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FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 3, 2016

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Acting General Counsel

Adav Noti *AN*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joanna S. Waldstreicher *JSW by RMK*
Attorney

Subject: AO 2016-15 (Gary Johnson Victory Fund) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 5:00 pm (Eastern Time) on October 6, 2016.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2016-15

2

3 Christina Sirois, Esq.
4 DB Capital Strategies PLLC
5 203 South Union Street, Suite 300
6 Alexandria, VA 22314

DRAFT A

7

8 Dear Ms. Sirois:

9 We are responding to your advisory opinion request on behalf of Gary Johnson Victory
10 Fund concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-
11 30146 (the “Act”), and Commission regulations to the requestor’s proposal to solicit, accept, and
12 hold in escrow contributions for certain joint fundraising participants that are currently seeking
13 recognition as state committees of a political party. The Commission concludes that the
14 requestor may solicit, accept, and hold in escrow such contributions as proposed.

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter and email received
17 on September 19 and 23, 2016, respectively.

18 Gary Johnson Victory Fund (“GJVF”) is a joint fundraising committee that registered
19 with the Commission on May 24, 2016. Advisory Opinion Request at AOR001. GJVF is
20 comprised of 25 participant committees: Gary Johnson 2016, which is the principal campaign
21 committee of presidential candidate Gary Johnson, and 24 Libertarian committees. *Id.* None of
22 the Libertarian committees have been recognized by the Commission as state party committees,
23 but 11 of the 24 committees have submitted pending advisory opinion requests seeking such
24 recognition (the “Pending Committees”).¹ *Id.* Eight of the remaining 13 committees have

¹ The Pending Committees are: Libertarian Party of Alabama, Libertarian Party of Arkansas, Arizona Libertarian Party, Inc., Libertarian Party of Hawaii, Libertarian Party of Idaho, Libertarian Party of Maryland, Libertarian Party of Mississippi, Missouri State Libertarian Party, Libertarian Party of New Mexico, Libertarian Party of North Dakota, and Libertarian Party of Texas. *See* Advisory Opinion Request 2016-14 (11 State

1 submitted letters requesting advisory opinions regarding their status as state party committees
2 (the “Potential Requestor Committees”), but those submissions have not yet qualified as advisory
3 opinion requests.² *Id.*; *see* 11 C.F.R. § 112.1. The final five Libertarian committees have not
4 submitted advisory opinion requests seeking Commission determination of their status.³ *Id.*

5 GJVF solicits and accepts funds on behalf of all of its participant committees and
6 distributes those funds according to GJVF’s joint fundraising agreement. *Id.* GJVF accepts
7 contributions up to the combined contribution limits for the participant committees. AOR002.
8 The contribution limit for Gary Johnson 2016 is \$2,700 per contributor, and the current
9 contribution limit for each Libertarian committee, as a nonconnected political committee, is
10 \$5,000 per contributor. Thus the maximum contribution GJVF may currently accept from any
11 single contributor is \$122,700. AOR002.

12 GJVF proposes to solicit and accept contributions up to the amount it would be able to
13 accept if all Pending Committees and Potential Requestor Committees were recognized as state
14 party committees. *Id.* Because the limit on an individual contribution to a state committee of a
15 political party is \$10,000, this contribution limit would be \$217,700: \$2,700 for Gary Johnson

Libertarian Committees). Libertarian Party of Arkansas is listed in the instant advisory opinion request as a committee that had not submitted a request seeking recognition as a state party committee, *see* AOR001, but that committee is one of the requestors in Advisory Opinion 2016-14 (11 State Libertarian Committees).

² The Potential Requestor Committees are: Libertarian Party of West Virginia, Wyoming Libertarian Party, Alaska Libertarian Party, Libertarian Party of Georgia, Inc., Libertarian Party of Maine, Libertarian Party of Minnesota, Libertarian Party of South Dakota, and Libertarian Party of Tennessee. *See* AOR001 n.1.

³ These are: Libertarian Party of Colorado, Libertarian Party of Michigan Executive Committee, Inc., Libertarian Party of Illinois, Montana Libertarian Party, and Libertarian Party of North Carolina.

1 2016, \$10,000 for each of the 19 Pending Committees and Potential Requestor Committees, and
2 \$5,000 for each of the other 5 participating committees.⁴

3 With respect to the funds it accepts on behalf of the Pending Committees, GJVF proposes
4 to hold any funds in excess of the current contribution limits in escrow until the Commission
5 responds to the Pending Committees' advisory opinion requests. *Id.* GJVF will not disburse to
6 any Pending Committee contributions in excess of \$5,000 per contributor unless the Commission
7 recognizes that committee as a state party committee. While the Pending Committees' advisory
8 opinion requests remain pending, the Requestor will segregate such funds and hold them in a
9 separate account, which the request refers to as an "escrow account." *Id.* Neither GJVF nor any
10 of the participant committees will assign or obligate any funds held in escrow. *Id.* If the
11 Commission either denies a Pending Committee's request for recognition as a state party
12 committee or cannot approve an advisory opinion by the required four affirmative votes, or if a
13 Pending Committee withdraws its request before the Commission issues a response, GJVF will
14 return any escrowed funds allocable to such a committee to the contributors. Advisory Opinion
15 Request Supplement (Sept. 23, 2016) ("AOR Supp.").

