

September 8, 2017

SENT VIA EMAIL

Federal Election Commission
Office of Complaints Examination
and Legal Administration
Attn: Christal Dennis, Paralegal
999 E Street, N.W.
Washington, D.C. 20463

RE: Gary Johnson Victory Fund and
Christina Needham (Treasurer), RR 17L-20

Dear Ms. Dennis:

Please accept this response on behalf of Gary Johnson Victory Fund (“GJVF” or “the Committee”) and Christina Needham in her official capacity as Treasurer (“Needham”), in regards to RR 17L-20. The Reports Analysis Division (“RAD”) has concluded that GJVF violated 52 U.S.C. §§ 30104(b)(2) and (4), as well as 11 C.F.R. § 104.3(a)-(b), by failing to timely report \$348,520.03 in receipts and \$550,879.98 in disbursements. GJVF and Needham respectfully request the Federal Election Commission (“Commission”) either refrain from taking further action against them or, in the alternative, proceed with the process to reach a Conciliation Agreement that does not seek payment of a fine.

Background

GJVF is a joint fundraising committee formed on May 24, 2016; Christina Needham is its treasurer. This matter arises from corrections GJVF made to its 2016 October Quarterly report (“the Report”).

GJVF, through its counsel, retained a third-party subcontractor to assist in preparing the Report. It directed the subcontractor to prepare a complete filing that fully complied with federal law and made available to him all information necessary to do so. When the subcontractor completed a draft of the Report, the Committee carefully reviewed it, but did not discover any problems on its face calling into question its accuracy or suggesting the subcontractor may have improperly reported some data. Each of the reported figures was within the range of figures the Committee reasonably could have expected given the volume of Committee activity during the reporting period. The Committee timely filed the Report on October 15, 2016, in compliance with the statutory deadline.

After the Report was filed, and subsequent to the 2016 general election, as GVJF began the process of winding down its operations, the Treasurer noticed several discrepancies between the Report’s figures and GJVF’s internal numbers. Anxious to ensure full compliance with federal law, the Committee immediately ordered the termination of the outside subcontractor and launched a full internal audit of each of its reports and the entirety of its finances to discover the causes of the discrepancies. The Committee discovered the subcontractor had failed to properly include in the Report correct data related to several data sets the Committee had made available to him and

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believed had been entered in the Report. A comprehensive and time-consuming audit was conducted. Upon completion of the audit, on January 17, 2017, the Committee filed an amended October 2016 Quarterly Report, among other amended reports that reconciled the Committee's activity to the penny, containing the correct data the subcontractor had failed to properly include. The amended report corrected six figures: three contribution line items, and three disbursement line items.

The Federal Election Campaign Act (the "FECA"), as amended, requires a political committee to report "the total amount of all receipts" for each reporting period. 52 U.S.C. § 30104(b)(2)(A). The statute further requires committees to report several specific categories of receipts, including "contributions from persons other than political committees," 52 U.S.C. § 30104(b)(2)(A); *see also* 11 C.F.R. § 104.3(a)(2)(i), as well as "rebates, refunds, and other offsets to operating expenditures," 52 U.S.C. § 30104(b)(2)(I); *see also* 11 C.F.R. § 104.3(a)(2)(vii).

A committee is likewise required to report "the total amount of all disbursements" for each reporting period. 52 U.S.C. § 30104(b)(4). It must also disclose "expenditures made to meet candidate or committee operating expenses," *id.* § 30104(b)(4)(A); *see also* 11 C.F.R. § 104.3(b)(1)(i); "transfers to affiliated committees," *id.* § 30104(b)(4)(B); *see also* 11 C.F.R. § 104.3(b)(1)(ii); and "contribution refunds," *id.* § 30104(b)(4)(F); *see also* 11 C.F.R. § 104.3(b)(1)(iv).

RAD contends the Committee's amended report contained the following changes:

Report Line	2016 October Quarterly Report	Amended Report	Variance
Line 11(a)(i) – Itemized contributions from individuals	\$1,425,785.68	\$1,565,173.87	\$139,388.19
Line 11(a)(ii) – Unitemized contributions from individuals	\$891,904.50	\$1,100,946.66	\$209,042.16
Line 15 – Offsets to operating expenditures	\$0.00	\$89.68	\$89.68
Line 21(b) – Other federal operating expenses	\$1,360,116.63	\$1,419,609.27	\$59,492.64
Line 22 – Transfers to Affiliated / Other Party Committees	\$0.00	\$490,658.60	\$490,658.60
Line 28(a) – Refunds of Contributions to Individuals	\$2,576.08	\$3,304.82	\$728.74
TOTAL			\$899,400.01

Discussion

As an initial matter, the Commission lacks statutory authority to take adverse actions against GJVF for its delay in correctly reporting several of the figures identified above—"Itemized contributions from individuals," "Unitemized contributions from individuals," and "Other federal operating expenses"—because it lacked power to require such disclosures in the first place.

