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COMMISSION  
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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

2004 MAR -9 A 10: 08

March 8, 2004

## AGENDA ITEM

For Meeting of: 03-11-04

**SUBMITTED LATE**

### MEMORANDUM

**To:** The Commissioners

**Through:** James A. Pehrkon  
Staff Director

Robert J. Costa  
Deputy Staff Director

Joseph F. Stoltz  
Assistant Staff Director

**From:** Ray Lisi  
Deputy Assistant Staff Director

**Subject:** Eligibility Report- Rev. Alfred C. Sharpton/Sharpton 2004

Attached is a report from the Audit Division regarding the eligibility of Rev. Alfred C. Sharpton/Sharpton 2004 to receive Presidential primary matching fund payments. Previously an eligibility report was circulated and then withdrawn to allow an analysis of the impact on eligibility of Rev. Sharpton potentially having exceeded his personal expenditure limitation under 11 CFR 9035.2. That analysis by the Office of General Counsel is attached (Attachment A), along with an analysis of the original eligibility report (Attachment B). Upon approval of the report, Rev. Alfred C. Sharpton/Sharpton 2004 will be advised that additional matching fund requests may be presented on a monthly basis.

This report is being circulated for placement on the March 11, 2004, open session agenda. Should you have any questions regarding this matter, please contact Ray Lisi at Ext. 1200.

Attachments as stated



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

ELIGIBILITY REPORT  
OF THE  
AUDIT DIVISION  
REV. ALFRED C. SHARPTON/  
SHARPTON 2004

For a Candidate seeking to become eligible to receive Presidential primary matching fund payments, 26 U.S.C. §9033(a) and (b) and 11 CFR §§9033.1 and 9033.2 set forth a series of agreements and certifications which must be executed by the Candidate. Among the certifications that the Candidate makes is a statement that he and his authorized committee(s) have not and will not exceed the limitations at 11 CFR §9035.2 (11 CFR §9033.3(b)(2)). In addition, 11 CFR §§9036.1(b) and 9033.2 require the Candidate and Committee to submit a Threshold Submission, prepared in accordance with the Commission's Guideline for Presentation in Good Order, which documents that matchable contributions exceeding \$5,000 have been received from residents of at least 20 States, which with respect to any one contributor, do not exceed \$250.

On January 2, 2004, Rev. Alfred C. Sharpton/Sharpton 2004 submitted a Threshold Submission along with a Letter of Candidate and Committee Agreements and Certifications as specified by 11 CFR §§9033.1 and 9033.2. (See copy at Attachment 1).

The Office of General Counsel has reviewed the Letter of Candidate and Committee Agreements and Certifications submitted by Rev. Alfred C. Sharpton/Sharpton 2004. The legal analysis from that office states that the letter meets all requirements as specified at 26 U.S.C. §9033, 11 CFR §§9033.1 and 9033.2. (See copy at Attachment 2). The Audit Division reviewed the Threshold Submission and, based upon the information and documentation contained in the submission, determined that Alfred C. Sharpton/Sharpton 2004 have raised in excess of \$5,000 in matchable contributions in 20 states. (See listing of qualifying states and verified amounts at Attachment 3).

Section 9035.2 of Title 11 of the Code of Federal Regulations states, in part, that no candidate who has accepted matching funds shall knowingly make expenditures from his or her personal funds in connection with his or her campaign for nomination for election to the office of President which exceeds \$50,000 in the aggregate. Further expenditures made using a credit card for which the candidate is jointly or solely liable will count against the limits of this section to the extent that the full amount due,

including any finance charge, is not paid by the committee within 60 days after the closing date of the billing statement on which the charges first appear.

A review of the Sharpton 2004 February monthly disclosure report shows that at January 31, 2004, \$20,000 was owed to Rev Sharpton in the form of loans. In addition the report includes \$81,802.38 in unpaid reimbursement requests owed to Rev. Sharpton. Of this amount \$27,821.13 has been outstanding in excess of 60 days. Therefore between loans and reimbursement requests that are more than 60 days old Rev. Sharpton is owed \$47,821.13. The remaining \$53,981.25 in unpaid reimbursement requests were first reported on the 2003 year end report but it is not possible to determine whether any portion of this amount may be outstanding in excess of 60 days since it could have been incurred anytime during the period October through December 2003 (See Attachment 4)

The Commission has addressed the issue of a candidate exceeding his personal expenditure limitation in Advisory Opinion 1983-9. In that case the candidate asked whether it would be acceptable to loan his committee in excess of \$50,000 during the testing the waters period if he were to then be reimbursed by his committee once he decided to become a candidate and applied for matching funds. The Commission decided that if the candidate were reimbursed within 10 days of becoming a candidate,<sup>1</sup> he would be able to certify that he had not and would not exceed the personal expenditure limitation and therefore be eligible to receive matching funds if all other eligibility requirements were met. Conversely, the Advisory Opinion concludes if the amount loaned to the committee was in excess of \$50,000 after the requester became a candidate, he could not certify that he had not and would not exceed the limitation at 9035.2 and would not qualify for matching funds.

Based on the information noted above it is the opinion of the Audit staff that a question exists as to whether Rev Sharpton has exceeded his personal expenditure limitation under 11 CFR §9035.1. The evidence is not sufficient to recommend an initial determination that matching fund eligibility be denied; however, it appears that a further review of this matter is warranted.

