



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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SUBJECT: Preliminary Audit Report on John Edwards for President, Inc. (LRA # 743)

I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Preliminary Audit Report ("PAR") for John Edwards for President, Inc. ("the Committee"). Our comments address various aspects of Finding 1. We concur with the remaining findings not specifically discussed in this memorandum. If you have any questions, please contact Albert Veldhuyzen or Allison T. Steinle, the attorneys assigned to this audit.¹

¹ The Office of the General Counsel recommends that the Commission consider this document in Executive Session because the Commission may eventually decide to pursue an investigation of matters contained in the PAR. 11 C.F.R. §§ 2.4(a) and (b)(6).

II. FINDING 1 – MATCHING FUNDS RECEIVED IN EXCESS OF ENTITLEMENT

A. INCLUSION OF GENERAL ELECTION CONTRIBUTIONS, REFUNDS, AND REDESIGNATIONS ON THE AUDIT DIVISION'S NOCO STATEMENT

The Committee accepted private general election contributions during the primary election period under the conditions set forth in Advisory Opinion (“AO”) 2007-03 (Obama). When the candidate withdrew from the Presidential primary race on January 30, 2008, the Committee was required to refund or redesignate those contributions. See 11 C.F.R. § 102.9(e)(3); AO 2008-04 (Doñal); AO 2007-03 (Obama); AO 2003-18 (Smith): After the candidate’s date of ineligibility (“DOI”), the Committee was only entitled to receive additional matching funds to the extent it had remaining Net Outstanding Campaign Obligations (“NOCOs”). 11 C.F.R. § 9034.1(h). Consequently, within fifteen days of DOI, the Committee was required to submit a Statement of Net Outstanding Campaign Obligations (“NOCO Statement”), which the Audit Division used to calculate the Committee’s entitlement to matching funds. 11 C.F.R. § 9034.5. On its NOCO Statement, however, the Committee excluded from cash the contributions received for the general election during the primary election period, but included as part of accounts payable the subsequent refunds and redesignations of those contributions. This caused the Committee’s NOCO Statement to show a larger deficit than was actually the case, and the Commission to certify more matching funds than the Committee would have otherwise been entitled to. The PAR concludes that the Committee received nearly \$3.5 million in excess of entitlement primarily because its NOCO statement understated its cash by excluding the general election contributions and overstated its liabilities by including the refunds and redesignations for the general election contributions.

We agree with the Audit Division that the Committee received matching funds in excess of entitlement due to its showing of a larger deficit on its NOCO Statement than was actually the case. However, the PAR’s conclusion that the Committee understated its cash and overstated its liabilities raises the question of whether the Committee’s general election contributions, refunds, and redesignations should be included or excluded in the NOCO Statement.

There is nothing that legally either requires or prohibits the inclusion of general election contributions, refunds, and redesignations in the NOCO Statement.² See 11 C.F.R. § 9034.5. Thus, we conclude that the Audit Division may take either approach, provided that, if the general election contributions and any subsequent refund and redesignation obligations are included in the NOCO Statement, they net each other out as assets (cash on hand) and liabilities (accounts payable).

² This applies both to NOCO Statements submitted by committees after their candidates’ DOIs in support of their requests for matching funds, and to the NOCO Statements as adjusted by the Audit Division that are included in its audit reports of any publicly financed Presidential primary committee.

In our opinion, however, it appears that excluding the general election funds from the NOCO Statement is the approach most consistent with both the purpose of the NOCO Statement and two recent Commission advisory opinions addressing the receipt of general election contributions by Presidential primary candidates. The general election funds are related to the general election, not to the candidate's publicly financed primary campaign for the nomination. The purpose of a NOCO Statement is to determine a candidate's financial status and entitlement to matching funds after the DOI with respect to that candidate's participation in the primary election under the Presidential Matching Payment Account Act ("Matching Payment Program"). See 11 C.F.R. § 9034.5; Explanation and Justification for 11 C.F.R. § 9034.5, 44 Fed. Reg. 20,336, 20,340 (Apr. 4, 1979).

