



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 16, 2003

To Whom it May Concern:

We write today to urge you to review the Presidential Public Funding Program administered by the Federal Election Commission. We believe that the presidential public financing system, particularly the system for presidential primaries, is in serious trouble.

Increased contribution limits, declining taxpayer check-off rates, stagnant primary spending ceilings, front-loaded primaries, and the exploding cost of presidential campaigns have all conspired to marginalize the public financing system. In 2000, President Bush opted out of the public financing system during the primaries and is likely to do so again in 2004. Published reports indicate that several Democratic candidates may opt out of the system. For the first time in history, there is a real possibility that both major party candidates will operate outside the public finance system in 2004.

In light of the foregoing, Congress should systematically examine all aspects of the presidential public financing system. Specifically, Congress should decide -- in light of the declining taxpayer check-off rates, candidates opting out of the system, and other systemic problems -- whether the public financing system should be abolished, substantially repaired, or maintained in its current structure.

We believe that if decisive legislative action is not taken, there is a real possibility that the presidential public financing system, at least for the primaries, may become irrelevant.

Included with this letter are proposed legislative remedies for the presidential public financing system. These proposals reflect our views as Commissioners and are not made on behalf of the Federal Election Commission. We are available at your convenience if you would like to discuss our proposals further.

Sincerely,

Handwritten signature of Michael E. Toner in black ink.

Michael E. Toner
Commissioner

Handwritten signature of Scott Thomas in black ink.

Scott Thomas
Commissioner

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Michael E. Toner
Commissioner

Scott Thomas
Commissioner

Legislative Recommendations Regarding Presidential Public Funding Program

Commissioners Michael E. Toner and Scott E. Thomas

April 16, 2003

Recommendation

The presidential public financing system, particularly the system for presidential primaries, is in serious trouble. Increased contribution limits, declining taxpayer check-off rates, stagnant primary spending ceilings, front-loaded primaries, and the exploding cost of presidential campaigns have all conspired to marginalize the public financing system. In 2000, President Bush opted out of the public financing system during the primaries and is likely to do so again in 2004. Published reports indicate that several Democratic candidates may opt out. For the first time in history, there is a real possibility that both major party candidates will operate outside the public finance system in 2004. If top-tier candidates opt out of the public financing system, it would indicate that there are serious problems with the system itself.

In light of the foregoing, we believe that Congress should systematically examine all aspects of the presidential public financing system. Specifically, Congress should decide -- in light of the declining taxpayer check-off rates, candidates opting out of the system, and other systemic problems -- whether the public financing system should be abolished, substantially repaired, or maintained largely as is. We do not take a position on these policy options, but we strongly believe that Congress should decide on one of these three courses.

If Congress decides to maintain the presidential public financing system, major structural changes are needed to make the system compatible with the practical realities of running for President in the 21st century. First and foremost, the primary spending limit for candidates who take matching funds should be significantly increased to reflect the modern cost of waging a successful campaign during the primaries. We specifically recommend that the primary spending ceiling, which was approximately \$40 million in 2000, be increased to match the general election ceiling, which is expected to be approximately \$75 million in 2004. In addition, we recommend increasing the public funding allowance to half of the increased primary spending limit (which would be approximately \$37.5 million in 2004). We also recommend that Congress significantly increase the total amount of matching funds a candidate can obtain by doubling the maximum matchable amount from \$250 to \$500 per donor. Congress should also tighten

significantly the eligibility requirements for receiving matching funds; the threshold amount (\$5,000 raised in each of 20 states) has not been adjusted since 1974.

Even if Congress determines that the current system should remain largely intact, we urge Congress to take action on the Federal Election Commission's previous recommendations to alleviate the projected temporary shortfall in matching fund payments and to eliminate the State-by-State primary spending limits.

Explanation

A. Congress Should Decide Whether the Presidential Public Financing System Should Be Abolished, Substantially Repaired, or Maintained Largely Intact.

Begun as a means of separating presidential candidates and party convention committees from traditional reliance on private contributions collected by fundraisers, the public financing program has been used by most major party candidates and convention committees over the years, and has been used by several minor or new party candidates and convention committees as well. In recent years, however, the primary matching fund program has proven less attractive, to the point that some top tier presidential candidates have opted out or considered opting out. With the real possibility in 2004 that top tier candidates of both parties will opt out of the presidential public funding program in the primary phase, we believe that Congress should seriously assess whether the program is functioning as intended and whether the program should be abolished, substantially repaired, or maintained largely as is.

1. Does the Public Financing System Have Popular Support?

We believe that any system of public financing should have popular support to succeed. The low taxpayer check-off rates cast doubt on whether the presidential public financing system has broad public support. From the mid-1970s through the mid-1980s, the check-off percentage averaged between 25 – 30%, and never dropped below 23%. However, from the mid-1980s through last year, the average percentage ranged from the teens through the low 20s, and during the last four years the percentage has hovered between 11 – 12%. When only 11 or 12% of the nation's tax returns show participation, it is very hard to conclude that the public financing system has popular support. On the other hand, some polling surveys have indicated a much higher level of support than the check-off rates would indicate. In fact, little research has been done to evaluate why the check-off rate has declined. In deciding whether to abolish or maintain the presidential public financing system, Congress should evaluate whether the presidential public financing system has the American public's support.