### RECOMMENDATIONS

- 1) The Audit Division recommends that the Commission determine that Rev. Alfred C. Sharpton/Sharpton 2004 have fulfilled the requirements set forth in 26 U.S.C. §9033(a) and (b) and 11 CFR §§9033.1, 9033.2, and 9036.1(b) and have established eligibility to receive primary matching fund payment under 26 U.S.C. §9037 and 11 CFR §9037.1.

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<sup>1</sup> At the time the Advisory Opinion was issued, 11 CFR §101.3 provided that contributions that were not in compliance with the Act could be used for testing the waters expenses provided that such contributions were returned to the contributors within 10 days of the individual becoming a candidate. The current regulation does not allow the receipt of such contributions during the testing the waters period and therefore the 10 day grace period no longer exists.

- 2) The Audit Division further recommends that the Commission initiate a review under 11 CFR §9039.3 to gather further evidence regarding the loans and unpaid reimbursement requests in question.
- 3) The Audit Division also recommends that, in accordance with 11 CFR §9036.1(c)(3) and the Commission's Guideline for Presentation in Good Order, a notification letter be sent to the Candidate regarding the Commission's eligibility determination. The letter further advises that additional Matching Fund requests may be presented to the Commission for review on a monthly basis. (See proposed letter at Attachment 5)
- 3) The Audit Division recommends that the Commission notify the Secretary of the Treasury of the Candidate/Committee's eligibility to receive payments from the Presidential Primary Matching Payment Account and certify an initial payment of \$100,000. (See proposed letter at Attachment 6)

Attachments as stated

January 2, 2004

Chairman Bradley A. Smith  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Dear Chairman Smith:

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 Democratic 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.
- IX. 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.

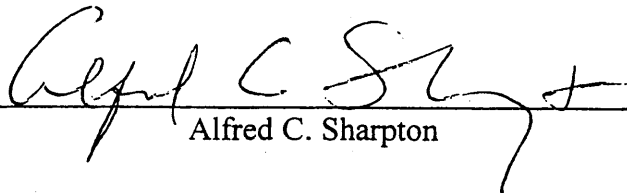
Name of Person: Luiz Miranda  
Mailing Address: 895 Broadway  
New York, NY 10003

Designated  
Depository: Citibank, NA

Address: 704 Allerton Ave.  
Bronx, NY 10467

- 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 100-116, 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.

Signed: \_\_\_\_\_

  
Alfred C. Sharpton



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463


RECEIVED  
FEDERAL ELECTION  
COMMISSION  
AUDIT DIVISION

2004 JAN 20 A 9:42


JANUARY 15, 2004


**MEMORANDUM**


TO: Joseph F. Stoltz  
Assistant Staff Director  
Audit Division

THROUGH: James A. Pehrkon   
Staff Director

Robert J. Costa  
Deputy Staff Director

FROM: James A. Kahl   
Deputy General Counsel

Lorenzo Holloway   
Assistant General Counsel  
for Public Finance and Audit

Dawn R. Jackson   
Attorney

SUBJECT: Letter of Candidate and Committee Certifications and Agreements-  
Sharpton 2004 (LRA# 644)

On January 7, 2004, the Audit Division forwarded to the Office of General Counsel a copy of the letter of candidate and committee certifications and agreements submitted by Alfred C. Sharpton ("the Candidate") and Sharpton 2004 ("the Committee") pursuant to 11 C.F.R. §§ 9033.1 and 9033.2. The Audit Division requested that this Office review the Committee's application materials to ensure that it conforms with the Commission's regulations:

This Office reviewed the letter of Candidate and Committee certifications and agreements submitted, and we concur with the Audit Division that the documents are in conformance with 11 C.F.R. §§ 9033.1 and 9033.2.



**Sharpton 2004**  
**Qualifying Threshold States**

<u>State</u>	<u>Verified Matchable</u> <u>Amount</u>
1. Alabama	\$ 5,180.00
2. California	\$ 5,396.00
3. Connecticut	\$ 5,325.00
4. Washington DC	\$ 5,237.00
5. Florida	\$ 5,320.00
6. Georgia	\$ 5,015.00
7. Illinois	\$ 5,045.00
8. Louisiana	\$ 5,060.00
9. Massachusetts	\$ 5,145.00
10. Maryland	\$ 5,210.00
11. Michigan	\$ 7,015.00
12. Missouri	\$ 5,345.00
13. Mississippi	\$ 5,025.00
14. North Carolina	\$ 5,190.00
15. New Jersey	\$ 7,795.00
16. New York	\$ 5,510.00
17. Ohio	\$ 5,055.00
18. Pennsylvania	\$ 5,189.00
19. South Carolina	\$ 5,294.00
20. Virginia	<u>\$ 5,275.00</u>
Total:	\$ 108,626.00

Sharpton 2004  
 Schedule of Loans and Expense  
 Reimbursements Owed to Candidate  
 As of January 31, 2004