Although section 9034.5 does not explicitly exclude general election funds from what should be included on the NOCO Statement, an account containing only contributions designated for the general election but received during the primary election period should not affect a candidate's financial status or entitlement to matching funds with respect to the primary election. Once a candidate fails to qualify for the general election or, in the case of Presidential candidates, elects to receive public financing for the general election campaign, the general election contributions become impermissible funds that must be refunded, redesignated, or disgorged. See AO 2008-04 (Dodd); AO 2007-03 (Obama); AO 2003-18 (Smith). For this reason, candidates must use an acceptable accounting method to distinguish between contributions designated for the primary election and contributions designated for the general election, must limit access to the general election funds, and may not use those funds for any purpose. See 11 C.F.R. § 102.9(e); AO 2008-04 (Dodd); AO 2007-03 (Obama). In the case of a committee such as the Edwards Committee that does not qualify for the general election, if one assumes that the committee has adequately segregated general election contributions from its primary election funds, the amount of general election contributions received should exactly equal the obligation to make refunds, obtain redesignations, or make disgorgement payments. Accordingly, if such a candidate has participated in the Matching Payment Program, the general election contributions and the refund obligation should net to zero and thus should neither increase nor decrease the amount of post-DOI matching funds to which a committee may otherwise be entitled. Because the general election accounts should have no impact on post-DOI matching fund entitlement, we believe they should not be included on a committee's NOCO Statement as a matter of policy.³

Again, however, there is nothing that legally prevents these amounts from being included in the NOCO Statement. See 11 C.F.R. § 9034.5. Accordingly, the auditors may elect to include these amounts in the Audit Division's adjusted NOCO Statement, so long as the general election contributions and any obligations to make general election refunds or redesignations net each other out as assets and liabilities.

³ We recognize that one disadvantage to this approach is that it fails to provide an accurate "overall" picture of the Committee's financial status. However, the Audit Division could address this concern by adding an accompanying footnote to the NOCO Statement that explains the existence of the general election funds and transactions related to general election funds. Moreover, the general election funds will be reflected on the Committee's disclosure reports.

B. THE COMMITTEE HAS NOT ESTABLISHED THAT CERTAIN PAYROLL EXPENSES PAID AFTER DOI ARE QUALIFIED CAMPAIGN EXPENSES

The Audit Division concluded that certain payroll expenses paid after DOI are non-qualified campaign expenses, and as a result did not include these expenses as a liability on the NOCO Statement. Specifically, the Committee made \$761,192 in payments to staffers, and for associated payroll taxes, on February 7, 2008. Ninety-nine staff members received payments. The Committee's normal pay periods for January 2008 ended on January 15, 2008 and January 30, 2008, but the Committee appears to have created an extra pay period that both began and ended on January 31, 2008 and was paid on February 7, 2008. The Committee has submitted a written response and spreadsheet that breaks down these payments as follows: (1) \$204,322 in back pay owed from the January 30, 2008 pay period; (2) \$205,182 in "salary increases" paid for December 23, 2007 to January 30, 2008; and (3) \$351,688 in winding down expenses paid for January 31, 2008 to February 15, 2008. The draft PAR concludes that everything but the back pay owed from the January 30, 2008 pay period was a monetary bonus paid after DOI, and that this monetary bonus was not a qualified campaign expense because it was not provided for in a written contract made prior to DOI. See 11 C.F.R. § 9034.4(a)(5).

We agree with the Audit Division that everything but the back pay owed from the January 30, 2008 pay period should be considered a non-qualified campaign expense. We, however, address each part of the Committee's breakdown below.

Back Pay Owed from the January 30, 2008 Pay Period

The Committee claims that \$204,322 is back pay owed from the January 30, 2008 pay period. We agree with the Audit Division that the \$204,322 was back pay owed from the January 30, 2008 pay period and therefore was a qualified campaign expense. Qualified campaign expenses are defined as expenses "incurred by or on behalf of a candidate or his or her authorized committee from the date the individual becomes a candidate through the last date of the candidate's eligibility." 26 U.S.C. § 9032(9); 11 C.F.R. § 9039.9. The auditors have verified that the Committee had incurred and owed \$204,322 in salary expenses prior to DOI. Specifically, staffers were only paid half of their normal net salary for the pay period that ended on January 30, 2008 and were therefore owed an additional \$204,322 in ordinary salary prior to DOI.

