



# Final Audit Report of the Commission on Nader for President 2008

January 4, 2008 – August 31, 2008

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## 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
  - **Total Receipts \$ 2,859,404**
  
- **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
  - **Total Disbursements \$ 2,561,190**

## Commission Findings (p. 3)

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

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<sup>1</sup> 26 U.S.C. §9038(a).

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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; and
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. The Audit staff determined the NFP records were materially complete and the fieldwork began immediately.

### **Audit Hearing**

NFP declined the opportunity for an audit hearing.

## 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

### Commission Findings

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

A review of NFP's financial activity through August 31, 2008 and estimated winding down costs indicated that the Candidate received matching funds of \$27,315 in excess of his entitlement. In response, NFP Counsel contended that: (1) 11 CFR §9034.11(d) was not fair to minor party or independent committees such as NFP because it did 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 was unfair to Mr. Nader because it resulted 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 Commission approved this finding. (For more detail, see p. 4.)

#### **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. Most of the understatement of disbursements was due to transfers that NFP made to its general committee but did not report. NFP clarified some differences and filed amended reports, correcting the remaining misstatements.

The Commission approved this finding. (For more detail, see p. 14.)

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

NFP secured a \$500,000 line of credit 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. NFP complied with the Audit staff's recommendation.

The Commission approved this finding. (For more detail, see p. 16.)

### Amount Owed to the U.S. Treasury

Finding 1	Federal Funds Received in Excess of Entitlement	\$27,315
	<b>Total Due to U.S. Treasury</b>	<b>\$27,315</b>

## Part IV

# Findings and Recommendations

### Finding 1. Net Outstanding Campaign Obligations

#### Summary

A review of NFP's financial activity through August 31, 2008 and estimated winding down costs indicated that the Candidate received matching funds of \$27,315 in excess of his entitlement. In response, NFP Counsel contended that: (1) 11 CFR §9034.11(d) was not fair to minor party or independent committees such as NFP because it did 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 was unfair to Mr. Nader because it resulted 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 Commission approved this finding.

#### 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. Assets 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 separately on the NQCO statement 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, the 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 these purposes either (1) after he or she notifies the Commission in writing of his or her withdrawal from the campaign for nomination or (2) 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 Audit staff prepared a Statement of Net Outstanding Campaign Obligations (NOCO) as of September 4, 2008, the Candidate's date of ineligibility (DOI).<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 originally 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. These allocation percentages were later revised to a 95/5 ratio, respectively, for winding down costs incurred after December 5, 2008, based upon the Audit staff's agreement with a detailed analysis provided by NFP in response to the Draft Final Audit Report. The Audit staff reviewed NFP's financial activity through June 30, 2011, analyzed estimated winding down costs and prepared an updated Statement of Net Outstanding Campaign Obligations, which 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 June 30, 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 – 12/5/08)	-0-	[b]
Actual Winding Down Costs (12/6/08 – 6/30/11)	141,800	
Estimated Winding Down Costs (7/1/11 – 10/31/11)	<u>8,145</u>	[c]

**Total Liabilities** **\$ 248,829**

**Net Outstanding Campaign Obligations (Deficit) as of September 4, 2008** **(\$104,309)**

**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 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 October 3, 2008, based on the most current financial information:

Net Outstanding Campaign Obligations (Deficit) as of 9/4/08	(\$104,309)
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>\$27,315</b>

As presented above, NFP received matching funds totaling \$27,315 in excess of the amount to which the Candidate was entitled. This amount includes adjustments made to the NOCO after the Audit staff's review of the NFP's responses to both the Preliminary Audit Report and Draft Final Audit Report discussed below.

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

At the exit conference held at the conclusion of audit fieldwork, the Audit staff presented a NOCO and informed NFP of a calculated repayment to the U.S. Treasury of \$62,698. In response to the exit conference, 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 convention. 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 such as 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, 2008.

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 money for any expenses incurred in the "general

election” period through December 5, 2008. 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. He said further that “...there is nothing in 11 C.F.R. §9034.11(d) that prohibits crediting the Committee as having expended its general election winding down costs during the post-general election period within the 31 days.” 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*.

The 70 percent primary 30 percent general election allocation ratio is already less than the suggested minimum ratio in the regulation and was the allocation that NFP and the Audit staff agreed upon during audit fieldwork. The ratio reflects that the primary winding down effort was the major share of the activity, but also recognizes that the general election campaign 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."

In the Preliminary Audit Report, the Audit staff recommended that NFP provide evidence that it did not receive matching fund payments in excess of entitlement. It was further noted that absent such evidence, the Audit staff would recommend that the Commission determine that \$62,698 was repayable to the U.S. Treasury.

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

In response to the recommendation in the Preliminary Audit Report, 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 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 Audit staff revised the NOCO deficit from \$68,926 to \$75,459 and reduced the amount of federal funds received in excess of entitlement from \$62,698 to \$56,165.

NFP Counsel reiterated in his written response to the Preliminary Audit Report 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, NFP paid all expenditures with general funds as required by the rule, but that \$90,479 (36 percent) of the expenditures 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 indicated by the Explanation and Justification for 11 CFR §9034.11(d) discussed in the Preliminary Audit Report, 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. He added that 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 credit for 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 audited for expeditiously seeking to terminate.”