Incurance Date	Loan Amount	Expense Reimbursement	Payments	Outstanding Balance	Balance	Memos From Disclosure Reports
1/9/2004	\$10,000.00			\$10,000.00	\$10,000.00	
12/19/2003	\$5,000.00			\$5,000.00	\$15,000.00	
12/29/2003	\$5,000.00			\$5,000.00	\$20,000.00	
4/1-6/30/03		\$8,000.00		\$8,000.00	\$28,000.00	Reimbursement for services rendered 4/1-6/30/03 - Julie Ritkind
4/1-6/30/03		\$22.00		\$22.00	\$28,022.00	Cell Phone bill Personal American Express Card Rev. Sharpton- Campaign related travel, lodging and expense charges for Rev. Sharpton, Eddie and Majorie Harris-Treasurer
08/03		\$41,000.00	\$21,200.87	\$19,799.13	\$47,821.13	requested in writing itemization of charges.
10/1-12/31/03		\$83,981.25	\$30,000.00	\$53,981.25	\$101,802.38	See Above

March, 2004

Rev Alfred C. Sharpton  
c/o Sharpton 2004  
895 Broadway 5<sup>th</sup> Floor  
New York, NY 10003

Dear Rev. Sharpton:

This letter is to advise you that, pursuant to 11 CFR §§9033.4 and 9036.1(c), on March, 2004, the Federal Election Commission approved an Audit Division staff report which states that you, as a Presidential candidate, have satisfied the eligibility requirements of 26 U.S.C. §9033(a) and (b) and 11 CFR §§9033.1, 9033.2, and 9036.1(b). In approving this report, the Commission has determined that your eligibility has been established to receive payments from the Presidential Primary Matching Payment Account under the provisions of 26 U.S.C. §9037 and 11 CFR §9037.1. A copy of the report is enclosed for your information.

Based on the Commissions approval of this report an initial certification of \$100,000 will be forwarded to the Secretary of the Treasury at this time. Additional Matching Fund requests may now be presented to the Commission once a month beginning on April 1, 2004. (See List of Submission Dates at Attachment 1).

The Commission suggests that prior to April 2004 your committee contact the Office of Financial Management Service at the Department of Treasury to arrange for a method of payment. In addition, please transmit in writing to the Department of Treasury the bank account number of the account to which payments will be deposited.

Should you have any questions regarding these matters, please contact Mr. Raymond Lisi of the Audit Division at (202) 694-1200 or toll free at (800) 424-9530.

Sincerely,

Bradley A. Smith  
Chairman

Enclosure as stated  
cc: Treasurer

**SCHEDULE OF MATCHING FUND SUBMISSION DATES  
AND CERTIFICATION DATES  
FOR 2004 PRESIDENTIAL CANDIDATES**

<u>SUBMISSION DATES</u>	<u>CERTIFICATION TO TREASURY</u>
04/01/03	12/29/03
05/01/03	12/29/03
06/02/03	12/29/03
07/01/03	12/29/03
08/01/03	12/29/03
09/01/03	12/29/03
10/01/03	12/29/03
11/03/03	12/29/03
12/01/03	12/29/03
01/02/04	01/29/04
02/02/04	02/26/04
03/01/04	03/30/04
04/01/04	04/29/04
05/03/04	05/28/04
06/01/04	06/29/04
07/01/04	07/29/04
08/02/04	08/30/04
09/01/04	09/29/04
10/01/04	10/28/04
11/01/04	11/29/04
12/01/04	12/30/04
01/03/05	01/28/05
02/01/05	02/25/05
03/07/05	03/30/05

Treasury Department payment dates will generally be within 48 hours of the certification dates.

March, 2004

The Honorable John W. Snow  
Secretary  
Department of the Treasury  
Washington, DC 20220

Dear Mr. Secretary:

On March, 2004, the Federal Election Commission determined that the following candidate and his authorized committee seeking nomination for election to the Office of President of the United States had satisfied the eligibility requirements of 26 U.S.C. §9033 and 11 CFR §§9033.1, 9033.2, and 9036.1 to receive presidential primary matching funds under 26 U.S.C. §9037 and 11 CFR §9037.1:

Re. Alfred C. Sharpton/Sharpton 2004

Pursuant to 11 CFR §9033.1(b)(8), the following individual and depository were designated by the candidate to receive funds from the Presidential Primary Matching Payment Account under 26 U.S.C. §9037 and 11 CFR §9037.1:

Designated Recipient:	Luiz Miranda
Address of Recipient:	895 Broadway New York, NY 10003
Designated Depository:	CitiBank, NA 704 Allerton Ave. Bronx, NY 10467

Accordingly, on March, 2004 the Commission certified that Rev. Alfred C. Sharpton/Sharpton 2004 is entitled to an initial payment of \$100,000.00 from the Presidential Primary Matching Payment Account.

Sincerely,

Bradley A. Smith  
Chairman

Attest:

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Mary W. Dove  
Secretary to the Commission



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

FEBRUARY 26, 2004

**MEMORANDUM**

**TO:** Joseph F. Stoltz  
Assistant Staff Director  
Audit Division

**THROUGH:** James A. Pehrkon  
Staff Director

**FROM:** James A. Kahl  
Deputy General Counsel

Thomasenia P. Duncan  
Associate General Counsel

Lorenzo Holloway  
Assistant General Counsel  
for Public Financing and Audit Advice

