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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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February 15, 2008

MEMORANDUM

AGENDA ITEM

For Meeting of: 12-04-08

TO: The Commission

FROM: Christopher Hughey *pch*
Deputy General Counsel

Lawrence L. Calvert, Jr. *LJC*
Associate General Counsel

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Public Finance and Audit Advice

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SUBJECT: Mike Gravel for President 2008 – Determination of Ineligibility and Letter of Candidate and Committee Certifications and Agreements (LRA 748)

Attached to this memorandum is a proposed Notice that includes an initial determination that Senator Mike Gravel is not eligible to receive matching funds. The Office of General Counsel recommends that the Commission find that Senator Gravel is not eligible to receive matching funds because he knowingly and substantially exceeded the \$50,000 personal expenditure limitation prior to applying for matching funds.¹ Senator Gravel had loaned more than an aggregate total of \$50,000 to his campaign prior to seeking matching funds, even though he was later repaid some of the loan amount. Senator Gravel's application for matching funds raises the novel issue of whether a candidate may be eligible for matching funds if he has previously loaned in excess of \$50,000 to his campaign but has been repaid a portion of his loans so that the outstanding loan amount fell below \$50,000 as of the date he made his submission for matching funds. The attached draft Notice sets forth the legal and factual basis for the recommended initial determination that Senator Gravel is not eligible to receive matching funds. See 11 C.F.R. §§ 9033.2(b)(2) and 9033.3(a).

¹ Representatives of Mike Gravel for President 2008 (the Committee) indicated that the Committee would dispute the staff recommendation that Senator Gravel is not eligible, but the Committee has not submitted a written response as of this date. If and when the Committee submits a written response, this Office will analyze that response and will forward our analysis to the Commission for its consideration.

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission:

1. Make an initial determination that Senator Mike Gravel is ineligible to receive matching funds because he knowingly and substantially exceeded the \$50,000 personal expenditure limitation prior to applying for matching funds;
2. Approve the Notice; and
3. Approve the appropriate letter.

Attachment

Draft Notice

dated December 7, 2007 and December 24, 2007 that he and his wife had loaned a total of \$73,000 to his campaign but the Committee has repaid him and his wife a portion of the loan, reducing the outstanding balance to \$47,000, below the \$50,000 personal expenditure limitation. Attachments 2 and 3. The Committee submitted documentation with the December 24, 2007 letter and on January 9, 2008 including copies of checks, a spreadsheet and several partial bank statements.³ Attachments 3 and 4. The documentation indicates that the Committee repaid \$25,900 of the \$73,516 loans leaving a balance of \$47,616. When Commission staff informed the candidate that his 9033 letter was deficient, the Committee indicated that it would dispute the staff decision.

III. INITIAL DETERMINATION OF INELIGIBILITY

The Commission determines that Senator Mike Gravel is ineligible to receive matching funds because he knowingly and substantially exceeded the \$50,000 personal expenditure limitation prior to applying for matching funds. 11 C.F.R. §§ 9033.2(b)(2) and 9033.3(a). Senator Gravel's application for matching funds raises the novel issue of whether a candidate may be eligible for matching funds if he has previously loaned in excess of \$50,000 to his campaign but has been repaid a portion of his loans so that the outstanding loan amount fell below \$50,000 as of the date he applied for matching funds. The Commission concludes that the candidate is not eligible to receive matching funds because he had loaned more than an aggregate total of \$50,000 to his campaign prior to seeking matching funds, even though he was later repaid some of the loan amount.

³ The December 24, 2007 letter also states that the Committee "requests an opinion" as to eligibility although the Committee indicated in telephone contacts with staff that they are not requesting an advisory opinion.

A candidate's eligibility to receive matching funds depends, in part, on not exceeding the \$50,000 personal expenditure limitation at 26 U.S.C. § 9035(a) and 11 C.F.R. § 9035.2. No candidate shall knowingly make expenditures from his personal funds or funds of his immediate family, including his spouse, in connection with his campaign for nomination which exceed \$50,000 in the aggregate. 26 U.S.C. § 9035; 11 C.F.R. § 9035.2; *see* 11 C.F.R. § 9003.2. The Presidential Primary Matching Payment Account Act ("Matching Payment Act") requires a candidate to certify that he "will not incur" qualified campaign expenses in excess of the expenditure limitations of section 9035, which include the \$50,000 personal expenditure limitation. 26 U.S.C. § 9033(b)(1). The regulations require a candidate to certify that the candidate and his authorized committee "have not incurred and will not incur" expenditures in excess of the limitations of part 9035. 11 C.F.R. § 9033.2(b)(2). The regulations also state that the Commission may determine a candidate to be ineligible if the candidate and his committee knowingly and substantially exceeded the expenditure limitations prior to that candidate's application for certification. 11 C.F.R. § 9033.3.

The Commission added the phrase "have not incurred and will not incur" in section 9033.2(b)(2) to apply the expenditure limitations both prospectively and retrospectively to expenditures made by a candidate from the time he became a candidate before applying for matching funds. *See Explanation and Justification, Presidential Election Campaign Fund; Presidential Primary Matching Fund*, 44 Fed. Reg. 63,756 (Nov. 5, 1979). The Commission reasoned that the legislative history and underlying purpose of the statute support both prospective and retrospective application. *Id.* The

Commission stated that retrospective application of the limitations to candidates who seek matching funds is “consistent with the manifest purpose of the statute” and it:

would run counter to the very purpose of the public financing statute to allow candidates who knowingly, willfully and substantially exceed the expenditure limitations prior to seeking certification to subsequently receive public funds. Such an outcome would permit a candidate to make vast amounts of campaign expenditures, and nevertheless receive matching payments, thereby defeating the basic purpose underlying the enactment of public financing. *Id.* at 63,756-57.

The Commission has required repayment of all the matching funds paid to a candidate who exceeded the personal expenditure limitation as of the date he applied for matching funds. *See* Statement of Reasons, Reverend Alfred C. Sharpton and Sharpton 2004 (“Sharpton”)(approved Apr. 28, 2005). The Commission determined that Rev. Sharpton must repay \$100,000 because he knowingly and substantially exceeded his personal expenditure limitation as of the date he applied for matching funds and thus, was never eligible to receive any matching funds. *See* 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9033.3(a). The Commission did not address the issue of repayment of candidate loans because Sharpton was over the personal expenditure limitation as of the date he applied for matching funds.

Here, Senator Gravel loaned more than \$50,000 to his campaign prior to applying for matching funds. The candidate loaned over \$73,000 to his campaign -- the Committee’s reports disclose a total of \$73,516 in loans received from the candidate and the candidate states that he and his wife loaned a total of \$73,000 to his campaign.⁴ Attachments 2 and 3. The candidate explained that the Committee repaid him and his

⁴ As the personal expenditure limitation applies to expenditures from the funds of the candidate and his immediate family including his spouse, the funds loaned by his spouse would be included in determining the candidate’s personal expenditures subject to the limit for purposes of determining his eligibility. 26 U.S.C. § 9035; 11 C.F.R. § 9035.2.

wife a portion of the loan, bringing the outstanding total below \$50,000. *Id.* The Committee has demonstrated that it repaid the candidate loans to bring the outstanding balance below \$50,000 as of the date the candidate applied for matching funds. *See* Attachments 2, 3 and 4. The Committee submitted documentation, including copies of checks, a spreadsheet and several partial bank statements, indicating that the Committee repaid \$25,900 of the \$73,516 loans leaving a balance of \$47,616. *Id.*

This leaves the legal question of whether the reduction in the outstanding loan balance made Senator Gravel eligible for matching funds. We conclude that it did not. Section 9033.2(b)(2)'s requirement that a candidate certify that he and his authorized committee "have not incurred and will not incur" expenditures in excess of the expenditure limitations applies both prospectively and retrospectively. Allowing a candidate who has previously loaned more than \$50,000 to his campaign to nevertheless become eligible for matching funds once those funds were repaid could enable that candidate to loan his committee funds for "vast amounts of campaign expenditures" and this would defeat the "basic purpose underlying the enactment of public financing" – specifically, the limitation of campaign expenditures. 44 Fed. Reg. at 63,756-57. While Senator Gravel's loans exceeded the personal expenditure limitation by a substantial amount, allowing him to become eligible would open the door for future candidates to loan their campaigns much larger amounts and remain eligible as long as those amounts were repaid. For example, a wealthy candidate who loans millions of dollars of seed money to start his campaign and later repays himself with fundraising proceeds should not remain eligible for matching funds. Allowing such candidates to make and repay such loans and remain eligible would undermine the purpose of the personal expenditure

limitation and would provide them an unfair advantage over candidates who abided by the limitation.

Moreover, repayment of loans does not somehow undo a previously exceeded personal expenditure limitation. The regulations recognize that loans can be repaid -- a loan is a contribution to the extent that it remains unpaid, but a loan is no longer a contribution to the extent that it is repaid. 11 C.F.R. § 100.52(b)(2). The regulations, however, also provide that a loan that exceeds the contribution limitations shall be unlawful whether or not it is repaid. 11 C.F.R. § 100.52(b)(2). By analogy, a candidate who certifies that he has not and will not exceed the personal expenditure limitation has already exceeded that limitation if he previously loaned funds in excess of \$50,000 to his campaign, even if those funds were repaid. Further, the regulatory definition of "expenditure" includes loans and does not make any distinction between repaid and unpaid loans. 11 C.F.R. § 100.111. The section 9035 limitations apply to expenditures. Thus, the personal expenditure limitation applies to all of Senator Gravel's personal expenditures on behalf of his presidential campaign, including loans made and repaid before he applied for matching funds.

The Committee asserts that the candidate was not aware of the personal expenditure limitation when he made the loans, and the Committee was "ethically and morally in compliance with the intent of the law." Attachment 2. While Senator Gravel did not *willfully* exceed the personal expenditure limitation, he did exceed it knowingly and substantially. *See* 26 U.S.C. § 9035; 11 C.F.R. §§ 9003.2, 9033.3, 9035.2. Senator Gravel's loans to his campaign were more than \$73,000, substantially in excess of the \$50,000 personal expenditure limitation; indeed, the excess amount was nearly half the

total limitation. The candidate knowingly exceeded the limit in that he was aware of the amount of the loans prior to applying for matching funds. Indeed, he arranged to obtain repayments from the Committee to bring the outstanding total below \$50,000. The candidate was not required to know of the matching fund certification requirements or the \$50,000 personal expenditure limitation at the time he made these loans for that limitation to apply retrospectively to these personal expenditures. Making an exception for Senator Gravel under these circumstances would reward a candidate's failure to familiarize himself at the outset of the campaign with the legal requirements of his public and private funding options.

IV. CONCLUSION

Based on the foregoing, the Commission has made an initial determination that Senator Gravel is ineligible to receive matching funds because he knowingly and substantially exceeded the \$50,000 personal expenditure limitation prior to applying for matching funds.⁵ 11 C.F.R. §§ 9033.2(b)(2) and 9033.3(a).

Attachments

1. Senator Mike Gravel 9033 letter
2. Letter from Senator Mike Gravel and Chris Petherick (Dec. 7, 2007)
3. Letter from Senator Mike Gravel and Chris Petherick (Dec. 24, 2007)
4. Check copies and bank documents (sent on Jan.9, 2008)
5. Memorandum from the Audit Division

⁵ The Committee did not submit a Threshold Submission. The Commission will not accept or consider any Threshold Submission from Senator Gravel because he is ineligible. If, however, the Commission subsequently makes a final determination that Senator Gravel is eligible, it would then accept and consider his Threshold Submission.

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March 28, 2008

Ms. Wanda J. Thomas
Deputy Assistant Staff Director for Public Financing
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Response to Informal Staff Decision Regarding Senator Mike Gravel's Application for Public Funding

Dear Ms. Thomas:

This responds to your letter dated January 20, 2008, informing Senator Mike Gravel of the Federal Election Commission's ("FEC") informal staff decision denying his application for matching funds. Your letter indicates that the Office of General Counsel ("OGC") found Senator Gravel's application for matching funds (his "9033 letter") deficient because he loaned his campaign an amount in excess of the personal expenditure limitation. At this preliminary stage, the FEC has not provided any analysis of what the loaned amounts were used for and how this might impact whether the loans should be considered "expenditures" subject to the personal expenditure limit.

Senator Gravel's 9033 letter, dated January 9, 2008, certified that he had not and would not incur expenditures in excess of the \$50,000 limitation prescribed by 26 U.S.C. § 9035 and 11 C.F.R. § 9035.2 Your letter recognizes that at the time he applied for matching funds and made the 9033 certifications, the campaign had repaid a significant portion of the loans, bringing the balance of Senator Gravel's outstanding loans to below \$50,000. Nevertheless, the OGC finds that he is ineligible to receive matching funds because "the law applies the limitation both prospectively and retrospectively."