Salary Increases for December 23, 2007 to January 30, 2008

The Committee claims that \$205,182 of the \$761,192 in payroll was intended as "salary increases" for the period between December 23, 2007 and January 30, 2008. The Committee states that these salary increases were intended "primarily to compensate staff for the fact that [the Committee] dispatched staff to many different field locations throughout the country for the January primaries and caucuses, placing them on an around-the clock schedule." Response of John Edwards for President to Supplemental Exit Conference Preliminary Audit Findings ("Supplemental Committee Response") at 1-2 (Apr. 16, 2009) The Committee states that it decided to increase staff salaries in December 2007, and that this increase was to be paid out "as

permitted by Committee resources." *Id.* However, the Committee has been unable to produce any written contracts or other documentation to verify this claim, and has stated that no employment contracts that specified staff salaries existed.

The Commission's regulations place the burden on a committee to prove that an expense is a qualified campaign expense, and candidates agree in writing to "obtain and furnish to the Commission any evidence it may request of qualified campaign expenses." 26 U.S.C. § 9033.1(a)(1); 11 C.F.R. § 9033.11(a). In *LaRouche's Comm. for a New Bretton Woods v. FEC*, 439 F.3d 733, 738 (D.C. Cir. 2006), the court concluded that the Commission was not required to find that an expense was a qualified campaign expense where the committee failed to produce any document by which the Commission could either quantify or determine the reasonableness of the expense. Here, as noted above, the Committee has not provided any documentation or a verifiable basis to support its assertion that \$205,182 was for salary increases to compensate employees for work performed prior to DOI. Accordingly, we conclude that the Committee has not met its burden of proving that the \$205,182 was a qualified campaign expense. To establish that the \$205,182 was a qualified campaign expense, the Committee should provide any written contracts, memoranda, payroll records, e-mails, or other contemporaneous documents that establish this amount was intended as a permanent increase in ordinary salary to compensate staff for work performed prior to DOI, or a written contract made prior to DOI that provided for a monetary bonus.⁴

Winding Down Expenses for January 31, 2008 to February 15, 2008

The Committee claims that the remaining \$351,688 of the \$761,192 in payroll was intended as winding down expenses for the period between January 31, 2008 and February 15, 2008. However, the Committee is somewhat unclear in its written response about why this amount was a winding down expense. The Committee first suggests that this amount was intended as an additional salary payment to help retain staff for necessary winding down activities such as returning cars to their required destination, closing offices and volunteer sites, and returning rental equipment. At the same time, however, the Committee claims that this

⁴ This level of documentation is necessary because in its absence, we would conclude that the payments were monetary bonuses paid after DOI. The Commission's regulations expressly state that monetary bonuses paid to staff after DOI in recognition of campaign-related activities or services are considered qualified campaign expenses only if they are paid no later than 30 days after DOI and are provided for in a written contract made prior to DOI. 11 C.F.R. § 9034.4(a)(5). While the Committee claims that this portion of the payroll was intended as "salary increases" rather than monetary bonuses, bonuses are generally defined as any payments that are made "in addition to or in excess of compensation that would ordinarily be given." Black's Law Dictionary 194 (8th ed. 1999). The Commission specifically promulgated section 9034.4(a)(5) to prevent "publicly funded campaigns [from] paying large monetary bonuses after [DOI] upon discovery of excess public funds." See Explanation and Justification for Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47,386, 47,390 (Aug. 8, 2003). Here, according to the Committee's own figures, the extra payment represented a 31 percent increase on top of the salary that the staff was ordinarily paid. Moreover, these "salary increases" were not included in the staff's ordinary payroll prior to DOI, despite the fact that the Committee appeared to have sufficient funds to include them in the ordinary payroll. Therefore, we believe the Committee must either document that the \$205,182 was intended to permanently increase the staff's ordinary salary, or produce a written contract made prior to DOI that provided for the monetary bonuses pursuant to section 9034.4(a)(5).

amount was intended to reimburse employees for the lodging, fuel, and meal costs they incurred while conducting winding down activities "in lieu of any attempt to have employees turn in receipts for reimbursement." Supplemental Committee Response at 2.

Winding down expenses are considered qualified campaign expenses so long as they are "associated with the termination of political activity related to a candidate's seeking his or her election," and can include staff salaries. 11 C.F.R. §§ 9034.4(a)(3)(i); 9034.11. Again, however, the Committee has not provided any documentation or a verifiable basis to support its assertion that \$351,688 was for salary payments to compensate staff for winding down activities.⁵ 26 U.S.C. § 9033.1(a)(1); 11 C.F.R. § 9033.11(a); *LaRouche*, 439 F.3d at 738. Accordingly, we conclude that the Committee has not met its burden of proving that \$351,688 was a qualified campaign expense.