Michelle E. Abellera  
Attorney

**SUBJECT:** Eligibility Report of the Audit Division on Rev. Alfred C. Sharpton/Sharpton 2004 (LRA #644)

**I. INTRODUCTION**

On January 2, 2004, Alfred C. Sharpton ("the Candidate") and Sharpton 2004 ("the Committee") submitted documentation supporting their eligibility for public funding under the Presidential Primary Matching Payment Account Act ("Matching Payment Act"). 11 C.F.R. §§ 9033.2(b)(3) and (c). The Audit Division examined the threshold submission and submitted a proposed eligibility report to this Office for review. In the report, the Audit Division recommends that the Commission certify the Candidate as eligible to receive public funds. The Office of General Counsel reviewed the eligibility report, and we concur with the Audit Division's recommendation. This Office previously reviewed the Committee's application materials and recommended approval of the letter of Candidate and Committee certifications and agreements. After our review,



the Office of General Counsel received information that the Candidate and the Committee may have violated the Federal Election Campaign Act of 1971 ("the Act") prior to their application for matching fund payments. These alleged violations raise the issue of whether the Commission should withhold its certification of public funds to the Candidate.

## II. DISCUSSION

The information indicates that the Committee may have violated the Act and the regulations by failing to disclose campaign expenditures and in-kind contributions and receiving corporate and excessive contributions. According to various news accounts, the Candidate traveled extensively for the campaign, and many of his appearances coincided with travel for other purposes including paid speeches and sermons, book promotions, and advocacy for his non-profit organization, National Action Network ("NAN"). The Committee, which reported only limited campaign expenditures for travel, may have shared its travel expenses with other entities. The Committee and NAN also participated in joint events. However, they may have failed to divide the costs of the events. Furthermore, NAN may have provided salary and financial support for various campaign consultants and staff. The Commission also has information indicating the campaign may have received and failed to disclose in-kind contributions for travel (airplanes, cars) and fundraising events (invitations, food, beverage). Lastly, the Committee may have submitted multiple contributions from the same individual for matching.

These alleged violations are not sufficient to withhold certification of the Candidate's eligibility for public funds. The Commission's obligation to certify matching fund payments to candidates under the Matching Payment Act is a serious and important role, and these funds should only be denied in extreme cases. *See Committee to Elect Lyndon LaRouche v. Federal Election Commission*, 613 F.2d 834, 841 (D.C. Cir. 1979) ("CTEL"). The policy underlying the certification process is "to provide prompt payments to eligible candidates" to ensure they "will have the money [they] need at a time when its availability is most important to the [campaign]." *CTEL*, 613 F.2d at 841. As such, the Commission may only reject certification if a matching fund request: (1) is not properly documented to meet threshold requirements, or (2) contains "patent irregularities suggesting the possibility of fraud." *Id.* at 842; *see also In re Carter-Monroe Reelection Committee, Inc.*, 642 F.2d 538, 544-45 (D.C. Cir. 1980) (Commission can investigate allegations concerning the certification of public funds when "it reasonably appears that a patent fraud or other major violation of law is being committed.")

The information received by the Office of General Counsel does not indicate that the Candidate's threshold submission for public funds includes patent irregularities suggesting fraud.<sup>1</sup> See *CTEL*, 613 F.2d at 841; *In re Carter-Mondale*, 642 F.2d at 544. The Candidate and the Committee submitted documentation to support the threshold submission, and the Audit Division found the documentation was sufficient. Therefore, we concur with the Audit Division's recommendation that the Commission certify the Candidate eligible to receive public funds.

The Commission has considered whether to deny certification of public funds under similar circumstances and has allowed payment of public funds when there is no evidence of fraud. In the 1992 election cycle, the Commission considered a petition filed by the Republican National Committee ("RNC") against the Clinton/Gore '92 campaign wherein the RNC alleged that the Clinton/Gore campaign impermissibly received funding from the Democratic National Party. The Commission rejected the petition since it did not reasonably appear that patent fraud or violations occurred in the subject transaction which would require withholding of payments. See *Statement of Reasons supporting denial of petition to deny certification of matching funds to Governor Bill Clinton* (approved June 25, 1992); see also *Statement of Reasons supporting denial of request to deny certification of matching funds to Senator Robert J. Dole and Dole for President, Inc.* (approved August 8, 1996) and *Statement of Reasons supporting denial of request to deny certification of matching funds to President William J. Clinton and Clinton/Gore '96* (approved September 3, 1996) (Commission rejected requests to suspend matching fund payments to campaign committees; Commission found allegations that committees exceeded expenditure limitation were speculative and did not create reasonable belief that patent fraud had occurred).

Finally, we note that a decision to certify the Candidate eligible to receive public funds will not prevent an orderly resolution of the issues raised by these possible violations of the Act. To the extent that these assertions are substantiated and constitute violations under the Act, the Commission may pursue these violations in another context. Moreover, the Audit Division will examine some of these transactions during its mandatory audit, and the Commission will eventually be presented with information on these transactions. 11 C.F.R. § 9038.1.

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<sup>1</sup> The Commission may also suspend matching fund payments if the Commission receives information that the candidate knowingly and substantially failed to comply with the disclosure requirements. 11 C.F.R. § 9033.9(a). However, we do not have any information suggesting that the Candidate knowingly and substantially filed false reports.



