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FEDERAL ELECTION COMMISSION
Washington, DC 20463

MAR 1 2000

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

AGENDA ITEM
For Meeting of: 3-16-00

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Rosemary C. Smith RCS
Assistant General Counsel

SUBJECT: Notice of Disposition on Repayments by Federally Financed Presidential Primary Campaign Committees (11 C.F.R. § 9038.2(b)(2))

In accordance with the Regulations Committee discussion on February 24, 2000, the Office of General Counsel has prepared the attached Notice of Disposition with respect to the regulations at 11 C.F.R. § 9038.2(b)(2) regarding repayments when publicly funded Presidential primary committees exceed either the state or the overall spending limits.

RECOMMENDATION

The Office of General Counsel recommends that the Commission approve the attached Notice of Disposition for publication in the *Federal Register*.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR PART 9038

[NOTICE 2000 -]

PUBLIC FUNDING OF PRESIDENTIAL PRIMARY CANDIDATES -- REPAYMENTS

AGENCY: Federal Election Commission.

ACTION: Notice of disposition; Termination of rulemaking.

SUMMARY: On December 16, 1998, the Commission issued a Notice of Proposed Rulemaking in which it sought public comments on deleting one section of its regulations governing the public financing of presidential primary election campaigns. These rules implement the Presidential Primary Matching Payment Account Act ("Matching Payment Act"), which indicates how funds received under the public financing system may be spent. In addition, the Matching Payment Act requires the Commission to seek repayment from publicly financed campaigns under certain conditions. The rule in question addresses the repayment of federal funds when candidates exceed the limits on either state-by-state or overall spending. The Commission is making no changes to this regulation at this time. Further information is provided in the supplementary information that follows.

FOR FURTHER INFORMATION CONTACT: Ms. Rosemary C. Smith, Assistant General Counsel, 999 E Street, N.W., Washington, D.C. 20463, (202) 694-1650 or toll free (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission has been considering whether to revise its regulations at 11 CFR 9038.2(b) governing repayments of matching funds in situations where primary candidates exceed the spending limits set forth in section 441a(b) of the Federal Election Campaign Act, 2 U.S.C. 441a(b) ("FECA"). These regulations implement 26 U.S.C. 9038. For the reasons explained below, the Commission is making no changes at this time to 11 CFR 9038.2(b).

On December 16, 1998, the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it sought comments on proposed revisions to these regulations, as well as on a number of other aspects of the Commission's public funding regulations. 63 F.R. 69524 (Dec. 16, 1998). In response to the NPRM, written comments addressing the repayment issue were received from Common Cause and Democracy 21 (joint comment); and Lyn Utrecht, Eric Kleinfeld, and Patricia Fiori (joint comment). The Internal Revenue Service stated that it has reviewed the NPRM and finds no conflict with the Internal Revenue Code or regulations thereunder. Subsequently, the Commission reopened the comment period and held a public hearing on March 24, 1999, at which the following witnesses presented testimony on the Commission's ability to seek repayments: Lyn Utrecht (Ryan, Phillips, Utrecht & MacKinnon), Joseph E. Sandler (Democratic National Committee), and Thomas J. Josefiak (Republican National Committee).

Please note that the Commission has already published separately several sets of final rules regarding other aspects of the public funding system. For a summary of these other provisions, see Explanation and Justification, 64 F.R. 49355 (Sept. 13, 1999), and Explanation and Justification, 64 F.R. 61777 (Nov. 15, 1999).

1. Alternatives Presented in the NPRM

The NPRM raised the issue of whether to delete paragraph (b)(2)(ii)(A) of section 9038.2 from the Commission's regulations. Under this provision, the Commission has in the past required the repayment of primary matching funds based on a determination that a candidate or authorized committee has made expenditures in excess of the primary spending limits. The NPRM raised the argument that this provision is without statutory basis, and that the reading implied in the current regulation is effectively prohibited by the statute. The NPRM noted that this issue has ramifications for excessive expenditures made directly by the candidate's campaign committee from its own funds, as well as excessive expenditures stemming from the campaign committee's acceptance of in-kind contributions, and excessive expenditures arising from primary campaign activities coordinated with the candidate's party committee.