The Audit Division has informed this Office that 85 of the 99 staffers did not receive any other salary payments in February because they did not remain with the campaign after DOI. To the extent the \$351,688 represents a salary payment to those staffers, the Committee should provide any written contracts, memoranda, payroll records, e-mails, or other contemporaneous documents that establish this amount was intended as an ordinary salary payment to compensate staff for winding down activities. However, 14 staffers remained with the campaign after DOI and continued to receive ordinary biweekly salary payments throughout the month of February. Therefore, to the extent that the \$351,688 represents an increase in these 14 staffers' ordinary salary, the Committee should document that this amount was intended as a permanent increase in ordinary salary to compensate staff for winding down activities, or provide a written contract made prior to DOI that provided for a monetary bonus pursuant to section 9034.4(a)(5).

⁵ The Committee's claim that at least part of the \$351,688 was intended to reimburse staff for the lodging, fuel, and meal costs they incurred while conducting winding down activities is not supported by the evidence. As the Audit Division notes in the draft PAR, the Committee had a reimbursement system in place, which it continued to use to reimburse staff on a per expense basis through the winding down period. Even assuming that this amount was in fact intended to reimburse staff for additional winding down costs, we note that Commission regulations limit how committees may reimburse staff for costs incurred from their personal funds in the course of providing services to or on behalf of a campaign. 11 C.F.R. §§ 100.79(a), 116.5. Specifically, payments made from staffers' personal funds for transportation and usual and normal subsistence expenses that exceed an aggregate of \$1,000 per election or \$2,000 per calendar year are considered contributions unless they are reimbursed by the Committee within 30 days after the expense was incurred or 60 days after the closing date of the billing statement if they were put on a credit card. *Id.* Committees are required to treat and report the obligations arising from these staff payments as debts until they are reimbursed. 11 C.F.R. § 116.5(c), (e). Accordingly, here, the Committee could have potentially been in violation of section 116.5 if it paid lump sum amounts intended to reimburse staffers for unspecified—and possibly partial or non-existent—lodging, fuel, and meal costs. 11 C.F.R. §§ 100.79(a), 116.5.

C. THE AUDIT DIVISION SHOULD ALLOW ESTIMATED WINDING DOWN EXPENSES THROUGH 2011

The Audit Division calculated the Committee's estimated winding down expenses as \$1,178,025 (January 31, 2008 through December 31, 2008). This line item is listed on the Committee's NOCO Statement as a liability. However, the Committee has included estimated winding down expenses of \$841,060 more than the Audit Division. This disagreement is due to different estimates as to how long the winding down process will take. In its response to the exit conference preliminary audit findings, the Committee states it should be entitled to winding down costs until the end of 2011, whereas the Audit Division believes a reasonable winding down time frame is the end of 2010.⁶ For the reasons stated below, this Office believes that the Audit Division should revise the PAR to allow winding down expenses through 2011.

In making its legal argument, the Committee cites 11 C.F.R. § 9034.11(h), which specifies that the matching funds paid to a committee for winding down expenses shall not exceed the lesser of:

- (1) 10 % of the overall expenditure limitation pursuant to 11 C.F.R. § 9035.1; or
- (2) 10 % of the total of:
 - (i) The candidate's expenses subject to the overall expenditure limitation as of the candidate's date of ineligibility; plus
 - (ii) The candidate's expenses exempt from the expenditure limitations as of the candidate's date of ineligibility; except that
 - (iii) The winding down limitation shall be no less than \$100,000.

Both the Audit Division and the Committee agree that the Committee's estimated winding down expenses fit within the ten percent limitation of 11 C.F.R. § 9034.11(b)(2). However, the Committee argues that: (1) because its estimated winding down expenses are within the limitation, the auditors should not adjust them; (2) its estimates are based on past experience that the winding down process will last longer than Audit Division projects; and (3) if forced to accept the Audit Division's estimated winding down expenses, it could be impossible to recapture any repaid public funds because the "deficiency might not become apparent until many months in the future." Response of John Edwards for President to Exit Conference Preliminary Audit Findings ("Committee Response") at 4 (Feb. 20, 2009).