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

March 9, 2004

**MEMORANDUM**

**TO:** Joseph F. Stoltz  
Assistant Staff Director  
Audit Division

**THROUGH:** James A. Pehrkon  
Staff Director

**FROM:** James A. Kahl *JAK*  
Deputy General Counsel

Thomasenia P. Duncan *TPD*  
Associate General Counsel

Lorenzo Holloway *LH*  
Assistant General Counsel  
for Public Financing and Audit Advice

Albert R. Veldhuyzen *AV*  
Attorney

Michelle E. Abellera *mea*  
Attorney

**SUBJECT:** Eligibility Report of the Audit Division on Rev. Alfred C.  
Sharpton/Sharpton 2004 (LRA #644)

**I. INTRODUCTION**

In order for the Commission to certify a candidate as eligible to receive public funds under the Presidential Primary Matching Payment Account Act ("Matching Payment Act"), the candidate must satisfy two basic requirements: 1) submit a letter of candidate agreement and certifications and 2) submit a satisfactory threshold submission of contributions that can be matched for public funds. 11 C.F.R. §§ 9033.2(a)(1) and (c). On January 2, 2004, Reverend Alfred C. Sharpton ("Candidate") and Sharpton 2004 ("Committee") submitted the Candidate's letter of agreement and certifications and the threshold submission to the Commission.

The Audit Division reviewed the Candidate's threshold submission, and it concluded that the Candidate met the minimum requirements. As a part of this examination, the Audit Division identified routine errors that included two contributions from the same individual that were submitted for matching. However, the Audit staff removed these contributions from the pool that was available for matching. With additional information from the Committee, the Candidate met the requirements for the threshold submission. Therefore, on February 26, 2004, the Audit Division submitted a report to the Commission that recommended certifying the Candidate as eligible to receive public funds.

A Commissioner objected to the eligibility report on the basis that: 1) the Candidate may be committing a major violation of law<sup>1</sup>; and 2) the Candidate may have failed to comply with disclosure requirements.<sup>2</sup> As a result of the Commissioner's objection, the Audit Division examined the Committee's disclosure reports and discovered information suggesting that the Candidate may have exceeded the amount of personal funds that he could expend on behalf of his committee. Accordingly, on March 4, 2004, the Audit Division withdrew the report recommending that the Commission determine the candidate as eligible to receive public funds.

On March 5, 2004, the Audit Division asked the Office of General Counsel whether the Candidate would be deemed ineligible based upon disclosure reports suggesting, but not establishing, that the Candidate may have exceeded his personal expenditure limitation. The Audit Division did not identify patent irregularities

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<sup>1</sup> The Commission is not required to determine whether the candidate is committing a major violation of law prior to certifying a candidate as eligible to receive public funds. In *In re Carter-Mondale Reelection Committee, Inc.*, the court of appeals held that it did not have jurisdiction to hear petitions to deny or delay certification of public funding while a related complaint, filed under 2 U.S.C. § 437g, was pending at the Commission. *In re Carter-Mondale Reelection Committee, Inc.*, 624 F.2d 538 (D.C. Cir. 1980) ("*In re Carter-Mondale*"). The court's holding was supported, in part by its interpretation of the statute as precluding denial of public funding once the objective criteria are met. *In re Carter-Mondale*, 624 F.2d at 544. The court noted in dicta that by so interpreting the statute, it was not interfering with the Commission's ability to investigate a major violation of law. *Id.* The court did not indicate that the Commission was required to engage in such an examination prior to certifying a candidate as eligible.

<sup>2</sup> The Commissioner also questioned whether the Commission should apply the 10% rule of 11 C.F.R. § 9033.5(b) to conclude that the Candidate became ineligible to receive public funds for the purpose of seeking the nomination while his application for funds was pending. If the Commission applied the rule in this way, the Candidate would have become ineligible on March 4, 2004, thirty days after the second consecutive primary when he received less than 10% of the vote. Under this scenario, the Candidate's entitlement could be limited to the debt reflected on the Candidate's Statement of Net Outstanding Campaign Obligations. 11 C.F.R. § 9034.1(a). This is a novel question, which would appear to be more relevant to the amount of the entitlement to, rather than eligibility for, public funds.

suggesting the possibility of fraud in the threshold submission. *Committee to Elect Lyndon LaRouche v. Federal Election Commission*, 613 F.2d 834, 842 (D.C. Cir. 1979) (“CTEL”).<sup>3</sup> This is an issue that involves the other criterion for receiving funds: the Candidate’s certification.

## II. THE COMMISSION SHOULD CERTIFY THE CANDIDATE AS ELIGIBLE FOR PUBLIC FUNDS

The regulations promulgated under the Matching Payment Act require the candidate to certify to several items including that the candidate and his/her authorized committee “have not incurred and will not incur expenditures in connection with the candidate’s campaign for nomination, which expenditures are in excess of the limitations.”<sup>4</sup> 11 C.F.R. § 9033.2(b)(2). The candidate may not knowingly make expenditures in connection with his campaign from his personal funds that exceed \$50,000. 11 C.F.R. § 9035.2(a)(1). If the Commission determines that a candidate knowingly and substantially exceeded the expenditure limitations prior to the candidate’s application for certification, the Commission may determine the candidate ineligible to receive matching funds. 11 C.F.R. § 9033.3(a); *see also* Advisory Opinion 1983-9A (candidate loaned his committee funds in excess of \$50,000 before becoming a candidate; Commission noted that, if excess funds were not returned before candidacy became official, candidate would not be eligible to receive matching funds because he could not certify that he had not exceeded the personal expenditure limitation).