The Senator respectfully disputes the FEC's preliminary decision for the reasons set forth below.

I. Senator Gravel's loans were used to pay for several categories of expenses that are exempt from spending limitations.

Senator Gravel's presidential campaign did not have the luxury of hiring full time accounting staff or establishing elaborate systems for creating vouchers, tracking outstanding advances, and making reimbursements for particular advanced amounts. To simplify things from the outset, it was determined that Senator Gravel's role generally would be to lend funds as necessary to help pay for particular expenses and have the campaign merely track what the Senator was owed. On

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a few occasions Senator Gravel used a separate campaign-related credit card to pay expenses, but this was a simple system that also allowed the campaign to easily track what was owed to the Senator. Only on rare occasion was the Senator's personal credit card (jointly shared by his wife) used for campaign expenses, so the need to account for particular campaign-related expenses, track and record any advance, and monitor the related repayment obligation was minimized. The FEC must keep these circumstances in mind and give the campaign the benefit of any doubt when analyzing whether the Senator's outlays can be treated as if he had paid for expenses directly and then sought reimbursement later.

A presidential candidate seeking matching funds is prohibited from making "expenditures" in excess of \$50,000 from his or her personal funds. 26 U.S.C. § 9035(a); 11 C.F.R. § 9035.2. The term "expenditure" generally includes loans made by any person for purposes of influencing a federal election. 2 U.S.C. § 431(9)(A). The term "expenditure" does not include, though, certain types of spending, whether made by loan or otherwise.

First, "expenditure" does not include "any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions . . ." to the extent these costs total 20% or less of the overall spending limit. 2 U.S.C. §§ 431(9)(B)(vi), 432(e)(2); *see also* 11 C.F.R. §§ 100.152(a), 102.7(d).¹ The overall spending limitation for presidential primary candidates in 2008 is \$42.05 million, meaning that any spending up to \$8.41 million by a candidate or committee on fundraising is not an expenditure. 2 U.S.C. § 441a(b)(1)(A); 11 C.F.R. § 9035.1; *see also* http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml. Under the fundraising exemption, amounts loaned by Senator Gravel to pay for campaign fundraising expenses would not count as "expenditures" subject to the \$50,000 personal spending limit.²

¹ An important concept in federal campaign finance law is that the candidate's outlays for a campaign are deemed outlays as an agent of the committee authorized by the candidate. 2 U.S.C. § 432(e)(2); 11 C.F.R. § 102.7(d). In the present context, outlays in the form of loans by Senator Gravel for fundraising expenses must be deemed outlays of the campaign for fundraising, and the statutory exemption available to the campaign committee therefore is applicable. This legal concept applies as well to the legal and accounting outlays discussed *infra*. Thus, even if the exemption language did not expressly extend to the candidate as well as the campaign, Senator Gravel would be able to rely on it.

² While FEC regulations (perhaps out of an abundance of caution) provide an explicit fundraising cost exemption for the overall spending limit, *see* 11 C.F.R. § 9035.1(c)(2), the statute provides a flat exemption from the definition of "expenditure" for "any costs incurred by an authorized

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Further, any spending up to \$1,000 for transportation expenses incurred by any individual on behalf of a candidate or political committee is not an expenditure. 11 C.F.R. § 100.139(a). Thus, any loan by Senator Gravel to the campaign for this purpose would fit with his \$1,000 allowance. Also, any unreimbursed payment from a volunteer's (including an uncompensated candidate's) personal funds for "usual and normal subsistence expenses incident to volunteer activity" is not an expenditure. 11 C.F.R. § 100.139(b). Thus, any loan by Senator Gravel to the campaign for this purpose would fit within his subsistence allowance.

Finally, a candidate's expenses for legal and accounting services to ensure compliance with the Federal Election Campaign Act "do not count against such candidate's expenditure limitations under 11 CFR part 9035 or 11 CFR 110.8." 11 C.F.R. § 100.146. Accordingly, loans by Senator Gravel for this purpose would not count against the \$50,000 expenditure limit.

A review of the campaign finance reports of Mike Gravel for President 2008 ("MGP") indicate that the Senator was the primary funder of his campaign from the third quarter of 2006 (when he began making loans) through the first quarter of 2007. Of the \$89,543.74 in total receipts reported during that nine month period, his loans represented \$73,515.73.³ More importantly, his loans funded the bulk of the campaign's \$91,552.85 spending total during that nine month period.⁴ He fully understood and expected that his loans to the campaign would be used for the types of fundraising, transportation, subsistence, and legal and accounting costs described above. While there is no documentation that he formally earmarked his loans to pay for these kinds of costs, he is providing with this response an affidavit (attached as Exhibit 1) indicating his awareness of the particular expenses being incurred and his intention to pay them using his loan

committee or candidate in connection with the solicitation of contributions [up to the 20% limit]." 2 U.S.C. § 431(B)(vi). The FEC cannot disavow the plain language of the statute and its application to the \$50,000 expenditure limit. If an outlay by a candidate is not an "expenditure," it is not subject to that limit any more than it is subject to the overall limit.

³ The first report of MGP covered the second quarter of 2006, and it showed total receipts of \$18,692.06 and \$2,507.45 cash on hand. The 2007 April Quarterly Report showed total election cycle-to-date receipts of \$108,235.80, meaning \$89,543.74 were raised after the second quarter of 2006.

⁴ The first report of MGP covering the second quarter of 2006 showed total disbursements of \$16,184.61. The 2007 April Quarterly report showed total election cycle-to-date disbursements of \$107,737,46, meaning \$91,552.85 were disbursed after the second quarter of 2006 (using primarily Senator Gravel's loan proceeds).

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proceeds.⁵ Under these circumstances, it would elevate form over substance to treat the Senator's loans any different from advances he might have made by paying the expenses in question with the expectation of afterward obtaining reimbursement from MGP.

The Senator's loans began in July of 2006, during the third quarter of that year. By the end of that quarter, he had made loans totaling \$53,100. By the end of the fourth quarter of that year, his loans had reached the \$69,100 level, and by the end of the first quarter of 2007, his loans reached their peak at \$73,515.73.⁶

As the attached chart (Exhibit 3) demonstrates, though, the Senator's loans can be linked to \$44,698.52 in itemized spending on the types of exempt expenses described above.⁷ If it is presumed the Senator intended his loans to be used for all expenses that would not count toward the personal spending limit (a fair presumption given the potential for treating such excessive spending as a violation of law), his loan amount would be reduced to only \$28,817.21

⁵ Conceivably, some accounting convention, like FIFO or LIFO, could be used to tie particular committee receipts to particular committee disbursements. Senator Gravel has not engaged an accountant to undertake this task due to the likely expense. At a minimum, it would seem, 80% of any disbursements in these categories during the three quarters when Senator Gravel's loans were being raised and used should be deemed paid with the loan proceeds provided by Senator Gravel. This is calculated by first adding the \$2,507.45 cash on hand at the beginning of the third quarter of 2006 (the quarter when Senator Gravel began making loans) to the \$89,543.74 raised during the three quarters when Senator Gravel's loans were being raised and used, for a total of \$92,050.19. The percentage of funds being used for disbursements that Senator Gravel's loans represent would be determined by dividing his loan total (\$73,515.73) by this total, yielding 80%.

⁶ The attached chart (Exhibit 2) shows the dates and amounts of the Senator's loans and the various repayments.

⁷ The attached affidavit of Senator Gravel (Exhibit 1) explains how several of the itemized payments listed on the chart fall into the applicable categories exempt from the personal spending limit. For some payees (e.g., where the purpose was for computer or Internet capability), the cost is divided as 1/3 for fundraising, 1/3 for legal and accounting, and 1/3 for other campaign purposes. The computer and Internet functions were essential to being able to send solicitations, receive contributions, gather necessary accounting and reporting information, and keep proper records of campaign transactions. For other payees (e.g., where the purpose was obtaining printing, stationery, or office supplies), the cost is divided as 1/2 for fundraising and 1/2 for other campaign purposes. These expenses generally were for the production of materials used in some fashion for solicitations. For some consultant payees, where the job function was about half for fundraising and half for other campaign organization tasks, the costs are divided 1/2 for fundraising and 1/2 for other campaign purposes.

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(\$73,515.73 minus \$44,698.52 = \$28,817.21). Even if the FEC only considered 80% of the disbursements during the applicable three quarters to have been paid for with Senator Gravel's loan proceeds, *see n. 5 supra*, the Senator's expenditures subject to the personal spending limit still would have been well below the \$50,000 level (\$73,515.73 minus (\$44,698.52 × 80%) = \$37,756.92). Thus, the FEC should conclude that Senator Gravel did not make "expenditures" from his personal funds that exceeded the \$50,000 spending limit set forth at 26 U.S.C. § 9035 and 11 C.F.R. § 9035.2.

II. The statutory language indicates the FEC should not apply its regulatory language to the situation where a candidate has paid down any loans below the \$50,000 level at the time of application for matching funds.

Pursuant to 26 U.S.C. § 9033(b)(1), in order to be eligible for matching funds, a candidate must include in his application a certification that the "candidate and his authorized committees *will not incur* qualified campaign expenses in excess of the limitations on such expenses under section 9035 [emphasis added]." Section 9035 states, "No candidate *shall* knowingly make expenditures from his personal funds, or the personal funds of his immediate family, in connection with his campaign for nomination for election to the office of President in excess of, in the aggregate, \$50,000 [emphasis added]." 26 U.S.C. § 9035. Both statutory sections use language that applies only prospectively. In this case, at the time Senator Gravel applied for matching funds and made his certification (January 9, 2008), the committee had repaid his loans such that the total amount remaining due to him was only \$45,809.56. *See Exhibit 2*. In accordance with the statutory language, after applying for matching funds, Senator Gravel kept the aggregate amount of his loans to his campaign to \$50,000 or less.

The FEC's regulatory counterpart to these statutes, 11 C.F.R. § 9033.2(b)(2), requires any presidential candidate seeking matching funds to certify that the candidate and the candidate's committee "*have not incurred and will not incur* expenditures in connection with the candidate's campaign for nomination" which are in excess of the \$50,000 limitation set forth in 11 C.F.R. § 9035.2(a). To justify this more expansive retrospective application of the statute, the FEC relied primarily on the fact that the statute at section 9035 uses the term "candidate," defined as "any individual who seeks nomination for election to be President of the United States," and the FEC extrapolated that the expenditure limitation is applicable from the time a presidential candidacy begins, not from the time of certification. *Transmittal of Regulations to Congress*, "Presidential Election Campaign Fund: Presidential Primary Matching Fund," 44 Fed. Reg. 63756 (Nov. 5, 1979), available at http://www.fec.gov/law/cfr/ej_compilation/1979/1979-20.pdf#page=2 ("1979 Regulations Transmittal").

The FEC should apply its regulatory language so that it does not clearly conflict with the actual language of the statutory provision—language requiring a certification that the candidate "*will*

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not incur qualified campaign expenses in excess of the limitations”⁸ To pass muster the regulatory language—“*have not incurred* and will not incur”—should be read to address retrospectively only that situation where a candidate and his/her committee have *at the time of certification* exceeded the spending limit. This is a situation where an applicant for public funding could be viewed as ‘gaming’ the system by seeking to use public funding and *simultaneously* relying on personal spending in excess of \$50,000. Indeed, the FEC confronted this situation in the last presidential election cycle regarding a candidate that had incurred personal spending above the \$50,000 limit and was in that very status at the time the certification was being made.

On the other hand, the FEC should not apply its regulatory language to the current situation. Where a campaign has raised sufficient private contributions to repay the candidate for loans above the \$50,000 level—thereby placing the campaign on equal footing with any other candidate as of the moment of application for matching funds—the FEC should track the statutory certification language more closely by examining only whether the candidate *will* incur excessive spending at any time while eligible for matching funds.¹⁰

III. Loans by a candidate, where there is an expectation of repayment by the campaign committee, should be treated deferentially under the FEC’s regulation.

Where, as here, the candidate loaned funds to the campaign with an expectation of repayment and the campaign committee repaid the loan total below \$50,000 before applying for matching

⁸ The FEC is quite familiar with the courts’ guidance in this area. In the “Shays v. FEC” cases, the courts have fully articulated the Supreme Court test emanating from *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Essentially, if Congress has spoken to the precise issue at hand, the agency must implement the unambiguous judgment of Congress; if Congress has not spoken explicitly to the question at hand, the agency’s rules must be based on a permissible reading of the statute. *Shays v. FEC*, No. 02cv01984 slip op. (D.C. Cir. 2005) at 32, available at http://www.fec.gov/pages/bcra/shays_meehan_opinion_appeals.pdf.