The Audit Division counters that the ten percent limitation is a cap, not an entitlement and therefore, they may reasonably question the Committee's winding down expenses. The Audit Division proposes to readjust estimated winding down expenses in the event the audit process extends into 2011.

⁶ In its response to the exit conference, the Committee identified "several erroneous assumptions" in the Audit Division's calculation of winding down expenses to include, among others, salary, rent, software maintenance, and contribution processing. The auditors have since reconciled these differences with the Committee and the only remaining disagreement concerns the length of time of the winding down period. See Committee Response at 4.

Before we address the merits of the arguments made, we need to first explore the history and purposes behind the ten percent limitation and whether the Commission has ever considered a time limit on winding down expenses. The Commission has recognized that, in the past, "issues have arisen as to the appropriate amounts and types of winding down expenses and as to the length of time committees need to wind down. . . . To avoid these disputes in the future, the Commission has decided to place certain reasonable restrictions on the amount of public funds used for winding down expenses." Explanation and Justification for 11 C.F.R. § 9004.11, 68 Fed. Reg. 47,386, 47,390-91 (Aug. 8, 2003).

In its rulemaking regarding 11 C.F.R. § 9034.11(b), the Commission adopted the ten percent limitation⁷ but it specifically declined to impose a winding down time limit although such a time limit was initially proposed in the Notice of Proposed Rulemaking ("NPRM"). The NPRM noted that the Commission considered a time limit but declined to adopt one in 1983 and 1995. The Commission ultimately declined to impose a time limit because it would be "quite difficult to select an amount or time frame sufficient to meet reasonable expenses incurred in winding down the campaign." Notice of Proposed Rulemaking, Restrictions on Winding Down Costs, 68 Fed. Reg. 18,485 (Apr. 15, 2003). However, in 2003, the Commission specifically proposed a limitation on the winding down period. In its final rules, the Commission ultimately decided against a winding down time limitation because it believed that "the winding down monetary limitation will be sufficient to address its concerns that winding down be completed expeditiously." Explanation and Justification for 11 C.F.R. § 9004.11(c), 68 Fed. Reg. 47,386, 47,393 (Aug. 8, 2003). The Commission noted that "several commenters opposed these temporal limits because after the expiration of this period, campaigns may be involved in enforcement actions, repayment determination court challenges, investigations by other government entities, or other lawsuits." *Id.* Therefore, the Commission has specifically considered and rejected a winding down period after which matching funds cannot be used. *Id.*

Given the Commission's stated position regarding this issue, it would be hard for the Audit Division to justify imposing a different winding down period estimate than the Committee. Both the Committee and the Audit Division agree that the Committee's winding down estimates are within the regulatory limitation. The Audit Division is correct that the committees are not allowed to automatically claim the maximum amount under the limitation as the amount of the winding down expenses. The Audit Division, therefore, retains some discretion in evaluating the subject matter of the amount below the limitation to ensure that those expenses meet the definition of winding down expenses and to ensure that they are reasonable. The Audit Division has not argued that the subject matter of the Committee's expenses does not meet the definition of winding down expense or that they are unreasonable. Hence, there does not appear to be a compelling reason to question whether the regulatory monetary limitation must be supplemented by a time limitation in this case, especially in light of the fact that the Commission implemented

⁷ The Commission noted that "this percentage would allow most campaigns, particularly small campaigns of unsuccessful candidates, to pay necessary winding down costs without exceeding the winding down limitation, and ensure that only campaigns with extraordinarily high winding down expenses exceed the winding down limitation." Explanation and Justification for 11 C.F.R. § 9034.11(b), 68 Fed. Reg. 47,386, 47,408 (Aug. 8, 2003).

its rule specifically to avoid disputes of this nature in the future. Explanation and Justification for 11 C.F.R. § 9004.11, 68 Fed. Reg. 47,386, 47,390-91 (Aug. 8, 2003).

Given the reasons outlined above, this Office recommends that the Audit Division revise the PAR and NOCO Statement to allow estimated winding down expenses for the Committee through 2011.