Section 9038 of the Matching Payment Act (26 U.S.C. 9038) provides three bases for determining repayments of primary matching funds: 1) payments in excess of entitlement; 2) payments used for other than qualified campaign expenses; and 3) excess funds remaining six months after the end of the matching payment period. In contrast, section 9007 of the Presidential Election Campaign Fund Act (26 U.S.C 9007) ("Fund Act") provides four bases for determining repayments of general election funds: 1) payments in excess of entitlement; 2) an amount equal to any excess qualified campaign

expenses; 3) an amount equal to any contributions accepted; and 4) payments used for other than qualified campaign expenses.

The provisions on "payments in excess of entitlement" and "other than qualified campaign expenses" are nearly identical between the two chapters. Inasmuch as Congress specified "excess expenses" as a repayment basis separate from "other than qualified campaign expenditures" in the general election statute, an argument exists that the nearly identical provision on "other than qualified campaign expenses" in the primary statute cannot reasonably be read to include excess expenses.

The argument against treating "excess" campaign expenditures as "nonqualified" is buttressed by the text of the "qualified campaign expense limitation" (26 U.S.C. 9035) itself, which prohibits candidates from "knowingly incur[ring] qualified campaign expenses in excess of the expenditure limitation applicable under section 441a(b)(1)(A) of title 2." First, one can argue that it is impossible to read this section other than as treating "excess" spending as "qualified." Second, this provision states that violation of the primary spending limits is a Title 2 violation, which would be addressed in the FEC's enforcement process, rather than a Title 26 violation, which could be addressed in the audit/repayment process.

The NPRM also set out countervailing arguments in support of retaining 11 CFR 9038.2(b)(2)(ii)(A). While section 9007(b)(2) of the Fund Act clearly states that repayments can be sought from general election candidates who incur expenses in excess of the aggregate payments to which they are entitled, the Matching Payment Act can be interpreted to set forth repayment requirements for primary candidates that are the equivalent of that general election provision.

A qualified campaign expense of a primary election committee is an expense where "neither the incurring nor payment . . . constitutes a violation of any law of the United States . . . ." 26 U.S.C. 9032(9). A Presidential primary candidate who exceeds the expenditure limitations violates two laws, 26 U.S.C. 9035 and 2 U.S.C. 441a(b)(1)(A). Section 9035 of the Matching Payment Act states that "no candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitations applicable under section 441a(b)(1)(A) of title 2 . . . ." Section 441a(b)(1) of the FECA states that "no candidate for the Office of President who is eligible" to receive public funds may make expenditures in excess of the statutorily prescribed limitations. 2 U.S.C. 441a(b)(1). Thus, one reading of this language is that expenses in excess of expenditure limitations for publicly funded primary candidates are non-qualified because they violate the law. Consequently, it can be argued that they are repayable under 26 U.S.C. 9038(b)(2). The answer to the argument that the language of section 9035 specifically contemplates that amounts spent in excess of the expenditure limitations can constitute qualified campaign expenses is that the two statutes must be read together, and section 9035 may mean that candidates shall not incur expenses that would otherwise be qualified except for the fact that they exceed the section 441a expenditure limitations.

Additionally, there is a countervailing argument that the Fund Act and the Matching Payment Act mandate identical results—namely, the repayment of expenditures exceeding the spending limits—albeit in slightly different ways. Arguably, there is no provision in the general election Fund Act corresponding to section 9035 of the Matching Payment Act. Consequently, it can be argued that this may be why 26 U.S.C. 9007(b)(2) specifically mandates repayments from general election committees for spending amounts

that exceed their entitlements. Under this interpretation, language corresponding to section 9007(b)(2) is not needed in the Matching Payment Act because repayments are already required when primary election committees make non-qualified campaign expenses by violating the law, which they do whenever they exceed the spending limits set forth in 2 U.S.C. 441a(b)(1) and 26 U.S.C. 9035. This reading of the two statutes avoids the anomalous situation that would result if spending limit violations involving candidates who accepted public funding for their primary elections were treated entirely differently than spending limit violations involving the very same candidates during their general election campaigns.