16 With respect to the funds it accepts on behalf of Potential Requestor Committees, GJVF
17 proposes to hold any funds in excess of the current contribution limits in escrow under largely
18 the same conditions described above for the Pending Committees. AOR002. The only
19 difference is that in addition to the refunding contributions over \$5,000 if a committee's advisory
20 opinion request is not approved or withdrawn, the requestor will also refund such contributions if

⁴ The request states that the total contribution GJVF will be able to accept if all the Pending Committees and Potential Requestor Committees are recognized as state party committees will be \$242,700. AOR002. However, this appears to inadvertently include \$10,000 for each of the five committees that are not seeking recognition as state party committees.

1 the Potential Requestor Committee has not submitted a qualified advisory opinion request by
2 November 8, 2016. AOR Supp.

3 ***Question Presented***

4 *May GJVF solicit, accept, and hold in escrow contributions reflecting the increased*
5 *contribution limits that the Pending Committees and the Potential Requestor Committees will be*
6 *eligible for if and when the Commission recognizes them as state party committees?*

7 ***Legal Analysis and Conclusions***

8 Yes, GJVF may solicit, accept, and hold in escrow contributions reflecting the increased
9 contribution limits that the Pending Committees and the Potential Requestor Committees will be
10 eligible for if and when the Commission recognizes them as state party committees.

11 The Act and Commission regulations permit candidates and political committees to
12 engage in joint fundraising by establishing a separate political committee to serve as their joint
13 fundraising representative. 52 U.S.C. § 30102(e)(3)(ii); 11 C.F.R. § 102.17(a). In raising funds
14 for its participating candidates and political committees, the joint fundraising representative
15 “shall collect contributions, pay fundraising costs from gross proceeds and from funds advanced
16 by the participants, and disburse net proceeds to each participant.” 11 C.F.R. § 102.17(b)(1).
17 The participants in a joint fundraising activity must enter into a written agreement that “shall
18 state a formula for the allocation of fundraising proceeds,” and the allocation formula must be
19 included in a joint fundraising notice that must be included with every solicitation for
20 contributions. 11 C.F.R. § 102.17(c)(1), (2). A contributor may make a contribution to the joint
21 fundraising committee that “represents the total amount that the contributor could contribute to
22 all of the participants under the applicable limits of 11 C.F.R. 110.1 and 110.2.” 11 C.F.R.
23 § 102.17(c)(5). The joint fundraising committee must establish a separate account to be used

1 solely for receipt and disbursement of joint fundraising proceeds, and each participant committee
2 must amend its Statement of Organization to reflect the account as an additional committee
3 account. 11 C.F.R. § 102.17(c)(3)(i). The joint fundraising committee must deposit all joint
4 fundraising proceeds in its separate account within ten days of receipt. 11 C.F.R.
5 § 102.17(c)(3)(ii).

6 The Act provides that no individual may contribute more than \$2,700 to any candidate
7 with respect to any election. 52 U.S.C. § 30116(a)(1)(A); *see also* 11 C.F.R. § 110.1(b); Price
8 Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure
9 Threshold, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015) (adjusting limit for inflation pursuant to 52
10 U.S.C. § 30116(c)). An individual may contribute up to \$10,000 to “a political committee
11 established and maintained by a [s]tate committee of a political party,” and up to \$5,000 to a
12 nonconnected political committee. 52 U.S.C. § 30116(a)(1)(C), (D); 11 C.F.R. § 110.1(c)(5),
13 (d).⁵ A candidate or authorized committee of a candidate may not “solicit, receive, direct,
14 transfer, or spend funds in connection with an election for Federal office . . . unless the funds are
15 subject to the limitations, prohibitions, and reporting requirements of this Act.” 52 U.S.C. §
16 30125(e).

17 A “[s]tate committee” of a political party is one that “by virtue of the bylaws of a
18 political party or the operation of a [s]tate law is part of the official party structure and is
19 responsible for the day-to-day operation of the political party at the [s]tate level, including an

⁵ For purposes of these contribution limits, “individual” contributions include contributions from nonconnected committees that are not multicandidate committees. *See* 52 U.S.C. § 30116(a). Because a multicandidate political committee may contribute up to \$5,000 to any political committee (other than national party committees, which are not at issue here), 52 U.S.C. § 30116(a)(2); *see also* 11 C.F.R. § 110.2(b)(1), (d), this advisory opinion does not affect contributions to the requestor from multicandidate committees.

1 entity that is directly or indirectly established, financed, maintained, or controlled by that
2 organization, as determined by the Commission.” 11 C.F.R. § 100.14(a). Thus, a political
3 committee is eligible for the higher contribution limit for state party committees once it is
4 recognized as such by the Commission.

