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FEDERAL ELECTION COMMISSION
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MEMORANDUM

AGENDA ITEM
For Meeting of: 9-29-04

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: James A. Kahl
Deputy General Counsel

Thomasenia P. Duncan
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

Delanie DeWitt Painter
Attorney

Michelle E. Abellera
Attorney

Albert R. Veldhuyzen
Attorney

SUBJECT: Oral Hearing- Sharpton 2004 (LRA # 644)

I. INTRODUCTION

The Office of General Counsel submits this memorandum to assist the Commission in outlining the issues for the Sharpton 2004 ("Committee") oral hearing on the repayment determination that the Commission has scheduled for September 29, 2004.[1] On May 14, 2004, the Commission determined that Rev. Alfred C. Sharpton ("the Candidate") and the Committee must repay $100,000 to the United States Treasury. Attachment 1. The repayment determination arose from the Commission's determination that the Candidate was never eligible to receive public funds because he spent more than $50,000 of his personal funds on his campaign as of the date he applied for matching funds.

[1] The Office of General Counsel will provide the Committee with a copy of this memorandum prior to the oral hearing.

A candidate's eligibility to receive public funds depends, in part, on the candidate not exceeding the $50,000 personal expenditure limitation at 26 U.S.C. § 9035(a) and 11 C.F.R. § 9035.2. The Presidential Primary Matching Payment Account Act ("Matching Payment Act") requires a candidate to certify that he will not incur qualified campaign expenses in excess of the expenditure limitations of section 9035. 26 U.S.C. § 9033(b)(1). The regulations promulgated under the Matching Payment Act require a candidate to certify that the candidate and his/her authorized committee "have not incurred and will not incur" expenditures in excess of the limitations of part 9035. 11 C.F.R. § 9033.2(b)(2).

Rev. Sharpton applied for public funds on January 2, 2004. The Commission reviewed his application and certified him eligible to receive public funds. In accordance with the Commission's certification, the United States Treasury paid the Candidate $100,000. Although the Commission certified the Candidate eligible, the Committee's disclosure reports revealed that the Candidate had incurred $47,821.13, and thus he was close to exceeding the $50,000 expenditure limitation. The Candidate used his credit card to incur most of the expenditures. Thus, it was likely, based on the available information, that he already had, or soon would, exceed the $50,000 expenditure limitation because more of his outstanding credit card debt would be subject to the expenditure limit as time elapsed from the closing dates of the credit card billing statements. *See* 11 C.F.R. § 9035.2(a)(2) (credit card charges count against a candidate's personal expenditure limitations to the extent that the full amount due, including any finance charge, is not paid within 60 days after the closing date of the billing statement on which the charges first appeared). Therefore, the Commission opened an investigation to resolve whether the Candidate had exceeded his $50,000 personal expenditure limitation. *See* 26 U.S.C. § 9039(b) and 11 C.F.R. § 9039.3.

The investigation revealed that the Candidate knowingly and substantially exceeded the $50,000 personal expenditure limitation by $66,976 as of January 2, 2004. The Committee claimed that the Candidate expended only $46,956.23 of his personal funds in connection with his campaign and that the Committee mistakenly reported large amounts of the Candidate's non-campaign related expenditures as campaign expenditures. Attachment 3 at 1-3. However, the Committee did not provide documentation to support its allocation of expenditures between campaign and non-campaign related expenses. Because the Candidate knowingly and substantially exceeded his personal expenditure limitation as of the date he applied for public funds, he was never eligible and was never entitled to receive any matching funds. 11 C.F.R. § 9033.3(a). As the Candidate was not entitled to any public funds, the entire $100,000 in public funds that he received was in excess of his entitlement. 26 U.S.C. § 9038(b)(1). Therefore, the Commission determined that the Candidate and the Committee must repay all public funds received in excess of his entitlement, $100,000.[2]

[2] Since the investigation revealed that the Candidate knowingly and substantially exceeded his expenditure limitation, the Commission suspended matching fund payments to the Candidate and the Committee on April 29, 2004. 11 C.F.R. §§ 9033.9(a) and (d)(2).

II. COMMITTEE'S RESPONSE TO REPAYMENT DETERMINATION

On July 16, 2004, the Committee submitted its written response to the repayment determination. Attachment 2. The Committee challenges the Commission's repayment determination on three bases. First, the Committee maintains that it properly allocated expenditures and, therefore, has demonstrated that the Candidate did not exceed his personal expenditure limitation. *Id.* at 1, 3. Second, the Committee argues that the Commission does not have an adequate legal basis to seek a repayment and the Commission cannot seek a repayment for public funds before the Commission conducts a full audit of the Committee's expenses. *Id.* at 2. Third, the Committee alleges that the Candidate has been unfairly treated and targeted by the Commission, with respect to the repayment, initiation of the investigation and the suspension of public funds.[3] *Id.*

III. CONSIDERATIONS FOR THE COMMISSION

A. ALLOCATION OF EXPENDITURES PAID BY THE CANDIDATE

The central factual dispute in this matter is the allocation of certain expenditures paid by the Candidate as either campaign-related and subject to the Candidate's $50,000 personal expenditure limitation, or unrelated to the campaign and not subject to that limitation. *See* 26 U.S.C. § 9035; 11 C.F.R. § 9035.2(a)(1). The Committee contends in its written response that it properly allocated the expenditures and the Candidate did not exceed his personal expenditure limitation. Attachment 2 at 1, 3. It states that it will use the oral hearing to "fully explain the Committee's allocation of expenditures and demonstrate that no repayment is required." Attachment 2 at 1. However, the Committee did not provide the details of its argument in its written response.

Rather than explaining its allocation of the expenditures paid by the Candidate in its response, the Committee refers to its response to the Commission's initial determination to suspend matching fund payments ("Suspension Response") and states that it "stands by its allocation of expenditures as explained in its prior submission." Attachment 2 at 1, 3. The Committee does not specifically state, but the Office of General Counsel assumes, that this statement means that the Suspension Response is incorporated by reference.[4] Otherwise, the Committee has waived the arguments about the details of its allocation set forth in the Suspension Response since a committee may only address issues at its oral hearing that it has raised in its written response to the notice of repayment determination. 11 C.F.R. § 9038.2(c)(2)(i) (candidate's failure to timely raise issues in the written materials constitutes a waiver of candidate's right to raise issue in future proceedings); *see Robertson v. FEC*, 45 F.3d

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[3] As the oral hearing is limited to matters concerning the repayment, this Office will not address issues related to the legality of the suspension of public funds in this memorandum. *See Explanation and Justification for 11 C.F.R. § 9007.2(c)*, 60 Fed. Reg. 31863 (June 16, 1995) (section 9007.2(c) is the parallel provision to 11 C.F.R. § 9038.2(c) promulgated under the presidential Election Campaign Fund Act).

[4] The Office of General Counsel's position on this issue does not bind the Commission in any future repayment determination. *See id.* at 927 ("staff memoranda do not set forth the Commission's position").

486, 491 (D.C. Cir. 1995) (regulation interpreted to limit additional material to the previously raised subjects).

In the Suspension Response, the Committee argued that the Candidate spent only $46,956.23 toward his personal expenditure limitation and that the Committee's disclosure reports were inaccurate. However, the Commission could not verify the Committee's claims that its prior disclosure reports were inaccurate and that the Candidate had only spent a total of $46,956.23 of his personal funds in support of his campaign. The Commission reviewed the available documentation and the Committee's disclosure reports. The Commission found that the Candidate made personal expenditures on behalf of his campaign totaling $116,976 as of January 2, 2004 -- more than double the personal expenditure limitation. Thus, the Candidate exceeded his personal expenditure limitation by $66,976 ($116,976 -$50,000) as of that date.