This argument is supported by the court decision in John Glenn Presidential Committee v. FEC, 822 F.2d 1097 (D.C. Cir. 1987) (upholding the Commission's repayment determination against a publicly funded primary election candidate for exceeding the state-by-state expenditure limitations in the face of a constitutional challenge). The Glenn opinion stated that "campaign expenses are not 'qualified' if they exceed the limits Congress set, including the limits on spending in each state. 26 U.S.C. 9035(a)." Id. at 1099. See also, Kennedy for President Committee v. FEC, 734 F.2d 1558, 1560 n. 1 (D.C. Cir. 1984) (holding that "[u]nder 26 U.S.C. 9035, campaign expenditures are not 'qualified' if they exceed certain spending limits, including limitations on spending in each state during the presidential primaries"). The state-by-state spending limits at issue in these two cases are in section 441a(b)(1)(A) and (g) of the FECA. These court decisions arguably require the Commission to order repayments of matching funds used for unqualified purposes. Glenn at 1099, Kennedy at 1561.

With regard to alleged in-kind contributions by third parties such as political party committees, it can be argued that the Glenn and Kennedy cases are not dispositive because they did not involve third party expenditures, and that these amounts are not necessarily in the same pool of funds from which a publicly funded campaign makes expenditures. The Glenn court indicated that it was not ruling on a repayment determination involving private funds. Glenn at 1098. However, on the other hand, in-kind contributions to candidates are simultaneously treated as expenditures by those candidates under section 431(8)(A)(i) and (9)(A)(i) of the FECA, and must be reported as both contributions and expenditures under 11 CFR 104.13. In the past, the Commission has considered in-kind contributions to be commingled with a publicly financed candidate's other expenditures and subject to the candidate's expenditure limitations.

2. Public Comments

Two written comments addressing the Commission's statutory authority to seek repayment from Presidential primary committees that exceed the spending limits were received from Common Cause and Democracy 21 (joint comment); and Lyn Utrecht, Eric Kleinfeld, and Patricia Fiori (joint comment). The witnesses who presented testimony on this issue were Lyn Utrecht (Ryan, Phillips, Utrecht & MacKinnon), Joseph E. Sandler (DNC), and Thomas J. Josefiak (RNC).

The bipartisan comments and testimony supported the Commission's authority to obtain repayments for excessive spending by primary candidates' campaign committees using their own funds to exceed the limits. However, two witnesses indicated that they did not believe the Commission has the authority to require a repayment from a Presidential campaign committee based on expenditures made by a party committee, or

based on contributors' in-kind contributions, where these expenses were not incurred or accepted by the candidate's campaign committee. One of these witnesses observed that both sections 9002(11) and 9032(9) of Title 26 define "qualified campaign expense" to mean an expense "incurred" by the candidate or the candidate's authorized committee. Thus, the witness's comment argued that expenditures made by other individuals or entities are not "qualified campaign expenses" and cannot form the basis for a repayment determination.

3. Additional Alternative – Repayment of Funds Exceeding Entitlement

After the close of the comment period and the hearing, the Commission considered whether repayments can be required under paragraph (b)(1) of 26 U.S.C. 9038, which addresses the repayment of funds received in excess of the aggregate amount of payments to which the candidate is entitled. The rationale for this approach would be that, since presidential primary candidates and their committees do not receive these matching funds until after they meet or exceed either the state-by-state or the overall spending limits, the campaigns were not entitled to receive these funds in the first place, and therefore must repay these amounts to the Treasury. None of the public comments or testimony addressed the payments-in-excess-of-entitlement theory for repayments under 26 U.S.C. 9038(b)(1) because this approach was not specifically included in the December 1998 NPRM.

4. Conclusion

The Commission has decided to make no changes to the regulation at 11 CFR 9038.2(b), which currently requires publicly funded Presidential primary campaigns to make repayments on the basis of exceeding the Congressionally-mandated spending

limits. The current rule is not being changed at this time because the Commission has concluded that it is too late in the 2000 Presidential primary election season to revise these regulations, and because there is no consensus in favor of one of the alternative approaches.

Darryl R. Wold
Chairman
Federal Election Commission

Dated: _____

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