⁹ Doyle, Kenneth P., “Sharpton Ineligible for Public Money; Must Pay Back \$100,000 Campaign Grant,” BNA Money & Politics Report (May 17, 2004).

¹⁰ This would be consistent with the other stated FEC rationale for adopting its regulatory language at 11 C.F.R. § 9033(3)(b)(2), i.e., “drastically reducing the amounts which may be expended by the candidate.” 1979 Regulations Transmittal, *supra*. If any candidate wishing to apply for matching funds is required to pay down loaned amounts in order to get below the \$50,000 spending level, candidates will structure any personal funding so that the amount remains low enough to assure that loans can be repaid from donors’ funds before application is made for matching funds.

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funds, the FEC should not count the amount of the reduction toward the \$50,000 limit. In an important case of first impression, the FEC should strive for an interpretation of the statute and its regulations that reaches a fair and just result.

The FEC by regulation *completely* exempts from the personal spending limit a candidate's extension of credit through the use of a charge card as long as the campaign committee pays the amount of the credit within 60 days of the closing date on the billing statement. 11 C.F.R. § 9035.2(a)(2). Thus, a candidate could charge \$100,000 on credit cards on October 1, get bills with a closing date of October 31, personally pay the bills on November 1, have the campaign reimburse on December 30, and then apply for matching funds with no concern that the FEC would deem the \$100,000 extension of credit for 90 days as an "expenditure" subject to the \$50,000 limit. Indeed, the candidate can even do the same thing *after* being determined eligible for matching funds without triggering the \$50,000 spending limitation.

As a matter of policy, if a candidate can provide, theoretically, an *unlimited* amount of credit in this manner simply because there is a committee repayment at the end of the transaction, a candidate's loans should receive at least some favorable treatment where the amount above \$50,000 is repaid relatively promptly, and well before application was made for matching funds. (In the case at hand, Senator Gravel's loans were paid down below the \$50,000 level on August 9, 2007.) By interpreting its regulations at 11 C.F.R. § 9033.3(b)(2) and 9035.2(a)(1) to exclude from the \$50,000 expenditure limit calculation loan amounts paid down before any matching fund application, the FEC would assure that its policy application was fair and internally consistent.

IV. There is no basis for concluding that Senator Gravel's loans constitute "knowingly and substantially exceed[ing]" the \$50,000 spending limit, the prerequisite threshold for determining him ineligible for receiving matching funds.

FEC regulations at 11 C.F.R. § 9033.3 permit the FEC to deem a candidate ineligible for matching funds only if the FEC has made a determination that the candidate or candidate's committee "knowingly and substantially" exceeded the expenditure limitations at 11 C.F.R. § 9035 prior to that candidate's application. The regulations do not define what constitutes a "knowing" act or at what point a candidate has "substantially" exceeded the limitation.

Here, Senator Gravel avers that at the time he loaned more than \$50,000 to his committee, he did not know of the limitation. *See* Exhibit 1. Further, as noted earlier herein, Senator Gravel was aware that his loans were being used for fundraising, subsistence, legal and accounting, and transportation expenses. Even if the knowledge standard the FEC chooses to apply depends solely on the Senator knowing the relevant facts, he knew enough facts about how his loans were being used (for expenses that turn out to be exempt from the spending limits) to counterbalance

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the general knowledge he had about the total amount of his loans. Stated differently, if he knew enough facts about going above \$50,000, he knew enough facts about loaning money for purposes that turn out to be exempt from the \$50,000 spending limit. Finding that he “knowingly” exceeded the limit under these circumstances would be a misapplication of an otherwise useful regulation.

Given the amounts of money traditionally involved in financing presidential campaigns, and compared to the amount involved in the most recent example of application of the regulation,¹¹ the \$23,515.73 amount by which Senator Gravel purportedly exceeded the expenditure limitation is not “substantial.” Thus, again, there is no clear basis for deeming Senator Gravel ineligible for matching funds.

V. There are other, more appropriate remedies available to the FEC to deal with any excessive spending by Senator Gravel.

Should the FEC continue to view some portion of the \$23,515.73 loan amount above \$50,000 as excessive spending, the FEC can use the repayment and enforcement process to address the matter. Because the harsh remedy of completely denying Senator Gravel the opportunity to obtain public funding to pay campaign expenses is inappropriate here, the FEC should be willing to use more traditional vehicles to deal with any excessive spending. Senator Gravel and the Mike Gravel for President 2008 are willing to enter discussions along these lines if the FEC ultimately rejects the substantive arguments made in parts I – III *supra*..

While Senator Gravel just recently decided to seek the nomination of the Libertarian Party and to leave the Democratic Party,¹² he is fully within his rights to continue to seek eligibility relating to his initial application on January 9, 2008. At that time, he still was very active as a candidate for the Democratic Party nomination. Had the Commission made an initial determination of eligibility within 15 days (see 11 C.F.R. 9033.4(b)), Senator Gravel would have then been looking forward to getting matching funds to pay for the primaries ahead (South Carolina on January 26 and then the “Super Tuesday” primaries on February 5). If the FEC determines that Senator Gravel should have been deemed eligible on or about January 24, he should be given the full opportunity to match contributions that would have been available due to his January 9 application. It would be a serious breach of his rights to conclude that he cannot have his eligibility rights restored as they would have been when he sought eligibility in January.¹³

¹¹ The Sharpton situation (referenced earlier at n. 9) involved apparent personal spending of at least \$116,000—an amount more than 100% above the spending limit.

¹² Associated Press, “Gravel Joins Libertarian Party,” March 26, 2008.

¹³ At the absolute minimum, assuming his eligibility would be affected thereafter by the FEC’s regulations establishing an ineligibility date (11 C.F.R. § 9033.5), he should be allowed to

DICKSTEINSHAPIRO_{LLP}

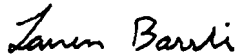
Ms. Wanda J. Thomas
March 28, 2008
Page 9

For all of the reasons set forth above, the FEC should determine that Senator Gravel and Mike Gravel for President 2008 are eligible for primary matching funds.

Respectfully submitted,



Scott E. Thomas
Lauren Hancock Barski



Dickstein Shapiro LLP
(202) 420-2601 direct dial
(202) 379-9258 direct fax
thomascott@dicksteinshapiro.com

cc: Senator Mike Gravel

establish eligibility to pay for whatever outstanding campaign obligations exist as of his date of ineligibility.

DSMDB.2414230.01

ATTACHMENT 1
Page 9 of 17

Exhibit 1

AFFIDAVIT OF SENATOR MIKE GRAVEL

I, Mike Gravel, being duly sworn, depose and say:

1. I am a Presidential candidate and serve as Treasurer of the Mike Gravel for President 2008 (MGP) campaign committee. I have personal knowledge of the facts set forth in this Affidavit.

2. Beginning in the third quarter of 2006 and continuing through the first quarter of 2007, I made loans to my campaign committee, MGP, in the aggregate amount of \$73,515.73.

3. At the time I made the loans, I was unaware that a presidential candidate's personal loans to his or her campaign could not exceed \$50,000.

4. At the time I applied for matching funds, January 9, 2008, MGP had repaid the loans to me such that my outstanding personal loans to MGP were below \$50,000.

5. At the time I made the loans, I was aware that MGP was incurring fundraising costs, transportation costs for my own travel, subsistence costs related to my travel, and legal and accounting costs ("exempt expenses") associated with my campaign, in addition to other expenses. I was in close contact with my campaign advisers and consultants regarding the making of particular expenses.

6. At the time I made the loans, I intended the loan money to be used to pay the fundraising, transportation, subsistence, and legal and accounting costs associated ("exempt expenses") with my campaign, in addition to other expenses.

7. At the time I made the loans, I expected to obtain reimbursement from MGP.

8. In certain instances, MGP used my loan money to make a single payment to a vendor for both exempt and non-exempt expenses. As explained hereafter, based on my personal

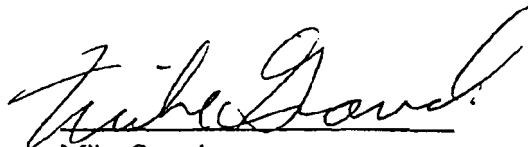
knowledge of the purpose of the payments, I can affirm that the allocations described are accurate and reasonable.

9. Vendors Staples, Adworks Stanton Barker, The Printed Page, Design Kiln, and Alexander S. Colvin provided printing, stationery, office supplies, and consulting services. These items and services were utilized in part for the production of fundraising materials and the development of fundraising communications. These vendors also provided other campaign services for which my campaign incurred non-exempt expenses. It is accurate and reasonable to allocate these payments as 1/2 fundraising and 1/2 other campaign functions.

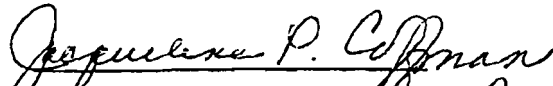
10. Vendors Verizon Wireless, Michael Grant, Rovian Inc., Circuit City, Telenomics Group, Inkspill Inc., Computer Technology, Network Guild LLC, Vonage USA, and Comcast Online provided services the campaign used in part for both fundraising and legal and accounting purposes. In particular, the computer and internet services were essential to my campaign's ability to send solicitations, receive contributions, compile accounting and reporting information, and record campaign transactions. These vendors also provided other campaign services for which my campaign incurred non-exempt expenses. It is accurate and reasonable to allocate these payments as 1/3 fundraising, 1/3 legal and accounting, and 1/3 other campaign functions.

11. Elliot Jacobson is erroneously identified as Elliot Jackson in some places on my FEC Reports. During Mr. Jacobson's initial work with my campaign, he devoted part of his time to fundraising consulting and part of his time to media consulting. It is accurate and reasonable to allocate these payments as 1/2 fundraising and 1/2 other campaign functions. In the later phase of the campaign, Mr. Jacobson devoted all of his time to fundraising.

I declare the foregoing to be true and correct to the best of my knowledge, information, and belief.


Mike Gravel

Subscribed and sworn to before me this 27 day of March, 2008 in Washington, DC.


Notary Public, Washington, DC Reg #306705

SEAL:

My commission expires: 10/31/09

Exhibit 2: Loans and Repayments

<i>Date</i>	<i>Loan</i>
7/17/2006	\$5,000.00
7/24/2006	\$30,000.00
7/24/2006	\$3,000.00
9/27/2006	\$15,000.00
9/27/2006	\$100.00
10/25/2006	\$5,000.00
11/30/2006	\$6,000.00
12/18/2006	\$5,000.00
2/7/2007	\$806.74
2/7/2007	\$181.87
2/23/2007	\$95.70
2/25/2007	\$1,500.00
2/26/2007	\$43.59
2/28/2007	\$1,000.00
3/8/2007	\$787.83
Total:	\$73,515.73

<i>Date</i>	<i>Repayment</i>	<i>Outstanding</i>
5/21/2007	\$5,000.00	\$68,515.73
5/21/2007	\$5,000.00	\$63,515.73
7/18/2007	\$4,209.72	\$59,306.01
8/3/2007	\$900.00	\$58,406.01
8/7/2007	\$7,586.45	\$50,809.56
8/9/2007	\$5,000.00	\$45,809.56
Total Outstanding:		\$45,809.56