In order to demonstrate that no repayment, or a lesser repayment, is warranted, the Committee should: 1) explain its allocation at the oral hearing and 2) submit additional documentation in support of its allocation.[5] In his candidate agreement, the Candidate promised to provide all documentation related to disbursements and receipts and any other information the Commission may request as well as an explanation of the connection between disbursements made by the candidate and the campaign if requested by the Commission. 11 C.F.R. §§ 9033.1(b)(3) and (5). At the oral hearing, the Committee could explain its allocation of expenditures paid by the Candidate and clarify the facts in this matter. The Committee could explain why certain expenditures should not be considered campaign-related and how it determined which expenditures to include in its allocation. The Committee argued in the Suspension Response that many expenses it had reported as campaign expenses were not campaign-related, but were related to the Candidate's activities as head of the National Action Network ("NAN"). However, it did not explain which expenses were in connection with the Candidate's presidential campaign and which were related to activities on behalf of NAN or how expenses were allocated between the campaign and NAN. The Committee also reduced some expenses for transportation, hotel and other charges by percentages and crossed out charges on credit card statements and invoices for incidentals such as laundry, room service, meals, and telephone calls, without explaining these reductions and deletions.

The Committee could explain why it did not include in its allocation expenses related to Ed Harris, an individual who traveled with the Candidate. The primary difference between the Audit staff's accounting of the Candidate's campaign expenditures and the Committee's allocation is that the Audit staff included travel and subsistence expenses related to Mr. Harris. The Committee provided no explanation of what Mr. Harris did and why his travel and subsistence were related to NAN rather than to the presidential campaign. According to information from the Committee's disclosure reports, materials provided with the Committee's response, and press reports, Mr. Harris was the campaign videographer, who accompanied the

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[5] The Committee contends that as it had "only days, in the middle of the campaign, to justify each expenditure" it was "not able, in the Commission's estimation, to adequately justify its allocation of expenses in the time provided." Attachment 2 at 3. However, it did not provide any additional information to support its allocation in this response to the repayment determination, filed several months after the Commission's March 31, 2004 subpoena.

Candidate to most events. For example, the Committee's disclosure reports listed a direct payment to Mr. Harris for "Campaign Video Taping Service" a campaign-related expense and reported debt owed to the Candidate for Mr. Harris' travel expenses: "Personal American Express Card. Campaign related travel, lodging and expense charges for Rev. Al Sharpton, Eddie Harris and Marjorie Harris." It is possible that Mr. Harris provided services that were both campaign and non-campaign related. At the oral hearing, the Committee could also explain why it allocated travel and subsistence expenses for Mr. Harris as non-campaign expenses after it previously reported them as campaign expenses.

Further, the Committee could explain why its disclosure reports showed that the Candidate had more than doubled the personal expenditure limitation if he had not, in fact, done so. In its original disclosure reports, the Committee reported that the Candidate made expenditures from his personal funds that are more than double the $50,000 personal expenditure limitation, but in its Suspension Response it claimed those disclosure reports were erroneous.

Even if the Committee explains its allocation at the oral hearing, the Committee must submit documentation to support its allocations.[6] Specifically, the Committee could provide documentation to support its allocation figures including: 1) a detailed itinerary of the Candidate's travel listing his activities and the identity, function and activities of those traveling with him; 2) an explanation of the source and derivation of the amounts disclosed as owed to the Candidate on the Committee's original reports; 3) a description of Ed Harris' roles and functions for the campaign and for NAN and an explanation of why he traveled with the Candidate; and 4) an explanation of the Committee's analysis of the Candidate's expenses demonstrating how it determined which expenses were in connection with his presidential campaign and which were on behalf of NAN. The Committee could also provide documents it has not yet provided in response to the Commission's subpoena (issued during the investigation), including the Candidate's American Express card statements for January through March 11, 2004, expense reimbursement forms, requests to the Candidate for further information concerning expense reimbursements and information showing how payments were applied to outstanding reimbursement requests.

B. COMMISSION'S LEGAL AUTHORITY TO SEEK REPAYMENT

The Committee contends that the Commission has not cited an adequate legal basis to seek a repayment prior to a full audit of the Committee's expenses. The Commission's regulations address the Committee's contention, but the Committee could use the oral hearing to elaborate and explain its position in greater detail.

The Commission may make a repayment determination using: 1) information from the mandatory audit, or 2) information from a 9039 inquiry. *See* 11 C.F.R. §§ 9038.2(a)(1), 9038.2(c)(1). The Commission's regulations state that an investigation conducted pursuant to section 9039 may result in "an initial or additional repayment determination." 11 C.F.R. § 9039.3(b)(4).

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[6] The Committee could provide additional documentation to support its allocation within five days after the oral hearing.

With respect to timing, the Commission's regulations require the Commission to make repayment determinations "as soon as possible." 11 C.F.R. § 9038.2(a)(2). The Explanation and Justification for section 9039.3(b)(4) indicates that a repayment determination pursuant to a 9039 investigation is not dependent upon an audit of the Committee. It states that, "[i]f the inquiry results in an initial or additional repayment determination, *whether or not this coincides with a Commission audit*, the procedures set forth at 11 C.F.R. §§ 9038.2, 9038.4 and 9038.5 shall be followed." *Explanation and Justification for 11 C.F.R. § 9039.3(b)(4)*, 60 Fed. Reg. 31871 (June 16, 1995) (emphasis added).

C. FAIRNESS OF 9039 INQUIRY AND REPAYMENT DETERMINATION

The Committee alleges that the Commission "singled out [the Candidate] for unwarranted and unreasonable scrutiny. Attachment 2 at 2. The Committee states that it "is not aware of any other instance in which the Commission initiated [a 9039] investigation where information available to the Commission demonstrated" there was no facial violation. *Id.* In addition, the Committee alleges that the Commission not only required the Candidate to produce documents in a very short period of time, but also required the Candidate to justify his allocation of expenditures amidst the campaign. *Id.* at 2-3. The Commission's regulations and the courts' decisions appear to resolve these issues. However, the Committee could provide further explanation of its position at the oral hearing.

When the Commission reviews an application for public funds, it cannot look beyond the face of a candidate's threshold submission or withhold certification once the objective criteria have been met.[7] *LaRouche v. FEC*, 996 F.2d at 1267 (citing *Committee to Elect Lyndon LaRouche ("CTEL") v. FEC*, 613 F.2d 834, 842 (D.C. Cir. 1979)). Nor can it rely on speculative allegations to deny public funding. *In re Carter-Mondale Reelection Committee, Inc.*, 624 F.2d 538, 547 (D.C. Cir. 1980). However, the Commission has broad investigative powers outside of the certification process. *See CTEL*, 613 F.2d at 843, n. 14, 17. These powers include the authority to conduct investigations about any certification, determination or finding. *See* 11 C.F.R. § 9039.3(a).[8] Often, the Commission exercises its authority under section 9039 when the issues raised relate to the candidate's continuing eligibility or the amount of his or her entitlement during the course of the campaign. *See Explanation and Justification for 11 C.F.R. § 9039.3*, 48 Fed. Reg. 5224, 5232 (April 4, 1983). Section 9039 "provides the Commission with a means for resolving such questions expeditiously in the course of fulfilling its statutory obligations to review submissions and certify funds." *Id.* Thus, the Commission is not precluded from conducting an investigation after a candidate has been certified eligible for public funding. Nor do the Matching Payment Act or the Commission's regulations require that the Commission wait until the conclusion of a campaign before conducting an investigation under section 9039. *See* 26 U.S.C. §§ 9031-9042 and 11 C.F.R. parts 9031-9039.

