

# Nader'08 Gonzalez

SENT VIA U.S. MAIL, E-MAIL, AND HAND DELIVERY

September 1, 2010

Mr. Joseph F. Stolz  
Assistant Staff Director  
Audit Division  
Federal Election Commission

Dear Mr. Stolz:

The Nader for President 2008 Committee submits the attached response to the Audit Division's Preliminary Audit report dated June 30, 2010.

We have complied with the recommendations or have explained any dispute with the recommendations and made certain proposals for accommodations herein.

If you have any questions concerning this response, please contact Assistant Treasurer Neil Crossan at 610-613-1783 or myself at 404-585-8748.

Sincerely,



Nathan Coppernoll  
General Counsel

cc: Ms. Sheraline L. Thomas, MS  
Mr. Martin Favin  
Mr. Carl Mayer  
Mr. Neil Crossan  
Ms. Theresa Amato

PAID FOR BY NADER FOR PRESIDENT 2008

P.O. Box 34103, Washington, DC 20043

The Nader for President 2008 Committee (the "Committee" or "NFP") submits the following response to the Audit Division's Preliminary Audit Report ("PAR") dated June 30, 2010.

## **I. Summary**

The Nader for President 2008 Committee disputes Finding 1 because the PAR contains calculation errors; these have now been resolved with the Audit Staff, and the revised calculation significantly lowers the amount received in excess of entitlement. The Committee also disagrees with Finding 1 because the Actual Winding Down Costs should be recalculated to reflect credit both for clearly-identifiable primary-related expenses incurred after the date of ineligibility ("DOI") and through the 31-day period after the General Election (until December 5, 2008), as well as use a more reasonable ratio for costs incurred after December 5, 2008. With respect to Finding 2, the Committee reports that it has complied with all recommended amendments by the Audit staff or has demonstrated where those amendments were unwarranted. With respect to Finding 3, the Committee notes that it disclosed the three lines of audit draws in its Schedule C-P, and filed the Schedule C-P-1 and a copy of the line of credit agreement as soon as the Committee was made aware of its inadvertent omission.

## **II. Nader for President 2008 Committee's Responses to the Audit Staff's Findings and Recommendations.**

The Committee has complied with the Audit staff's recommendations or explains any outstanding disputes with the Audit staff's findings and recommendations provided in the PAR as follows:

### **A. Nader for President 2008's Response to Finding 1, Net Outstanding Campaign Obligations.**

The Committee respectfully disagrees with the Net Outstanding Campaign Obligation ("NOCO") as of September 4, 2008, as prepared by the Audit staff through December 31, 2009, and presented in the PAR. The Audit staff found and recommended in Finding 1:

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. The Audit staff recommends that NFP provide evidence that the Candidate did not receive matching fund payments in excess of entitlement. Absent this evidence, the Audit staff will make a recommendation that the Commission determine that \$62,698 is repayable to the U.S. Treasury.

PAR at 4.

The Committee disagrees with Finding 1 for four reasons:

1. The PAR contained a miscalculated Actual Winding Down Costs line item (12/5/08-12/31/09). After the Committee's discussion with the Audit Division staff, the Audit Division staff adjusted

the NOCO contained within the PAR. The corrected figure alters the Net Outstanding Campaign Obligations (Deficit) as of September 4, 2008 and thereby lowers the Audit staff's finding of Federal Funds Received in Excess of Entitlement from \$62,698 to \$45,472.

2. The Committee disagrees that all of its expenditures for the period of November 5, 2008 to December 5, 2008 should be excluded as legitimate winding down costs. The application of 11 C.F.R. § 9034.11(d) (2010) (the "31-day rule") to the Committee excludes winding down costs obviously related to the primary election, including itemized expenses incurred with the Committee's compliance with this audit.
3. The date of Ineligibility ("DOI") rule, as applied in the PAR, is unfair to the Committee because it does not allow the recognition of clear primary-related ballot access expenses that uniquely apply to independent and minor party candidates whose primary season is the ballot access petitioning process that goes on beyond the date of the last major party nomination. By prohibiting a claim after the last major party's national convention, the DOI rule fails to recognize some primary-related expenses minor parties and independents incur based on the deadlines of state ballot access laws. The Committee urges the Commission to reconsider its DOI rule as it has the potential to discriminate against minor party and Independent candidates whose ballot access drives or minor party nominations may or may not be completed by the latest time a major party sets its convention dates.
4. Given the timing of the Committee's audit, the Commission should reallocate winding costs from a 70/30 ratio between the primary and general accounts to a 100/0 ratio after December 5, 2008.

These four reasons are further explained in detail as follows:

1. ***The Audit staff revised its NOCO calculation to now recommend a repayment to the U.S. Treasury in the amount of \$45,472.***

In Finding 1 of the PAR, the Audit staff recommended that the Commission determine that \$62,698 was repayable to the U.S. Treasury for matching funds received in excess of entitlement. After examining the PAR, the Committee found a miscalculated Actual Winding Down Costs line item (12/5/08-12/31/09). The Committee then brought this to the attention of the Audit staff. It is the Committee's understanding that the Audit staff has readjusted the NOCO, with a new NOCO provided to the Committee on August 18, 2010 showing that the Net Outstanding Campaign Obligations (Deficit) as of September 4, 2008 is now \$86,151.52.<sup>1</sup> Accordingly, the actual amount of Federal Funds Received in

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<sup>1</sup> The Audit staff credited the Committee with \$77,898 in Actual Winding Down Costs for 12/5/08-12/31/09. The Committee discovered that a breakout of how that number was calculated reflected the lack of tabulation of one cell on the spreadsheet, unintentionally eliminating all Actual Winding Down Costs (calculated at 70%) for the period 12/5/08-12/31/08, which should have been included in the calculation as actual costs as they were not included anywhere else on the NOCO. This increased the Actual Winding Down Costs by another \$45,937.64. Simultaneously, however, the Committee discovered that certain "memo entries" were double counted by the Audit staff erroneously. Although these are winding down costs, they should not be included in the

Excess of Entitlement (subject to the ongoing actual reported winding down expenses) is now calculated as \$45,472.

**2. The 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.**

The Committee disputes the application of 11 C.F.R. § 9034.11(d) (the "31-day rule") to the Committee because it 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. The Committee complied with this rule and the NOCO reflects zero winding down costs for this period. The Committee urges the Commission to reconsider the "bright-line" 31-day rule, however, as the justifications for the rule are nonexistent here.

During the operation of the 31-day rule, from November 5, 2008 to December 5, 2008, the Committee incurred a total of \$252,475.10 in combined primary and general expenditures. All of its expenditures were paid with general funds, as required by the rule. Of this amount, \$90,478 should have been paid for as winding down costs and \$161,996.12 by the general account. In other words, in a month for which the Committee was given zero credit for actual winding down costs, 36% of the Committee's expenditures immediately following the general election were demonstrably winding down costs.

The Committee notes that *na Nader* 2008 primary matching funds or any primary monies were permitted for any expenses incurred in the "general election" period through December 5, 2008 because of the prohibition presented in 11 C.F.R. § 9034.11(d):

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.

With respect to the *Nader* Committee in 2008, the 31-day rule produced a paradoxical result. The rule operated to punish the Committee for quickly and efficiently meeting its audit obligations under federal election law. The Audit staff was on the Committee's premises from November 13, 2008 for the entrance interview, and for fieldwork from November 17, 2008 through December 9, 2008. The

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NOCO calculation because they are already included in the NOCO calculation elsewhere. This decreased the Actual Winding Down Costs in the NOCO by \$17,259.67. Accordingly, the net adjustment resulted in the Actual Winding Down Costs line item for the period of 12/5/08-12/31/09 amounting to \$106,576.04. The Audit staff also updated the Actual Winding Down Costs from 01/01/10-06/30/10 to \$5,261.00. The Audit staff then estimated the Projected Winding Down Costs from 07/01/10-03/31/11 at \$19,950, thus arriving at total obligations of \$230,671.50, and a Net Outstanding Campaign Obligations as of 9/4/08 of \$86,151.52.

Committee provided to the Audit staff in *September 2008*, during the course of the general election and pursuant to an *August 2008* request for documents, preliminary information including bank statements, receipts and disbursements database, copies of contributor checks greater than \$50, deposit batches, contributor cards/best effort letters, loan documents, and credit card statements. During both the general election period of September 4, 2008 to November 4, 2008 and the post-general election 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. See 11 C.F.R. § 9038.1(b) (2010). It 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; such practice merely delays the settlement of primary related issues.

The bulk of the field work for the Committee's audit of its primary election expenses was conducted on the Committee's premises, with Committee staff cooperation, during the 31-day period. Federal regulations required the Committee to provide space to the Audit staff to conduct their audit. See 11 C.F.R. § 9038.1(b)(1)(i) ("[o]n the date scheduled for the commencement of fieldwork, the candidate or his or her authorized committee(s) shall provide Commission staff with office space and committee records. . ."). Yet, despite the Committee incurring federally-mandated primary winding down expenses during the 31-day period, the 31-day rule prohibits applying matching funds for these expenses.