Exhibit 3: Exempt Itemized Transactions from Committee Reports

2006 October Quarterly Report

<u>Date</u>	<u>Amount</u>	<u>Payee</u>	<u>Amount</u>	<u>Payee</u>	<u>Amount</u>	<u>Payee</u>	<u>Amount</u>	<u>Payee</u>
7/17/2006							\$339.60	Southwest Airlines
7/17/2006			\$139.42	Hilton Capital				
7/20/2006	\$500.00	Elliot Jacobson**, ****						
7/24/2006							\$115.30	Southwest Airlines
7/24/2006							\$5.00	Travel City
7/24/2006	\$251.55	Staples*					\$400.00	Enterprise Rent-A-Car
7/24/2006			\$711.90	Hotels.com				
7/25/2006							\$307.80	US Airways
7/25/2006	\$54.22	Verizon Wireless**			\$54.22	Verizon Wireless**		
7/31/2006			\$94.02	The Connecticut Grand				
8/1/2006	\$3,500.00	Elliot Jacobson**, ****						
8/9/2006	\$32.85	Circuit City**			\$32.85	Circuit City**		
8/9/2006					\$12.47	Wachovia Bank		
8/10/2006	\$55.28	Staples*						
8/14/2006	\$25.79	Staples*						
8/22/2006	\$293.95	Elliot Jacobson**, ****						
8/22/2006	\$169.03	Elliot Jacobson**, ****						
8/24/2006	\$20.99	Verizon Wireless**			\$20.99	Verizon Wireless**		
8/24/2006	\$1,666.67	Michael Grant**			\$1,666.67	Michael Grant**		
8/31/2006	\$20.99	Staples*						
8/31/2006	\$333.33	Rovian Inc.**			\$333.33	Rovian Inc.**		
9/1/2006	\$46.39	Verizon Wireless**			\$46.39	Verizon Wireless**		
9/1/2006	\$333.33	Rovian Inc.**			\$333.33	Rovian Inc.**		
9/1/2006	\$263.33	Rovian Inc.**			\$263.33	Rovian Inc.**		
9/1/2006	\$32.85	Circuit City**			\$32.85	Circuit City**		
9/1/2006	\$335.00	Nova Information Syst.						
9/2/2006					\$2,000.00	Augustine Gyarnfi		
9/6/2006	\$166.67	Telenomics Group**			\$166.67	Telenomics Group**		
9/8/2006	\$401.50	Elliot Jacobson**, ****						
9/11/2006	\$59.96	Verizon Wireless**			\$59.96	Verizon Wireless**		
9/11/2006	\$80.32	The Printed Page*						
9/12/2006	\$6.66	Verizon Wireless**			\$6.66	Verizon Wireless**		
9/12/2006					\$62.00	Wachovia Bank		
9/21/2006	\$288.75	Inskspill Inc**			\$288.75	Inskspill Inc**		

L1-1-0000

Date	Amount	Payee	Amount	Payee	Amount	Payee	Amount	Payee
9/27/2006	\$79.75	Computer Technology**			\$79.75	Computer Technology**		
9/28/2006	\$32.85	Circuit City**			\$32.85	Circuit City**		

2006 Year-End Report

Date	Amount	Payee	Amount	Payee	Amount	Payee	Amount	Payee
10/2/2006	\$3,000.00	Elliot Jackson (Jacobson)						
10/2/2006	\$60.00	Nova Information Syst						
10/3/2006	\$833.33	Network Guild LLC**			\$833.33	Network Guild LLC**		
10/3/2006	\$3,000.00	Elliot Jackson (Jacobson)						
10/10/2006	-\$3,000.00	Elliot Jackson (Jacobson)						
10/10/2006	-\$25.00	Nova Information Syst						
10/10/2006	\$500.00	James Brauner						
10/11/2006					\$39.00	Wachovia Bank		
10/12/2006	\$84.10	Verizon Wireless**			\$84.10	Verizon Wireless**		
10/20/2006	\$500.00	Spencer McNeil						
10/24/2006	\$3,000.00	Elliot Jackson (Jacobson)						
10/26/2006	\$31.53	Comcast Online**			\$31.53	Comcast Online**		
10/27/2006	\$47.74	Staples*						
10/30/2006	\$33.49	FedEx Kinko's*						
10/30/2006			\$142.00	Common Man Dining				
10/30/2006					\$2,000.00	Augustine Gyarnfi		
10/30/2006	\$833.33	Network Guild LLC**			\$833.33	Network Guild LLC**		
11/1/2006	\$60.15	Nova Information Syst						
11/8/2006	\$46.54	Verizon Wireless**			\$46.54	Verizon Wireless**		
11/10/2006	\$18.24	Vonage USA**			\$18.24	Vonage USA**		
11/27/2006	\$15.75	Vonage USA**			\$15.75	Vonage USA**		
12/1/2006	\$60.00	Nova Information Syst						
12/4/2006	\$475.00	Adworks Stanton Barker*						
12/5/2006	\$48.98	Staples*						
12/6/2006			\$96.42	Common Man Dining				
12/6/2006	\$3,000.00	Elliot Jackson (Jacobson)						
12/6/2006	\$500.00	James Brauner						
12/6/2006	\$833.33	Network Guild LLC**			\$833.33	Network Guild LLC**		
12/8/2006	\$116.68	Staples*						
12/11/2006					\$12.00	Wachovia Bank		
12/11/2006	\$19.56	Vonage USA**			\$19.56	Vonage USA**		
12/11/2006	\$39.99	Staples*						

ATTACHMENT 1
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Fundraising			Subsistence		Real and Accounting		Miscellaneous	
Date	Amount	Payee	Amount	Payee	Amount	Payee	Amount	Payee
12/12/2006					\$70.00	Wachovia Bank		
12/13/2006					\$105.00	Wachovia Bank		
12/13/2006	\$53.96	Staples*						
12/22/2006	\$34.16	Comcast Online**			\$34.16	Comcast Online**		
12/22/2006	\$62.46	Verizon Wireless**			\$62.46	Verizon Wireless**		
12/26/2006	\$678.00	Elliot Jackson (Jacobson)						
12/26/2006	\$15.84	Vonage USA**			\$15.84	Vonage USA**		

2007 April Quarterly Report

Fundraising			Subsistence		Real and Accounting		Miscellaneous	
Date	Amount	Payee	Amount	Payee	Amount	Payee	Amount	Payee
1/1/2007	\$3,000.00	Elliot Jackson (Jacobson)						
1/2/2007	\$50.00	Elliot Jackson (Jacobson)						
1/2/2007	\$60.00	Nova Information Syst						
1/10/2007					\$12.46	Wachovia Bank		
1/10/2007	\$18.24	Vonage USA**			\$18.24	Vonage USA**		
1/26/2007	\$17.10	Vonage USA**			\$17.10	Vonage USA**		
2/1/2007	\$60.00	Nova Information Syst						
2/2/2007					\$105.00	Wachovia Bank		
2/7/2007	\$65.69	Comcast Online**			\$65.69	Comcast Online**		
2/7/2007	\$84.25	Verizon Wireless**			\$84.25	Verizon Wireless**		
2/7/2007	\$119.63	Verizon Wireless**			\$119.63	Verizon Wireless**		
2/9/2007	\$19.37	Vonage USA**			\$19.37	Vonage USA**		
2/9/2007					\$12.00	Wachovia Bank		
2/16/2007	\$500.00	Alexander S. Colvin*						
2/25/2007	\$750.00	Design Kiln*						
2/26/2007			\$108.90	Hampton Inns & Suites				
2/26/2007			\$27.97	Suncoast Hotel and Gas				
2/27/2007	\$17.02	Vonage USA**			\$17.02	Vonage USA**		
2/28/2007	\$500.00	Alexander S. Colvin*						
3/1/2007	\$68.38	Nova Information Syst						
3/5/2007	\$500.00	Alexander S. Colvin*						
3/8/2007	\$184.63	Comcast Online**			\$184.63	Comcast Online**		
3/8/2007	\$59.57	Verizon Wireless**			\$59.57	Verizon Wireless**		
3/9/2007	\$19.37	Vonage USA**			\$19.37	Vonage USA**		
3/9/2007					\$12.31	Wachovia Bank		
3/23/2007			\$72.55	Floral Park Motor Lodge				
3/26/2007	\$250.00	Alexander S. Colvin*						

ATTACHMENT 17

Fundraising		Subsistence		Legal and Accounting		Transportation		
Date	Amount	Payee	Amount	Payee	Amount	Payee	Amount	Payee
3/26/2007	\$17.02	Vonage USA**			\$17.02	Vonage USA**		
3/26/2007	\$500.00	Elliot Jackson (Jacobson)						
3/30/2007					\$105.00	Wachovia Bank		
Fundraising Total: <u>\$30,889.44</u>			Subsistence Total: <u>\$1,393.18</u>		Legal and Accounting Total: <u>\$11,415.90</u>		Transportation*** Total: <u>\$1,000.00</u>	

Total Exempt Itemized Transactions from Committee Reports: \$44,698.52

*This payee's amount for this date represents one-half of the total amount reported. See affidavit of Senator Gravel.

**This payee's amount for this date represents one-third of the total amount reported. See affidavit of Senator Gravel.

***The total travel expenses noted from the 2006 October Quarterly Report clearly indicates the Senator's loan proceeds were used to make at least \$1,000 in transportation expenses of the Senator. Accordingly, no further such expenses on subsequent reports are listed.

****Elliot Jacobson initially devoted half of his time to fundraising consulting, and half to media consulting. His fee was labeled "media consultant fee" inadvertently on the MGP initial report, but it should have indicated fundraising work also. This purpose description was accurately changed to "consulting fees fundraising" on subsequent reports. During the time covered in the later reports, all of Mr. Jacobson's work fell into the category of fundraising. In addition, subsequent reports mistakenly list Mr. Jacobson as "Elliot Jackson," when instead he should have been listed as "Elliot Jacobson."

ATTACHMENT
Page 17 of 17



P.O. Box 848 ; Arlington, VA 22216 ; gravel2008.us
Main Office 703-652-4668 ; Main Fax 703-349-2958

January 09, 2008

The Honorable Robert D. Lenhard
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Mr. Chairman:

As a candidate seeking to become eligible to receive Presidential primary matching funds, I certify and agree to the following provisions as prescribed at 11 CFR §9033.1 and 11 CFR §9033.2.

- I. In accordance with 11 CFR §9033.2(b)(1) and 11 CFR §9033.2(b)(3), I certify that I am seeking the nomination of the (name of political party) for election to the Office of President in more than one State. I and/or my authorized committee(s) have received matchable contributions, which in the aggregate exceed \$5,000 from residents of each of at least twenty States, which with respect to any one person do not exceed \$250.00.
- II. Pursuant to 11 CFR §9033.2(b)(2), I and/or my authorized committee(s) have not incurred and will not incur qualified campaign expenses in excess of the expenditure limitations prescribed by 26 U.S.C. §9035 and 11 CFR §9035.
- III. In accordance with 11 CFR §9033.1(b)(1), I acknowledge that I have the burden of proving that disbursements made by me, and any of my authorized committee(s) or agents are qualified campaign expenses as defined at 11 CFR §9032.9.
- IV. Pursuant to 11 CFR §9033.1(b)(2), I and my authorized committee(s) will comply with the documentation requirements set forth in 11 CFR §9033.11.
- V. Upon the request of the Commission, I and my authorized committee(s) will supply an explanation of the connection between any disbursement made by me or my authorized committee(s) and the campaign as prescribed by 11 CFR §9033.1(b)(3).
- VI. In accordance with 11 CFR §9033.1(b)(4), I and my authorized committee(s) agree to keep and furnish to the Commission all documentation for matching fund submissions, any books, records (including bank records for all accounts) and supporting documentation and other information that the Commission may request.
- VII. As provided at 11 CFR §9033.1(b)(5), I and my authorized committee(s) agree to keep and furnish to the Commission all documentation relating to disbursements and receipts including any books, records (including bank records for all accounts), all documentation required by this section (including those required to be maintained under 11 CFR §9033.11), and other information that the Commission may request. If I or my authorized committee(s) maintains or uses computerized information containing any of the categories of data listed in 11 CFR §9033.12(a), the committee will provide computerized magnetic media, such as magnetic tapes

or magnetic diskettes, containing the computerized information at the times specified in 11 CFR §9038.1(b)(1) that meet the requirements of 11 CFR §9033.12(b). Upon request, documentation explaining the computer system's software capabilities shall be provided and such personnel as are necessary to explain the operation of the computer system's software and the computerized information prepared or maintained by the committee(s) shall be made available.

VIII. As prescribed at 11 CFR §9033.1(b)(6), I and my authorized committee(s) will obtain and furnish to the Commission upon request all documentation relating to funds received and disbursements made on my behalf by other political committees and organizations associated with me.

LX. In accordance with 26 U.S.C. §9038 and 11 CFR §9033.1(b)(7), I and my authorized committee(s) shall permit an audit and examination pursuant to 11 CFR §9038 of all receipts and disbursements, including those made by me, all authorized committee(s) and any agent or person authorized to make expenditures on my behalf or on behalf of my authorized committee(s). I and my authorized committee(s) shall also provide any material required in connection with an audit, investigation, or examination conducted pursuant to 11 CFR §9039. I and my authorized committee(s) shall facilitate the audit by making available in one central location, office space, records and such personnel as are necessary to conduct the audit and examination, and shall pay any amounts required to be repaid under 11 CFR §9038 and 11 CFR §9039.

X. Pursuant to 11 CFR §9033.1(b)(8), the person listed below is entitled to receive matching fund payments on my behalf, which will be deposited into the listed depository, which I have designated as the campaign depository. Any change in the information required by this paragraph shall not be effective until submitted to the Commission in a letter signed by me or the Treasurer of my authorized principal campaign committee.