According to the Audit Division’s eligibility report, the Committee owes the Candidate \$47,821.13 for loans and expenses the Candidate made on behalf of the Committee. However, the Audit staff does not know whether any portion of an additional \$53,981.25 in unreimbursed expenses is subject to the Candidate’s personal expenditure limitation.

The Audit Division’s findings are not sufficient to deny the Candidate’s eligibility for public funds. The current information does not demonstrate that the Candidate exceeded the personal expenditure limitations prior to his application for public funds, or

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<sup>3</sup> When evaluating a candidate’s threshold submission, the Commission should simply assess whether the submission meets the fundraising requirements and whether “[the] submission (or [the] submission together with other reports on file with the Commission) contains patent irregularities suggesting the possibility of fraud.” *LaRouche v. FEC*, 996 F.2d at 1267 (citing *CTEL*, 613 F.2d at 842). If the results of both inquiries are favorable to the Candidate, the Commission should certify him as eligible. *Id.* If patent irregularities are uncovered, the Commission may conduct a “properly circumscribed investigation.” *CTEL*, 613 F.2d at 842.

<sup>4</sup> The statute does not include the backward looking language of “have not incurred.” The Matching Payment Act only requires the candidate to certify that he will not incur expenses in excess of the expenditure limitation. *Compare* 26 U.S.C. § 9033(b)(1) *with* 11 C.F.R. § 9033.2(b)(2).

that he now has exceeded the limitation. And, given the lack of even a facial violation of the expenditure limitations, we cannot conclude whether the Candidate “knowingly and substantially” exceeded the \$50,000 limit.

Given the important constitutional free speech considerations inherent in the public financing system, the overall goal of the system is for the Commission to determine the candidate eligible once the candidate has met the *objective* criteria for eligibility. *In re Carter-Mondale*, 624 F.2d at 544 (D.C. Cir. 1980); *CTEL*, 613 F.2d at 844. The Commission may not engage in an exercise of examining a candidate’s *subjective* intent in his certifications and commitments. *LaRouche v. Federal Election Commission*, 996 F.2d 1263, 1266 (D.C. Cir. 1993).<sup>5</sup> Nor should it rely on speculative allegations to deny public funding. *In re Carter-Mondale*, 624 F.2d at 547. These focused inquiries promote the policy of providing “prompt payments to eligible candidates” to ensure they “will have the money [they] need at a time when its availability is most important to the [campaign].” *CTEL*, 613 F.2d at 841.

Whether a candidate exceeded his personal expenditure limitation is an objective test. This examination merely requires the Commission to count the amount the candidate has spent on behalf of the Committee against the \$50,000 expenditure limitation. By applying this objective test, the Commission will not have to be concerned with potentially exceeding its boundaries as in *LaRouche*.<sup>6</sup> See *LaRouche*, 996 F.2d 1263. Moreover, the Candidate must exceed the limitations “knowingly and substantially,” a threshold that requires the Commission to meet a high burden before it can deny a candidate’s eligibility on this basis. 11 C.F.R. § 9033.3(a). This high burden is consistent with the “important constitutional free speech considerations inherent in public campaign financing” that the court of appeals has stressed. *In re Carter-Mondale*, 642 F.2d at 544.<sup>7</sup> However, we do not reach the question of whether the Commission could meet this burden because the Audit Division’s report does not show that the Candidate had exceeded his personal expenditure limitation prior to his application for public funds. In fact, the report does not even show that the Candidate has now exceeded

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<sup>5</sup> In dictum, the court noted there could be a limitation to its instruction on subjective intent: The Commission may be able to deny eligibility if “a candidate, like a melodrama villain, whispers an aside that he intends to welsh on his commitments.” *LaRouche*, 996 F.2d at 1269.

<sup>6</sup> According to the Audit Division, the Commission has never determined that a candidate was ineligible to receive public funds on the basis that the candidate exceeded his personal expenditure limitation. The Commission has considered the question of whether it should *suspend* public funds on the basis of allegations that the 1996 Dole and Clinton Committees exceeded their overall expenditure limitations. In those cases, the Commission noted that the allegations were speculative and did not create a reasonable belief that patent fraud had occurred; therefore, it refused to suspend the candidate’s public funds. See *Statement of Reasons supporting denial of request to deny certification of matching funds to Senator Robert J. Dole and Dole for President, Inc.* (approved August 8, 1996); *Statement of Reasons supporting denial of request to deny certification of matching funds to President William J. Clinton and Clinton/Gore '96* (approved September 3, 1996).

<sup>7</sup> In *LaRouche*, the court noted “[T]he object of the statute is to enhance the ability of candidates to present their positions and themselves to voters in presidential primaries.” *LaRouche*, 996 F.2d at 1267.

his personal expenditure limitation. Therefore, we recommend that the Commission certify the candidate as eligible to receive public funds.

### III. THE COMMISSION SHOULD AUTHORIZE AN INVESTIGATION

While making the recommendation that the Commission certify the candidate as eligible, this Office does not suggest that there are no legitimate questions as to whether the candidate has exceeded or will exceed his personal expenditure limitation. The Audit Division's report notes that if an amount as low as \$2,200 of the unreimbursed expenses is applied to the Candidate's expenditure limitation, this will place the candidate over the expenditure limitation. It is our understanding that the Audit Division can determine whether the limitation has been exceeded if it had access to the Candidate's credit card billing statements.