In the *Explanation and Justification* for 11 C.F.R. § 9034.11(d) quoted in the PAR, the rationale for the 31-day rule was two-fold. See 68 Fed. Reg. 47409, 47410 (Aug. 8, 2003); see also PAR at 10. First, the *Explanation and Justification* expects that the "small amount of administrative costs" related to terminating the primary campaign during the general election would be offset by general election start up costs incurred by the primary committee. *Id.* Second, it states that the rule is consistent with the Commission's other bright line rules for allocating expenses between the primary and general campaigns at 11 C.F.R. § 9034.4(e) (2010). *Id.*

Neither of those justifications for the 31-day rule is present here. First, the audit and pre-audit work occurred during the general election time period, and a full 36% of the total expenditures within the 31-day post election cannot be characterized as de minimis "administrative costs" offset by de minimis general election start-up costs. Second, this unfair result is inconsistent with the objectives of 11 C.F.R. § 9034.4(e) -- to reach an equitable mechanism for allocating expenses between the primary and general elections. Because neither of the justifications behind the 31-day rule is present, the Commission should reevaluate the rule's application. Finally, while these primary-related audit and administrative costs during the 31-day period 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.

On October 19, 2009, the Committee submitted excel files to the Audit staff that contained detailed spreadsheets itemizing each of these winding down-related expenses incurred during November 5, 2008 to December 5, 2008 in the amount of \$90,478.98. Moreover, the Committee provided corresponding receipts correlated to each itemized expense on the spreadsheets. The Committee should be allowed full credit for the primary Winding Down Costs incurred during the November 5, 2008 to December 5, 2008 period. If not, at the very least, the Commission should grant the Committee a 70% credit because not only incidental primary winding down costs occurred during the 31-day period (as assumed by the rule's *Explanation and Justification*). In fact, the bulk of the audit field work and its related primary winding down expenses, including those mandated by regulation, occurred during this time frame. If neither of these issues (the 31-day rule or the reasonable allocation ratio) are resolved in the Committee's favor, the Committee could be put in the untenable position of having to now raise funds to make a repayment for not being credited for expeditiously seeking to terminate.

**3. The DOI rule, as applied to the Committee, assigns a date that fails to capture critical primary-related expenses and thus should be modified with respect to Mr. Nader and other similarly situated minor party and Independent candidates.**

The Committee also disagrees with Finding 1 of the PAR and the NOCO statement because of how the Commission currently interprets the winding down rules as applied to a candidate who receives primary matching funds, goes on to the general election, but does not receive general election public funding. The current bright-line date of ineligibility rule ("DOI") can become unfairly onerous to some candidates running outside of the two major parties, including Mr. Nader.<sup>2</sup> Respectfully, the Committee urges the Commission to establish a fairer DOI policy that captures a larger percentage of true primary related expenses.

The Committee agrees that under the Commission's current application of the regulations, the date of ineligibility of September 4, 2008 is calculated correctly. This regulation pegs the minor party/Independent candidate's date of ineligibility as "the last day of the last national convention held by a major party" to hold a nominating convention, if candidate had not already become ineligible because he ceased to be active in more than one state or had exceeded 30 days following a second consecutive primary in which the candidate receives less than 10 percent of the popular vote. See 11 C.F.R. § 9032.6 (2010); see also 11 C.F.R. § 9033.5 (2010). Furthermore, 11 C.F.R. § 9034.4(e)(1) essentially treats expenditures prior to the DOI as primary and after the DOI as general.

The Committee contends, however, that the DOI as applied is unfair because state law imposes continuing ballot access hurdles that last well after the last date on which one of the major parties hold its nominating convention. Under the current DOI rule, minor party and Independent candidates' DOI are set by their competitors' selection of dates for their nominating conventions. But minor party and

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<sup>2</sup> For the past three election cycles, the DOI regulations have applied to Mr. Nader's campaigns uniquely as he is the only minor party or Independent candidate outside the two major parties to both qualify for and receive only primary matching funds, and to then run in both the presidential primary and general elections. (Mr. Buchanan in 2000 received both primary and general election funds.)

Independent candidates are also subject to 50 different state rules (plus the District of Columbia) on ballot access. Often, ballot access deadlines occur after the major parties hold their nomination conventions. For example, in the 2008 presidential election, seven states had ballot access deadlines of September 5, 2008 or later. There are six additional states that had a deadline of September 2, 2008. Accordingly, no less than 13 states— one fourth of the states in the United States—have ballot deadlines in September. Nine more states had deadlines on August 15, 2008 or thereafter, raising the total to 22 states with deadlines between mid-August and September. If both major parties were to schedule their conventions before mid-August or earlier, minor party and Independent candidates seeking minor party nominations, would be unable to count as primary expenses the expenditures for nearly half of their ballot access drives or nominations for the election! See Ballot Access News, September 1, 2008, Vol. 24, No. 5 at <http://www.ballot-access.org/2008/090108.html#13>. Thus, minor party and Independent candidates incur indisputably primary-related expenses, ballot access expenditures that the DOI rule disqualifies because the major parties finished their primary election responsibilities.

Specifically with respect to the Committee's experience, bills coming due for up to thirteen ballot drives or party nominations occurring in September were cut off arbitrarily on September 5, 2008, the day after the Republican party chose to hold its convention. From September 5 to November 4, 2008, the Committee spent at least an additional \$3,904.53 worth of primary ballot access expenses and can provide documentation for those expenditures. These expenditures were made out of general funds because of the DOI rule. For the PAR to state that "[i]n Mr. Nader's case, he has been given the benefit of the longest possible primary period" and that "[t]herefore, expenses between September 5, and November 4, 2008, cannot be considered primary election expenses," is a conclusion totally devoid of the content in which minor parties and independent candidates operate. See PAR at 8. The rule does not comport with the policy of one quarter of the states in this country, which provide for ballot access deadlines well into September for independent candidates – effectively the independent candidate's primary – substantially beyond the date for the 2008 Republican convention. Nor does it comport with the Commission's advisory opinions on this matter which treat ballot access expenditures as primary qualified expenditures.<sup>3</sup> The Committee urges the Commission to harmonize the date of ineligibility rule with State ballot access law by permitting Mr. Nader and similarly-situated candidates to have a DOI consistent with the deadlines to qualify for the ballot in all 51 jurisdictions. The primary date for independent and minor party candidates should be deemed to have continued beyond the date for the Republican Convention and the DOI set accordingly.

**4. The Commission should increase the 70/30 ratio by which winding down expenses are credited to 100/0 after December 5, 2008.**

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<sup>3</sup> See, e.g., Advisory Opinion 1995-45 ("It has long been the view of the Commission that, for non-major party candidates, the process by which they satisfy the requirements of State law governing qualification for a position on the general election ballot serve purposes similar to a primary election or other nominating process.") (Additional citations omitted).

The Committee believes that the Commission should increase the ratio of primary to general expenses credited as winding down expenses from December 5, 2008 to date and through termination given the timing of Committee's audit. Regulation 11 C.F.R. § 9004.11(c) (2010) provides the Audit staff with the flexibility in determining a reasonable allocation, by allowing:

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 total winding down costs.

Notably, nothing in 11 C.F.R. § 9034.11(d) prohibits crediting the Committee as having expended its general election winding down costs during the post general election period within the 31 days; indeed the regulation solely refers to not using the primary matching funds for this period and primary winding down costs. See 11 C.F.R. § 9034.11(d).

The Radar campaign in 2008 spent of its total combined resources, approximately 70% on the Primary election and 30% on the General election. If the Committee is not credited with winding down expenses during the 31-day rule, \$90,478.98 in winding down expenses will be booked as having been paid with General funds while they were in actuality all winding down expenses. If the Commission applied a 70:30 ratio of Primary to General actual winding down costs, which comports with the overall expenditures (both Primary and General) of the entire campaign, and if this ratio were to hold for winding down costs from November 9, 2008 through termination, \$90,478.98 is 30% of \$301,592. One would expect total Primary Winding Down Costs to be in the vicinity of \$211,115, the remaining 70%. Yet, the Committee is only credited with approximately \$132,000, 70% of total primary winding down costs for the post 12/5 time period, including projected winding down costs. This reflects an improperly inverted ratio of the total primary to general expenses for the winding down period. The Committee spent more than 2/3 of its total expenditures on primary expenses, yet it is not being credited for these expenditures for the primary winding down during the entire winding down period. Providing the Committee with 100% credit for the post December 5, 2008 period only begins to address the overall imbalance caused by the application of the DOI and 31-day rules.

Moreover, there is precedent and support for this 100% allocation in the determinations made in the Nader 2000 Audit Report. During this audit, similar issues were raised on the then novel question concerning how to treat a candidate who receives primary but not general election funding. In the Nader 2000 Audit Report, all expenditures from June 1, 2001 to termination were credited at 100% for Primary Committee because the actual audit began in August 2001. See Attachment A, page 11. In this election cycle the actual audit began in November 2008. Using the rationale in the 2000 NOCO, the Committee believes that it is reasonable to credit the Committee with incurring winding down expenses during November, the audit time frame, and that it is certainly reasonable to credit any expenses



incurred after December 5, 2008 at 100%. The Nader campaign'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.