Name of Person: Augustine Gyamfi
Mailing Address: Mike Gravel for President
P. O. Box 948
Arlington, VA 22216

Designated Depository: Wachovia Bank
2026 Wilson Boulevard
Arlington, VA 22201

XI. Pursuant to 11 CFR §9033.1(b)(9), 11 CFR §9033.1(b)(10), and 11 CFR §9033.1(b)(11), I and my authorized committee(s) will: (A) prepare matching fund submissions in accordance with the Federal Election Commission's Guideline for Presentation in Good Order, including the provision of any magnetic media pertaining to the matching fund submissions and which conforms to the requirements specified at 11 CFR §9033.12; (B) comply with the applicable requirements of 2 U.S.C. §431 *et seq.* 26 U.S.C. §9031 *et seq.* and the Commission's regulations at 11 CFR Parts 100-300, and 9031-9039; (C) pay any civil penalties included in a conciliation agreement or otherwise imposed under 2 U.S.C. §437g against myself, any of my authorized committee(s) or any agent thereof.

XII. Pursuant to 11 CFR §9033.1(b)(12), any television commercial prepared or distributed by me or my authorized committee(s) will be prepared in a manner which ensures that the commercial contains or is accompanied by closed captioning of the oral content of the commercial to be broadcast in line 21 of the vertical blanking interval, or is capable of being viewed by deaf and hearing impaired individuals via any comparable successor technology to line 21 of the vertical blanking interval.

Sincerely,

A handwritten signature in cursive script that reads "Mike Gravel U.S.S."

Senator Mike Gravel



P.O. Box 948 · Arlington, VA 22216 | gravel2008.us
Main Office 703-652-4698 | Main Fax 703-343-2958

December 7, 2007

Federal Elections Commission
Office of General Counsel
999 E Street, NW
Washington, D.C. 20463

To whom it may concern,

The Presidential Campaign of Senator Mike Gravel requests an advisory opinion on Federal Election Campaign Law §9035 as it relates to a loan to the campaign by Senator Gravel and our qualification for the Presidential Primary Matching Payment Account.

At the time of filing for presidential primary matching funds, Senator Gravel has loaned his presidential campaign \$47,000. Prior to this, Senator Gravel and his wife, Whitney, had loaned his campaign \$73,000. However, the Senator and his wife have been paid back a portion of that loan, bringing the total amount to \$47,000. This is below the \$50,000 limit set by campaign finance law §9033(b)(2).

At the time of making the loans, the Senator was not aware of 11 CFR §9033.2(b)(2). We feel the Gravel Presidential Campaign has complied with the intent of the law as it pertains to eligibility for public funds.

The presidential matching funds program was created by Congress in order to reduce the corrupting influence of money in politics. Certainly if there is a campaign that meets the intended purpose of public funding of political campaigns, it is the campaign of Senator Gravel, who has pledged not to take money from special interest groups or PACs and, as a result, has raised approximately \$300,000 in the first three quarters of 2007.

I hope that you see this as we do and appreciate a quick resolution to this matter.

Sincerely,

Senator Mike Gravel

Sincerely,

Chris Petherick
Chief of Staff



11 Rue St. Augustin, 20076 - 9044 2700
Ver. 09/01/02 - 001 - 001 - 001 - 001

December 24, 2007

Federal Elections Commission
Office of General Counsel
999 E Street, NW
Washington, D.C. 20463

To whom it may concern,

As a supplemental to Senator Mike Gravel's Presidential Candidate Matching Funds Submission Statement, the Senator requests an opinion on Federal Election Campaign Law §9035 as it relates to a loan to the campaign by Senator Gravel and our qualification for the Presidential Primary Matching Payment Account.

At the time of filing for presidential primary matching funds, Senator Gravel has loaned his presidential campaign \$47,000. Prior to this, Senator Gravel and his wife, Whitney, had loaned his campaign \$73,000. However, the Senator and his wife have been paid back a portion of that loan, bringing the total amount to \$47,000. This is below the \$50,000 limit set by campaign finance law §9033(b)(2).

At the time of making the loans, the Senator was not aware of 11 CFR §9033.2(b)(2). Certainly, ignorance is no defense but the campaign was so impoverished that it could not afford legal counsel and the Senator is not a lawyer. Had we been aware of the regulation (the law is not at all clear on the subject) the Senator would not have loaned more than the regulations provided for, since it was his intention from the beginning to avail himself of the matching fund program. The Senator has taken a very strong public stand for the public financing of all elections as the only way to address the corruption of our political system.

We feel the Gravel Presidential Campaign is both ethically and morally in compliance with the intent of the law as it pertains to eligibility for public funds and hope that the FEC would rule favorably on our request.

The presidential matching funds program was created by Congress in order to reduce the corrupting influence of money in politics. Certainly if there is a campaign that meets the intended purpose of public funding of political campaigns, it is the campaign of Senator Gravel, who has pledged not to take money from special interest groups or PACs and, as a result, has raised approximately \$300,000 in the first three quarters of 2007.

I hope that you see this as we do and appreciate a quick resolution to this matter.

Sincerely,

Senator Mike Gravel

Sincerely,

Chris Petherick
Chief of Staff



Custom Business Checking

Deposits and Other Credits *continued*

Date	Amount	Description
8/30	50.10	AUTOMATED CREDIT NOWA INFO SYSTEM MERCH DEP
8/30	524.60	DEPOSIT
8/31	240.00	AUTOMATED CREDIT NOWA INFO SYSTEM MERCH DEP
Total	527,157.74	

Checks

Number	Amount	Date posted	Number	Amount	Date posted	Number	Amount	Date posted
1080	170.19	8/15	1087	2,500.00	8/03	1097	1,500.00	8/17
1079*	8,880.00	8/07	1088	3,000.00	8/16	1098*	480.00	8/30
1080	1,500.00	8/02	1089	810.00	8/27	1102*	2,982.33	8/27
1081	29.95	8/06	1090	723.40	8/06	1105*	3,729.00	8/24
1082	455.00	8/07	1092*	106.61	8/07	1106	3,729.00	8/30
1083	3,000.00	8/01	1094*	7,596.45	8/07	1107	2,000.00	8/30
1084	39.74	8/13	1095	122.11	8/07	Total	\$48,353.78	
1086*	2,000.00	8/02	1096	5,000.00	8/09			

* Indicates a break in check number sequence (checks could be listed under Automated Checks)

Automated Checks

Number	Amount	Date	Description
1091	104.52	8/07	AUTOMATED CHECK AT & T MOBILITY CHECK PYMT
1093	656.24	8/06	AUTOMATED CHECK VERIZON ARC CHECK PYMT
Total	\$761.06		

Other Withdrawals and Service Fees

Date	Amount	Description
8/01	53.00	PURCHASE SOUTHWEST AIR #526232 07/30
8/01	71.64	PURCHASE THE HOME DEPOT 480 07/30
8/01	74.53	PURCHASE IRELAND'S FOUR COU 07/30
8/01	272.60	PURCHASE SOUTHWEST AIR #526232 07/30

Other Withdrawals and Service Fees continued on next page.

* Loan Repayment 1



WACHOVIA

Wachovia Business Online

ONLINE IMAGE

Account Number:

Check Number

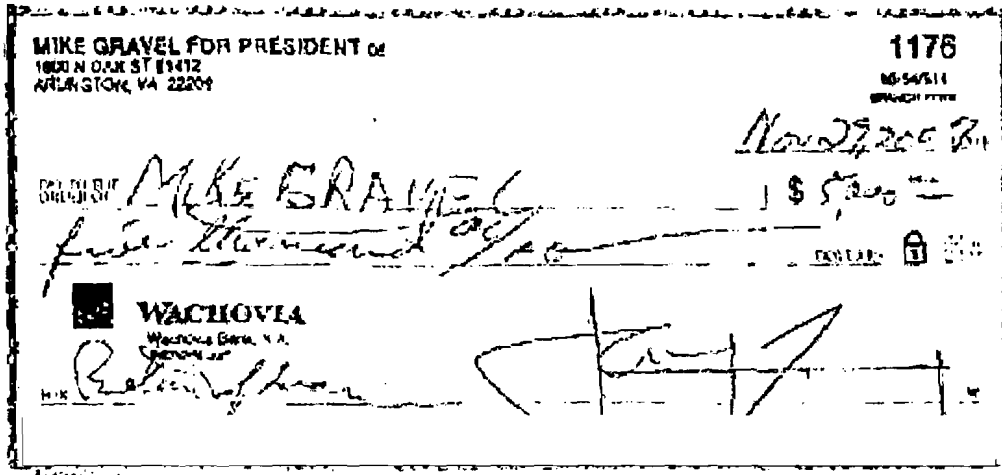
Amount

Date Posted

1176

\$5,000.00

12/04/2007



Handwritten notes:
 To transfer to
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How To Save This Image

PC users

Internet Explorer

Right-click on the check image, and choose "Save Picture As..."

Others:

Right-click on the check image, and choose "Save Image As..."

MAC users

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ATTACHMENT 4
 Page 3 of 6



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Wachovia Business Online

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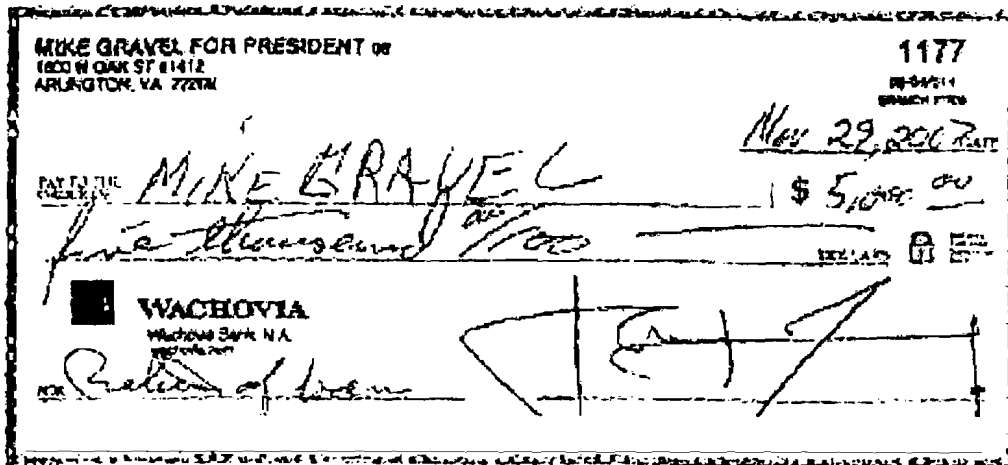
Amount

Date Posted

1177

\$5,000.00

12/21/2007



Handwritten notes:
 No problem
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How To Save This Image

PC users

Internet Explorer:
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ATTACHMENT: 4
 Page 4 of 6

U. S. Senatorial Campaign - Fagin, Jip

Cash on hand
 Cash on order
 Cash on deposit
 Cash on loan
 Cash on credit
 Cash on account
 Cash on interest
 Cash on commission
 Cash on other

Code	Description	Amount	Balance	Check No.	Date
10	Federal Funds				
1176	Contributions from public, party, committee	135,895.87	135,895.87		
1177	Contributions from other political organizations				
1180	Contributions from the candidate	5412.50			
1181	Transfer from other account				
1182	Other funds received	75818.23			
1183	Other funds received				
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ATTACHED 4
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Gravel for President 2008
Schedule of Loan Repayments

Total Loans Reported as of 9/30/07

\$73,515.73

Repayments

Counter Check

	date	amount	balance	comments
	5/29/2007	10,000.00	63,515.73	
Debit card purchase to Dr. Lawrence Rothen	8/3/2007	900.00	62,615.73	Bank statement annotated -"Non-campaign related expense charged against Mike Gravel loan account"
Check 1096	8/7/2007	5,000.00	57,615.73	
Check 1176	11/29/2007	5,000.00	52,615.73	
Ccheck 1177	11/29/2007	5,000.00	47,615.73	Loan balance
Total Loans Repayments		<u>25,900.00</u>		

Source: Hard copies of negotiated checks and bank statements from Gravel for President bank account (Wachovia Bank _____). See Threshold workpaper bundle.

wjt 1-9-08

5
 ATTACHMENT
 21 of 1
 page

Fax

To: Wanda Thomas **From:** AUGUSTINE GYAMFI
Fax: 202-208-1575 **Pages:** 9
Phone: **Date:** 01-08-2008
Re: Primary Matching Fund Submission - **cc:**
Senator Mike Gravel

Urgent For Review Please Comment Please Reply Please Recycle

ATTACHEMENT 5
Page 2 of 12

FROM : KG INTERNATIONAL

FAX NO. : 7033927725

Jan. 09 2008 05:49AM P2

1/8/2 9:16 AM PAUL

Wachovia

For Deposit

Name Mike Green DATE 5-29-07

Account No *

PAY TO THE ORDER OF ten thousand and 00/100 \$ 10,000.00

WACHOVIA Wachovia Bank, National Association

FOR Mike Green

88-548/514

D

The following company, bank, or other entity is not a member of the FDIC. Deposits with this entity are not insured by the FDIC.