The FECA requires a political committee's periodic reports "disclose . . . the total amount of all receipts" the committee received during the reporting period. 52 U.S.C. § 30104(b)(2). It goes on to require a committee to disclose "the total amount of all receipts" it received in each of 11 distinct categories. *Id.* § 30104(b)(2)(A)-(K). The FECA does not grant the Commission power to add to this list of requirements or otherwise compel committees to disclose in their periodic reports information not specified in the statute. *Cf. id.* § 30107(a)(8) (permitting the Commission to "develop such prescribed forms and to make, alter, and repeal such rules . . . as are necessary to carry out the provisions of this Act"). Indeed, § 30104(b)(2)'s detailed list of specifications shows Congress specifically considered each of the disclosures a committee's periodic reports must contain; the comprehensiveness and precision of this list implicitly precludes the Commission from adding to it.

The FECA provides political committees must disclose "the *total* amount of *all receipts* in the following categories," including "contributions from persons other than political committees." 52 U.S.C. § 30104(b)(2)(A) (emphasis added); *accord* 11 C.F.R. § 104.3(a)(2)(i)(C). Some of the disclosures to which RAD objects are not required by this (or any other) statutory provision. RAD suggests the Commission take adverse action against GJVF based on delay in disclosing two distinct categories of information: "itemized contributions from individuals" (Line 11(a)(i)) and "unitemized contributions from individuals" (Line 11(a)(ii)). Though such disclosures are required by 11 C.F.R. § 104.3(a)(2)(i)(A)-(B), no statutory basis exists for these regulatory requirements. Section 30104(b)(2)(A) requires committees to disclose only the "total" amount of "all receipts" from persons other than political committees; nothing in the statute requires them to report subsidiary amounts of itemized and unitemized contributions from such sources. Moreover, 11 C.F.R. § 104.3(a)(2)(i)(C) requires committees to comply with § 30104(b)(2)(A)'s requirements by directing them to disclose "[t]otal contributions from persons other than any committees." There is no statutory basis for § 104.3(a)(2)(i)(A)-(B)'s additional requirements that committees separately report the amounts of itemized and unitemized contributions they received. Because GJVF was under no statutory obligation to report the figures required by Lines 11(a)(i) and 11(a)(ii), they may not form the basis of any adverse administrative action against either GJVF or its Treasurer; 11 C.F.R. § 104.3(a)(2)(i)(A)-(B) are invalid.

The FECA likewise provides political committees must disclose "the *total* amount of *all disbursements* in the following categories," including "expenditures made to meet candidate or committee operating expenses." 52 U.S.C. § 30104(b)(4)(A) (emphasis added); *accord* 11 C.F.R. § 104.3(b)(1)(i)(C). FEC regulations go on to require committees to report "[i]temized operating expenses," "[u]nitemized operating expenses," and "[t]otal operating expenses." 11 C.F.R. § 104.3(b)(1)(i)(A)-(C). One of the disclosures to which RAD objects is not required by either the FECA or the Commission's implementing regulations. RAD asks the Commission to take adverse action against GJVF based on delay in disclosing "other federal operating expenses" (Line 21(b)). The FECA, however, requires a committee to report only the "total" amount of "all" disbursements

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made to meet operating expenses, and does not require committees to separately identify and report “other federal operating expenses.” 52 U.S.C. § 30104(b)(4)(A). Likewise, none of the categories of disbursements that must be reported pursuant to 11 C.F.R. § 104.3(b)(1)(i)(A)-(C) relate to “other federal operating expenses,” either. Consequently, because neither the FECA nor Commission regulations required GJVF to report the figure required by Line 21(b), the Committee’s delay in providing the correct figure may not form the basis of any adverse administrative action against either GJVF or its Treasurer.

In any event, the Commission should exercise its broad discretion to refrain from taking adverse action against GJVF or its Treasurer in this case. Most basically, the Committee has no assets from which to pay a fine. Its Second Quarter 2017 filing shows that, even before the Committee received RAD’s notice of July 26, 2017, it had no cash on hand. During that period, it had received a total of only \$95.00 in late-arriving funds, which it subsequently refunded in the wind-down process (as reported).

Moreover, the Committee’s delay in providing some correct figures in the Report was the result of unintentional conduct by an outside subcontractor who was promptly terminated upon the Committee’s discovery of the errors. It appears the subcontractor did not properly handle, import and account for various specific items, including one particular joint fundraising stream likely comprising the majority of the additional receipt items disclosed in the amended report. There was nothing the Committee reasonably could have done to identify and correct the errors before it filed the amended report, while still filing other statutorily required reports during an election year, including both pre-general and post-general election reporting deadlines after the Report deadline. Immediately upon identifying potential problems, the Committee conducted a full internal audit to provide the Commission – and the public – with correct information.

In addition, the delay in disclosure was not material and would not reasonably have affected any voter’s decision or hindered the Commission’s ability to detect or prevent corruption. The adjustment of GJVF’s disclosure concerning unitemized contributions is particularly harmless. The omission did not deprive the public of any information concerning the identities of the Committee’s supporters. Moreover, political committees typically seek to demonstrate broad-based public support from small donors, rather than seeking to suppress such information; GJVF incurred no benefit by under-reporting the total support of small donors through unitemized contributions.