### **B. Nader for President 2008 Committee's Response to Finding 2, Misstatement of Financial Activity.**

The Committee reports that it has amended its disclosure reports to correct any restatements or has clarified with the Audit staff items that were not misstated. It is the Committee's understanding that following these amendments and clarifications with the Audit staff, there are no further amendments recommended at this time.

In Finding 2, the Audit staff found and recommended:

A comparison of NFP's reported figures to its bank records revealed that from January 4, 2008 through August 31, 2008, receipts were overstated by \$17,106; disbursements were understated by \$74,599; and, ending cash was overstated by \$91,705. The majority of the disbursements understatement was due to transfers NFP made to its General committee which were not reported. The Audit staff recommends that NFP amend its disclosure reports to correct the misstatements.

PAR at 4. The Committee further notes that the Audit staff identified these transfers as "mainly contributions to NFP where the contributors had exhausted their contribution limitation to NFP and the excessive portion of the contribution was *properly redesignated* to the Nader General." PAR at 12 (emphasis added). Pursuant to the Audit Staff's recommendations and subsequent discussions since the issuance of the PAR on how to file amendments:

- The Committee has amended its reports to correct any misstatements and has clarified with the Audit staff certain items that were not misstated;<sup>4</sup> and
- The Committee has amended the cash balance on its most recently filed report with an explanation that it resulted from audit adjustments from a prior period.

Following amendment of these reports and consultation with the Audit staff, it is the Committee's understanding that there are no additional reports that are recommended for amendment.

### **C. Nader for President 2008 Committee's Response to Finding 3, Disclosure of Loans**

As noted in the PAR, the Committee secured a line of credit totaling \$500,000 on June 25, 2008, repayable by September 3, 2008. See PAR at 14. A total of \$300,000 was drawn against this line of credit

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<sup>4</sup> For example, the PAR on page 12 noted a misstatement of \$13,725 in contributions that had been reported correctly and should be removed from the Finding.

in three separate transactions. *Id.* On each occasion the Committee made a line of credit withdrawal (June 27, 2008; July 10, 2008; and August 22, 2008), the Committee timely disclosed these withdrawals on its reports, filing Schedules C-P for each of the three line of credit draws. *Id.* The first withdrawal was just two days after securing the line of credit and timely reported, in the same report covering the period when the loan was obtained, thereby disclosing the existence of the loan.

In Finding 3, the Audit staff stated the following:

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.

*Id.*

None of the Committee's staff involved at the time of obtaining the loan were aware of the additional requirement to also file a Schedule C-P-1 or a copy of the line of credit agreement until they were alerted of this requirement by the Audit Division once the Audit began in November 2008. As noted, the Committee disclosed each of three lines of credit draws in its Schedules C-P. At that time the Committee became aware of the need to file a C-P-1 instead of a C-P, along with a copy of the loan or line of credit agreement, the Committee took immediate corrective action to address this unintentional oversight. In light of the Nader campaign's history of prompt compliance with FEC mandates this should be seen as a de minimis oversight that was corrected immediately upon notification.

### **III. CONCLUSION**

Thank you for this opportunity to respond to the Audit staff's findings and recommendations. You can be assured of the Committee's continued cooperation.

Sincerely,



Nathan Coppemoll  
General Counsel

# **ATTACHMENT**

**A**



FEDERAL ELECTION COMMISSION  
WASHINGTON, D C 20461

November 27, 2002

**MEMORANDUM**

**TO:           RON M. HARRIS**  
**PRESS OFFICER**  
**PRESS OFFICE**

**FROM:        JOSEPH F. STOLTZ** *JFS*  
**ASSISTANT STAFF DIRECTOR**  
**AUDIT DIVISION**

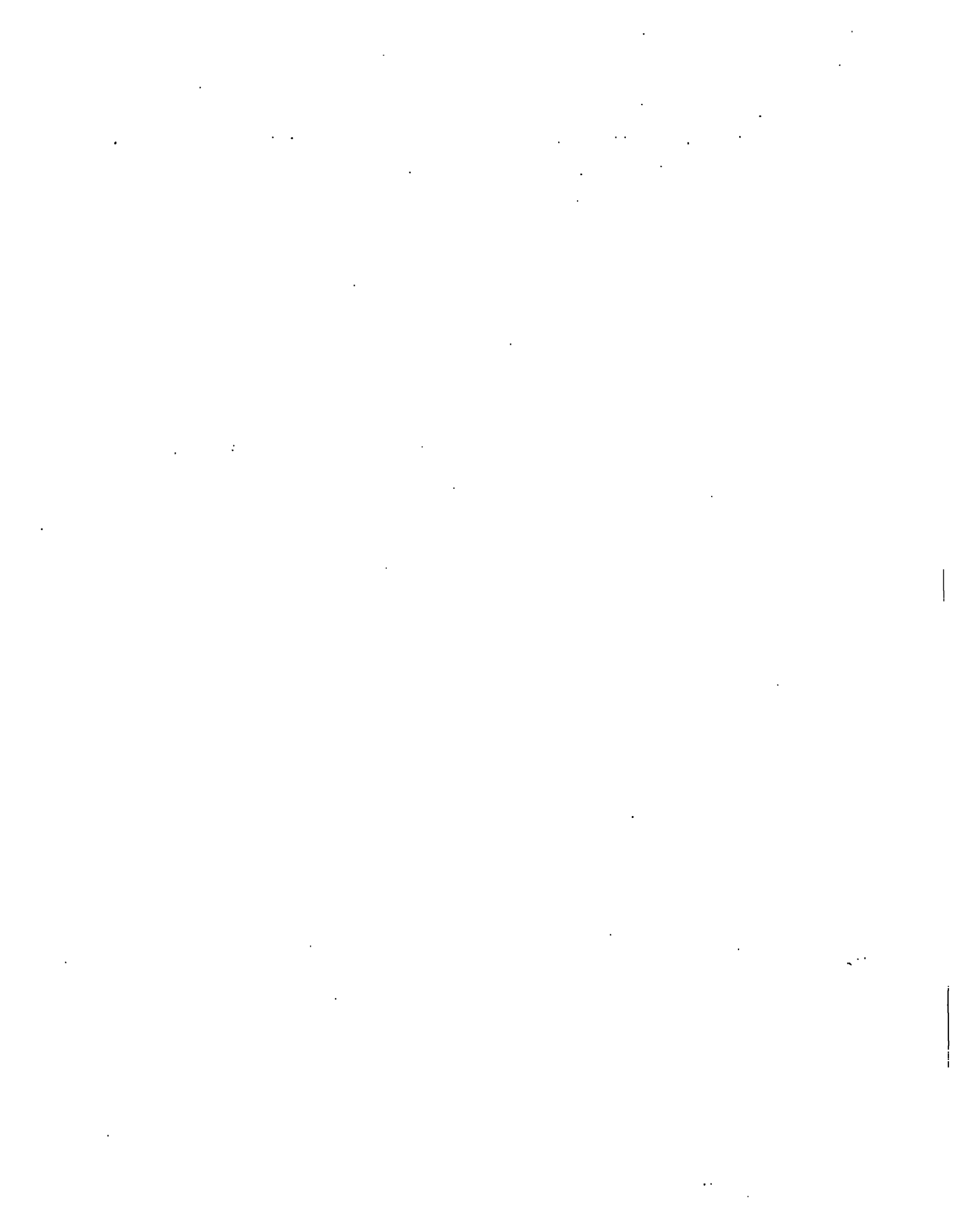
**SUBJECT:     PUBLIC ISSUANCE OF THE FINAL AUDIT REPORT ON**  
**NADER 2000 PRIMARY COMMITTEE, INC.**

Attached please find a copy of the final audit report and related documents on Nader 2000 Primary Committee, Inc. that was approved by the Commission on November 14, 2002.

All parties involved have received informational copies of the report and the report may be released to the public.