ATTACHMENT 5

Page 3 of 12

1-800-870-6321

FOR DEPOSIT ONLY

ENDORSE HERE

Wachovia Bank, N.A. certifies that the above image is a true and exact copy of the original item issued by the named customer, and was produced from original data stored in the archives of Wachovia Bank, N.A. or its predecessors.

Wachovia Bank, N.A. certifies that the above image is a true and exact copy of the original item issued by the named customer, and was produced from original data stored in the archives of Wachovia Bank, N.A. or its predecessors.

Number	Amount	Posted	Number	Amount	Posted	Number	Amount	Posted
0000	18,000.00 ✓	5/29	1040	1,500.00	5/21	6034		
0000	4,000.00	5/29	1041	2,472.62	5/21	6035	710.00	5/17
1035*	1,000.00	5/02	1042	1,181.00	5/21	6036	1,707.34	5/21
1038	1,000.00	5/02	1043	600.00	5/31	6037	231.59	5/21
1038*	11,929.32	5/25	1044	3,452.75	5/31	6038	900.00	5/23
1039	3,600.00	5/21	5033*	2,000.00	5/24	Total	\$57,534.55	

* indicates a break in check number sequence

Other Withdrawals and Service Fees

Date	Amount	Description	Date
5/01	51.42	PURCHASE VONAGE PRICE+TAXE	04/30
5/01	561.43	AUTOMATED DEBIT-NOVA INED SYSTEM MERCH.FEE	
5/03	5.95	AUTOM DEBIT-AMERICAN EXPRESS COLLECTION CO.3D.	
5/04	2.00	PURCHASE CEX*AP270301W3HP98	05/02
5/04	15.00	PURCHASE GOZY SOUP & BURGER	05/02
5/04	125.80	PURCHASE UNITED AIR 016713	05/02
5/07	10.00	PURCHASE WII*RESERVATIONR1EW	05/06
5/07	18.01	PURCHASE HURSON HOTEL	05/04
5/07	10.30	PURCHASE THE FLAME DINER	05/03
5/07	47.70	PURCHASE BLAKES CREAMERY WE	05/04

ATTACHED 5
Page 9 of 12

CONTINUE FROM PREVIOUS PAGE 002

5/07	47.70	PURCHASE	BLAKES CREAMERY WE	05/04
5/07	48.95	PURCHASE	FANNAEGRO #177	05/04
5/07	84.00	PURCHASE	SOUTHWESTAIR 526030 DALLAS	05/04
5/07	120.90	PURCHASE	SOUTHWESTAIR 526030 DALLAS	05/04
5/07	151.39	PURCHASE	HERTZ RENT A CAR MANCHESTER NH	05/08
5/09	18.90	COMMERCIAL SERVICE CHARGES	EDR APRIL 2007	
5/10	4.50	AUTOMATED DEBIT	AMERICAN EXPRESS COLLECTION	

Other Withdrawals and Service Fees continued on next page.

WACHOVIA BANK, N.A., WILSON AND RHODES

page 8 of 9

ATTACHMENT 5
Page 5 of 12

1/8/2

9:16 AM PAGE 3/000

WACHOVIA

1099

MIKE GRAVEL FOR PRESIDENT 08
703-652-4600

08-07-2007 DATE

20-54516
BRANCH 7708

PAY TO THE ORDER OF MIKE GRAVEL \$5,000 =

FIVE THOUSAND DOLLARS ONLY DOLLARS

WACHOVIA
Wachovia Bank, N.A.
wachovia.com

FOR Part-Len. Repayment

[Signature]

1. This document is a true and exact copy of the original item issued by the named customer, and was produced from original data stored in the archives of Wachovia Bank, N.A. or its predecessors.

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5. This document is a true and exact copy of the original item issued by the named customer, and was produced from original data stored in the archives of Wachovia Bank, N.A. or its predecessors.



*Paul Howard
for deposit*

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Custom Business Checking

Other Withdrawals and Service Fees *continued*

Date	Amount	Description
8/01	1,045.54	AUTOMATED DEBIT NOVA INFO SYSTEM MERCH FEE
8/02	10.00	PURCHASE WLI*RESERVATIONREW 08/01 800-7327031 CT 7
8/02	11.10	AUTOMATED DEBIT DISC NETWORK SETTLEMENT
8/02	16.40	PURCHASE USPS 5165430133 08/01 ARLINGTON VA
8/02	24.14	PURCHASE STAPLES 0010 07/31 ARLINGTON VA
8/02	52.45	PURCHASE OFFICE DEPOT #1220 07/31 800-837-3600 MD 7
8/02	118.00	PURCHASE USPS 5165430133 08/01 ARLINGTON VA
8/02	122.11	PURCHASE STAPLES 0010 07/31 ARLINGTON VA
8/03	3.00	PURCHASE SOUTHWESTAIRS2 DALLAS TX
8/03	100.00	PURCHASE UNITED AIR 015216 08/01 MUMBAI 4000 IL
8/03	381.80	PURCHASE SOUTHWESTAIRS26232 08/01 DALLAS TX
8/03	0.00	PURCHASE DR LAWRENCE ROTHEN 08/02 CHEVY CHASE MD
8/06	3.99	PURCHASE CTX AP270301W48LLO 08/02 CHEAPTICKETS IL
8/06	6.99	PURCHASE ORB AP800101EEGCHR 08/03 ORBITZ.COM IL
8/06	6.99	PURCHASE ORB AP800101ECYXQ5 08/03 ORBITZ.COM IL
8/06	64.69	PURCHASE DOMINO'S PIZZA 043 08/03 ARLINGTON VA
8/06	73.00	PURCHASE HYATT HOTELS MCCOR 08/05 CHICAGO IL
8/06	81.66	PURCHASE WWW.CIRCUITCITY.CO 08/02 800-843-2489 OK
8/06	149.40	PURCHASE AMERICAN AI 001714 08/02 NASHVILLE TN
8/06	296.40	PURCHASE AMERICAN AI 001213 08/02 AA.COM/AA RETX
8/06	307.80	PURCHASE USAIRWAYS 037156 08/03 MANKATO MN
8/06	314.30	PURCHASE USAIRWAYS 037156 08/03 MANKATO MN

** Non Campaign related
expense charged
against Mike
Gravel Wan
Account*

Other Withdrawals and Service Fees continued on next page.

ATTACHMENT 5
Page 7 of 12



Custom Business Checking

Deposits and Other Credits *continued*

Date	Amount	Description
8/30	50.10	AUTOMATED CREDIT NOVA INFO SYSTEM MERCH DEP
8/30	524.80	DEPOSIT
8/31	240.00	AUTOMATED CREDIT NOVA INFO SYSTEM MERCH DEP

Total \$27,157.74

Checks

Number	Amount	Date posted	Number	Amount	Date posted	Number	Amount	Date posted
1066	170.19	8/15	1087	2,500.00	8/03	1097	1,500.00	8/17
1079*	6,860.00	8/07	1088	3,000.00	8/16	1099*	400.00	8/30
1080	1,500.00	8/02	1089	810.00	8/07	1102*	2,982.33	8/27
1081	20.95	8/06	1090	723.40	8/08	1105*	3,729.00	8/24
1082	455.00	8/07	1092*	106.61	8/07	1106	3,729.00	8/30
1083	3,000.00	8/01	1094*	7,596.45	8/07	1107	2,000.00	8/30
1084	39.74	8/13	1095	122.11	8/07	Total	\$48,353.78	
1086-	2,000.00	8/02	1096	5,000.00	8/09			

* Indicates a break in check number sequence (checks could be listed under Automated Checks)

Automated Checks

Number	Amount	Date	Description
1091	104.82	8/07	AUTOMATED CHECK AT & T MOBILITY CHECK PYMT
1093	656.24	8/06	AUTOMATED CHECK VERIZON ARC CHECK PYMT

Total \$761.06

Other Withdrawals and Service Fees

Date	Amount	Description
8/01	53.00	PURCHASE SOUTHWESTAIR526232 07/30 DALLAS TX
8/01	71.84	PURCHASE THE HOME DEPOT 460 07/30 FALLS CHURH VA
8/01	74.53	PURCHASE IRELAND'S FOUR COU 07/30 ARLINGTON VA
8/01	272.80	PURCHASE SOUTHWESTAIR526232 07/30 DALLAS TX

Other Withdrawals and Service Fees continued on next page.

** Loan Reassignment 1*

ATTACHMENT 5
PAGE 8 OF 12



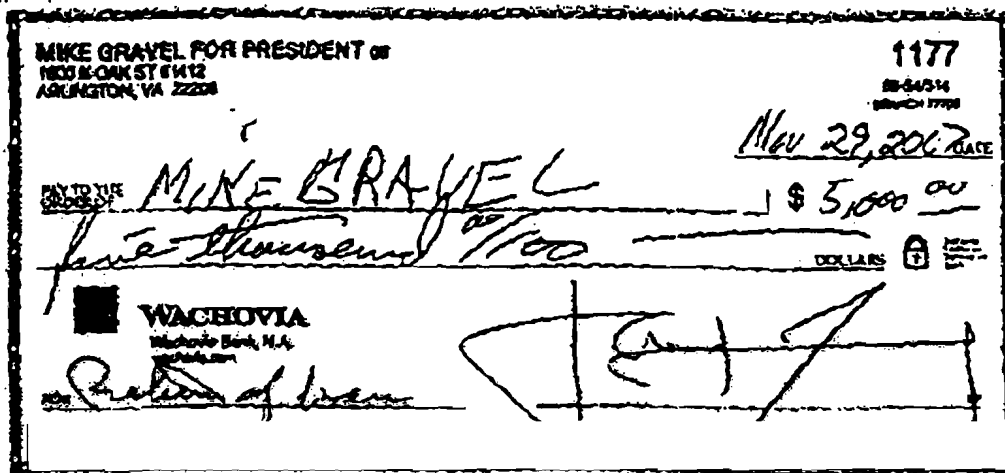
WACHOVIA

Wachovia Business Online

ONLINE IMAGE

Account Number:

Check Number	Amount	Date Posted
1177	\$5,000.00	12/21/2007



Jane Townsend
12/28/2007

How To Save This Image

PC users

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Others:
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ATTACHMENT 5
Page 9 of 12



WACHOVIA

Wachovia Business Online

ONLINE IMAGE

Account Number: _____

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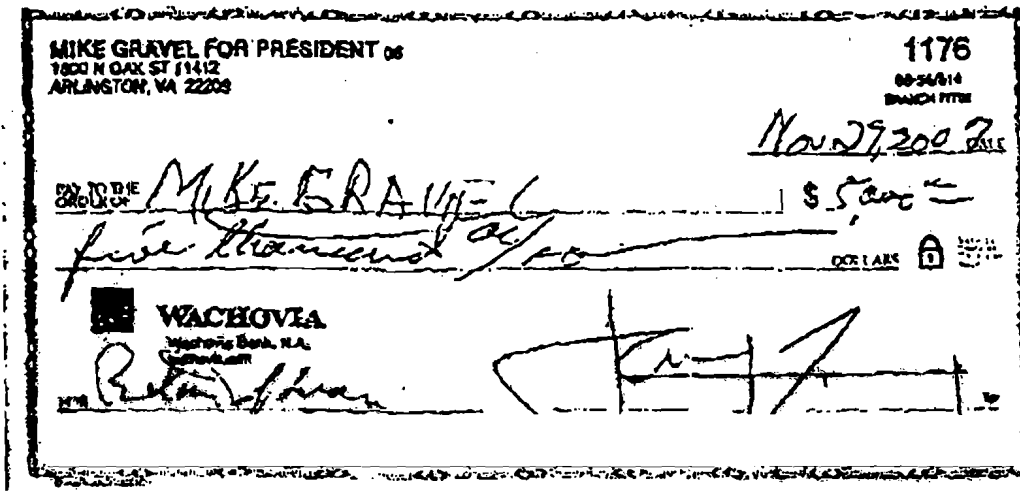
Amount

