third of the total winding down costs allocated to each committee. *Id.* However, a candidate "may demonstrate that an allocation method is reasonable even if either committee is allocated less than one third of the total winding down costs." *Id.* The Commission explained that if particular circumstances require a candidate to allocate less than one third of the total costs to one committee, the committee "will be required to demonstrate that their allocation method was reasonable." Explanation and Justification for 11 C.F.R. § 9004.11, 68 Fed. Reg. 47,392 (Aug. 8, 2003). The Commission further explained that this rule gives candidates "flexibility to allocate their winding down expenses based on the particular circumstances of their campaigns;" for example, candidates "who do not receive public funds for the general election might concentrate winding down activity on their publicly funded primary committee" or committees might focus winding down efforts on the committee that must deal with more complex issues or larger potential repayments in the audit and repayment process. *Id.* at 47,393.

The Commission could consider whether to increase the percentage of primary winding down expenses after December 5, 2008. We note that the 70% primary allocation is already slightly higher than 2/3 of the total winding down costs. The percentage could be further increased if the Commission concludes that the Committee has demonstrated that the higher allocation is reasonable. 11 C.F.R. § 9034.11(d). The Commission has previously allocated 100% of expenses to a primary committee after the date when the general committee's winding down process is completed. *See* Audit Report of Nader 2000 Primary, Inc. at 11 (100% of winding down expenses after June 1, 2001 were attributed to the primary committee because the general committee's wind down process was completed) (approved Nov. 14, 2002, prior to the promulgation of 11 C.F.R. § 9034.11(c)). Because the Committee has not demonstrated that the general election wind down was completed by December 5, 2008, a 100% primary allocation may not be appropriate on that date. Instead, the Commission could apply a higher primary winding down percentage than 70% but less than 100% for the period after December 5, 2008. The DFAR includes calculations of potential decreased repayment amounts if the Commission increases the percentage to 80% or 90%.

Conversely, the Commission might conclude that the Committee has not adequately demonstrated that a higher percentage allocation is reasonable. The Committee has not provided documentation explaining what amount of its activity and expenses after December 5, 2008 was related to primary winding down as opposed to general election winding down. Such documentation could include a description of Committee activity during this period related to the primary wind down, an explanation of which staff worked on primary winding down compared to those who worked on the general wind down and a list of winding down expenses explaining why they were related to the primary rather than the general. We suggest that the DFAR list types of documentation that the Committee could provide to demonstrate that a higher percentage allocation would be reasonable.

**CASE INDEX FORM**

**CASE NO. & NAME:** 08-0007; Nader for President 2008

**STAFF ASSIGNED:** Marty Favin, Audit Manager  
Sheraline Thomas, Lead Auditor

**TELEPHONE:** Audit - 202-694-1200

**DATE**

**DOCUMENT**

**January 5, 2009**

**Committee's Response to the Fieldwork Exit Conference (Narrative Portion)**

**December 8, 2009**

**Legal Analysis of Preliminary Audit Report (PAR)**

**March 31, 2010**

**PAR to Commission**

**September 1, 2010**

**Committee's Response to PAR**

**June 22, 2011**

**Draft Final Audit Report (DFAR) and Legal Analysis of DFAR Sent to Committee**

**July 11, 2011**

**Committee's Response to the DFAR**

**The above documents can be viewed in the Voting Ballot Matters folder. If you have any questions, please contact Marty Favin at 694-1189.**



Sheraline Thomas /FEC/US  
07/25/2011 12:00 PM

To Martin Favin/FEC/US@FEC

cc

bcc

Subject Fw: Nader NOCO/WD estimates (per Neil)

7/25/11

History: This message has been replied to.

Thanks,

Sheraline L Thomas  
Audit Division  
Federal Election Commission  
202-694-1184 (Phone)  
202-219-3483 (Fax)

— Forwarded by Sheraline Thomas/FEC/US on 07/25/2011 11:59 AM —



Neil Crossan  
<neil@neilcrossan.com>  
07/25/2011 11:52 AM

To Sheraline Thomas <shthomas@fec.gov>

cc

Subject Fwd: Sheraline email

Sheraline:

Attached to this email is an excel spread sheet which breaks down our estimated remaining expenses (see tab "Est"). It assumes the campaign will close down in Sept/October of 2011. Hopefully we'll have the FAR in the next couple of weeks so we can write the refund check and seek to terminate.

I also included a tab called "NOCO" which gives an updated refund calculation assuming the FEC agrees to our new allocation method of 95% for all expenses after 1/1/09. Please take a look at that and let me know if you disagree with any of my calculations.