Attachment as stated

cc:   Office of General Counsel  
      Office of Public Disclosure  
      Reports Analysis Division  
      FEC Library



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**REPORT OF THE AUDIT DIVISION  
ON THE  
Nader 2000 Primary  
Committee, Inc.**

**November 14, 2002**



**FEDERAL ELECTION COMMISSION  
999 E STREET, N.W.  
WASHINGTON, D.C.**

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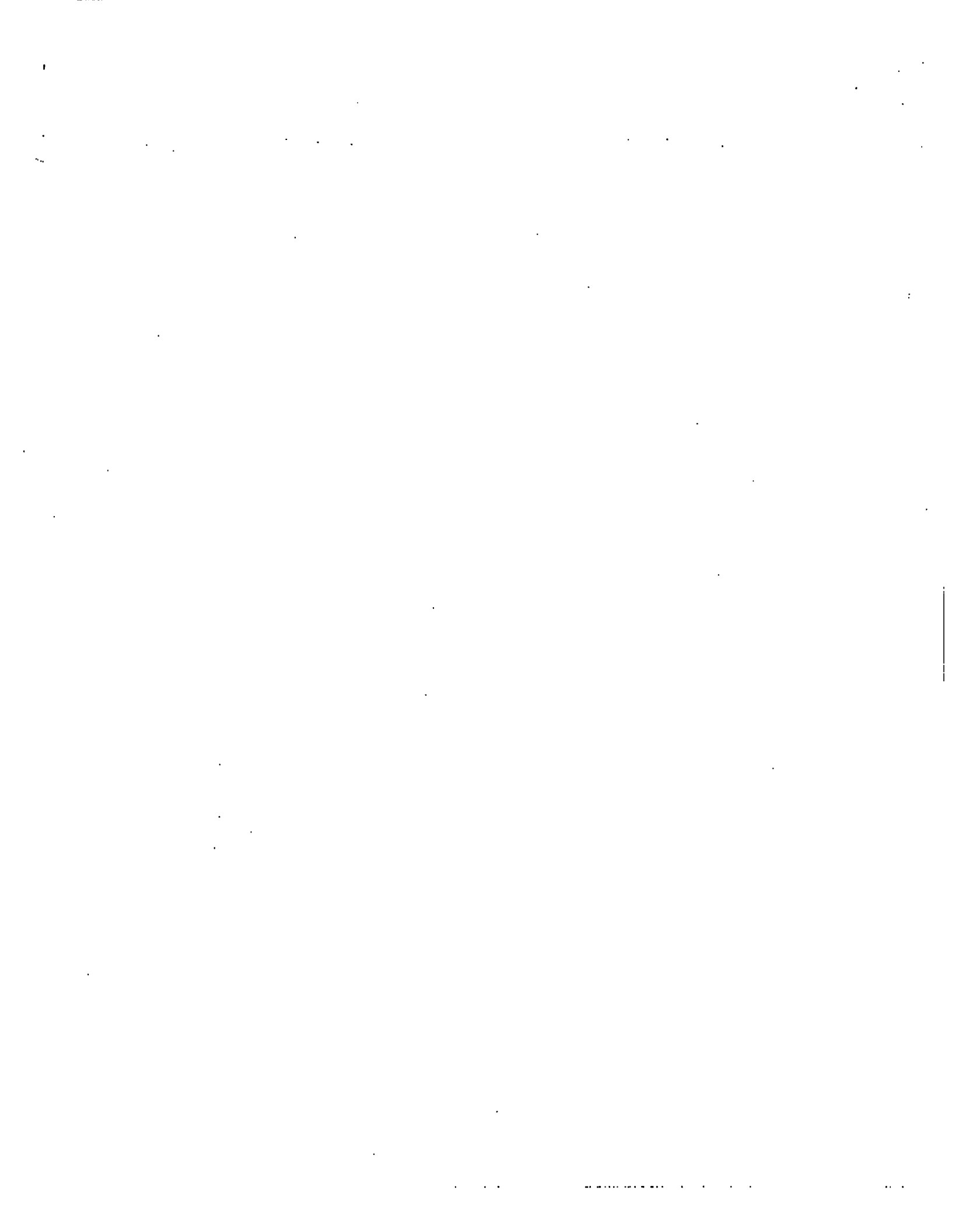
**NADER 2000 PRIMARY COMMITTEE, INC.**

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20461

**NADER 2000 PRIMARY COMMITTEE, INC.**

**EXECUTIVE SUMMARY**

Nader 2000 Primary Committee, Inc. (NPC) registered with the Federal Election Commission on February 18, 2000, as the principal campaign committee for Ralph Nader (the Candidate), a candidate for nomination of the office of President of the United States.

The audit is mandated by Section 9038(a) of Title 26 of the United States Code, requiring the Commission to audit committees authorized by candidates who receive Federal Funds. The Candidate received \$723,308 in matching funds from the U.S. Treasury.

The findings of the audit were presented to NPC at the exit conference held on January 18, 2002 and in the Preliminary Audit Report (PAR). NPC's responses to the findings are contained in the audit report.

The following is an overview of the findings contained in the audit report.

**DETERMINATION OF NET OUTSTANDING CAMPAIGN OBLIGATIONS** – 11 CFR §9034.5(a) and 9034.1(b). A Statement of Net Outstanding Campaign Obligations was prepared to determine NPC's financial position as of the Candidate's date of ineligibility, August 17, 2000. The Audit staff concluded that NPC did not receive matching funds in excess of its entitlements.

**STALE-DATED CHECKS** – 11 CFR §9038.6. The Audit staff identified 24 stale-dated checks totaling \$11,398. The Commission determined that these amounts are payable to the U.S. Treasury.





FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**REPORT OF THE AUDIT DIVISION  
ON  
NADER 2000 PRIMARY COMMITTEE, INC.**

**I. BACKGROUND**

**A. AUDIT AUTHORITY**

This report is based on an audit of the Nader 2000 Primary Committee, Inc. (NPC). The audit is 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 payments under section 9037." Also, Section 9039(b) of Title 26 of the United States Code and Section 9038.1(a)(2) of Title 11 of the Code of Federal Regulations state that the Commission may conduct other examinations and audits from time to time, as it deems necessary.

In addition to examining the receipt and use of Federal funds, the audit seeks to determine if the campaign has materially complied with the limitations, prohibitions, and disclosure requirements of the Federal Election Campaign Act of 1971 (the Act), as amended.

**B. AUDIT COVERAGE**

The audit covered the period from NPC's first bank transaction, February 8, 2000 through December 31, 2000. NPC reported an opening cash balance of \$-0-, total receipts of \$3,691,792, total disbursements of \$3,368,307 and a closing cash balance of \$323,485<sup>1</sup>. In addition, a limited review of NPC's financial activity and disclosure reports for the period from January 1, 2001, through June 30, 2002, was conducted to determine its matching fund entitlement based on its financial position.

**C. CAMPAIGN ORGANIZATION**

NPC registered with the Federal Election Commission (the Commission) on February 18, 2000 as the principal campaign committee for Ralph Nader (the Candidate), a candidate for nomination for the office of President of the United States.

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<sup>1</sup> The amounts were calculated from amended reports filed by NPC.

NPC currently maintains its headquarters in Washington, D.C. NPC's Treasurer from inception until June 9, 2000 was Patrick Alia. On June 9, 2000, Harvey Jester became Treasurer and continues to serve in that capacity.

NPC maintained depositories in Washington, D.C. To handle its financial activity, NPC utilized four bank accounts. From these accounts the campaign made approximately 1,550 disbursements. In addition, NPC received contributions totaling \$2,424,433 from approximately 26,900 contributors. NPC also received a loan of \$500,000, offsets to expenditures of \$64,229, and interest and other receipts of \$10,082<sup>2</sup>.

In addition to the above, the Candidate was determined eligible to receive matching funds on June 30, 2000. NPC made four matching fund requests totaling \$888,763 and received \$723,308 from the United States Treasury. This amount represents 4.28% of the \$16,890,000 maximum entitlement that any candidate could receive. For matching fund purposes, the Commission determined that Mr. Nader's candidacy ended on August 17, 2000, the last day of the matching payment period. On October 2, 2000, NPC received its final matching fund payment to defray expenses and to help defray the cost of winding down the campaign.

#### **D. AUDIT SCOPE AND PROCEDURES**

In addition to a review of the expenditures made by NPC to determine if they were qualified or non-qualified campaign expenses, the audit covered the following general categories:

1. the receipt of contributions or loans in excess of the statutory limitations;
2. the receipt of contributions from prohibited sources, such as those from corporations or labor organizations;
3. proper disclosure of contributions from individuals, political committees and other entities, to include the itemization of contributions when required, as well as the completeness and accuracy of the information disclosed;
4. proper disclosure of disbursements including the itemization of disbursements when required, as well as, the completeness and accuracy of the information disclosed;
5. proper disclosure of campaign debts and obligations;
6. the accuracy of total reported receipts, disbursements and cash balances as compared to campaign bank records (see Finding II.);

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<sup>2</sup> See Finding II – Misstatement of Financial Activity

7. adequate recordkeeping for campaign transactions;
8. accuracy of the Statement of Net Outstanding Campaign Obligations filed, to disclose its financial condition and to establish continuing matching fund entitlement;
9. compliance with spending limitations; and,
10. other audit procedures that were deemed necessary in the situation.

As part of the Commission's standard audit process, an inventory of campaign records was conducted prior to the audit fieldwork. This inventory was conducted to determine if NPC's records were materially complete and in an auditable state. Based on our review of records presented, fieldwork began immediately.

Unless specifically discussed below, no material non-compliance was detected. It should be noted that the Commission may pursue further any of the matters discussed in the audit report in an enforcement action.

## **II. AUDIT FINDING AND RECOMMENDATION - NON-REPAYMENT MATTER**

### **MISSTATEMENT OF FINANCIAL ACTIVITY**

Sections 434(b)(1), (2) and (4) of Title 2 of the United States Code state, in part, that a political committee shall disclose the amount of cash on hand at the beginning of the reporting period and the total amount of all receipts and all disbursements for the reporting period and the calendar year.