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[7] When evaluating a candidate's threshold submission for matching fund payments, the Commission determines whether the submission meets the requirements of 11 C.F.R. § 9033.2(b) 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*, 996 F.2d at 1267.

[8] Unlike investigations conducted pursuant to 2 U.S.C. § 437g and 11 C.F.R. § 111.10, the Commission is not required to find reason to believe a violation has occurred before initiating an investigation under section 9039.

The Commission did not deny the Candidate eligibility because he exceeded the expenditure limitation. The Commission certified the Candidate as eligible, and he received $100,000 from the United States Treasury. The investigation found that he was never eligible to receive those funds. Therefore, the Commission is seeking a repayment.

Attachments

1. Inquiry Report and Notice of Repayment Determination for Alfred C. Sharpton and Sharpton 2004, approved May 14, 2004 (attachments omitted).

2. Response of Rev. Alfred C. Sharpton and Sharpton 2004 to the Repayment Determination, dated July 16, 2004.

3. Sharpton 2004 Response to Initial Determination to Suspend Public Funds, dated April 21, 2004 (narrative portion only).

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	LRA # 644
Alfred C. Sharpton, and	)	
Sharpton 2004	)	

INQUIRY REPORT AND NOTICE OF REPAYMENT DETERMINATION

I. SUMMARY REPAYMENT DETERMINATION

On May 14, 2004, the Federal Election Commission ("Commission") determined that Alfred C. Sharpton and Sharpton 2004 must repay $100,000 to the United States Treasury for matching funds received in excess of the candidate's entitlement. 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1). This Notice of Repayment Determination sets forth the factual and legal basis for the repayment determination. 11 C.F.R. §§ 9038.2(c)(1), 9039.3(a)(2) and (b)(4).

II. INTRODUCTION

Rev. Alfred C. Sharpton ("Candidate") was a candidate for the Democratic Party presidential nomination in the 2004 primary election. On January 2, 2004, Rev. Sharpton and Sharpton 2004 ("Committee") applied for matching fund payments under the Presidential Primary Matching Payment Account Act ("Matching Payment Act"), 26 U.S.C. §§ 9031-9042. *See* 11 C.F.R. §§ 9031-9039. The application included the Candidate's letter of agreements and certifications ("9033 Letter"). Attachment 3. The 9033 letter included Rev. Sharpton's certification that he had not and would not exceed the expenditure limitations at 26 U.S.C. § 9035 and 11 C.F.R. part 9035, which include the $50,000 personal expenditure limitation. *See id.* The application also included the Committee's threshold submission.

The Commission reviewed the application and found the threshold submission adequate to qualify the Candidate as eligible to receive public funds. However, the Commission questioned whether Rev. Sharpton had exceeded his $50,000 personal expenditure limitation. *See* 11 C.F.R. § 9035.2. The Committee's disclosure reports revealed that Rev. Sharpton had incurred $47,821.13 in expenditures that were subject to his personal expenditure limitation, and thus, he was close to exceeding the $50,000 personal expenditure limitation.

The Candidate used his credit card to incur most of the expenditures. Thus, it was possible that more of his outstanding credit card debt would be subject to the expenditure limit as time elapsed from the closing dates of the credit card billing statements. *See* 11 C.F.R. § 9035.2(a)(2) (Credit card charges count against a candidate's personal expenditure limitation to the extent that the full amount due, including any finance charge, is not paid within 60 days after the closing date of the billing statement on which the charges first appeared.)

If the Commission had been aware, at the time it reviewed the Candidate's application, that he had exceeded his personal expenditure limitation, the Commission would have determined the Candidate ineligible to receive public funds. 11 C.F.R. § 9033.3(a). However, since the Committee's disclosure reports on file at that time did not demonstrate that the Candidate had exceeded his personal expenditure limitation, the Commission determined the Candidate eligible to receive public funds.[1] On March 11,

[1] On March 26, 2004, the Commission determined that March 15, 2004 was Rev. Sharpton's date of ineligibility. 11 C.F.R. § 9033.5(a).

2004, the Commission certified an initial $100,000 matching fund payment to the Candidate.[2]

Also on March 11, 2004, the Commission initiated an investigation pursuant to 26 U.S.C. § 9039(b) and 11 C.F.R. § 9039.3 ("9039 Investigation") to resolve whether Rev. Sharpton had exceeded his $50,000 personal expenditure limitation. *See* 26 U.S.C. § 9035; 11 C.F.R. § 9035.2(a)(1). As part of the 9039 Investigation, the Commission sent a letter to Rev. Sharpton on March 16, 2004, requesting certain relevant records concerning his expenditure of personal funds on behalf of his campaign. Although the Committee indicated that it would be responsive to the request, it did not respond by the due date of March 23, 2004.[3]

The Committee filed its next monthly disclosure report on March 20, 2004. This disclosure report revealed that Rev. Sharpton made expenditures on behalf of his Committee that are more than double the $50,000 personal expenditure limitation. The Commission, on March 29, 2004, made an initial determination to suspend matching fund payments to the Candidate. The Commission issued subpoenas to the Committee and the Candidate requesting relevant records. On April 21, 2004, the Committee and the Candidate submitted a response to the initial determination to suspend payments and to the Commission subpoenas. Attachment 2. On April 29, 2004, the Commission made a

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[2] On April 1, 2004, the Commission certified an additional matching fund payment to the Candidate in the amount of $79,708.99. However, after the Commission made a final determination to suspend matching fund payments to Rev. Sharpton on April 29, 2004, the Commission notified the Secretary of the Treasury that this amount should not be paid to the Candidate.

[3] On March 24, 2004, the Committee requested a 15-day extension of time to respond. The Commission denied the request and notified the Committee that it could provide the requested documents during the Candidate's 20-day response period following the initial determination to suspend payments. *See* 11 C.F.R. § 9033.9(b).

final determination to suspend matching fund payments to Rev. Sharpton and the Committee. *See* Statement of Reasons in Support of Final Determination to Suspend Matching Funds (April 29, 2004).

III. INVESTIGATION SHOWS SHARPTON EXCEEDED EXPENDITURE LIMITATION

The Committee's response to the initial determination to suspend matching funds and the subpoena provided some, but not all, of the documents subpoenaed by the Commission. Specifically, the Committee did not provide: 1) the Candidate's American Express card statements for January 1, through March 11, 2004; 2) expense reimbursement forms submitted by Rev. Sharpton to the Committee; 3) documentation of any Committee requests to Rev. Sharpton for further information regarding his expense reimbursement requests; and 4) any information detailing how payments to Rev. Sharpton were applied to outstanding reimbursement requests. In addition, it is not clear whether the documentation that was provided, such as checks and receipts and invoices supporting charges on credit card statements, was complete.

The Committee submitted spreadsheets that stated the Candidate expended $46,956.23 of his personal funds. However, the Committee failed to submit sufficient documentation to support its spreadsheets.[4] The Committee stated that many of the expenses paid by Rev. Sharpton that it had reported as campaign expenses were not campaign-related, but were related to the Candidate's activities as head of the National

[4] The Committee made several legal arguments that are fully addressed in the Commission's Statement of Reasons supporting its final determination to suspend matching funds payments. *See* Statement of Reasons in Support of Final Determination to Suspend Matching Funds (April 29, 2004). These arguments have not been raised in the repayment context. Therefore, the Commission is not addressing these arguments in the inquiry report. The Committee will have an opportunity to raise these and any other arguments in the repayment context by requesting an administrative review. *See* 11 C.F.R. § 9038.2(c)(2).