NFP Counsel also argued 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. For example, he cited seven states that had ballot access deadlines of September 5, 2008 or later and six more that had a deadline of September 2, 2008. He said it is unfair that a committee such as NFP incur 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. NFP Counsel referred to Advisory Opinion 1995-45, which treats ballot access expenditures as primary qualified expenditures and he urged 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 election, 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 election because the Commission audit began in August 2001, and said 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 funds for the general election, must wait 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 NFP incurred the majority of the \$90,479 in costs during this period and would have incurred the costs 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. Committee officials and the Audit staff together determine when audit fieldwork is to begin. In this case, we agreed to begin fieldwork early, after NFP officials requested an early start to enable members of their staff to shut down their headquarters so they could relocate to their respective homes prior to the 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 it applied the treatment of primary winding down costs 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.

#### **D. Draft Final Audit Report**

The Draft Final Audit Report concluded that NFP received \$56,165 in excess of the Candidate's entitlement and should pay that amount to the United States Treasury.

In the Draft Final Audit Report, the Audit staff notified NFP that if it could demonstrate a reasonable allocation method, pursuant to 11 CFR §9034.11(c), for winding down costs incurred after December 5, 2008, resulting in a higher percentage than the 70 percent primary allocation agreed upon during audit fieldwork, the Commission would consider allowing a larger winding down total for NFP.

#### **E. Committee Response to the Draft Final Audit Report**

In response to the Draft Final Audit Report, NFP provided a detailed analysis of its allocation of post-December 5, 2008 winding down expenses. NFP officials noted that they began providing records to the Audit staff in September 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 winding down for the general election. The committee included a listing of five primary-related staff involved in the NFP audit from December 6 through December 31, 2008, along with their roles and responsibilities. NFP also included a list of the names, roles and responsibilities of seven additional staff paid during both the primary and general cycles to assist in shutting down both the primary and general election functions from December 6 through December 31, 2008. The officials 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; for more than a year, no one has been on the payroll.

NFP officials presented a proposed allocation method in response to the Draft Final Audit Report. The committee allocated all expenses from December 6, 2008 through December 31, 2008 at a rate of 70 percent to the primary totaling \$45,938 ( $\$65,625 \times .70$ ). This resulted in no change in the amount allocated to the primary election for this period. However, NFP allocated all expenses from January 1, 2009 through June 30, 2011 at 95 percent (instead of 70 percent) to the primary election 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 winding down percentage of 85 percent ( $\$141,800/\$166,532$ ). In addition, NFP Counsel referenced its previous response to the Preliminary Audit Report relative to its disagreement with the application of the 31-day rule to NFP.



NFP also provided additional documentation updating estimated winding down costs from July 1, 2011 through October 31, 2011 and broke them down into various categories such as legal fees, records management, finance, software and storage. Based on NFP's response to the Draft Final Audit Report, the Audit staff made adjustments to the NOCO, resulting in a decrease to the federal funds received in excess of entitlement from \$56,165 to \$27,315.

### **Commission Conclusion**

On August 3, 2011, the Commission considered the Audit Division Recommendation Memorandum in which the Audit Division recommended that the Commission determine that NFP received \$27,315 in matching funds in excess of the Candidate's entitlement and must repay that amount to the United States Treasury.

The Commission approved the Audit staff's recommendation.

## **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. Most of the understatement of disbursements was due to transfers that NFP made to its general committee but did not report. NFP clarified some differences and filed amended reports, correcting the remaining misstatements.

The Commission approved this finding.

### **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)
• Overreported 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 limits to NFP and the committee properly redesignated the excessive portion of the contribution to the Nader General committee.

#### **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.

In the Preliminary Audit Report, 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 the misstatement had 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 it made clarifications with the Audit staff 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 the misstatement had resulted from audit adjustments from a prior period.

### **D. Draft Final Audit Report**

In the Draft Final Audit Report, the Audit staff acknowledged that it and NFP representatives agreed upon clarifications and the committee filed corrective amendments.

### **E. Committee Response to the Draft Final Audit Report**

In response to the Draft Final Audit Report, NFP Counsel reiterated that clarifications were made with the Audit staff and corrective amendments were filed.

### **Commission Conclusion**

On August 3, 2011, the Commission considered the Audit Division Recommendation Memorandum in which the Audit Division recommended that the Commission adopt a finding that NFP misstated its financial activity.

The Commission approved the Audit staff's recommendation.

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

### **Summary**

NFP secured a \$500,000 line of credit 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. NFP complied with the Audit staff's recommendation.

The Commission approved this finding.

### **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 creditworthiness; and that the lending institution is aware of the requirement that a loan or a line of credit must be made on a basis that 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 Preliminary Audit Report, 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. NFP Counsel added that NFP took immediate corrective action to address this unintentional oversight.

**D. Draft Final Audit Report**

In the Draft Final Audit Report, the Audit staff acknowledged that NFP filed a Schedule C-P-1 and a copy of the line of credit agreement as soon as it was notified of the omission.

**E. Committee Response to the Draft Final Audit Report**

In response to the Draft Final Audit Report, NFP Counsel reiterated that corrective amendments were filed as soon as NFP was made aware of its inadvertent omission.

**Commission Conclusion**

On August 3, 2011, the Commission considered the Audit Division Recommendation Memorandum, in which the Audit Division recommended that the Commission adopt a finding that NFP did not file the required C-P-1 or a copy of the line of credit agreement until the Audit staff made it aware of this omission.

The Commission approved the Audit staff's recommendation.