Section 434(b)(5)(A) of Title 2 of the United States Code states, in part, that each report under this section shall disclose the name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

Section 104.18(d) of Title 11 of the Code of Federal Regulations states, in part, if a committee files an amendment to a report that was filed electronically, it shall also submit the amendment in an electronic format. The committee shall submit a complete version of the report as amended, rather than just those portions of the report that are being amended.

The Audit staff compared NPC's reported figures to its bank records and found that for calendar year 2000, NPC materially misstated its receipts, disbursements, and ending cash-on-hand.

NPC's reported receipts of \$3,691,792 were understated by a net amount of \$30,259. The misstatement resulted from NPC's failure to report \$55,332 in receipts from the Nader 2000 General Committee (the General Committee). In addition, NPC had miscellaneous reporting errors in a net amount of (\$25,073). The correct amount of reportable receipts was \$3,722,051.

NPC's reported disbursements of \$3,368,307 were understated by a net amount of \$367,684. NPC was not aware that the General Committee's payroll for the period August through December 2000 was erroneously paid by the payroll processor, from NPC's account. Consequently, disbursements totaling \$495,888 that should have been reported by NPC were reported instead by the General Committee. In addition, NPC reported some disbursements twice (\$93,648) and misreported miscellaneous items in a net amount of (\$34,557). The correct amount of reportable disbursements was \$3,735,990.

The misstatements in reported receipts and disbursements, caused cash-on-hand at December 31, 2000 to be overstated by \$337,424.

At the exit conference, the Audit staff provided NPC with documentation explaining the misstatements. The Audit staff also provided a schedule of the payroll disbursements that were required to be itemized on Schedule B-P (Itemized Disbursements). NPC representatives agreed to file amended reports.

In the Preliminary Audit Report, the Audit staff recommended that NPC file amended reports for calendar year 2000 to correct the misstatements and itemize, on Schedule B-P, the \$495,888 in payroll disbursements discussed above.

NPC filed the necessary amendments.

### **III. AUDIT FINDING AND RECOMMENDATION -- AMOUNT DUE TO THE U.S. TREASURY**

#### **A. DETERMINATION OF NET OUTSTANDING CAMPAIGN OBLIGATIONS**

Section 9034.5(a) of Title 11 of the Code of Federal Regulations requires that within 15 calendar days after the candidate's date of ineligibility (DOI), the candidate shall submit a statement of net outstanding campaign obligations (NOCO)<sup>3</sup> which reflects the total of all outstanding obligations for qualified campaign expenses plus estimated necessary winding down costs.

<sup>3</sup> The NOCO statement indicates whether, on the date of ineligibility, a committee has a surplus of funds (and therefore has to make a repayment to the U.S. Treasury) or has a net outstanding debt (and may be eligible for additional matching funds). The NOCO statement also determines whether the committee can keep the primary matching funds it received after the candidate's date of ineligibility or whether it must return some of those funds.

Section 9034.1(b) of Title 11 of the Code of Federal Regulations states, in part, that if on the date of ineligibility a candidate has not outstanding campaign obligations as defined under 11 CFR 9034.5, that candidate may continue to receive matching payments provided that on the date of payment there are remaining net outstanding campaign obligations.

In addition, Section 9034.4(b)(3) of the Title 11 of the Code of Federal Regulations states that any expenses incurred after a candidate's date of ineligibility, as determined under 11 CFR 9033.5, are not qualified campaign expenses except to the extent permitted under 11 CFR 9034.4(a)(3). The section states, in part, that any expenses incurred before the candidate's date of ineligibility for goods and services to be received after the candidate's date of ineligibility, or for property, services, or facilities used to benefit the candidate's general election campaign, are not qualified campaign expenses.

The NOCO statement prepared by the Audit staff and an analysis of cash received subsequent to the statement date indicated that NPC had a deficit (net outstanding debt). Therefore the Audit staff concluded that the Mr. Nader had not received matching funds in excess of the amount to which he was entitled and no repayment to the United States Treasury is required.

Mr. Nader's date of ineligibility was August 17, 2000<sup>4</sup>. However, he continued to campaign as a candidate for the general election. The Audit staff reviewed NPC's financial activity through June 30, 2002 and analyzed winding down costs. In determining NPC's financial position at DOI, the Audit staff only included winding down costs incurred after December 7, 2000, the end of the expenditure report period described in 11 CFR §9002.12 and these were allocated between NPC and the General Committee.<sup>5</sup> The audited Net Outstanding Campaign Obligations statement appears below:

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<sup>4</sup> The Commission determined that Ralph Nader's date of ineligibility was the last day of the last national convention held by a major party (in this case, the Democratic Party) in the calendar year. 11CFR §§9032.6 and 9033.5.

<sup>5</sup> In a statement provided to the Audit staff subsequent to the Exit Conference, NPC recommended that certain winding down costs be allocated 70% to NPC and 30% to the General Committee. The Audit staff agreed that this ratio was reasonable.



**STATEMENT OF NET OUTSTANDING CAMPAIGN OBLIGATIONS (NOCO)**  
**As of August 17, 2000**  
**As determined at June 30, 2002**

**ASSETS**

Cash on Hand	1,156	
Cash in Bank	155,293	
Accounts Receivable	110,249	
Due From General Committee	180,852	
Capital Assets (60% of cost)	19,536	
<b>Total Assets</b>		<b>467,086</b>

**OBLIGATIONS**

Loan Payable	500,000	
Bank interest due on Loan	5,960	
Accounts Payable for Qualified Campaign Expenses	139,973	
Winding Down Expenses (12/8/00 – 6/30/02)	365,410(a)	
Estimated Winding Down Costs Post 6/30/02	78,924(b)	
Due To General Committee	75,025	
Excess Transfer of Holding Account Balance to General Committee	16,489(c)	
Amount Due US Treasury - State Dated Checks	11,398	
<b>Total Obligations</b>		<b>1,193,180</b>
<b>Net Outstanding Campaign Obligations (Deficit)</b>		<b>(726,094)</b>

FOOTNOTES TO NOCO

- (a) This amount represents 70% of identified winding down costs; 30% was attributed to the general campaign. This amount does not include winding down costs of \$54,753 incurred between 8/18/00 and 12/7/00, the end of the expenditure report period (11 CFR §9002.12).
- (b) The estimated winding down costs will be monitored throughout the calendar year 2002. Any differences between the actual and estimated costs will be adjusted on the NOCO accordingly.
- (c) The Holding Account ceased to exist for primary election purposes on 7/31/00. Beginning 8/1/00 the General Committee used the account which had an existing balance of \$96,038. To compensate for this, the General Committee reimbursed NPC \$112,527. The excess amount reimbursed, \$19,489, is payable to the General Committee.

NOCO (Deficit) as of 8/17/00	(\$726,094)
Net Private Contributions 8/18/00 to 9/1/00	90,868
Matching Funds Received on 9/1/00	<u>385,523</u>
Remaining Net Outstanding Campaign Obligations at 9/1/00	(\$249,703)
Net Private Contributions 9/2/00 to 10/2/00	106,999
Matching Funds Received on 10/2/00	<u>59,157</u>
Remaining Net Outstanding Campaign Obligations (Deficit)	(\$83,547)

The audited NOCO statement as well as the calculation of remaining entitlement was presented to NPC representatives at the exit conference. Subsequently, NPC provided documentation that clarified certain components of the statement and to dispute the inclusion and/or exclusion of other components.

The above NOCO statement and calculation of remaining entitlement have been updated based on a review of NPC's response to the preliminary audit report as well as a review of additional financial records, as discussed below.

#### Accounts Receivable

The value of accounts receivable has been reduced by \$16,105. NPC presented documentation showing that the Audit staff double counted a refund received from the Verizon Company.

#### Bank Interest Due on Loan

NPC's response stated that the total interest paid on the loan to Amalgamated Bank was \$7,373. However, according to the records obtained by NPC for the Audit staff from Amalgamated Bank, the interest rate has been adjusted twice, decreasing the total interest due by \$1,413. Thus, the actual interest payment was \$5,960. Therefore, the amount of loan interest due as presented on the NOCO statement, remains unchanged.

#### Accounts Payable for Qualified Campaign Expenses

NPC stated that the NOCO statement presented in the preliminary audit report significantly understated NPC's accounts payable at August 17, 2000. NPC disputed 20 expenses, totaling \$27,064, it says were incurred prior to the Candidate's date of ineligibility and should have been included in accounts payable. Three of the expenses, totaling \$15,630, were payments for legal representation; 16 payments totaling \$3,799 represented reimbursed expenses to NPC's contractors; and one payment of \$7,635 represented the purchase of office supplies.

The Audit staff's review of relevant disbursement records showed that the legal services were rendered and the corresponding payments for those services occurred

after DOI. Similarly, NPC did not demonstrate that the payments to contractors in Alabama totaling \$3,799 were for expenses incurred prior to the Candidate's DOI. Further, without a vendor invoice indicating a date of incurrence prior to DOI, the October 2000 payment of \$7,635 for the purchase of office supplies is not a payable.