5 At present, GJVF’s participating committees other than Gary Johnson 2016 are neither
6 candidate committees nor party committees and therefore may accept contributions up to the
7 \$5,000 limit for contributions to “other political committees” under 11 C.F.R. § 110.1(d). GJVF
8 asks whether it may solicit and accept contributions reflecting the higher contribution limits that
9 may apply to the Pending Committees and Potential Requestor Committees at a later date,
10 holding any amounts in excess of the current contribution limits in escrow until that later date
11 and returning them to the contributors if the Pending Committees and Potential Requestor
12 Committees do not become eligible for the higher limits. AOR002-03.

13 The Commission has concluded previously that committees may solicit and accept
14 contributions that would be passed on to other committees upon the occurrence of certain
15 conditions. For example, the Commission has concluded that a political committee may accept
16 contributions designated for an as-yet-unnamed nominee (a “nominee fund”) or for a specific
17 individual who has not yet become a candidate (a “draft fund”). In such scenarios, the
18 Commission has approved a committee’s acceptance of conditional contributions where: (1) the
19 condition that would trigger the planned disbursement of the funds was objectively determinable
20 and outside the control of the committee; (2) the committee specified a date certain by which the
21 condition would or would not be met; (3) the committee would refund or otherwise lawfully
22 distribute the funds if the triggering condition was not met; and (4) all of the foregoing was
23 clearly communicated to contributors. *See* Advisory Opinion 2014-19 (ActBlue) at 3-4

1 (approving nominee fund where triggering condition was gender of nominee on date of nomination,
2 funds would be disbursed to lawful non-candidate recipient if condition was not met, and committee
3 notified contributors in advance); *id.* at 4-5 (approving draft fund “so long as the deadline is
4 established in advance, objectively verifiable, not subject to change . . . , and clearly communicated
5 to contributors before they make their contributions”); Advisory Opinion 2006-30 (ActBlue)
6 (approving draft fund where triggering condition was individual’s filing of Statement of
7 Candidacy by specified date, funds would be disbursed to lawful non-candidate recipient if
8 condition was not met, and committee notified contributors in advance); Advisory Opinion 2003-23
9 (WE LEAD) (approving nominee fund where triggering condition was presidential candidate
10 winning majority of pledged convention delegates, funds would be disbursed to lawful non-
11 candidate recipient if condition was not met, and committee notified contributors in advance); *see*
12 *also* Advisory Opinion 1982-23 (Westchester Citizens for Good Government) (approving
13 nominee fund). These requirements ensure that the contributors have ultimate control over their
14 contributions and that the intermediary political committee exercises no discretion with regard to
15 the disposition of the conditional funds. *See* Advisory Opinion 2014-19 (ActBlue).

16 GJVF’s proposal is analogous to the proposals approved in these previous advisory
17 opinions. GJVF proposes to solicit, accept, and hold in escrow contributions that will be
18 disbursed only if a given condition, objectively determinable and outside of GJVF’s control,
19 occurs: Any contribution over \$5,000 allocable to a Pending Committee or Potential Requestor
20 Committee will be disbursed to that committee only if the Commission affirmatively recognizes
21 it as a state party committee by a set date. For the Pending Committees, that date is the date on
22 which the Commission responds to their advisory opinion request (or the date on which that

1 request is withdrawn).⁶ For the Potential Requestor Committees, the date is either the date the
2 Commission responds to the request or November 8, 2016, if no complete request has been
3 submitted by then. If the condition of receiving state party status is not met by the set date, the
4 funds will be refunded to the contributors. GJVF will notify contributors of these conditions, the
5 dates by which they must be satisfied, and the disposition of the funds if they are not satisfied,
6 before accepting any of the proposed contributions. The proposal therefore ensures that the
7 contributors will be informed of and have complete control over the disposition of their
8 contributions.

9 Accordingly, the Commission concludes that GJVF may, consistent with 52 U.S.C.
10 §§ 30116(a) and 30125(e): (1) solicit and accept contributions up to \$217,700; (2) hold any
11 amounts in excess of \$5,000 per Pending Committee in escrow unless and until the Commission
12 recognizes such Pending Committee as a state party committee, refunding such amounts to the
13 contributors if the Commission does not recognize a given Pending Committee as a state party
14 committee; and (3) hold any amounts in excess of \$5,000 per Potential Requestor Committee in
15 escrow unless and until the Commission recognizes such Potential Requestor Committee as a
16 state party committee, refunding such amounts to the contributors if the Commission does not
17 recognize a given Potential Requestor Committee as a state party committee or if the Potential
18 Requestor Committee has not submitted a complete advisory opinion request by November 8,
19 2016. As discussed above, GJVF must clearly communicate to potential contributors how it will
20 distribute their contributions. 11 C.F.R. § 102.17(c)(2); *see also* Advisory Opinion 2014-19
21 (ActBlue).

⁶ The Commission must issue an advisory opinion not later than 60 days after receiving a complete advisory opinion request. 52 U.S.C. § 30108(a)(1). The Pending Committees' complete request was received on September 19, 2016.