D. OBJECTION TO REPAYMENT OF MATCHING FUNDS

Based on a review of the Committee's NOCO Statement, the Audit Division recommends that the Commission determine that the Committee repay \$3,498,013 to the United States Treasury because the Committee received public funds in excess of entitlement. The Committee, however, argues that repayment is not due because entitlement to public funds for eligible candidates must be based "solely on the source, size, and timing of the contributions received prior to the date of ineligibility." Committee Response at 4. We understand this to mean, in essence, that in the Committee's view, if it received a matchable contribution prior to the candidate's DOI, it is entitled to a matching payment for that contribution, regardless of when it submitted the contribution for matching and regardless of whether the matching payment was made prior to or after DOI. Accordingly, the Committee argues that the size of the Committee's NOCOs at the time the United States Treasury actually paid the public funds was irrelevant to the Committee's entitlement and the Audit Division improperly "refused to match valid contributions received while the candidate was active and eligible." *Id.* at 5.

This is not an issue of first impression. Contrary to what we understand to be the Committee's position, the Commission's regulations specifically provide that that an ineligible candidate without NOCOs has no entitlement to additional matching payments "*regardless of the date of deposit of the underlying contributions.*" 11 C.F.R. § 9034.1(a) (emphasis added). The Commission has consistently rejected arguments similar to the Committee's, and concluded that for an ineligible candidate to receive matching funds, not only must the matched contributions be matchable—a requirement that applies both before and after DOI—but the ineligible candidate must also have remaining debts on the most recent NOCO Statement. *See, e.g.*, 11 C.F.R. 9034.1(a) and (b); Explanation and Justification for 11 C.F.R. § 9034.1, 48 Fed. Reg. 5,224, 5,227 (Feb. 4, 1983); Mandale for President Committee Final Audit Report ("FAR") at 57-58, 64-68 (Oct. 28, 1986); Dukakis for President Committee FAR at 31-33 (Dec. 17, 1991); Clinton/Gore '92 Committee FAR at 12-13 (Dec. 27, 1994).

As the Commission noted at length in the Clinton/Gore '92 Committee FAR, the Commission has a long and consistent history of conditioning a candidate's remaining entitlement after DOI on the candidate's NOCOs at the time the matching funds are paid. Section 9034.1(b) of the Commission's regulations states that after DOI, candidates may continue to receive payments only to the extent they have sufficient NOCOs. Section 9034.1(b) dates to a December 1976 memorandum to the Commission proposing an amendment to then section 134.3(c)(2) of the Commission's regulations. The proposed rule stated that "a candidate shall be entitled to no further matching funds if, at the time of any submission for certification, the total contributions and matching funds received after the ineligibility date equals or exceeds

the net obligations outstanding on the date of ineligibility." The 1979 Explanation and Justification for section 9034.1 explained that for candidates who have NOCOs after DOI, "[b]asically, these candidates are entitled to payments only if the private contributions received between the date of ineligibility and the date of submission are not sufficient to discharge the net debt." Explanation and Justification for 11 C.F.R. § 9034.1, 44 Fed. Reg. 20,336, 20,338 (Apr. 4, 1979). The Commission explained that this regulation "furthers the policy that the candidate should use private contributions to discharge campaign obligations wherever possible." *Id.* Most importantly, in 1983, the Commission revised these regulations to make clear "that to receive matching funds after the date of ineligibility, candidates must have net outstanding campaign obligations as of the date of payment rather than the date of submission. Thus, if the candidate's financial position changed between the date of his or her submission for matching funds and the date of payment, reducing the candidate's net outstanding campaign obligations, that candidate's entitlement would be reduced accordingly." Explanation and Justification for 11 C.F.R. § 9034.1, 48 Fed. Reg. 5,224, 5,227 (Feb. 4, 1983); *see also* Explanation and Justification for 11 C.F.R. § 9034.5, 60 Fed. Reg. 31,854, 31,868 (June 16, 1995). Accordingly, the Commission has repeatedly rejected the position advanced here by the Committee as contrary to the plain meaning of the Commission's regulations, as well as long standing Commission practice and policy. *See, e.g.*, Mondale for President Committee FAR at 57-58, 64-68 (Oct. 28, 1986); Dukakis for President Committee FAR at 31-33 (Dec. 17, 1991); Clinton/Gore '92 Committee FAR at 12-13 (Dec. 27, 1994).