Thanks again for all your help with getting us ever closer to winding down Nader '08.  
Neil



Nader 08 Estimated Termination Costs 063011.xls

7/25/11

**NADER FOR PRESIDENT 2008**

**Estimated Wind Down Expenses from 6/30/11 until Termination**

Nathan Coppemoll - Legal	1,000.00
Matt Zawlsky - Records Manger	2,000.00
Nell Crossan - Finance	800.00
Bruce Afran - Legal	975.00
Complete Campaigns - Software (4 Months)	1,000.00
Gossamer Threads - Hosting (4 Months)	300.00
Storage - (3 Years)	3,372.75
<b>TOTAL ESTIMATED WIND DOWN</b>	<b><u>9,247.75</u></b>

7/25/11

**NADER FOR PRESIDENT 2008**

<b>Assets</b>			<b>144,520.00</b>
<b>A/P</b>			<b>98,884.00</b>
<b>Actual Wind Down</b>		<b>TOTAL</b>	<b>ALLOCATION</b>
12/5-12/31/08 Expenses	70%	65,625.20	45,937.64
1/1/09-6/30/2011 Expenses	95%	100,906.94	95,861.60
		<u>166,532.14</u>	<u>141,799.24</u>
<b>Estimate Wind Down</b>	95%	9,247.75	8,785.36
<b>NOCO</b>			<b>(104,948.60)</b>
<b>Late Contributions</b>			<b>3,665.00</b>
<b>10/3/08 Matching Funds Pmt</b>			<b>127,959.00</b>
<b>Amount Due to the FEC</b>			<b>26,675.40</b>





Sheraline Thomas /FEC/US  
07/27/2011 08:15 AM

To Martin Favir/FEC/US@FEC  
cc  
bcc  
Subject Fw: nade

7/26/11

History: This message has been forwarded

Thanks,

Sheraline L Thomas  
Audit Division  
Federal Election Commission  
202-694-1184 (Phone)  
202-219-3483 (Fax)

— Forwarded by Sheraline Thomas/FEC/US on 07/27/2011 08:15 AM —



neil@neilcrossan.com

07/26/2011 10:05 AM

Please respond to  
neil@neilcrossan.com

To Sheraline Thomas <shthomas@fec.gov>  
cc  
Subject Fw: nade

Sheraline,

We just got our bill for the storage and they gave a nice discount from an earlier quote. See attached.

Neil

--- On Mon, 7/25/11, Crossan, Neil <Neil.Crossan@schwab.com> wrote:

From: Crossan, Neil <Neil.Crossan@schwab.com>  
Subject: nade  
To: neil@neilcrossan.com  
Date: Monday, July 25, 2011, 4:59 PM

Neil Crossan  
Senior Accounting Manager  
Schwab Bank  
Charles Schwab & Co., Inc.  
211 Main Street  
San Francisco, CA 94105  
Mailstop: SF211MN-07-106  
Phone: 415.667.0327  
Fax: 415.667.9088



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Nader 08 Estimated Termination Costs 063011.xls

7/26/11

**NADER FOR PRESIDENT 2008**

**Estimated Wind Down Expense from 6/30/11 until Termination**

Nathan Coppemoll - Legal	1,000.00
Matt Zawisky - Records Manger	2,000.00
Neil Crossan - Finance	600.00
Bruce Afran - Legal	975.00
Complete Campaigns - Software (4 Months)	1,000.00
Gossamer Threads - Hosting (4 Months)	300.00
Storage - (3 Years)	2,698.20
<b>TOTAL ESTIMATED WIND DOWN</b>	<b><u>8,573.20</u></b>

7/26/11

**NADER FOR PRESIDENT 2008**

<b>Assets</b>			<b>144,520.00</b>
<b>A/P</b>			<b>98,884.00</b>
<b>Actual Wind Down</b>		<b>TOTAL</b>	<b>ALLOCATION</b>
12/5-12/31/08 Expenses	70%	65,625.20	45,937.64
1/1/09-6/30/2011 Expenses	95%	100,906.94	95,861.60
		<u>166,532.14</u>	<u>141,799.24</u>
<b>Estimate Wind Down</b>	<b>95%</b>	<b>8,573.20</b>	<b>8,144.54</b>
<b>NOCO</b>			<b>(104,307.78)</b>
<b>Late Contributions</b>			<b>3,665.00</b>
<b>10/3/08 Matching Funds Pmt</b>			<b>127,959.00</b>
<b>Amount Due to the FEC</b>			<b>27,316.22</b>