The Commission should authorize an inquiry under 11 C.F.R. § 9039 to obtain the additional information required to determine if the Candidate has exceeded the personal expenditure limitation. The Commission may formally request the candidate's records, conduct fieldwork, or subpoena records to resolve this matter. 11 C.F.R. § 9039(b)(2). Therefore, we recommend that the Audit Division include in its revised eligibility report a recommendation for the Commission to authorize an inquiry under section 9039.

We note that the Commission does not withhold public funds pending the results of such an inquiry unless it finds patent irregularities suggesting the possibility of fraud in materials submitted by, or in the activities of, the candidate or his committee. 11 C.F.R. § 9039.3(a)(3). As noted above, evidence of such patent irregularities is not present herein. If the Commission obtains information from the investigation that the Candidate knowingly and substantially exceeded his personal expenditure limitation, the Commission may suspend the candidate's entitlement to public funds, and the Candidate will not be entitled to any additional public funds.<sup>8</sup> 11 C.F.R. §§ 9033.9(a) and (d)(2); *see* 11 C.F.R. § 9039.3(a)(2).

An investigation under section 9039 requires the Commission to provide a notice to the Candidate that will summarize the legal and factual basis for the Commission's decision to investigate. 11 C.F.R. § 9039.3(b)(1). Therefore, we recommend that the Audit Division include the enclosed factual and legal analysis as attachment to its

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<sup>8</sup> If the Commission has information suggesting that a candidate has knowingly and substantially filed false reports, an investigation under section 9039 can be used to determine if a candidate has done so. If the candidate has knowingly and substantially filed false reports, the Commission may suspend additional public funds. 11 C.F.R. § 9033.9(a). However, if a candidate corrects the reporting problems and pays any related civil or criminal penalties, a candidate may be entitled to additional public funds. 11 C.F.R. § 9033.9(d)(1).

eligibility report. We also recommend that the Audit Division incorporate the factual language from the eligibility report into a separate document<sup>9</sup> that can be enclosed as the factual basis for the summary.

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<sup>9</sup> The Audit Division should reference this document as “Audit Division Summary Report.”



**FEDERAL ELECTION COMMISSION  
FACTUAL AND LEGAL ANALYSIS IN SUPPORT OF INVESTIGATION  
AUTHORIZED PURSUANT TO 11 C.F.R 9039.3**

**I. INTRODUCTION**

On March 11, 2004, the Commission authorized an investigation of Rev. Alfred C. Sharpton ("Candidate") and Sharpton 2004 ("Committee") under 11 C.F.R § 9039.3(a)(1) for the purpose of determining the Candidate's continuing eligibility for public funds under the Presidential Primary Matching Payment Account Act ("Matching Payment Act"). In order for the Commission to certify a candidate as eligible to receive public funds under the Matching Payment Act, the candidate must satisfy two basic requirements: 1) submit a letter of candidate agreement and certifications, and 2) submit a satisfactory threshold submission of contributions that can be matched for public funds. 11 C.F.R. §§ 9033.2(a)(1) and (c). On January 2, 2004, the Committee submitted the Candidate's letter of agreement and certifications and the threshold submission to the Commission.

The Commission reviewed the Candidate's threshold submission, and it concluded that the Candidate met the minimum requirements. As a part of this examination, the Commission identified routine errors that included two contributions from the same individual that were submitted for matching. However, the Commission removed these contributions from the pool that was available for matching. With additional information from the Committee, the Candidate met the requirements for the threshold submission. Therefore, on March 11, 2004, the Commission certified the Candidate as eligible to receive public funds. However, the Commission has questions as

1 to whether the Candidate exceeded his personal expenditure limitation. 11 C.F.R.  
2 § 9035.2(a)(1).

3 **II. PERSONAL EXPENDITURE LIMITATION**

4 The regulations promulgated under the Matching Payment Act require the  
5 candidate to certify to several items including that the candidate and his/her authorized  
6 committee "have not incurred and will not incur expenditures in connection with the  
7 candidate's campaign for nomination, which expenditures are in excess of the  
8 limitations." 11 C.F.R. § 9033.2(b)(2). The candidate may not knowingly make  
9 expenditures in connection with his campaign from his personal funds that exceed  
10 \$50,000. 11 C.F.R. § 9035.2(a)(1). If the Candidate knowing and substantially exceeded  
11 his personal expenditure limitation, the Commission may suspend the candidate's  
12 entitlement to public funds, and the Candidate will not be entitled to any additional public  
13 funds. 11 C.F.R. §§ 9033.9(a) and (d)(2); *see* 11 C.F.R. § 9039.3(a)(2).

14 The attached Summary Report from the Commission's Audit Division shows that  
15 the Committee owes the Candidate \$47,821.13 for loans and expenses the Candidate  
16 made on behalf of the Committee. However, the Commission cannot determine without a  
17 further inquiry whether any portion of an additional \$53,981.25 in unreimbursed expenses  
18 is subject to the Candidate's personal expenditure limitation. The Summary Report notes  
19 that if an amount as low as \$2,200 of the unreimbursed expenses is applied to the  
20 Candidate's expenditure limitation, this will place the Candidate over the expenditure  
21 limitation.