Action Network ("NAN"). The Committee explained that "after conducting a detailed analysis" of the Candidate's expense records, it was able to determine "with much greater accuracy which expenses were campaign related and which were non-campaign related." However, the Committee did not provide to the Commission adequate documentation of its "detailed analysis" of the Candidate's expenses demonstrating which of the reported expenses made by the Candidate were in connection with his presidential campaign and which were on behalf of NAN. The Committee provided no explanation or documentation of how expenses were allocated between the campaign and NAN, other than credit card statements and invoices with specific items crossed out.[5]

Nevertheless, even in the absence of complete information, the Commission's review of the available records indicates that the Candidate exceeded his personal expenditure limitation by $66,976 as of January 2, 2004. Attachment 1. The primary difference between the Commission's accounting of the Candidate's campaign expenditures and the Committee's accounting is that the Commission included in the campaign expenditures travel and subsistence expenses related to Ed Harris, an individual

[5] The incomplete information provided by the Committee in response to the Commission's initial request for documents, the March 31, 2004 subpoena, and the initial determination to suspend matching funds, made it impossible to verify the Committee's claims that its prior disclosure reports were inaccurate and that the Candidate has only spent a total of $46,956.23 of his personal funds in support of his campaign. Specifically, the Committee should have provided all documents requested by the subpoena, including the American Express card statements for January through March 11, 2004, expense reimbursement forms, requests to Rev. Sharpton for further information concerning expense reimbursements and information showing how payments were applied to outstanding reimbursement requests. In addition, the Committee could have provided information to support its figures including: 1) a detailed itinerary of the Candidate's travel listing his activities and the identity, function and activities of those traveling with him; 2) an explanation of the source and derivation of the amounts disclosed as owed to the Candidate on the Committee's original reports; 3) a description of Ed Harris' roles and functions for the campaign and for NAN and an explanation of why he traveled with the candidate; and 4) an explanation of the Committee's "detailed analysis" of the Candidate's expenses demonstrating how it determined which expenses were in connection with his presidential campaign and which were on behalf of NAN.

who traveled with the Candidate. The Committee provided no explanation of what Mr. Harris did and why his travel and subsistence were related to NAN rather than to the presidential campaign. According to information from the Committee's disclosure reports, materials provided with the Committee's response, and press reports, Mr. Harris is the campaign videographer, who accompanies the Candidate to most events. *See* Attachment 1 at 3. The Committee's disclosure reports listed a direct payment to Mr. Harris for "Campaign Video Taping Service" a campaign-related expense. *Id.* The Committee reported debt owed to the Candidate for Mr. Harris' travel expenses: "Personal American Express Card. Campaign related travel, lodging and expense charges for Rev. Al Sharpton, Eddie Harris and Marjorie Harris." *Id.*

The Commission acknowledges that Mr. Harris could have provided services that were both campaign and non-campaign related. However, the Committee did not demonstrate which Candidate expenditures on behalf of Mr. Harris were, and which were not, campaign-related. The Commission's information from the Committee's disclosure reports shows that Mr. Harris' expenses were campaign-related.

The Committee did not explain why its disclosure reports showed that the Candidate had more than doubled the personal expenditure limitation if he had not, in fact, done so.[6] The Committee's disclosure reports indicate that these expenses were

[6] In its original disclosure reports, the Committee reported that the Candidate made expenditures from his personal funds that are more than double the $50,000 personal expenditure limitation. In its response to the Commission's initial determination to suspend matching funds, the Committee sought to retract its disclosure reports, and stated that, had it "known that the reports would jeopardize its eligibility for matching funds, it would have devoted the resources necessary to gather the appropriate documentation and conduct a precise calculation of campaign versus non-campaign-related expenditures." The Committee's April monthly report, filed after its response on April 28, 2004, continues to show Candidate expenditures in excess of the limitation. The Commission relied on the original disclosure reports when it determined the Candidate eligible for public funds. The Committee has a legal duty to submit accurate disclosure reports, and the Commission is entitled to presume that such reports are accurate, regardless of whether or not matching funds are jeopardized. 11 C.F.R. § 104.14(d). Accurate disclosure is critical to

campaign related. Therefore, the Commission has treated all of these expenses as campaign expenses allocable to the Candidate's personal expenditure limitation.

III. SHARPTON MUST REPAY ALL PUBLIC FUNDS

The Commission may utilize information obtained through a 9039 inquiry to make a repayment determination. *See* 11 C.F.R. §§ 9038.2(a)(1) and (c)(1), 9039.3(a)(2). Based on the information from the investigation, the Commission has determined that Alfred C. Sharpton and Sharpton 2004 must repay $100,000 to the United States Treasury for matching funds received in excess of the candidate's entitlement. 26 U.S.C. § 9038(b)(1).

The Matching Payment Act requires the candidate to certify, *inter alia*, that "the candidate and his authorized committees will not incur qualified campaign expenses in excess of the limitations on such expenses under section 9035." 26 U.S.C. § 9033(b)(1). Similarly, the Commission's regulations promulgated under the Matching Payment Act require the candidate to certify 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 under 11 CFR part 9035." 11 C.F.R. § 9033.2(b)(2). One of those limitations is a $50,000 limitation that applies to a candidate's use of his personal funds to make expenditures on behalf of his campaign. 26 U.S.C. § 9035; 11 C.F.R. § 9035.2(a)(1).

The candidate's eligibility to receive public funds depends, in part, on the candidate not exceeding his $50,000 personal expenditure limitation. The Commission

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the public financing system; indeed, the Commission may suspend matching fund payments to a candidate who knowingly and substantially fails to comply with the disclosure requirements. *See* 11 C.F.R. § 9033.9(a).

may determine that a candidate is ineligible to receive matching funds if it determines that the candidate and the candidate's authorized committee have knowingly and substantially exceeded the expenditure limitations at 11 CFR part 9035 prior to the candidate's application for certification to receive matching funds. 11 C.F.R. § 9033.3. Only candidates who are eligible are entitled to public fund payments. 26 U.S.C. § 9034(a). If the Commission can deny a candidate public funds during the eligibility stage based on the fact that the candidate knowingly and substantially exceeded the personal expenditure limitation, then the Commission can seek a repayment of public funds if it subsequently discovers that the candidate had exceeded the limitation prior to his application for public funds and, therefore, was never eligible for public funds. If a candidate is not eligible he has zero entitlement. *See* 26 U.S.C. § 9034(a). The Commission may determine that any portion of the matching fund payments made to a candidate were in excess of the candidate's entitlement and must be repaid. 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1).[7]

Legislative and regulatory history supports recovering matching funds paid to a candidate who knowingly and substantially exceeded the personal expenditure limitation prior to applying for public funds. The legislative history of the matching fund system

[7] Section 9038.2(b)(1) of the regulations lists examples of payments for the receipt of matching funds in excess of entitlement. Repayment of matching funds paid to a candidate who was not eligible is not one of the listed examples. However, section 9038.2(b)(1) uses the non-exhaustive language of "include, but are not limited to" in describing the list.

indicates that a primary purpose of that legislation was to curb excessive campaign expenditures:

> the greatest potential for abuses by special interest groups and big money is in connection with campaigns to the office of President. The unhappy experiences of the 1972 presidential campaign served to underscore the dangers of spiraling campaign expenditures and the influence of excessive private political contributions.
>
> The committee bill limits expenditures and private contributions and limits the potential abuse of big money in presidential elections by allowing . . . for public financing on a matching basis for presidential primaries.

