



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

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MEMORANDUM

AGENDA ITEM

For Meeting of: 08-21-08

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

P. Christopher Hughey *pch*
Deputy General Counsel

Lawrence L. Calvert *no for h/c*
Associate General Counsel
For General Law and Advice

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

Danita C. Lee *no for h/c*
Attorney

Allison T. Steinle *ATS*
Attorney

SUBJECT: Commission Vote on John McCain 2008, Inc. – Presidential Primary Matching Payment Program (LRA 731)

I. INTRODUCTION

The purpose of this memorandum is to expand on this Office's conclusion in our main memorandum that an affirmative vote of four Commissioners is required to release Senator McCain from his obligations under the Presidential Primary Matching Payment Account Act ("Matching Payment Program"). It is our view that 2 U.S.C. § 437c(c) requires an affirmative vote of four Commissioners to allow Senator McCain to withdraw from the Matching Payment Program.

II. DISCUSSION

As context for our discussion regarding why an affirmative vote of four Commissioners is required for withdrawal from the Matching Payment Program, we first discuss why an affirmative vote of four Commissioners is required for entry into the Matching Payment Program.

To enter into the Matching Payment Program, candidates present to the Commission a letter in which they promise to abide by a number of conditions necessary for participation in the Program, such as seeking the nomination of a political party to the Office of President, not incurring expenditures in excess of the expenditure limitations set forth in the Program, and permitting an audit and examination of all receipts and disbursements. *See* 2 U.S.C. § 9033(a)-(b); 11 C.F.R. §§ 9033.1(b), 9033.2(b). Candidates also must provide a threshold submission, which contains proof that they have received contributions in each of at least 20 states, of which the matchable portion must total more than \$5,000 in each state. 11 C.F.R. §§ 9033.2(c), 9036.1(a).

The Commission then reviews the letter and the threshold submission to determine if the candidate is qualified to participate in the Matching Payment Program. *See* 11 C.F.R. § 9033.4(a). It does this by considering an “Eligibility Report” submitted by the Audit Division. Commission Directive 24. Should the Commission determine, based on the letter and the threshold submission, that the candidate qualifies to participate in the Matching Payment Program, it votes to “determine that [candidate/name of committee] have fulfilled the requirements set forth in 26 U.S.C. § 9033(a) and (b) and 11 C.F.R. §§ 9033.1, 9033.2, and 9036.1(b) and have established eligibility to receive primary matching fund payments under 26 U.S.C. § 9037 and 11 C.F.R. § 9037.1.” *See, e.g.,* Eligibility Report and Certification for Senator John McCain/John McCain 2008, Inc. (Aug. 28, 2007). This process is known as an “eligibility determination.”¹ Courts have agreed that it is the Commission’s role to review a candidate’s letter and threshold submission to determine if the candidate is eligible. *See La Rouche v. FEC*, 996 F.2d 1236, 1267 (D.C. Cir. 1993); *Comm. to Elect Lyndon La Rouche v. FEC*, 613 F.2d 834, 841 (D.C. Cir. 1979). Once the Commission determines that a candidate is eligible, the candidate is “in” the Matching Payment Program in this very practical sense: unless permitted to withdraw, the candidate will receive a minimum of \$100,000 in public funds (which matches the threshold eligibility amount), will be held to his or her promises in the letter, will be subject to the expenditure limitations, and will be audited by the Commission.

As it does with every candidate, the Commission voted to determine that Senator McCain was “eligible.” Eligibility Report and Certification for Senator John McCain/John McCain 2008, Inc. (Aug. 28, 2007). Because the Commission was directly involved in determining Senator McCain’s eligibility, the determination was an “action in accordance with . . . chapter 95 or 96 of title 26,” and as such required “the affirmative vote of 4 members of the Commission.” 2 U.S.C. § 437c(c).

¹ Participation in the Matching Payment Program involves two separate and distinct concepts: eligibility and entitlement. Eligibility refers to whether a candidate is qualified to participate in the Matching Payment Program. Entitlement refers to the amount of matching funds a candidate is qualified to receive.

Because the affirmative vote of four Commissioners was necessary to authorize Senator McCain to enter into the Matching Payment Program, it follows that an affirmative vote of four Commissioners is necessary to authorize Senator McCain to withdraw from the Program. A Commission decision regarding withdrawal from participation in the Program is a symmetrical determination to reverse a candidate's eligibility status. A candidate who desires to withdraw is telling the Commission that he or she no longer wishes to be bound by the commitments he or she made in the letter. Because the Commission itself made the determination, through a vote, that Senator McCain is eligible and would be bound by the expenditure limitations and audit requirements, the Commission must vote to reverse its prior decision. There is no legal authority for any other person or entity to effect this decision, and the candidate cannot unilaterally determine that the regulatory requirements of the Matching Payment Program are not binding. *See* 2 U.S.C. 437c(b)(1) (requiring the Commission to administer, seek to obtain compliance with, and formulate policy with respect to the Matching Payment Program).

Moreover, from a practical standpoint, if the Commission continues to take the approach that certain standards must be met before a candidate can withdraw from the Matching Payment Program, it will need to evaluate, in each particular instance, whether those standards have in fact been met. For example, if the Commission adopts this Office's recommendation and concludes that the Matching Payment Program permits withdrawal unless the candidate has actually received public funds or pledged them as security for private financing, the Commission necessarily must determine whether the candidate has in fact received or pledged public funds. Similarly, a decision that Senator McCain's request to exit the program is sufficient on its own to allow him to do so would require either a Commission vote endorsing that result in this particular case, or a Commission vote to formulate a mechanism that would allow any candidate in the program to exit the program unless the candidate has received matching payments.

III. CONCLUSION

For the above stated reasons, it is our view that the Commission must make a determination as to whether a candidate is allowed to withdraw from the Matching Payment Program. Furthermore, because such a determination is an "action in accordance with . . . chapter 95 or 96 of title 26," it requires "the affirmative vote of 4 members of the Commission." 2 U.S.C. § 437c(c).