The Commission should also consider that over half of the \$139,388.19 increase in the figure for “itemized contributions from individuals” (Line 11(a)(i)) reflected in the amended report stemmed from the addition of only two entries totaling \$73,448.50. One entry, reflecting a contribution from Robert Day received on September 8, 2016, was erroneously included in the original Report in the amount of \$1,551.50. The amended report correctly identified the contribution amount was \$50,000. The Committee’s subcontractor apparently entered the data for this single line-item wrong, directly causing nearly 1/3 of the under-reporting in Line 11(a)(1).

Similarly, the Committee’s Pre-General 2016 report specified that Alexander Sinkys contributed \$25,000 on October 3, 2016, likely because the funds were deposited and posted to the bank account on that day. Following the Committee’s internal audit process, however, the amended report disclosed that contribution as received on Friday, September 30, 2016, out of an

abundance of caution, because the Committee determined it received the contribution check on that day via mail, not knowing whether the envelope was opened or not that same day. The funds were deposited the following business day (October 3) since the person responsible for handling and processing contribution checks was not in the office after mail arrived on the date received. This amendment is especially harmless as the contributor's identity and contribution amount were originally reported in full in the Committee's Pre-General report, filed only twelve days later than the Report. The remaining \$65,939.69 in additional itemized contributions appear to be the result of similar data handling errors by the Committee's subcontractor within a small set of overall data.

The errors in disbursement reporting were similarly inconsequential. As a joint-fundraising committee, GJVF is essentially a pass-through entity that conducts joint fundraising activity and disburses funds among its constituent committees according to a pre-determined, publicly disclosed formula. In auditing the Committee's reports and finances, the Committee also discovered the original Report failed to disclose \$490,658.60 (Line 22) in Transfers to Affiliated / Other Party Committees. This entire figure reflects a single wire transfer the subcontractor inadvertently omitted from the Report; the Committee had transferred the full \$490,658.60 – comprised entirely of relatively modest contributions below the per candidate per election base limit - to the authorized candidate committee Gary Johnson 2016. The Committee's delay in accurately reporting this transfer did not meaningfully deprive the public of any information, however, since Gary Johnson 2016 timely reported receiving the full amount on its own October 2016 monthly report (Image 201610209034495760; Image 201610209034496972). More broadly, within the context of the 2016 presidential election in which approximately \$9 Billion dollars were spent, inadvertent discrepancies concerning less than \$600,000 by a third-party political committee do not warrant the Commission's enforcement attention.

GJVF itself identified the deficiencies in its original Report, and itself took the necessary steps to promptly and voluntarily correct its disclosure with the Commission. Taking adverse administrative action against GJVF under these circumstances would chill other committees from pro-actively identifying and promptly reporting such errors in their filings in the future. Moreover, third-party related political activities lack the resources of their major-party counterparts to devote to ongoing operations, and thus the Committee has wound down its activities without any remaining funds. Pursuing administrative action against such smaller, thinly financed entities would chill political participation by true grassroots and emerging groups, further entrenching the tremendous institutional advantage of the major parties (from which the FEC's Commissioners are drawn).

GJVF filed the Report in good faith, with the intent of fully complying with federal campaign finance law and providing transparency to the public. The errors at issue here stemmed solely from the actions of an outside subcontractor and could not reasonably have been identified and corrected with amended reports sooner. Such errors reflect less than 10% of the Committee's financial activity during the reporting period (approximately \$2.6 million in receipts and slightly under \$2 million in expenditures) and less than a tiny fraction of a percent of the overall financial activity that occurred in connection with the 2016 presidential campaign. There was no willful misconduct, fraud, attempt to conceal other violations of federal campaign finance law, effort to shield embarrassing information from public scrutiny, or connection to any actual or apparent corruption. GJVF terminated the subcontractor responsible for the mistakes and has taken all

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necessary steps to correct its disclosures and accurately report *all* of the Committee's receipts and expenditures during the 2016 election cycle. Further action would not promote the public interest.

Conclusion

For the reasons discussed in this letter, GJVF and its Treasurer respectfully request the Commission exercise its broad equitable and enforcement discretion to refrain from pursuing further enforcement action. In the alternative, they propose a Conciliation Agreement that does not seek payment of a fine.

Respectfully submitted,

/s/

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Counsel for Gary Johnson

Victory Fund and Christina

Needham, in her official capacity

as Treasurer



FEDERAL ELECTION COMMISSION
Washington, DC 20463

Statement of Designation of Counsel

Provide one form for each Respondent/Witness
FAX 202-219-3923

CASE #: RR 17L-20

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The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

9/8/2017
Date Christina Needham Signature TREASURER Title

RESPONDENT: Gary Johnson Victory Fund/ Christina Needham Official Capacity Treasurer
(Committee Name/Company Name/Individual Named In Notification Letter)

MAILING ADDRESS:
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Telephone: (H): _____ (W): _____

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This form relates to a Federal Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person receiving the notification or the person with respect to whom the investigation is made.

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