1 **III. IMPACT OF COMMISSION INVESTIGATION**

2 If, after the investigation, the Commission finds that the Candidate knowingly and  
3 substantially exceeded his personal expenditure limitation, the Commission may suspend  
4 the Candidate's entitlement to public funds. 11 C.F.R. §§ 9033.9(a). In addition the  
5 Candidate will not be entitled to any additional public funds. 11 C.F.R. §§ 9033.9 (d)(2);  
6 *see* 11 C.F.R. § 9039.3(a)(2). Any information obtained from this investigation may be  
7 used as basis, or partial basis, for a repayment determination.

8 11 C.F.R § 9039.3(a)(2). The information may also be used in connection with an  
9 investigation under 2 U.S.C. § 437g. *Id.* However, if the Commission finds that no  
10 action or no further action is warranted in this matter, the Commission will notify the  
11 Candidate and the Committee of such findings. 11 C.F.R § 9039.3(b)(4).



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

March 8, 2004

## Audit Division Summary Report

For a Candidate seeking to become eligible to receive Presidential primary matching fund payments, 26 U.S.C. §9033(a) and (b) and 11 CFR §§9033.1 and 9033.2 set forth a series of agreements and certifications which must be executed by the Candidate. Among the certifications that the Candidate makes is a statement that he and his authorized committee(s) have not and will not exceed the limitations at 11 CFR §9035.2 (11 CFR §9033.3(b)(2)). In addition, 11 CFR §§9036.1(b) and 9033.2 require the Candidate and Committee to submit a Threshold Submission, prepared in accordance with the Commission's Guideline for Presentation in Good Order, which documents that matchable contributions exceeding \$5,000 have been received from residents of at least 20 States, which with respect to any one contributor, do not exceed \$250.

Section 9035.2 of Title 11 of the Code of Federal Regulations states, in part, that no candidate who has accepted matching funds shall knowingly make expenditures from his or her personal funds in connection with his or her campaign for nomination for election to the office of President which exceeds \$50,000 in the aggregate. Further expenditures made using a credit card for which the candidate is jointly or solely liable will count against the limits of this section to the extent that the full amount due, including any finance charge, is not paid by the committee within 60 days after the closing date of the billing statement on which the charges first appear.

A review of the Sharpton 2004 February monthly disclosure report shows that at January 31, 2004, \$20,000 was owed to Rev Sharpton in the form of loans. In addition the report includes \$81,802.38 in unpaid reimbursement requests owed to Rev. Sharpton. Of this amount \$27,821.13 has been outstanding in excess of 60 days. Therefore between loans and reimbursement requests that are more than 60 days old Rev. Sharpton is owed \$47,821.13. The remaining \$53,981.25 in unpaid reimbursement requests were first reported on the 2003 year end report but it is not possible to determine whether any portion of this amount may be outstanding in excess of 60 days since it could have been incurred anytime during the period October through December 2003. However if only \$2,200 of this amount were to be outstanding more than 60 days, Rev Sharpton will have exceeded the expenditure limitation under 11CFR §9035.1. (See Attachment 1)

The Commission has addressed the issue of a candidate exceeding his personal expenditure limitation in Advisory Opinion 1983-9. In that case the candidate asked

whether it would be acceptable to loan his committee in excess of \$50,000 during the testing the waters period if he were to then be reimbursed by his committee once he decided to become a candidate and applied for matching funds. The Commission decided that if the candidate were reimbursed within 10 days of becoming a candidate,<sup>1</sup> he would be able to certify that he had not and would not exceed the personal expenditure limitation and therefore be eligible to receive matching funds if all other eligibility requirements were met. Conversely, the Advisory Opinion concludes if the amount loaned to the committee was in excess of \$50,000 after the requester became a candidate, he could not certify that he had not and would not exceed the limitation at 9035.2 and would not qualify for matching funds.

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<sup>1</sup> At the time the Advisory Opinion was issued, 11 CFR §101.3 provided that contributions that were not in compliance with the Act could be used for testing the waters expenses provided that such contributions were returned to the contributors within 10 days of the individual becoming a candidate. The current regulation does not allow the receipt of such contributions during the testing the waters period and therefore the 10 day grace period no longer exists.

Sharpton 2004  
 Schedule of Loans and Expense  
 Reimbursements Owed to Candidate  
 As of January 31, 2004

Incurance Date	Loan Amount	Expense Reimbursement	Payments	Outstanding Balance	Balance	Memos From Disclosure Reports
1/9/2004	\$10,000.00			\$10,000.00	\$10,000.00	
12/19/2003	\$5,000.00			\$5,000.00	\$15,000.00	
12/29/2003	\$5,000.00			\$5,000.00	\$20,000.00	
4/1-6/30/03		\$8,000.00		\$8,000.00	\$28,000.00	Reimbursement for services rendered 4/1-6/30/03 - Julie Rifkind
4/1-6/30/03		\$22.00		\$22.00	\$28,022.00	Cell Phone bill
						Personal American Express Card Rev. Sharpton-Campaign related travel, lodging and expense charges for Rev. Sharpton, Eddie and Majorie Harris-Treasurer
08/03		\$41,000.00	\$21,200.87	\$19,799.13	\$47,821.13	requested in writing itemization of charges.
10/1-12/31/03		\$83,981.25	\$30,000.00	\$53,981.25	\$101,802.38	See Above