H.R. Rep. No. 93-1239, at 13 (1974). Allowing a candidate who exceeds the limitations prior to seeking certification to keep public funds would permit the "candidate to make vast amounts of campaign expenditures, and nevertheless receive matching payments, thereby defeating the basic purpose underlying the enactment of public financing." *See* Explanation and Justification, *Presidential Election Campaign Fund; Presidential Primary Matching Fund*, 44 Fed. Reg. 63756-57 (Nov. 5, 1979).

Rev. Sharpton affirmed the importance of the personal expenditure limitation by signing the candidate agreements and certifications. However, the Commission's investigation reveals that Rev. Sharpton had already knowingly and substantially exceeded his $50,000 personal expenditure limitation on January 2, 2004, when he signed and submitted his letter of candidate agreements and certifications. Therefore, Rev. Sharpton inaccurately certified that he had not and would not exceed his personal expenditure limitation. *See* 11 C.F.R. § 9033.3; Attachment 3.

Rev. Sharpton had made personal expenditures on behalf of his campaign totaling $116,976 as of January 2, 2004 -- more than double the personal expenditure limitation. Attachment 1 at 4. Thus, the Candidate exceeded his personal expenditure limitation by

$66,976 ($116,976 -$50,000) as of that date. Moreover, the amount in excess of the Candidate's personal expenditure limitation continued to increase after that date and totaled $169,198 as of March 2, 2004, more than three times the $50,000 limitation and $119,198 in excess of the limitation. *Id.* If this information had been available at the time the Commission considered the Candidate's eligibility, the Commission could have determined that the Candidate knowingly and substantially exceeded the personal expenditure limitation and was, thus, ineligible to receive matching fund payments.[8] *See* 11 C.F.R. § 9033.3.

Rev. Sharpton and his Committee were or should have been aware of his expenditures on behalf of his presidential campaign because the expenses were incurred on his personal credit card and bank account and were disclosed on the Committee's disclosure reports. Therefore, the Candidate knowingly exceeded his personal expenditure limitation by $66,976. *See Federal Election Commission v. Dramesi*, 640 F.Supp. 985, 987 (D.N.J. 1986) ("[A] knowing standard, as opposed to "knowing and willful" one, does not require knowledge that one is violating the law, but merely requires an intent to act"). Moreover, the amount of Rev. Sharpton's personal expenditures on behalf of his campaign was $66,976 in excess of the personal expenditure limitation as of

[8] The Commission certified the Candidate as eligible for matching fund payments only because the Committee's disclosure reports on file at that time indicated that the Candidate had not spent in excess of the personal expenditure limitation and information revealing that the 9033 letter certification was inaccurate was not available to the Commission when it considered the Candidate's threshold submission. The Commission did not withhold certification and matching payments pending the results of this 9039 Investigation because the Candidate's threshold submission was adequate and did not contain "patent irregularities suggesting the possibility of fraud" and the policy of the certification process is to "provide prompt payments to eligible candidates." *See Committee to Elect Lyndon LaRouche v. Federal Election Commission,* 613 F.2d 834, 841-842 (D.C. Cir. 1979); 11 C.F.R. § 9039.3(a)(3). Moreover, 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).

January 2, 2004, more than double the allowable personal amount. Thus, the Candidate substantially exceeded the personal expenditure limitation.

Since the Candidate knowingly and substantially exceeded his personal expenditure limitation as of January 2, 2004, he was never eligible to receive matching funds. 11 C.F.R. § 9033.3(a). As the Candidate was never eligible, he was never entitled to receive any public funds. Because he was not entitled to any federal matching funds ($0), any matching funds he received were in excess of his entitlement.[9] 26 U.S.C. § 9038(b)(1). Rev. Sharpton received matching funds in the amount of $100,000. Therefore, Rev. Sharpton and the Committee must repay all matching funds received in excess of his entitlement, $100,000 ($100,000 - $0). 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1).

V. CONCLUSION

The Commission has determined that Alfred C. Sharpton and Sharpton 2004 must repay $100,000 to the United States Treasury for matching funds received in excess of the Candidate's entitlement. 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1); *see* 11 C.F.R. § 9038.2(c)(1) and (d)(1).

Attachments
1. Audit Analysis
2. Sharpton 2004 Response to Matching Fund Inquiry (narrative portion only)
3. 9033 letter dated January 2, 2004.

[9] The Commission has previously determined that the entire amount of matching funds paid to a candidate must be repaid where the audit revealed that the candidate had not met the eligibility requirements. *See* Audit of Milton J. Shapp and the Shapp for President Committee (1976 cycle committee repaid entire amount of matching funds received where the Commission's audit revealed prohibited contributions were included in the candidate's threshold submission and, when those contributions were subtracted from the threshold submission, the candidate did not have sufficient contributions in at least 20 states to be eligible.)

ATTACHMENT 1
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BRAND & FRULLA
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700
TELECOPIER: (202) 737-7565

July 16, 2004

HAND DELIVERED

Thomasenia P. Duncan, Esquire
Associate General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Request for Oral Hearing

Dear Ms. Duncan:

On behalf of our clients, Rev. Alfred C. Sharpton and Sharpton 2004 (collectively, the "Committee"), we write in response to your letter dated May 14, 2004 informing the Committee that it must repay $100,000 to the United States Treasury.

The Committee strongly disputes that any repayment is required. The Committee, therefore, respectfully requests an oral hearing pursuant to 11 C.F.R. § 9038.2(c)(2)(ii) to address the Commission in open session to fully explain the Committee's allocation of expenditures and demonstrate that no repayment is required. Further, the Committee specifically reserves the right to raise issues relating to the allocation of expenditures and the Commission's authority to seek a repayment under these circumstances, and does not by this letter waive any right to raise these issues, as described in 11 C.F.R. § 9038.2(c)(2)(i).

The Commission based its repayment determination on its conclusion that Rev. Sharpton exceeded the personal expenditure limitation at 11 C.F.R. § 9035.2(a)(1), which, in turn, was based on the Commission's rejection of the Committee's allocation of expenditures. However, as the Committee stated in its April 21, 2004 response to the Commission's initial determination to suspend matching fund payments, the Committee properly allocated expenditures, and, thus, Rev. Sharpton did not exceed the personal expenditure limitation.

Furthermore, the Commission has not cited an adequate legal basis to seek a repayment under these circumstances. More specifically, the Commission has not demonstrated that a repayment may be sought after the valid certification of matching funds but prior to a full audit of the Committee's expenses.

The Committee also believes that the Commission has singled Rev. Sharpton out for unwarranted and unreasonable scrutiny for reasons the Committee has not yet determined. For instance, the Commission reviewed Rev. Sharpton's matching fund application and certified Rev. Sharpton to receive public funds. However, according to the Commission, "the Committee's disclosure reports revealed that Rev. Sharpton had incurred $47,821.13 in expenditures that were subject to his personal expenditure limitation, and thus, he was close to exceeding the $50,000 personal expenditure limitation." *See* Federal Election Commission Notice of Repayment Determination at 2, May 14, 2004 (emphasis added). The Commission then initiated an investigation into whether Rev. Sharpton had exceeded this limitation.