Date Posted

1176

\$5,000.00

12/04/2007



*Order of
Rita Gravel
11/29/07*

How To Save This Image

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ATTACHMENT 5
Page 10 of 12



Custom Business Checking

Deposits and Other Credits *continued*

Date	Amount	Description
12/27	60.00	AUTOMATED CREDIT BKCD PROCESSING BKCD DEPST
12/27	145.00	AUTOMATED CREDIT BKCD PROCESSING BKCD DEPST
12/28	35.00	AUTOMATED CREDIT DISCOVER NETWORK SETTLEMENT
12/28	235.00	AUTOMATED CREDIT BKCD PROCESSING BKCD DEPST
12/28	400.00	AUTOMATED CREDIT PAYPAL TRANSFER
12/31	50.00	AUTOMATED CREDIT AMERICAN EXPRESS SETTLEMENT
12/31	60.00	AUTOMATED CREDIT DISCOVER NETWORK SETTLEMENT
12/31	75.00	AUTOMATED CREDIT AMERICAN EXPRESS SETTLEMENT
12/31	189.60	AUTOMATED CREDIT PAYPAL TRANSFER
12/31	220.00	AUTOMATED CREDIT BKCD PROCESSING BKCD DEPST
Total	\$28,933.27	

Checks

Number	Amount	Date posted	Number	Amount	Date posted	Number	Amount	Date posted
1171	400.00	12/10	1178	1,500.00	12/04	1181	2,500.00	12/11
1176*	5,000.00	12/04	1179	2,982.33	12/11	1184*	1,500.00	12/18
1177	5,000.00	12/21	1180	1,500.00	12/10	Total	\$20,382.33	

*Indicates a break in check number sequence

ATTACHMENT 5
Page 11 of 12

LA 170
2/7/08



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 7, 2008

Memorandum

To: Thomasenia Duncan
General Counsel

Through: Patrina M. Clark *PMC*
Staff Director

From: John D. Gibson *JG*
Chief Compliance Officer

Joe Stoltz *JSt*
Assistant Staff Director
Audit Division

By: Wanda J. Thomas *wjt*
Deputy Assistant Staff Director (PECF)

Subject: Senator Mike Gravel Will Dispute OGC's Conclusion Regarding Matching Funds

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2008 FEB - 8 P 1:41

On January 18, 2007, by e-mail, I informed Senator Gravel that the Office of General Counsel concluded that he was not eligible to receive matching funds. Later, in a telephone conversation, Senator Gravel informed me that he intended to dispute the OGC's conclusion. He stated that he had retained an attorney who would be filing documents on his behalf soon.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 20, 2008

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*
Deputy General Counsel

Lawrence L. Calvert, Jr. *LJC*
Associate General Counsel

Lorenzo Holloway *LH*
Assistant General Counsel
Public Finance and Audit Advice

Delanie DeWitt Painter *DWP*
Attorney

SUBJECT: Mike Gravel for President 2008 Ineligibility Determination – Analysis of Response (LRA # 748)

This memorandum addresses Senator Mike Gravel's arguments that he is eligible to receive matching funds, and the Commission should consider this as a supplement to our memorandum submitted to the Commission on February 15, 2008. After considering Senator Gravel's arguments, however, the Office of General Counsel's recommendation remains the same: the Commission should make an initial determination that Senator Gravel is not eligible to receive matching funds.

This Office previously circulated a draft Notice of Initial Determination of Ineligibility for the Commission's approval. *See* Memorandum to the Commission, Mike Gravel for President 2008 Determination of Ineligibility and Letter of Candidate and Committee Certifications and Agreements (LRA # 748) (Feb. 15, 2008) ("Draft Notice"). This Office recommended that the Commission approve the Draft Notice and make an initial determination that Senator Gravel and Mike Gravel for President 2008 (the "Committee") is not eligible to receive matching funds. *See id.* This Office concluded that Senator Gravel knowingly and substantially exceeded the \$50,000 personal expenditure limitation prior to applying for matching funds because he loaned more than \$50,000 to his campaign, even though he was repaid some of the loan amount prior to seeking matching funds. The Audit staff agreed with this Office's conclusion and informally notified the Committee that staff would recommend that the Commission determine Senator Gravel is not eligible. The Committee responded to the staff

recommendation. Attachment 1. After we discuss the background information in this case, we will analyze the arguments in the Committee's response.

I. BACKGROUND

Senator Mike Gravel submitted a letter of candidate and committee certifications ("9033 letter") as part of his application to receive matching funds. Prior to applying for matching funds, Senator Gravel loaned more than \$50,000 to his campaign. The Committee's 2007 Year End report discloses a total of \$73,516 in loans received from the candidate and loan repayments of \$25,900.¹ The candidate stated in letters submitted prior to his 9033 letter that he and his wife had loaned a total of \$73,000 to his campaign but the Committee had repaid a portion of the loan. The Committee submitted documentation of the loan repayments indicating that it repaid \$25,900 of the \$73,516 loans, leaving a balance of \$47,616. After staff informed Senator Gravel of the staff recommendation, the Committee submitted the attached response disputing the staff recommendation.

¹ The Committee filed its Year End report late, on March 2, 2008, and did not file any monthly reports for 2008. It filed an "April Quarterly Report" in June 2008 disclosing the same loan and repayment amounts; however, the candidate is required to file monthly, not quarterly, reports. 11 C.F.R. § 104.5(b)(1)(i). Although the candidate agreed to comply with the election laws in his 9033 letter, the Committee is failing to file timely reports. While failure to file reports is not a basis to deny eligibility to a candidate, the Commission may suspend payments to a candidate if the Commission determines that the candidate knowingly and substantially failed to comply with the disclosure requirements in 2 U.S.C. § 434 and 11 C.F.R. Part 104. 11 C.F.R. § 9033.9.

The Committee notes that Senator Gravel changed from seeking the nomination of the Democratic Party to the Libertarian Party. Attachment 1 at 8. Subsequently, the Libertarian Party nominated a different candidate. To be eligible for matching funds, the candidate must certify that he is seeking the nomination of a political party. 11 C.F.R. § 9033.2(b)(1). Since, however, we are not recommending the Commission determine Senator Gravel eligible to receive matching funds, his party change and the Libertarian Party nomination do not affect our analysis. In the 2000 election cycle, the Commission determined that the decision of a candidate, who had already been determined eligible to receive matching funds, to seek the presidential nomination of a different party had no effect on his eligibility for matching funds, and allowed the candidate to amend his 9033 letter. See Memorandum to the Commission, Patrick J. Buchanan and Buchanan Reform, Inc. – Impact of Party Change on Eligibility (LRA # 569) (Dec. 13, 1999) (approved by Commission Dec. 20, 1999). Moreover, given that Senator Gravel was seeking a party's nomination when he submitted his 9033 letter but the Commission was unable to act at that time due to its lack of a quorum, we do not argue here that his current status as a former candidate is an additional reason to find him ineligible. The Commission may determine Senator Gravel eligible to receive matching funds even though he is no longer seeking the nomination of a party. Cf. *LaRouche v. FEC*, 996 F.2d 1263 (D.C. Cir. 1993) (Where court determined Commission decision that candidate was not eligible was incorrect, it directed Commission to certify funds to candidate a year after the 1992 Democratic Party nomination).

II. COMMITTEE RESPONSE DOES NOT CHANGE THIS OFFICE'S RECOMMENDATION THAT CANDIDATE IS NOT ELIGIBLE

The Committee's response raises several arguments. We address these arguments below. The Committee's arguments, however, do not persuade this Office to change our recommendation that Senator Gravel is not eligible to receive matching funds.

A. FUNDRAISING AND COMPLIANCE EXEMPTIONS DO NOT APPLY TO CANDIDATE'S PERSONAL EXPENDITURE LIMITATION

The Committee first argues that a large amount of the candidate's loans were used to pay for expenses that are exempt from the expenditure limitations and from the definition of "expenditure," and thus, should not count against his personal expenditure limitation. *See* Attachment 1 at 1-5. The Committee notes that although a candidate seeking matching funds may not make expenditures from personal funds in excess of \$50,000, the term "expenditure" does not include certain types of spending. *Id.* Specifically, the Committee states that fundraising costs up to 20 percent of the overall expenditure limit are exempt from the definition of expenditures. *Id.* at 2. From this, it reasons that amounts loaned by the candidate to pay for campaign fundraising expenses do not count as expenditures subject to the personal expenditure limit. The Committee also asserts that amounts the candidate loaned to pay for legal and accounting compliance expenses, unreimbursed subsistence costs of a volunteer (including the candidate himself), and up to \$1,000 for individual transportation expenses are exempt from the definition of expenditure. *Id.* at 3.

Further, the Committee contends that the candidate was the main source of funds for his campaign in late 2006 and early 2007 and that his loans accounted for approximately 80 percent of the campaign's receipts and disbursements, including exempt expenses.² *Id.* at 3-5. To support its argument, the Committee provided an affidavit from the candidate. *Id.* at 10-12. The Committee also provided a chart of expenses that it contends would enable the candidate's loans to be linked to \$44,699 in exempt expenses. *Id.* at 14-17. The Committee suggests that "some accounting convention, like FIFO or LIFO, could be used to tie particular committee receipts to particular committee disbursements," but does not do such an analysis. *Id.* at 4. The Committee argues that the Commission should consider the loans as used first to pay for exempt expenses, or alternatively, treat 80 percent of all expenses (including exempt expenses) paid during the period when the candidate made the loans as paid for with the

² The Committee states that the candidate's loans were \$73,516 of the Committee's \$89,544 total receipts during the nine months from the third quarter of 2006 through the first quarter of 2007, and that his loans funded the bulk of the campaign's \$91,553 spending during that period (approximately 80 percent of the campaign's receipts and disbursements).

candidate's funds, which it asserts would reduce the amount the candidate paid for expenditures below the \$50,000 limit.³ *Id.* at 5.

We disagree with the Committee for several reasons. First, the Committee has failed to demonstrate that the candidate's loans were used to pay for any specific exempt expenses. Second, the fundraising, legal and accounting compliance, and other exemptions from the definition of "expenditure" exempt these kinds of disbursements from the state and overall campaign expenditure limitations, not from the candidate's personal expenditure limitation. Third, the Committee's interpretation could undermine the rules and requirements governing candidates in the matching funds system by creating huge exemptions that dwarf the amount of the personal expenditure limitation. We examine each of these reasons in more detail below.

As a threshold issue, the Committee has not provided sufficient documentation to demonstrate either that it made exempt expenses or that the candidate's loan was used to pay for any such exempt expenses. The Committee has provided only an affidavit from the candidate and a brief chart of expenses that it claims were exempt, but no other documentation of expenses demonstrating that particular expenses were exempt. The Committee could have provided documentation such as vendor invoices or credit card bills detailing specific goods and services to support its argument that particular disbursements were exempt, yet did not do so. The Committee did not even explain why particular expenses should be considered exempt. For example, the chart lists vendor payees in a column of expenses the Committee claims were fundraising, but does not explain or provide documentation of how the specific disbursements were related to fundraising.⁴ While the Committee suggests that the candidate's loans can be linked to \$44,699 in exempt expenses and that a LIFO or FIFO accounting analysis could be used to connect the candidate's loans with particular disbursements, the Committee made no attempt to perform such an accounting analysis.⁵ Nor does the Committee demonstrate that the loans paid for particular exempt expenses.

³ The Committee argues that a minimum of 80 percent of its disbursements for exempt expenses during the nine months when the candidate's loans were received and used should be considered to have been paid for with the candidate's loans. The Committee calculated 80 percent by adding its cash on hand of \$2,507 at the beginning of the third quarter of 2006 to the \$89,544 received during the three quarters when the candidate's loans were raised and used for a total of \$92,050, and then dividing the loan total of \$73,516 by this amount for 80 percent. *Id.* at 4.

⁴ The chart notes in a footnote that one individual worked on both fundraising and media consulting at different times, but again, provides no documentation of his activities to support this claim.

⁵ We note that the Committee's proposal of associating particular disbursements with those funds the Committee had available to pay them at the time they were made (LIFO or FIFO analysis) would be contrary to long standing Commission accounting practice and precedent in the audit and repayment context. The Commission does not associate particular disbursements made by a publicly-funded primary candidate with particular receipts based on the timing of the disbursements. Rather, the Commission considers all of the contributions and matching funds a candidate receives from the beginning of his candidacy to be commingled in a mixed pool from which all campaign disbursements are made. *See* 11 C.F.R. § 9038.2(b)(2); *Kennedy for President v. FEC*, 734 F.2d 1558, 1562 (D.C. Cir 1984). The mixed

Nevertheless, even if the Committee had provided sufficient documentation, its argument is not persuasive. The fundraising and compliance exemptions from the definition of “expenditure” do not exempt disbursements from the candidate’s personal expenditure limitation, but instead apply only to the state and overall campaign expenditure limitations of 2 U.S.C. § 441a(b). The language and structure of the fundraising exemption from the definition of expenditure in the statute and Commission regulations supports this conclusion. See 2 U.S.C. § 431(9)(B)(vi); 11 C.F.R. §§ 100.152, 110.8, 9035.1.