The Committee also argues that the unique circumstances of 2007 and 2008 demonstrate why the position taken by the Commission over the years is wrong, and why its position is the only fair approach to determining the Committee's entitlement to public funds. In order to evaluate the Committee's argument, it is necessary to begin by briefly recounting what those circumstances were.

The Commission first determined Senator Edwards to be eligible for and entitled to matching funds in December 2007. Under normal circumstances, the United States Treasury would have made the initial payment of matching funds to the Committee on January 2, 2008, the first business day of the election year. 11 C.F.R. §§ 9037.1, 9037.2. However, a shortfall in the Presidential Election Campaign Fund meant that there were no funds available in the Matching Payment Account for the Treasury to pay to Senator Edwards or any other candidate on January 2. In fact, the United States Treasury did not make the first payment to the Committee until February 14, 2008. Senator Edwards withdrew from the campaign on January 30, 2008, making that date his DOI. *See* 11 C.F.R. § 9033.5. At that time, of course, he had received no payments at all from the Treasury and would not for another 15 days.

Moreover, on December 31, 2007, the Commission lost its quorum. As a result, it could not certify Senator Edwards' entitlement to any amounts in addition to those it had certified earlier that month. *See* 26 U.S.C. § 9036; 2 U.S.C. § 437c(c). As it happened, the Commission was unable to certify Senator Edwards' entitlement to any additional amounts until July 2008, months after the candidate's DOI.

The Committee asserts that even under the Commission's longstanding approach to post-DOI payments, but for the shortfall in the Presidential Election Campaign Fund and the lack of a Commission quorum, it would have already received by January 30 all but \$2.9 million of the \$12.8 million in matching funds it was eventually paid. Because of that, it notes, none of the amount it would have received prior to DOI would have been subject to repayment for having been received in excess of entitlement. Committee Response at 4. Thus, the Committee appears to argue that the Commission should change its approach and pay matching funds for all matchable contributions deposited by the Committee prior to DOI, because otherwise shortfalls in the Presidential Election Campaign Fund and unique circumstances like the lack of a Commission quorum will shortchange committees in the end, preventing them from receiving funds they otherwise would have received, or in some instances, like this one, requiring them to repay funds that they otherwise would not have had to repay. *See id.*

The question, then, is whether, as the Committee claims, the unique circumstances of 2007 and 2008 call for the Commission to ignore the plain meaning of 11 C.F.R. § 9034.1 and change its long standing practice and policy. We conclude they do not. The Committee's claim that section 9034.1 "presumes that eligible candidates have already received payments to which they are entitled prior to the date of ineligibility, and not, as in this case, after," *see* Committee Response at 5 n.4, is incorrect. When drafting the regulations, the Commission considered that a shortfall in the Presidential Election Campaign Fund might prevent a committee from being paid the full amount the Commission had certified prior to DOI. Explanation and Justification for 11 C.F.R. § 9034.1, 56 Fed. Reg. 35,898, 35,904-05 (July 29, 1991). The Commission nevertheless concluded that post-DOI entitlement would be based on the candidate's NOCO at the time of payment of public funds rather than the date the matchable contributions were received or the date of submission. In particular, the Commission's regulations provide that "[a]fter the candidate's date of ineligibility, if the candidate does not receive the entire amount of matching funds on a regularly scheduled payment date due to a shortfall in the matching payment account, the candidate shall also submit a revised statement of net outstanding campaign obligations," on which basis the Commission may "revise the amount previously certified for payment." 11 C.F.R. §§ 9034.5(f)(3), 9036.4(c)(2). In other words, if a shortfall delays payment, any eventual payment will be based on any subsequent NOCO statement, and this may result in a reduction even to amounts already certified by the Commission. The Committee may wind up not receiving amounts it otherwise would have received but for the shortfall. The Commission was well aware of this when it promulgated the regulation. *See also* 56 Fed. Reg. at 35,904-05 (noting that candidates' receipt of matching funds "could be affected by the amount of funds available in the matching payment account").

Regardless of whether the Committee was paid the full amount the Commission had certified prior to DOI, the Committee should not be permitted to receive public funds after DOI unless it has NOCOs that those funds will be used to pay. In this instance, as noted in Part II.A, the Committee's NOCO Statements at the time of payment appeared to support further payment of public funds, but the audit has revealed that the NOCOs were in fact overstated. Consequently, the Committee received funds in excess of entitlement.