



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
) MUR 6956  
Espaillat for Congress and Rafael )  
Lantigua in his official capacity as Treasurer )  
)

**STATEMENT OF REASONS OF  
COMMISSIONER LEE E. GOODMAN**

I voted to find reason to believe the Espaillat for Congress Committee (“Espaillat Committee”) violated 52 U.S.C. § 30116(f) by accepting excessive contributions, but for a different reason than articulated in the Factual & Legal Analysis and Conciliation Agreement approved by the Commission. I write separately to explain what I believe is the proper rationale for finding excessive contributions when a primary election campaign spends general election contributions prior to the primary election.

Adriano Espaillat ran for nomination to a congressional seat in a primary election held on June 24, 2014. Mr. Espaillat lost the primary election and did not become a candidate in the 2014 general election. After the primary election, the Espaillat Committee had insufficient cash on hand to pay its primary debts or refund \$22,550 in general fund contributions that it received before the primary.<sup>1</sup> Those contributions could not be redesignated to Espaillat’s primary election because donors had already contributed their maximum amounts to the primary election.<sup>2</sup> The Espaillat Committee pledged to raise further funds to pay its primary debts and refund these general election contributions and has since done so.<sup>3</sup>

The Commission found reason to believe the Espaillat Committee violated 52 U.S.C. § 30116(f) because it did not refund its general election contributions “within 60 days after the candidate’s June 24, 2014, loss in the primary.”<sup>4</sup> I believe that failure to refund general election

<sup>1</sup> Espaillat Committee 2014 Year End Report at 2; Espaillat Committee Misc. Rept. to FEC (Nov. 19, 2014).

<sup>2</sup> Espaillat Committee 2014 April Quarterly Report at 10, 14, 42, 50, 52; Espaillat Committee 2014 Pre-Primary Report at 10, 31, 16-17, 32-33, 52, 62-63.

<sup>3</sup> First General Counsel’s Report at 6, MUR 6956 (Espaillat for Congress); Conciliation Agreement at ¶ IV.10, MUR 6956 (Espaillat for Congress).

<sup>4</sup> Factual and Legal Analysis at 5, MUR 6956 (Espaillat for Congress).

contributions after Espaillat's loss is not the critical predicate for the excessive contribution violation; rather, the Espaillat Committee's expenditure of general election funds on primary election expenses triggered excessive primary contributions.

Commission regulations acknowledge that candidates may receive contributions designated for a general election prior to the date of the primary election, provided that they "use an acceptable accounting method to distinguish between contributions received for the primary election and contributions received for the general election."<sup>5</sup> Candidates may spend money prior to the primary election on "general election disbursements," provided that their records "demonstrate that, prior to the primary election, recorded cash on hand was at all times equal to or in excess of the sum of general election contributions received less the sum of general election disbursements made."<sup>6</sup> The minimum cash on hand requirement, however, does not include funds to pay primary debts as well. Finally, "[i]f a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, redesignated ... or reattributed," as appropriate.<sup>7</sup>

Within these regulatory provisions lurks a legal and practical conundrum. On the one hand, the regulation expressly permits a candidate committee to spend general election contributions to pay *bona fide* general election expenses (e.g., fundraising and accounting expenses) before the date of the primary election. On the other hand, the regulation has been interpreted to require the committee to refund all general election contributions if the candidate loses the primary election. Yet, it is impossible for a campaign committee to spend and refund the same dollar. Further compounding the problem, a committee's general election contribution refund obligation may exist alongside its obligation to pay general election vendors (i.e., creditors) for services rendered to raise, account for, and administer the general election contributions, but the Commission's refund requirement has been interpreted to prohibit a losing committee from paying its general election vendors with general election funds.

The Commission has attempted to reconcile this regulatory conflict between two provisions of the same regulation (11 C.F.R. § 102.9(e)(2) vs. § 102.9(e)(3)) in the most ponderous manner: permit the campaign committee to spend general election contributions before the primary date at the risk of violating the law if the candidate loses the primary election.<sup>8</sup> In a past matter, I articulated in detail my disagreement with this regulatory catch-22, and the impossible quagmire it imposes upon campaign committees.<sup>9</sup> I have proposed an alternative reasonable way to harmonize the two regulatory provisions: read them in *para*

<sup>5</sup> 11 C.F.R. § 102.9(e)(1).

<sup>6</sup> 11 C.F.R. § 102.9(e)(2).

<sup>7</sup> 11 C.F.R. § 102.9(e)(3).

<sup>8</sup> See Advisory Opinion 1986-17 (Green).

<sup>9</sup> See Statement of Commissioner Lee E. Goodman on LRA 980 Request for Consideration of a Legal Question Submitted by Cantor for Congress, April 20, 2015 (publicly available at [http://www.fec.gov/law/lra\\_documents/LRA\\_980\\_Cantor\\_statement\\_Goodman.pdf](http://www.fec.gov/law/lra_documents/LRA_980_Cantor_statement_Goodman.pdf)).

*materia* to require refunds of general election funds *net* of the general election funds already spent on *bona fide* general election expenses.<sup>10</sup>

In the interest of brevity, I will not recapitulate the detailed legal analysis set forth in my prior statement here. It suffices to observe a point of particular relevance to this matter. I have posited that a refund requirement is not necessary to maintain per election contribution limits. Commission regulations already provide that general election contributions may be spent only on *bona fide* general election purposes.<sup>11</sup> This restriction is sufficient to maintain the per election contribution limit. Restricting the use of general election contributions to *bona fide* general election uses also prevents excessive primary contributions.

This matter demonstrates my point. The Espaillat Committee spent \$22,550 in general election contributions on primary election expenses. The contributors who constituted the \$22,550 had already contributed the maximum to the primary election, so they could not redesignate their contributions to the primary election. That necessarily means those contributors gave in excess to Espaillat's primary election effort. Thus, it was the expenditure of the general election funds on primary election expenses that triggered excessive contributions to the primary election campaign by these contributors, not a post-election failure to refund general election contributions.

Although this distinction may appear academic here, it carries severe consequences in other factual contexts, particularly where a campaign committee raises general election contributions and lawfully spends them on *bona fide* general fund expenses before the primary election.

On this reasoning, I voted to find reason to believe the Espaillat Committee accepted excessive contributions in the amount of \$22,550 in general election contributions raised and spent on primary election expenses.<sup>12</sup>

  
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Lee E. Goodman  
Commissioner

Feb. 26, 2016  
Date

<sup>10</sup> There may be other regulatory approaches affecting the expenditure side of this regulatory scheme that might assist in accomplishing a rational approach, but this is a subject beyond the scope of the present critique of the flaws in the Commission's current approach.

<sup>11</sup> 11 C.F.R. § 102.9(e)(2); Advisory Opinion 1986-17 (Green).

<sup>12</sup> I also concurred with the finding of reason to believe that the Espaillat Committee accepted \$15,790 in excessive primary election contributions as set forth in the First General Counsel's Report.