These expenses have been treated as general election expenses consistent with other expenses incurred between DOI and the end of the expenditure report period. Therefore, the Audit staff made no adjustment to accounts payable regarding these disbursements.

#### Winding Down Expenses – August 18, 2000 through December 7, 2000

In the preliminary audit report, \$54,753 in winding down expenses between August 18, 2000 and December 7, 2000, were excluded from the calculation of net outstanding campaign obligations pursuant to 11 CFR §9034.4(e)(3) and 11 CFR §9002.12.

In its response to the preliminary audit report, NPC disagreed with this exclusion stating that the cited regulations do not support the Audit staff's conclusion. Further, NPC asserted that a note in the Financial Control and Compliance Manual for Presidential Primary Candidates Receiving Public Financing<sup>6</sup> that states that salaries and overhead expenses between the date of nomination and the end of the expenditure period (December 7, 2000) are general election expenses that may not be charged to exempt compliance for the purposes of winding down the primary campaign, is limited to federally funded candidates who go on to receive federal funds for the general election. Mr. Nader did not receive federal funds for the general election.

The Audit staff's treatment of winding down expenses for this period is based on the premise that candidates who obtain primary election public funding can only use those funds for their primary campaigns and to pay the costs associated with winding down the primary campaigns. (11 CFR §9034.4(a)). Candidates, like Mr. Nader, who continue on to the general election, are not winding down their campaigns prior to the general election but are incurring costs associated with campaigning for the general election. These costs are not qualified campaign expenses for the primary campaign (11 CFR §9034.4(b)(3)).

#### Winding Down Expenses – December 8, 2000 through June 30, 2002

The preliminary audit report identified \$287,956 in winding down expenses for the period December 8, 2000 through January 25, 2002<sup>7</sup>. NPC disagreed with the 70/30% allocation of winding down costs between the primary and general committees. They maintain that the entire amount should be attributed to NPC.

<sup>6</sup> April 2000, p. 54, note 19.

<sup>7</sup> This is actual winding down expenses through January 25, 2002, the day of the Exit Conference.

Using disclosure reports filed as of June 30, 2002 the Audit staff updated the NOCO statement to reflect actual winding down expenses through that date. Consequently, the value of the expenses paid during the period December 8, 2000 through June 30, 2002 is \$365,410. This amount is the sum of expenses for three periods during which winding down expenses were calculated as follows:

1. December 8, 2000 – May 31, 2001 – The total amount of winding down expenses incurred during this period was \$194,759. NPC's portion, \$136,331, represents 70% of this amount. The remaining \$58,428, or 30%, was attributed to the General Committee. Based on the relative financial activity of both committees through May 2001, the Audit staff determined that the 70/30 cost allocation, which was initially proposed by NPC, was reasonable.
2. June 1, 2001 – December 31, 2001 - \$150,155 (100%) of the winding down expenses was attributed to NPC by the Audit staff because the General Committee's winding down process had been completed.
3. January 1, 2002 – June 30, 2002<sup>8</sup> - \$78,924 (100%) of the winding down expenses was attributed to NPC by the Audit staff because the General Committee's winding down process had been completed.

#### Private Contributions Deposited After the Date of Ineligibility

According to the preliminary audit report, private contributions totaling \$294,611 were deposited into NPC's account between August 18, 2000 and October 2, 2000. These contribution checks included many that were made payable to "Nader," "Nader for President," "Nader 2000" and other names that did not indicate whether they were intended for NPC or the General Committee. These ambiguous checks were deposited into NPC's checking account after DOI, although many were dated prior to DOI. NPC claims that these contributions were intended for the general election and that they were erroneously deposited in NPC's account. To document that these contributions were intended for the General Committee, NPC in its response to the preliminary audit report, provided copies of 1,855 checks totaling \$122,910<sup>9</sup>. In some cases, solicitation devices accompanied the contribution checks. Some of the devices appeared to be solicitations for contributions to the general campaign; other devices did not identify the intended recipient.

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<sup>8</sup> NPC's disclosure reports were reviewed to determine the actual value of the winding down expenses for the period.

<sup>9</sup> Twenty-six contribution checks totaling \$1,468 were excluded from the review because they were either illegible or duplicates.

According to 11 CFR §110.1(b)(2)(ii) and (b)(4)(i) and (ii), in the case of a contribution not designated in writing by the contributor for a particular election, the contribution is deemed designated for the next election for that Federal office after the contribution is made. Contributions are considered to be designated in writing if they are made by a negotiable instrument that clearly indicates the election for which they are intended or they are accompanied by a writing signed by the contributor that clearly indicates the election. In the case of these ambiguous checks, the copies of solicitation devices provided with some checks did not contain the signatures of the contributor. For such items, the Audit staff considered checks that were dated prior to August 18, 2000 as contributions for NPC and any dated after August 17, 2000 as contributions for the General Committee.

As a result of our review, the Audit staff determined that 1,550 contributions totaling \$96,744 intended for the General Committee were erroneously deposited to NPC's account between August 18 and October 2, 2000<sup>10</sup>. Accordingly, these contributions were not included in the Audit staff's calculation of entitlement remaining after DOI.

#### **B. STALE-DATED CHECKS**

Section 9038.6 of Title 11 of the Code of Federal Regulations states that if the committee has checks outstanding to creditors or contributors that have not been cashed, the committee shall notify the Commission. The committee shall inform the Commission of its efforts to locate the payees, if such efforts have been necessary, and its efforts to encourage the payees to cash the outstanding checks. The committee shall also submit a check for the total amount of such outstanding checks, payable to the United States Treasury.

The Audit staff identified 38 stale-dated checks totaling \$18,346 issued by NPC from its Main Primary Account. The checks were dated between May 24, 2000 and January 17, 2001 and had not been cashed by the recipients as of May 31, 2001. Eighteen of the stale-dated checks were issued to refund excessive contributions.

At the exit conference, the Audit staff provided NPC representatives with a schedule of the stale-dated checks and advised them that they might contact the contributors or vendors and request that they cash the checks.

In the preliminary audit report, the Audit staff recommended that the NPC provide evidence that:

- The checks were not outstanding, by providing copies of the front and back of the negotiated checks; or
- The outstanding checks were void by providing statements from the vendors indicating that they have been paid in full or an account reconciliation showing that no obligation exists.

<sup>10</sup> Eighty contributions totaling \$4,737 were erroneously deposited to NPC's account between 8/18/00 and 9/1/00; 1,470 contributions totaling \$92,007 were deposited in error between 9/2/00 and 10/2/00.

Absent such evidence, the Audit staff would recommend that the Commission determine that NPC had to pay the United States Treasury \$18,346 to cover the total of stale-dated checks.

NPC provided documentation that it voided and subsequently re-issued 14 checks totaling \$6,948. NPC further demonstrated that as of May 31, 2002 the recipients had cashed all 14 reissued checks. Twenty-four stale-dated checks totaling \$11,398 (\$18,346 - \$6,948) remained.

**Recommendation**

The Audit staff recommends that the Commission determine that NPC pay the United States Treasury \$11,398 to cover the total of the outstanding stale-dated checks.





FEDERAL ELECTION COMMISSION  
WASHINGTON, DC 20461

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November 8, 2002

**MEMORANDUM**

TO: Robert J. Costa  
Deputy Staff Director

THROUGH: James A. Pehkonen *JAP*  
Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

Gregory R. Baker *GRB*  
Acting Associate General Counsel

Peter G. Blumberg *PGB*  
Acting Assistant General Counsel

Delanis DeWitt Painter *DDP*  
Attorney

SUBJECT: Proposed Audit Report on Nader 2000 Primary Committee, Inc. (LRA #588)

The Office of General Counsel has reviewed the proposed Audit Report on Nader 2000 Primary Committee, Inc. (the "Committee") submitted to this Office on August 23, 2002. This memorandum summarizes our comments on the proposed report. Our comments focus on the issue of the Committee's net outstanding campaign obligations, specifically the calculation of winding down costs and accounts payable. Generally we concur with any findings not specifically addressed in these comments. If you have any questions, please contact Delanis DeWitt Painter, the attorney assigned to this audit.

**I. NOCO - WINDING DOWN COSTS AND ACCOUNTS PAYABLE (III. A.)**

**A. WINDING DOWN COSTS**

The proposed Report raises the novel issue of how to calculate the winding down costs for a candidate who ran in both the primary and general elections but only received public funds for the primary election. This Office concurs with the Audit Division's exclusion of purported

<sup>1</sup> The Office of General Counsel recommends that the Commission consider this document in open session since the report does not include matters exempt from public disclosure. See 11 C.F.R. § 24



primary wind down costs between the candidate's date of ineligibility and the end of the general election expenditure report period.<sup>2</sup> We agree with your conclusion that these expenses should be treated as general election expenses rather than primary winding down costs. Several provisions of the regulations and the regulatory history support allocating expenses incurred between the date of nomination and the end of the expenditure report period as general election expenses. As discussed more fully below, this approach is consistent with the regulations governing the attribution of expenses between the primary and general election campaigns, the regulations governing winding down costs and the regulations defining qualified campaign expenses. Moreover, this approach treats the winding down expenses of this candidate in a manner consistent with those of other general election candidates who received matching funds during the primary period.

