FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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

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

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

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

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

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

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

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

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

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

Moreover, the 31 day rule at 11 C.F.R. § 9034.11(d) is a "bright line" rule that divides expenses based on a date rather than considering each particular expense. Bright line rules improve administrative efficiency, conserve resources and avoid prolonged disputes over the allocation of specific expenses. The Commission made a number of changes to the winding down costs rules for both primary and general candidates in the 2003 rulemaking to avoid future disputes over winding down costs like the disputes that had lengthened previous audit and repayment processes. *See* Explanation and Justification for 11 C.F.R. § 9004.11, 68 Fed. Reg. 47,390-391 (Aug. 5, 2003).

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

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

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

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

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

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

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

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

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

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

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