The Committee is not aware of any other instance in which the Commission initiated an investigation into a candidate where information available to the Commission demonstrated on its face that the candidate had not violated the law. In this case, the Commission opened an investigation, during the middle of the presidential campaign, because Rev. Sharpton "was close to exceeding" the $50,000 personal expenditure limitation, though, by its own admission, the Commission had no evidence Rev. Sharpton had, in fact, exceeded the limitation.[1]

---

[1] The unfair treatment afforded Rev. Sharpton extended beyond the initiation of the investigation to the conduct of the investigation itself. Specifically, the Commission imposed an unreasonable deadline of five business days for the Committee to provide documents pursuant to the Commission's request. In response, the Committee requested a very reasonable extension of fifteen days to respond, a request that was summarily rejected by the Commission. Putting aside the fact that a five day response time is totally unprecedented in any Commission action that the Committee is aware of, the Committee believes that the Commission is attempting in this Notice of Repayment to justify its unreasonable denial of an extension of time by casting the Committee in an unfavorable light. Specifically, the Notice of Repayment Determination states that "[a]lthough the Committee indicated that it would be responsive to the request, it did not respond by the due date of March 23, 2004." This is not an accurate statement. The Commission's March 16, 2004 letter to the Committee requested a response within "five (5) business days of your receipt of this letter." The Committee replied on March 24, 2004, which was, by the Committee's calculation, within five business days of the receipt of the Commission's letter. The Commission acknowledges receipt of the Committee's request for an extension on March 24, 2004, but only in a footnote; the body of the Notice simply states that the Committee "did not respond by the due date..."

Moreover, while all other candidates certified for matching funds received their funds without delay, Rev. Sharpton was denied his duly certified funds and then given only days, in the middle of the campaign, to justify each expenditure. Other recipients of matching funds are permitted to justify their allocation of expenses during the mandatory FEC audit process which, as you know, begins months after the election, involves extensive discussions between the committees and the Audit Division, and can take years to complete. The Committee was denied this opportunity and was given only days to make its case.

It is no surprise, therefore, that the Committee was not able, in the Commission's estimation, to adequately justify its allocation of expenses in the time provided.

Nevertheless, the Committee stands by its allocation of expenditures as explained in its prior submission to the Commission and looks forward to addressing the Commission in open session to fully explain the Committee's allocation of expenditures and demonstrate that no repayment is required. If you should have any questions or require additional information, please do not hesitate to contact me.

Sincerely,

Stanley M. Brand/mob

Stanley M. Brand

SMB:mob

cc: Andrew A. Rivera, Esquire
934 4th Street, Northeast
Washington, DC 20002

ATTACHMENT 2
PAGE 3 OF 3

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	**Primary Matching Fund**
Rev. Alfred C. Sharpton	)	**Inquiry**
Sharpton 2004 and	)	
Andrew A. Rivera, as treasurer	)	
	)	

RESPONSE OF REV. ALFRED SHARPTON AND SHARPTON 2004 TO THE FEDERAL ELECTION COMMISSION'S MATCHING FUND INQUIRY

I. INTRODUCTION

This constitutes the response of Rev. Sharpton and Sharpton 2004 (the "committee") to the initial determination made by the Federal Election Commission ("FEC" or the Commission") to suspend matching fund payments to Rev. Sharpton and the committee and the accompanying subpoena. [1]

As the attached documents and discussion in Section II demonstrate, Rev. Sharpton has expended only $46,956.23 from his personal funds in connection with his campaign for President of the United States, not $101,802.38 as indicated in the Factual and Legal Analysis ("FLA"). Consequently, Rev. Sharpton has not exceeded the personal expenditure limitation described at 11 C.F.R. § 9035.2(a)(1).

We, therefore, respectfully request the Commission withdraw its initial determination to suspend matching fund payments. The delay in the distribution of matching funds caused by this inquiry has resulted in significant financial hardship to the committee and we urge the Commission to permit the release of the funds as soon as possible.

We note that the Audit Division's calculation of Rev. Sharpton's personal expenditures was based on the committee's recent disclosure reports to the FEC. However, those reports were filed during a frenetic period of an ongoing presidential campaign and included the committee's

[1] We have provided all responsive documents in our possession. However, despite numerous attempts, American Express has failed to provide statements to Sharpton 2004 for the months of January, February, and March, 2004. *See* attached letter from Sharpton 2004 to American Express, April 19, 2004.

very rough estimates of campaign-related expenditures made by Rev. Sharpton during the applicable reporting periods. More specifically, the committee mistakenly reported large amounts of non-campaign related expenditures as campaign expenditures.

As head of the National Action Network, Rev. Sharpton undertook a great deal of non-campaign related activities on behalf of NAN during the same period in which he was a presidential candidate. Only after conducting a detailed analysis of Rev. Sharpton's expense records pursuant to the Commission's inquiry were we able to determine with much greater accuracy which expenses were campaign related and which were non-campaign related. Had the committee known that the reports would jeopardize its eligibility for matching funds, it would have devoted the resources necessary to gather the appropriate documentation and conduct a precise calculation of campaign versus non-campaign-related expenditures. However, at the time the reports were filed, the committee was focusing its limited resources on the ongoing campaign. The committee had always intended to amend its FEC reports when the resources do the necessary precise evaluations became available. Unfortunately, the committee's staff is very small with individual staff members occupying multiple positions within the campaign.[2]

Nevertheless, though Rev. Sharpton has not exceeded the personal expenditure limitation, as we demonstrate in Section III below, the Commission has acted contrary to law by failing to apply the personal expenditure limitation regulation according to its plain meaning. More specifically, section 9035.2(a)(1) unambiguously states that the limitation does not apply until the candidate has already accepted matching funds:

> 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 exceed $50,000, in the aggregate.

11 C.F.R. § 9035.2(a)(1)(emphasis added).

Federal courts have repeatedly emphasized the importance of the "plain meaning" rule, stating that if the language of a regulation has a plain and ordinary meaning, courts need look no further and must apply the regulation as written. Consequently, the FEC may not ignore the plain meaning of section 9035.2(a)(1), even if it believes, as a matter of public policy, the limitation should apply prior to the acceptance of matching funds, particularly, as in this case, when the candidate has specifically relied on the regulation's plain meaning. Finally, the portion of Rev. Sharpton's matching fund certification that refers to part 9035 relates to qualified campaign expenditure limitations and not personal expenditures by the candidate. Rev. Sharpton's certification, therefore, has in no way altered the Commission's duty to apply the personal expenditure regulation according to its plain meaning.

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[2] In addition to providing the attached spreadsheets and documents, we are amending the committee's FEC disclosure reports to reflect to the best of our ability the actual campaign expenses of the committee.

II. REV. SHARPTON'S PERSONAL EXPENDITURES

As noted above, the Commission's determination that Rev. Sharpton exceeded the personal expenditure limitation was based on the committee's third and fourth quarter disclosure reports. However, those reports included rough estimates of Rev. Sharpton's campaign-related expenses, and were based on very incomplete information available to campaign officials at the time. Specifically, we did not have the staff nor did the committee have access to a number of the records, including credit card statements, receipts, invoices, expense reimbursement forms, and other related materials, when the reports were filed. As we conducted a review of these documents pursuant to the Commission's investigation, we were we able to determine with much greater accuracy which expenses were campaign related and which were non-campaign related. However, as we note in footnote 1, despite several requests, American Express has not provided statements for January, February, and March 2004. We, therefore, have had to estimate campaign and non-campaign related expenditures for that three month period

The attached spreadsheet and accompanying documentation provided pursuant to the Commission's subpoena demonstrate that Rev. Sharpton's campaign-related travel expenses were far less than originally estimated and that, according to the Commission's interpretation of the regulations, Rev. Sharpton's personal expenditures were far less than the $101,802.38 stated in the FLA.