Ralph Nader qualified for matching funds for his primary election campaign and became ineligible on August 17, 2000. He also ran in the general election but did not qualify for public funds. The Committee contended that certain expenses between the candidate's date of ineligibility and the end of the general expenditure report period, December 7, 2000, should be allocated 70% to the primary election as winding down costs and 30% to the general election as operating expenditures.<sup>3</sup> In the Preliminary Audit Report, the Audit Division considered none of the expenses incurred between August 18, 2000 and December 7, 2000 to be primary winding down expenses. The Committee argued in response that there is no legal authority for this conclusion and that it continued to incur primary-related winding down expenses during this period. The Audit staff was not convinced by these arguments and the proposed Report excludes \$35,324 in costs incurred during this period from the calculation of the Committee's primary winding down costs.<sup>4</sup>

Essentially, the issue here is how to allocate these expenses between the candidate's primary and general election campaigns. The regulations governing the attribution of expenditures between the primary and general expenditure limitations apply to "candidates who receive public funding in either the primary or general election, or both."<sup>5</sup> 11 C.F.R.

<sup>2</sup> For purposes of this discussion, we are assuming that all of the expenses at issue would have been qualified primary winding down costs if the candidate had not run in the general election.

<sup>3</sup> For general election candidates who received public funds, the expenditure report period began on the date they received their parties' nomination and ended on December 7, 2000, 30 days after the general election. See 11 C.F.R. § 9002.12.

<sup>4</sup> The Audit Division also attributed 70% of expenses from December 8, 2000 through May 31, 2001 as primary winding down expenses and 30% as general winding down expenses based on the financial activity of both committees. Because the general committee's winding down process was completed by May 31, 2001 while the audit of the Committee continued, you attributed 100% of expenses from June 1, 2001 through June 30, 2002 to the Committee as primary election wind down costs. We agree that these attributions are reasonable.

<sup>5</sup> The Commission revised the bright line rules in 1999 to clarify that section 9034.4(e) "applies to Presidential campaign committees that accept federal funds for either election." 64 Fed. Reg. 49,359. The Commission explained that not all candidates receive public funds for both elections and that "candidates accepting federal financing for only the general election will also need guidance in attributing their expenditures" between the

§ 9034.4(e). Since Ralph Nader received public funds for the primary election (but not for the general election) these rules apply to him. The general rule is that expenditures, other than certain listed categories of expenses, "for goods and services that are used for the primary election campaign" are attributed to the primary expenditure limitation and expenditures "for goods or services that are used for the general election campaign" are attributed to the general election expenditure limitation. 11 C.F.R. § 9034.4(e)(1). The regulation provides specific "bright line" expenditure attribution rules that generally focus on the timing of the activity for polling, state or national campaign offices, campaign materials, media production costs, campaign communications and travel costs. 11 C.F.R. § 9034.4(e)(2)-(7). Thus, section 9034.4(e) supports attributing all expenses incurred during Nader's general election campaign (between his date of ineligibility and the end of the expenditure report period) as general election expenses.

The regulations governing winding down costs also support treating all expenses of a general election candidate between his date of ineligibility and the end of the expenditure report period as general election expenditures rather than primary winding down costs. The bright line attribution rule for state and national offices provides that "overhead and payroll costs associated with winding down the campaign and compliance activities shall be governed by" 11 C.F.R. § 9034.4(a)(3). 11 C.F.R. § 9034.4(e)(3). Winding down costs are "costs associated with the termination of political activity, such as the costs of complying with the post election requirements of the Act and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies."<sup>6</sup> 11 C.F.R. § 9034.4(a)(3)(i). Thus, the regulatory definition of winding down costs supports excluding purported primary winding down costs during the general election period because a candidate who is actively campaigning for the general election is not generally terminating political activity and winding down his campaign.<sup>7</sup> See *id.* Since Nader's presidential campaign did not terminate until after the general election, expenditures incurred during his general election campaign should not be treated as winding down costs.

Several other provisions of the regulations also support attributing expenses of a general election candidate during the expenditure report period as general election expenses. Candidates

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primary and general elections. *Id.* Thus, the Commission considered the possibility that candidates would only receive public funds for the general election, but did not appear to focus on the reverse situation. In 1999, it appeared likely that at least one candidate might forgo primary matching funds but accept general election public funds. Although the Commission did not focus on the reverse situation, there is no indication it intended different rules to apply to candidates who run in both elections but only receive primary matching funds.

<sup>6</sup> Winding down costs are qualified campaign expenses and a candidate may receive and use matching funds for them after his date of ineligibility. *Id.*

<sup>7</sup> Some administrative costs paid by a general election candidate may be related to terminating the primary campaign; however, identifying which costs incurred during the general election campaign are primary winding down costs would consume the time and resources of both the Commission and audited committees. Such an in-depth review of winding down costs would be contrary to the Commission's intent in establishing the "bright line" rules for allocating expenses between primary and general campaigns. See *infra* at 5, note 10.

who receive public funds for their primary election campaigns can use those funds only for their primary campaigns. See 11 C.F.R. §§ 9032.9(a)(1), 9034.4(a), (b) and (e). The regulations define qualified campaign expenses for a primary candidate as, *inter alia*, expenses incurred "from the date the individual becomes a candidate through the last day of the candidate's eligibility" and made "in connection with his or her campaign for nomination." 11 C.F.R. § 9032.9(a)(1). Non-qualified primary campaign expenses include: expenses incurred before the candidate's date of ineligibility for goods or services to be used after the date of ineligibility; expenses incurred for property, services or facilities used to benefit the candidate's general election campaign; and expenses incurred after the candidate's date of ineligibility other than winding down costs. 11 C.F.R. § 9034.4(b). These regulations indicate that expenses of a general election campaign generally would be non-qualified primary campaign expenses because they are not "in connection with" the campaign for nomination; they are incurred and used after the date of ineligibility, and they benefit the candidate's general election campaign. See 11 C.F.R. §§ 9032.9(a)(1), 11 C.F.R. 9034.4(b). Thus, excluding purported primary winding down costs while the candidate is running for the general election would prevent the possible use of primary matching funds for non-qualified expenses that may benefit the general election campaign.

The regulatory history also supports attributing expenses during the expenditure report period as general election expenses rather than primary wind down expenses for candidates who run in both the primary and general elections. The attribution of expenses between the primary and general campaigns of publicly-financed candidates who ran in both elections raised difficult and contentious issues in previous election cycles. The Commission addressed these issues in a 1995 rulemaking that created the bright line rules discussed above, at 11 C.F.R. § 9034.4(e), for the attribution of certain expenditures that may benefit both the primary and the general election campaign, including costs of state or national offices. A 1999 revision to the bright line rules considered whether primary wind down costs incurred after the candidate's nomination should be attributed to the general election. See Explanation and Justification, "Public Financing of Presidential Primary and General Election Candidates," 64 Fed. Reg. 49,355, 49,358-59 (September 13, 1999). The Commission sought comments on a draft revised rule providing "that for candidates who win their parties' nominations, no salary and overhead expenses may be treated as winding down costs until after the end of the expenditure report period." 64 Fed. Reg. 49,358.

Instead of the approach outlined in the draft rules, the final rules approved by the Commission revised section 9034.4(a)(3)(iii), which allows committees to treat all salary, overhead and computer costs after a certain date as compliance costs exempt from the expenditure limitations.<sup>8</sup> Revised section 9034.4(a)(3)(iii) provides that "a candidate who does not receive public funding for the general election" may treat 100% of salary, overhead and computer expenses incurred after the candidate's date of ineligibility as exempt legal and accounting compliance expenses for purposes of the expenditure limitations beginning with the

<sup>8</sup> Section 9034.4(a)(3)(iii) is a sub-section of the rules governing winding down costs at 9034.4(a)(3). Salary, overhead and computer expenses generally constitute a large portion of winding down costs.

first full reporting period after the date of ineligibility. 11 C.F.R. § 9034.4(a)(3)(iii). It further states, "candidates who receive public funding for the general election must wait until the end of the expenditure report period" (i.e., 30 days after the general election) before they may treat 100% of salary, overhead and computer expenses as exempt compliance costs for the purposes of the expenditure limitations. *Id.* The Commission noted that the issue needed to be clarified and observed that "[d]uring the general election campaign, there are significant distinctions between the winding down activities of candidates who win their parties' nominations and those who do not, particularly with regard to legal and accounting compliance expenses." 64 Fed. Reg. 49,359. The Commission stated that the revised rules provide that "a publicly funded primary candidate who does not run in the general election" may treat all salary and overhead expenses as compliance after the date of ineligibility, but "federally financed primary candidates who continue on to the general election . . . must wait until after the end of the expenditure report period before they may begin treating all salary and overhead expenses as compliance expenses."<sup>9</sup> *Id.* Although this revision did not explicitly preclude party nominees from treating salary and overhead expenses as winding down costs before the end of the expenditure report period, the regulation is consistent with attributing salary and overhead expenses of general election candidates as general election expenses rather than primary wind down expenses during the expenditure report period. The compliance exemption would not apply to salary and overhead costs before the end of the expenditure report period if those costs are considered general election expenses that would not count against the primary expenditure limitation.