The statutory fundraising exemption at section 431(9)(B)(vi) could be interpreted in two ways. It states:

The term “expenditure” does not include . . . any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate, except that this clause shall not apply with respect to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a(b), but all such costs shall be reported in accordance with section 434(b).

One interpretation would be that fundraising disbursements by any candidate for Federal office are exempt from the definition of expenditure, subject to a ceiling based on the overall expenditure limitation for publicly-financed presidential candidates. The Commission, however, has not interpreted the statute in that fashion in its regulations at 11 C.F.R. § 100.152. Rather, the Commission reads the statute practically, as an exemption from the 2 U.S.C. § 441a(b) campaign expenditure limitations applicable to publicly-funded presidential candidates. Specifically, it makes clear first that the exemption applies only to candidates certified to receive public funds. It then makes clear that the exemption applies only “to the extent that the aggregate of such costs does not exceed 20 percent of *the* expenditure limitation applicable to the candidate.” 11 C.F.R. § 100.152(a) (emphasis added). Section 100.152(c) identifies that one expenditure limitation as the “overall expenditure limitation” under section 9035.1, see 2 U.S.C. § 441a(b)(1)(A), and makes no reference to the candidate’s personal expenditure limitation in section 9035.2. Indeed, there is no indication in the regulations governing the fundraising and compliance exemptions at sections 100.152, 110.8, or 9035.1 that the Commission ever contemplated applying a fundraising or compliance exemption to the personal expenditure limitation. In fact, the fundraising and compliance exemptions are addressed in section 9035.1(c) of the regulations, as part of the rule governing the state and overall campaign expenditure limitations, but those exemptions are not even

pool analysis starting at the beginning of candidacy is consistent with the Commission’s application of the expenditure limitations to a candidate retrospectively “from the time his candidacy begins, not only from the date of certification” of matching funds. See *Explanation and Justification, Presidential Election Campaign Fund; Presidential Primary Matching Fund*, 44 Fed. Reg. 63,756 (Nov. 5, 1979).

referenced in section 9035.2, the rule governing the personal expenditure limitation. Compare 11 C.F.R. § 9035.1 with 11 C.F.R. § 9035.2.

The Commission's interpretation of the fundraising exemption is supported by and reflected in the language of the statute. Section 431(9)(B)(vi) explicitly refers to the overall campaign expenditure limitation at 2 U.S.C. § 441a(b) but makes no reference to the personal expenditure limitation at 26 U.S.C. § 9035(a). It exempts costs "incurred" by a candidate or committee "in connection with the solicitation of contributions" except that the exemption shall not apply "to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a(b)." This language supports the conclusion that the fundraising exemption applies only to expenditures subject to the campaign expenditure limitations at 2 U.S.C. § 441a(b)(1) and not to the personal expenditure limitation because it specifically refers to those limitations and uses the same "incur" verb as is used for those campaign expenditure limitations, rather than the "make" expenditures language used in the candidate's personal expenditure limitation at 26 U.S.C. § 9035(a). The reference to 20 percent of the "expenditure limitation applicable to such candidate under section 441a(b)" implies that the fundraising exemption only applies to the calculation of expenditures subject to the 441a(b) limitations.

The regulatory history also supports the conclusion that the fundraising and compliance exemptions apply only to the campaign expenditure limitations at 2 U.S.C. § 441a(b) and not to the candidate's personal expenditure limitation. The regulatory history consistently discusses the fundraising and compliance exemptions with respect to the overall and state campaign expenditure limitations and does not appear to contemplate the possibility that these exemptions could apply to the personal expenditure limitation. For example, in a 1991 rulemaking, the Commission explained that it was "revising and simplifying the way in which the 20% fundraising exemption from the overall spending limit for primary candidates is determined" in revising the definition of expenditure at former section 100.8 (now section 100.152). *Explanation and Justification, Public Financing of Presidential Primary and General Election Candidates*, 56 Fed. Reg. 35,898 (emphasis added) (Jul. 29, 1991). The Commission continued that the "amounts excluded at the state level are added to an amount excluded at the national level to permit committees to claim the full benefit of the 20% fundraising exemption established by the FECA." *Id.* (emphasis added); see also 56 Fed. Reg. at 35,901-02 (revisions to section 110.8) and 35,906 (revisions to section 9035.1).

Likewise, the Commission's advisory opinions do not support the Committee's argument. For example, in Advisory Opinion ("AO") 1988-6 (Gore) (superseded by rulemaking) the Commission discussed the fundraising exemption as an exception from the state and overall expenditure limitations, and made no reference to the personal expenditure limitation. The Commission said that it "has long held that fundraising expenditures are not counted against either the national limit or any state limit provided they are within the 20 percent exclusion." AO 1988-6 (emphasis added) (citing former

11 C.F.R. § 100.8 (now 11 C.F.R. § 100.152) and AO 1975-33 (Bentsen) (partly superseded by 1976 amendments)). In AO 1975-33, the Commission discussed application of the fundraising exemption to the overall and state expenditure limitations and noted that the fact that there is no parallel exemption from the definition of contribution precludes an individual or committee "from absorbing any candidate's fundraising expenses under the guise of the fundraising exemption." The Committee's argument that fundraising expenses should be exempt from the candidate's personal expenditure limit is analogous to the idea of an individual paying for campaign fundraising costs above his limitation "under the guise of the fundraising exemption," which was disapproved by the Commission in AO 1975-33. Just as the fundraising exemption cannot be used as a way to artificially increase an individual's contribution limitation, it should not be used as a way to artificially increase a candidate's personal expenditure limitation.

Finally, the Committee's interpretation of the personal expenditure limitation and the exemptions could undermine the rules and requirements governing candidates in the matching funds system. The exemptions from the definition of expenditure, such as the fundraising and compliance exemptions, apply only to exempt certain kinds of disbursements from the state and overall campaign expenditure limitations, but do not apply to the candidate's personal expenditure limitation.⁶ Applying these exemptions to the \$50,000 personal expenditure limitation could lead to exemptions that would dwarf the amount of the personal expenditure limitation, because the exemptions are calculated based on a percentage of the overall campaign expenditure limitation. For example, applying a fundraising exemption that could total \$8.41 million dollars (calculated based on 20 percent of the 2008 \$42.05 million dollar primary overall campaign expenditure limitation) to a candidate's personal expenditure limit of only a fraction of that amount--\$50,000--would render the personal expenditure limitation meaningless and easy for candidates to circumvent. This anomalous result, when the fundraising exemption is applied to the \$50,000 personal expenditure limitation, explains why there is a difference between the personal expenditure limitation and the much larger overall expenditure limitation of \$42.05 million, and the state expenditure limitations, which range from \$841,000 in several states to \$18,2779,300 in California, \$11,626,700 in Texas, and \$10,014,000 in New York.

B. COMMITTEE'S OTHER ARGUMENTS ARE NOT PERSUASIVE

The Committee makes four arguments in addition to the one addressed above, none of which is persuasive. The Committee's second argument is that the Commission

⁶ Since the candidate is an individual, it is possible that the travel and subsistence exemption at 11 C.F.R. § 100.139 could apply to some small amount of his personal travel and subsistence expenses if he paid for them directly. It is less clear if the exemption would apply if the Committee paid for those expenses using funds loaned by the candidate. The Committee has not provided sufficient documentation to clarify the amount of any possible exempt candidate travel or subsistence expenses. In any case, the amount of these expenses would likely be negligible, and would not have a significant effect on the total loan amount subject to the candidate's personal expenditure limitation.

should not apply the regulatory language “has not and will not incur” to situations like this one, where the campaign has repaid the candidate for loans above \$50,000 as of the time when he applies for matching funds. Attachment 1 at 5-6; *see* 11 C.F.R. § 9033.2(b)(2). The Committee contends that the Commission’s regulation should apply retrospectively only where a candidate is in excess of the personal spending limit at the time of certification. *Id.* The Committee’s argument is not persuasive because the regulation as applied here is entirely consistent with the statute. The Commission considered retroactive application of the expenditure limitations in crafting its regulation to apply to all candidates from the beginning of their candidacy and did not create any exceptions to the rule. Indeed, as the Draft Notice explains, the Commission added the prospective and retroactive “has not and will not” language based on legislative history and the underlying purpose of the statute.⁷ *See* Draft Notice at 3-4.

The Committee’s third argument is that the Commission should treat candidate loans made with an expectation of repayment deferentially under the regulation and should not count the amount repaid against the limit. Attachment 1 at 6-7. The Committee argues by analogy that the Commission’s regulations at section 9035.2(a)(2) exempt credit card charges paid within 60 days of the closing date of the billing statement from the personal spending limit. *Id.* It asserts that this rule could allow a candidate to provide an unlimited amount of credit so long as the charges are paid within that time period. *Id.* The Committee argues that, to be fair and internally consistent with the credit card rule, the Commission should treat candidate loans the same way and exclude from the personal expenditure limit candidate loan amounts repaid before the candidate applies for matching funds. *Id.*

This argument is not persuasive. The Commission created a specific narrow rule for the payment of credit card charges within a specified time period. That rule does not apply to candidate loans that did not involve credit cards paid within that time period. In any event, the candidate’s loans here were not paid within 60 days. According to the chart of loans and repayments provided by the Committee, the candidate’s loans were made between July 2006 and March 2007 and repaid in part between May and August of 2007. *See* Attachment 1 at 13. In addition, as explained in the Draft Notice, allowing

⁷ We note that in one instance, where a candidate proposed to loan his campaign more than \$50,000 while he was testing the waters, the Commission concluded that the candidate could still become eligible under certain circumstances. AO 1983-9 (Curry). The Commission concluded, under the testing the waters rules in effect at that time, that if the loaned funds in excess of \$50,000 were repaid to the candidate within ten days of the date he became a candidate, he could still become eligible to receive matching funds, but if the funds were not returned to the candidate within ten days, he would not be eligible. *Id.* The Commission’s analysis relied on an analogy to a former regulation allowing candidates to receive and expend funds that would otherwise be prohibited during the testing the waters period so long as the candidate returned the contributions within ten days of becoming a candidate. The narrow exception in AO 1983-9 would not apply here because: 1) Senator Gravel’s loans were not made while he was testing the waters; 2) the loans were not repaid within ten days of when he became a candidate; and 3) the testing the waters rules have changed.

candidates to become eligible after loaning large amounts of funds to their campaigns would defeat the purpose of the personal expenditure limitation. See Draft Notice at 5-6.

The Committee's fourth argument also is unconvincing. The Committee asserts that the candidate did not knowingly and substantially exceed the personal expenditure limit because he did not know of the \$50,000 limit when he loaned money to his campaign and the amount loaned was not substantially over the limit. Attachment 1 at 7-8. The Committee contends that the candidate was aware that his loans were being used for fundraising, legal and accounting, transportation, and subsistence expenses, which are exempt. *Id.* As discussed in the Draft Notice, the candidate's loans were both knowing, because he was aware he was making the loans, and substantial, because the excess amount was nearly half the total \$50,000 limitation. See Draft Notice at 6-7. The fact that the candidate also knew that the money would pay for expenses the Committee claims were exempt does not change the fact that the loans were made knowingly, particularly since the Committee's exemption argument is not persuasive.

The Committee's last argument is that it would be more appropriate for the Commission to address any excess spending by seeking a repayment or pursuing violations in the enforcement process instead of the "harsh remedy" of completely denying matching funds to Senator Gravel. Attachment 1 at 8. Again, this argument is not convincing. For both public policy and practical reasons, the Commission should not certify payment of public funds to a candidate who has not met the eligibility requirements only then to use its limited resources to seek repayment of those public funds or pursue enforcement action. Repayment and enforcement are not appropriate remedies for a candidate who is not eligible. Rather, the appropriate course here is for the Commission to consider whether the candidate has met the criteria for eligibility. If the Commission concludes that the candidate has not met the criteria, then the Commission must determine that the candidate is not eligible to receive matching funds. 11 C.F.R. §§ 9033.3 and 9033.10.

Attachments

1. Letter from Scott E. Thomas to Wanda J. Thomas, Response to Informal Staff Decision Regarding Senator Mike Gravel's Application for Public Funding (Mar. 28, 2008)
2. Senator Mike Gravel 9033 Letter
3. Letter from Senator Mike Gravel and Chris Petherick (Dec. 7, 2007)
4. Letter from Senator Mike Gravel and Chris Petherick (Dec. 24, 2007)
5. Check Copies and Bank Documents (sent on Jan. 9, 2008)
6. Memorandum from the Audit Division