In fact, Rev. Sharpton's personal expenditures from August 1, 2003 through March 11, 2004 amount to $46,956.23.

We note that we are also amending the committee's FEC disclosure reports to reflect to the best of our ability the actual campaign expenses of Rev. Sharpton and the committee.

III. THE PERSONAL EXPENDITURE LIMITATION IS NOT TRIGGERED UNTIL THE CANDIDATE "HAS ACCEPTED" MATCHING FUNDS

Though the preceding section conclusively demonstrates that Rev. Sharpton has not expended in excess of $50,000 of his personal funds in connection with his campaign, by considering Rev. Sharpton's personal expenditures prior to his acceptance of matching funds, the FEC has acted contrary to the plain meaning of the regulation governing the personal expenditure limitation.

Specifically, the personal expenditure limitation regulation unambiguously states that the limitation is triggered only after the candidate "has accepted" matching funds. *See* 11 C.F.R. § 9035.2(a)(1). The general counsel's interpretation, as evidenced by the FLA, is contrary to the plain meaning of the regulation and, therefore, contrary to law. Further, it is patently unfair to subject Rev. Sharpton to an interpretation of the regulation that is completely inconsistent with the regulation's plain meaning. For these reasons, we urge the Commission to follow the plain language of its regulation and consider only those personal expenditures of Rev. Sharpton's that follow the date of his certification to receive of matching funds.

A. **The FEC must apply the personal expenditure limitation according to the "plain meaning" of the regulation governing that limitation.**

When the FEC promulgated section 9035.2(a)(1), title 11 of the Code of Federal Regulations, it gave the regulation the unambiguous title "Limitation on expenditures from personal or family funds." The text of the regulation is equally unambiguous:

> No candidate who **has accepted matching funds** shall knowingly make expenditures from his or her personal funds, or funds of his or her immediate family, in connection with his or her campaign for nomination for election to the office of President which exceed $50,000, in the aggregate.

11 C.F.R. § 9035.2(a)(1)(emphasis added).[3]

Federal courts have repeatedly emphasized the importance of the "plain meaning" rule, stating that if the language of a regulation has a plain and ordinary meaning, courts need look no further and must apply the regulation as written. The D.C. Court of Appeals stated it this way:

> In construing a statute, courts look first for the plain meaning of the text. If the language of the statute has a plain and unambiguous meaning, the court's inquiry ends so long as the resulting statutory scheme is coherent and consistent.

United States v. Barnes, 353 U.S. App. D.C. 87 (D.C. Cir. 2002). *See also Pfizer, Inc. v. Heckler*, 237 U.S. App. D.C. 66 (D.C. Cir. 1984)("Construction of the MAC regulation must begin with the words in the regulation and their plain meaning"); *Bayview Hunters Point Community Advocates v. Metropolitan Transportation Commission*, 2004 U.S. App. Lexis 6489 (9th Cir. 2004); and *Advanta USA Inc. v. Chao*, 350 F.3d 726 (8th Cir. 2003)(No deference to agency is due if the interpretation is contrary to the regulation's plain meaning).

Despite the plain meaning of this regulation, the FEC in this case is considering Rev. Sharpton's personal expenditures prior to his acceptance of matching funds. In other words, the FEC is considering Rev. Sharpton's personal expenditures **before** Rev. Sharpton "has accepted" matching funds. In that sense, the general counsel is completely reading out of the regulation the operative phrase "has accepted."

However, an agency may not construe a regulation so as to make certain phrases superfluous. As the Court stated in *APWU v. Potter,*

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[3] The FLA cites 11 C.F.R. § 9035.2 but does not address the fact that the regulation includes the "has accepted" language. In fact, a verbatim citation of 11 C.F.R. § 9035.2(a)(2) is conspicuously absent from the FLA; the FLA only paraphrases the regulation as follows: "[t]he candidate may not knowingly make expenditures in connection with is campaign from his personal funds that exceed $50,000." This "paraphrasing" of section 9035.2 completely ignores the "has accepted" language. *See* Factual and Legal Analysis at p.1.

> A basic tenet of statutory construction, equally applicable to regulatory construction is that a text should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.

APWU v. Potter, 343 F.3d 619 (U.S. App. , 2003)(emphasis added). *See also In re Surface Min. Regulation Litigation*, 201 U.S. App. D.C. 360, 627 F.2d 1346 (D.C.Cir.1980) and *Association of Bituminous Contractors, Inc. v. Andrus*, 189 U.S. App. D.C. 75, 1978 U.S. App. LEXIS 12502 (D.C. Cir., February 22, 1978).

As noted above, the FLA reads out of the personal expenditure limitation regulation the operative phrase "has accepted," making that phrase superfluous. Besides being contrary to law, the effect of this is to fundamentally expand the scope of the limitation from one which applies only after the candidate "has accepted" matching funds, to one which apparently applies when an individual becomes a candidate, regardless of whether the candidate has sought matching funds.[4]

Moreover, it is irrelevant that other primary matching fund regulations may introduce ambiguity into the FEC's complicated primary matching fund regulatory regime. For instance, 11 C.F.R. § 9033.3 notes that the Commission may make an initial determination that the candidate is ineligible to receive matching funds if the Commission determines that the candidate "knowingly and substantially exceeded the expenditure limitations at 11 C.F.R. part 9035 prior to that candidate's application for certification. . ." This implies that a candidate could violate the expenditure limitations at 11 C.F.R. § 9035 prior to an acceptance of matching funds. However, this implication does not alter the plain meaning of the personal expenditure limitation regulation which a reasonable person would conclude governs the personal expenditure limitation.

Broadly speaking, a reasonable person seeking to determine the personal expenditure limitations would look to 11 C.F.R. Part 9035 titled "Expenditure Limitations," and, more specifically, to the regulation titled "Limitation on expenditures from personal or family funds," which states unambiguously that "[n]o candidate who **has accepted** matching funds shall knowingly make expenditures from his or her personal funds . . . which exceed $50,000." 11 C.F.R. § 9035.2(a)(1)(emphasis added). The Commission should not require a candidate to look outside of this specific regulation for possible modifiers to the plain language of the regulation. If a candidate cannot look to the regulation titled "Limitation on expenditures from personal or family funds" to conclusively determine his or her personal expenditure limitation, where can he or she look?

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[4] In fact, the FEC's interpretation of the regulation would essentially act as a barrier to the certification of matching funds by any individual who, having relied upon the plain meaning of section 9035.2(a)(1) (which states that "[n]o candidate who **has accepted** matching funds shall knowingly make expenditures from his or her personal funds . . . which exceed $50,000"), spends in excess of $50,000 of his or her own funds.

With regard to Rev. Sharpton's certification for matching funds, the FLA begins with a reference to the primary matching fund regulations requirement that the candidate "certify several items, including that the candidate and his/her authorized committee 'have not and will not incur expenditures in connection with the candidate's campaign for nomination, which expenditures are in excess of the limitations.' 11 C.F.R. §9033.2(b)(2)." Presumably, the FLA includes the verbatim quote "have not and will not incur expenditures . . . in excess of the limitations" from 11 C.F.R. § 9033.2(b)(2) in anticipation of Rev. Sharpton's argument that the personal expenditure limitations apply only after he "has accepted" matching funds. However, a review of Rev. Sharpton's certification reveals that Rev. Sharpton certified, in pertinent part:

> Pursuant to 11 C.F.R. §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 C.F.R. § 9035.2.