Moreover, one of the motivating factors for promulgating the bright line rules for attributing primary and general expenses was to avoid consuming time and resources to delineate between primary and general expenses in particular cases.<sup>10</sup> The Commission recognized that

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<sup>9</sup> This Office recognizes that the language of 11 C.F.R. § 9034.4(a)(3)(iii), and in particular the first sentence, is confusing. We believe that the most logical interpretation of 9034.4(a)(3)(iii) is that primary candidates who receive primary matching funds, but who do not run in the general election may exempt salary, overhead and computer costs (which are types of winding down costs) as compliance expenses after their date of ineligibility. However, candidates like Nader who receive primary matching funds but who go on to run in the general election without public funding must wait until the end of the expenditure report period to exempt these categories of costs as compliance expenses. This reading is based on the relatively clear intent expressed in the regulatory history of this section. Under our reading, the language of this section does not appear to contemplate the possibility of a publicly funded primary candidate who runs in the general election without public funds. The Committee correctly notes that the 2000 *Financial Control and Compliance Manual for Presidential Candidates Receiving Public Funding* at page 54, footnote 19, refers to candidates "who go on to receive public funds in the general election" and does not discuss candidates who run in the general election but do not receive public funds. Alternatively, section 9034.4(a)(3)(iii) could be read to allow primary candidates like Nader who run in the general election to exempt certain costs as compliance expenses after their date of ineligibility so long as they do not receive general election public funds. However, this alternative interpretation seems contrary to the regulatory scheme created by section 9034.4 and the regulatory history.

<sup>10</sup> A "major factor" the Commission considered in the 1995 rulemaking was "the desire to complete the audits more quickly and using fewer agency resources" by avoiding the "extremely time and labor intensive" examination of "thousands of individual expenditures" where "both the timing and the purpose of each expenditure is at issue." Explanation and Justification, "Public Financing of Presidential Primary and General Election Candidates," 60 Fed. Reg. 31,854, 31,866 (June 16, 1995).

the bright line rules might not always "accurately reflect the relative impact of particular expenditures" but considered that the "differences should balance themselves out over the course of a lengthy campaign." 60 Fed. Reg. 31,867. Under the bright line rules, candidates like Nader who receive primary matching funds may use those public funds prior to their date of ineligibility for some expenses that may benefit their general election effort; however, those expenses would be balanced under the rules by expenses that may have a primary winding down component but are considered general election expenses. When the Commission sought comments on revising the regulations concerning winding down costs, it observed that this "clarification would recognize that under the 'bright line rules,' the costs incurred for winding down the primary campaign during the general election period will be offset by pre-convention general election expenses." Notice of Proposed Rulemaking, "Public Financing of Presidential Primary and General Election Candidates," 63 Fed. Reg. 69,524, 69,526 (December 16, 1998).

Furthermore, there is no indication in the regulations or regulatory history that the Commission intended to exempt candidates who run in both the primary and general elections but receive public funds only for the primary election from the rules applicable to other candidates. Indeed, the regulatory history indicates that the Commission intended to encompass candidates who "continue on to the general election." 64 Fed. Reg. 49,359. The "significant distinctions between the winding down activities of candidates who win their parties' nominations and those who do not" are the same regardless of whether those candidates receive public funds for the general election. *Id.* Moreover, the potential problem that public funds received for the primary campaign could be used for non-qualified expenses related to the general election exists whether or not the candidate receives public funds for the general election. Finally, Nader's winding down expenses should be treated consistently with those of other general election candidates who received matching funds during the primary period. It would be inconsistent to allow one general election candidate to fund overhead during the general election campaign with primary matching funds while other general election candidates cannot do so.

## B. ACCOUNTS PAYABLE

This Office disagrees with the adjustment of the Statement of Net Outstanding Campaign Obligations ("NOCO Statement") in the proposed Report to include \$19,429 in expenses incurred and paid after the candidate's date of ineligibility as accounts payable for "Other Primary Expenses." This attribution is inconsistent with the exclusion from the NOCO Statement of primary winding down costs during the same period. The Committee has not demonstrated that these expenses were incurred prior to the candidate's date of ineligibility. Therefore, we recommend that these expenses be treated as general election expenses consistent with other expenses incurred after the date of ineligibility.

The Committee's assertions that these expenses were incurred prior to the date of ineligibility are not persuasive. Documentation provided by the Audit staff indicates that most, if not all, of these expenses were both incurred and paid after the date of ineligibility. Indeed, the Committee admits that the legal services for a lawsuit concerning Illinois ballot access were

rendered after August 25, 2000 and that some work by Alabama ballot access workers may have occurred after the date of ineligibility.<sup>11</sup> Ballot access costs may be primary qualified campaign expenses but are also inherently related to the general election.<sup>12</sup> In addition, the Committee contends that a payment of \$7,500 to a law firm on September 11, 2000 for legal expenses to defend a trademark infringement suit was incurred prior to the date of ineligibility because the advertisement at issue in the lawsuit aired prior to that date.<sup>13</sup> However, a letter from the law firm dated September 8, 2000 states that the firm was beginning *pro bono* representation of the Committee in the case and that the \$7,500 was an advance for out of pocket expenses and any work by non-volunteers. Further, the advertisement at issue in the trademark infringement suit could have benefited both the candidate's primary and general election campaigns. Since these expenses were incurred after the candidate's date of ineligibility, they should be treated as general election expenses consistent with other expenses incurred between the candidate's date of ineligibility and the end of the general election expenditure report period.

Therefore, we concur with the calculation of winding down costs but disagree with the treatment of certain expenses as primary accounts payable in the proposed Audit Report. Finally, we note that these issues have no repayment consequences. The candidate is in a deficit position under the Audit Division's calculations and did not receive matching fund payments in excess of his entitlement.

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<sup>11</sup> Although the available documentation does not clarify when the activity by the Alabama ballot access workers occurred, the e-mail requesting payment was dated October 11, 2000 and the payments were made on October 23, 2000, two months after the date of ineligibility.

<sup>12</sup> The cover memorandum to the proposed Report refers to an Advisory Opinion ("AO") as support for treating general election ballot access expenses as primary qualified campaign expenses and accounts payable. In AO 1984-25 and AO 1995-45, the Commission concluded that disbursements during the matching payment period by a minor party primary candidate to obtain ballot access for the general election were qualified campaign expenses. Most of the ballot access expenses here, however, were incurred after the candidate's date of ineligibility and the end of the matching payment period.

<sup>13</sup> Press accounts indicate that the advertisement first aired in August 2000 and that Mastercard filed suit against the Committee on August 17, 2000, the date of ineligibility. One article stated that Mastercard sought a preliminary injunction "to get the ad off the air" in October 2000. See Valerie Sieminski, *First Amendment: Priceless Mastercard is Still Trying to Get Nader Ad Off the Air* NAT'L L. J. October 2, 2000 at B12. Thus, it is not clear whether the Committee planned to air the advertisement after the date of ineligibility.





FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20461

November 15, 2002

Mr. Harvey Jester, Treasurer  
Nader 2000 Primary Committee, Inc.  
2841 Woodlawn  
Falls Church, VA 22042

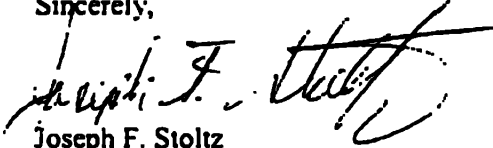
Dear Mr. Jester:

Attached please find the Report of the Audit Division on Nader 2000 Primary Committee, Inc. The Commission approved the report on November 14, 2002. As noted in the report, the Commission may pursue any of the matters discussed in an enforcement action.

The Commission approved report will be placed on the public record on November 25, 2002. Should you have any questions regarding the public release of the report, please contact the Commission's Press Office at (202) 694-1220.

Any questions you have related to matters covered during the audit or in the report should be directed to Zuzana Parrish or Wanda Thomas of the Audit Division at (202) 694-1200 or toll free at (800) 424-9530.

Sincerely,

  
Joseph F. Stoltz  
Assistant Staff Director  
Audit Division

Attachment as stated

cc: Theresa Amato, Assistant Treasurer  
Michael Trister, Attorney at Law





**NADER 2000 PRIMARY COMMITTEE, INC.**

**CHRONOLOGY**

<b>Audit Fieldwork</b>	<b>08/06/01 – 12/05/01</b>
<b>Exit Conference</b>	<b>01/25/02</b>
<b>Preliminary Audit Report to the Committee</b>	<b>04/03/02</b>
<b>Response to the Preliminary Audit Report</b>	<b>06/04/02</b>
<b>Final Audit Report Approved</b>	<b>11/14/02</b>