



FEDERAL ELECTION COMMISSION
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MEMORANDUM

AGENDA ITEM

For Meeting of: 08-21-08

TO: The Commission

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SUBJECT: John McCain 2008, Inc. – Presidential Primary Matching Payment
Program (LRA 731) – Supplemental Memorandum

SUBMITTED LATE

I. INTRODUCTION

As you know, the Commission is scheduled to discuss Senator John McCain's request to withdraw from the matching fund program in the open session meeting on August 21, 2008. We address below some additional considerations regarding this matter. First, we address whether it makes any difference to the Commission's consideration that Senator McCain's request to withdraw was not styled as such, but was instead phrased as a "notification" of his intention no longer to participate in the program. Second, we address reasons why the Commission should consider this matter now.

II. DISCUSSION

A. SENATOR MCCAIN'S REQUEST TO WITHDRAW

It is true that Senator McCain's letter to the Commission was not styled as a "request," but was framed more as "notification" that the candidate had withdrawn. Very similar language was used by counsel for Elizabeth Dole in 1999, who informed the Commission that "we are withdrawing the Committee's request for public matching funds," and by Governor Howard Dean in 2003, who informed the Commission that he "withdraw[s] the candidate agreement filed with the Commission pursuant to 11 C.F.R. § 9033.1 and 2." Both of those communications were nevertheless described as "requests" in the Office of General Counsel's memoranda to the Commission about them, and the Commission affirmatively voted on the Office of General Counsel's recommendation that it withdraw its prior certifications to the Secretary of the Treasury regarding those candidates.

Consistent with the Commission's actions in those matters, and with Advisory Opinion 2003-35 (Gephardt), in which the Commission analyzed the question of withdrawal as a mutual agreement, our February 19 letter to Senator McCain informed him that "we consider your letter as a request that the Commission withdraw its previous certifications" and that "the Commission will consider your request at such time as it has a quorum." Senator McCain's subsequent letter, submitted in response to the February 19 letter, asserted that his withdrawal from the program was effective upon notice. Ignoring Senator McCain's original letter, which we have been treating as a request, and taking no action related to withdrawal in response to it, would not be consistent with past Commission practice. Moreover, for the reasons expressed in our supplemental memorandum regarding why a Commission vote is necessary, we believe Senator McCain's view in his second letter, that withdrawal is effective on notice, is incorrect.

B. WHETHER TO CONSIDER THIS MATTER NOW

As a matter of law and Commission procedure, questions arising in the operation of the matching fund program are separate and distinct from any other matters that might be before the Commission, such as enforcement matters, litigation, advisory opinion requests, or other matters. *Cf., e.g., John Glenn Presidential Comm. v. FEC*, 822 F.2d 1097, 1100 (D.C. Cir. 1987) (noting that a Title 26 matter regarding a repayment determination was "not considered to involve violations of the law"). More particularly, for nearly 30 years courts and the Commission have taken the position that Title 26 matters should not be held in abeyance pending the outcome of matters arising in other contexts. *See In re Carter/Mondale Reelection Comm., Inc. v. FEC*, 642 F.2d 538, 544 (D.C. Cir. 1980). In *Carter/Mondale*, the court addressed a complaint filed by a third party against a presidential candidate, requesting as a remedy, *inter alia*, that the Commission decline to certify the candidate as eligible for public funding in the general election. The court concluded that the Fund Act "precludes withholding funding from a candidate once the objective criteria for eligibility are met, because of the important constitutional free speech considerations inherent in public financing." *Id.*; *see also*

Comm. to Elect Lyndon La Rouche v. FEC, 613 F.2d 834, 841 (D.C. Cir 1979). The court went on to say that it would not be proper for the Commission to delay payment of funds to an eligible candidate pending an ongoing investigation because “it would be a denial of [a candidate’s] constitutional free speech rights.” *Id.* While this case addressed an eligibility determination rather than a withdrawal determination, in fact, the free speech considerations inherent in the withdrawal request are just as strong, if not stronger, than those in an initial eligibility certification. Senator McCain’s First Amendment rights are directly implicated by the question of whether or not he remains in the Matching Payment Program.

Moreover, as set forth in the main memorandum, the Treasury to our knowledge has not made any attempt to pay Senator McCain, pending resolution of this matter. However, the last formal communications from the Commission to the Treasury concerning Senator McCain’s participation in the matching funds program were the two certifications from the Commission that Senator McCain was entitled to specific amounts, so we presume the Treasury needs an answer from the Commission as soon as possible as to whether the Commission will withdraw those certifications.