Certification of Rev. Sharpton, Jan. 2, 2004, paragraph II (emphasis added).

The phrase "qualified campaign expenses" refers to the spending limits at 11 C.F.R. § 9035.1, not expenditures from personal funds which, by definition, are not qualified campaign expenses. In fact, it is impossible for an expense to be both a qualified campaign expense (one which may be paid for with matching funds) and a personal expenditure. Consequently, Rev. Sharpton made no certification with regard to personal expenditure limitations, and, therefore, the language of the regulation is controlling and is unmodified by Rev. Sharpton's certification.

Even if the FEC asserts that it intended that the personal expenditure limitation apply when an individual becomes a candidate, the Commission may not now interpret its own regulation contrary to its plain meaning. To do so would be patently unfair and unlawful, particularly after Rev. Sharpton has relied on this regulation. As stated above, federal courts have repeatedly held that no deference to an agency is due if the interpretation is contrary to the regulation's plain meaning.

Furthermore, when drafting 11 C.F.R. § 9035.2(a)(1), the Commission chose to include the phrase "has accepted." If its intention was that the personal expenditure limitation apply when an individual becomes a candidate, the Commission could have drafted the regulation without this delimiting phrase. A reasonable person could come to no other conclusion than that the Commission intended the phrase "has accepted" to have its plain meaning that the personal expenditure limitation applies after the candidate "has accepted" matching funds.[5]

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[5] As evidence of the Commission's intention to purposefully include the phrase "has accepted," one needs look no farther than the regulation directly preceding section 9035.2. Section 9035.1 states "No candidate or his or her authorized committee(s) shall knowingly incur expenditures in connection with the candidate's campaign for nomination, which expenditures, in the aggregate, exceed $10,000,000. . ." 11 C.F.R. § 9035.1. Though not reviewed by Rev. Sharpton or the committee prior to the preparation of this response, the November 5, 1979 Explanation and Justification ("E & J") for Part 9035 explains that the regulations promulgated on May 7, 1979, made the expenditure limitation applicable to only those candidates who accepted matching funds. However, "[w]ith this revision, it is clear that the expenditure

Nevertheless, as numerous federal courts have stated in other contexts, the FEC may not ignore the plain meaning of section 9035.2(a)(1) because it intended something different, particularly when the candidate has specifically relied on the regulation's plain meaning. *See United States v. Barnes*, 353 U.S. App. D.C. 87 (D.C. Cir. 2002); *Pfizer, Inc. v. Heckler*, 237 U.S. App. D.C. 66 (D.C. Cir. 1984); *Bayview Hunters Point Community Advocates v. Metropolitan Transportation Commission*, 2004 U.S. App. Lexis 6489 (9th Cir. 2004); and *Advanta USA Inc. v. Chao*, 350 F.3d 726 (8th Cir. 2003).

Moreover, the FEC's application of the personal expenditure limitation prior to the acceptance of matching funds should not be viewed as merely an agency's attempt to interpret an ambiguous regulation. On the contrary: the FEC's interpretation is completely inconsistent with the plain meaning of the regulation. In fact, it greatly expands the scope of the personal expenditure limitation.

The Supreme Court held that an agency's construction of a regulation will be shown deference, but not when the construction of the regulation by the agency "is plainly erroneous or inconsistent with the regulation." In *Bowles v. Seminole Rock Co.*, the Supreme Court stated:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation **if the meaning of the words used is in doubt**. . . . The ultimate criterion is the

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(continued)

limitations apply to a candidate from the time the individual becomes a candidate, rather than from the time of certification for matching funds." 44 FR 63756 (Nov. 5, 1979). At first blush, this would seem to indicate that the personal expenditure limitation would apply from the time the individual becomes a candidate. However, a thorough review reveals that the Commission at that time apparently retained the "has accepted" language of the personal expenditure limitation while apparently modifying the language of the overall expenditure limitation language to make clear that the overall expenditure limitation applies when the individual becomes a candidate. The Commission at that time could have revised the personal expenditure limitation regulation to make clear that the limitation applied at the time the individual became a candidate by removing the "has accepted" language. For reasons not explained in the E & J, the Commission apparently either added or retained the "has accepted" language, while changing the overall expenditure limitation language (despite our best efforts, we have been unable to locate the actual pre-November 5, 1979 section 9035 regulations and we must, therefore, base this specific discussion on the November 5, 1979 E & J). Consequently, a clear wording difference exists between 9035.1 and 9035.2 which could lead a reasonable person to conclude that the two limitations apply at different times (the overall expenditure limit when the individual becomes a candidate and the personal expenditure limit only after the candidate "has accepted" matching funds). Viewing the two regulations, which appear at 11 C.F.R. Part 9035 directly adjacent to one another, a person could reasonably conclude that the FEC intentionally phrased the limitations differently.

> administrative interpretation, which becomes of controlling weight **unless it is plainly erroneous or inconsistent with the regulation**.

Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945) (emphasis added). *See also San Luis Obispo Mothers for Peace v. United States NRC*, 252 U.S. App. D.C. 194, 1986 U.S. App. LEXIS 24449 (D.C. Cir., April 25, 1986, Decided).

The D.C. Court of Appeals stated it this way:

> If, after the court subjects the statute to that analysis, the court concludes that the statute **is silent or ambiguous** with respect to the specific issue, then the court affords Chevron deference to the agency and upholds the administrative construction if it is based on a permissible construction of the statute.

Theodus v. McLaughlin, 271 U.S. App. D.C. 413, 1988 U.S. App. Lexis 10723 (D.C. Cir., August 5, 1988)(emphasis added).

In other words, federal courts may look to the agency's construction or interpretation of the regulation only if the meaning of the words within the regulation is in doubt, the regulation is silent, or is ambiguous. In this case, the regulation is unambiguous and there can be no doubt as to the plain meaning of the phrase "has accepted." Rev. Sharpton should not be denied duly certified matching funds because the Commission may have intended the regulation apply prior to the acceptance of matching funds. If the Commission intends for the personal expenditure limitation to apply prior to the candidate's acceptance of matching funds, the proper course is for the Commission to amend section 9035.2(a)(1) to remove the "has accepted" language.

B. Any violation of the personal expenditure limitation was not "knowing."

Finally, despite having conclusively demonstrated that Rev Sharpton has not violated the personal spending limitation as evidenced by the discussion in Section II and the accompanying spreadsheet and documents, even if the Commission, despite the plain meaning of the regulation, disagrees with Rev. Sharpton, the Commission must acknowledge that the language of section 9035.2 could lead a reasonable person to conclude that the personal expenditure limitation would not be triggered until after a candidate "has accepted" matching funds. Because Rev. Sharpton relied on the regulation as promulgated and believed that the personal expenditure limitation was not triggered until after he had accepted matching funds, he could not under any interpretation of the regulation "knowingly" have violated the personal expenditure limitation, as required by section 9035.2.

IV. Conclusion

For the foregoing reasons, we respectfully request the Commission withdraw its initial determination to suspend matching fund payments.

Sharpton 2004

Andrew A. Rivera, Treasurer
Sharpton 2004
1001 6th Avenue, Suite 1211
New York, NY 10018

ATTACHMENT 3
PAGE 9 OF 9