2. Other Issues to Consider.

A fair evaluation of the primary public funding program will raise longstanding arguments about whether public funding provided by taxpayer check-offs is better than

private financing provided by contributions raised by candidates (or parties in the case of convention funding). Most such arguments begin with assertions about popular acceptance of public funding. As noted above, while some will argue that the decline in taxpayer participation in the check off program (from a high of about 40 million individuals in 1981 to a low of about 20 million in 2001) signals broad opposition to the public funding concept, others will point to various opinion surveys indicating the opposite. Similarly, some will argue that if only 11% of the tax returns filed have a YES box checked, a minority of taxpayers are forcing the rest to go along with using tax dollars for the program. Others, of course, will argue that a duly elected Congress passed the program (and the check off mechanism), and it allows taxpayers a free choice of whether or not to earmark \$3 of their own taxes for this purpose.

More fundamentally, opponents of public funding are likely to assert that reliance on traditional fundraising fosters better contact with supporters and the voting public. Proponents of public funding are likely to counter that less reliance on fundraising means more freedom on the part of candidates to campaign directly with the broad electorate. Opponents will probably assert that public funding has not shielded presidential candidates from allegations of improper ties to fundraisers, particularly in light of the ‘soft money’ allowances in past election cycles. Proponents probably will reply that without public funding things would have been worse because the program has substituted the funds collected from millions of citizens at \$3 each for over \$200 million that would have been raised the traditional way in recent elections.

B. If Congress Decides to Maintain the Public Financing System, Major Structural Changes Are Needed to Make the System Viable.

If Congress concludes that the public financing system should be maintained, it should address the very real fact that the primary matching program is not working as intended if top-tier candidates are not participating. We believe that several significant changes must be made to the program to address this core, structural problem.

1. The Primary Spending Ceiling Should Be Significantly Increased.

The most significant concern for primary candidates has been the spending limit that applies in the primary campaign if a candidate accepts public funding. In the 2000 presidential election, for example, the primary spending limit was about \$40 million (adding the nearly \$33 million base and the nearly \$6.6 million add-on for fundraising expenses). Compared to the general election spending limit (about \$68 million in 2000), the primary limit has proven very restrictive. (*Compare* 2 U.S.C. § 441a(b)(1)(A) (primary) *with* 2 U.S.C. § 441a(b)(1)(B) (general).) Given that the primary process now commonly stretches over an 18-month period—from January of the year before the election through the conventions—whereas the general election runs only several months from the conventions through early November, campaigns easily can exhaust their spending allowance after the early primaries.

This problem has been exacerbated by the trend in recent years to move more and more presidential primary and caucus contests to the first two or three months of the presidential election year. The intense competition during this compacted time frame has left the top-tier candidates very close to their spending limit with several months left until the nominating convention. The campaigns have been compelled to dramatically slow down operations, reduce staff, and rely on the assistance of party-funded or outside group-funded activity.

With recent changes to the campaign finance law, particularly the increase in the contribution limit for individuals to \$2,000 per election, some candidates are likely to be even less inclined to opt for the primary matching fund program. It will be easier to raise sufficient funds through traditional fundraising networks, and the public funding match (still set at only \$250 per donor) will be less significant in this context. Further, the new 'soft money' and 'issue ad' restrictions on party and outside group activity will erode traditional reliance on such support during the pre-convention period when the candidates' spending limit is nearly exhausted.

While reasonable minds could differ on where to set the mark, we recommend that the primary spending limit be increased to equal the general election spending limit. Adjusted for inflation, the 2004 general election limit is projected to be about \$75 million. The primary spending limit should be the same. This would allow top-tier candidates, who can be expected to expend about \$45 million as of the early primary season, to continue to raise and spend sufficient funds thereafter to mount a competitive race through the convention. Replacing the \$10,000,000 figure in 2 U.S.C. § 441a(b)(1)(A) with \$20,000,000 (in 1976 dollars) would accomplish these proposals.

2. The Separate Fundraising Allowance Should be Eliminated.

We recommend eliminating the separate fundraising allowance that simply adds an additional 20% to the base spending limit. (2 U.S.C. § 431(9)(B)(vi).) The complicated rules and calculations involved in the separate fundraising allowance outweigh any possible benefits from its application. The suggested increase in 2004 to a spending ceiling of about \$75 million would still provide a considerable boost from the projected ceiling of about \$45 million (base plus 20% fundraising allowance) that otherwise would apply. This could be accomplished by deleting 2 U.S.C. § 431(9)(B)(vi).

3. The Amount of Matching Funds Available to Candidates Should be Increased Proportionately By Any Adjustment in the Primary Spending Ceiling.

Given that the public funding component has been limited to 50% of the base primary spending limit, we recommend that Congress allow the public funding component to rise to 50% of the new overall primary spending limit. (26 U.S.C. § 9034(b).) Thus, in 2004, for example, qualifying candidates would be eligible to receive approximately \$37.5 million in matching funds. As with the current system, though, candidates would be expected to rarely if ever reach the 50% limit because many donors give more than the

amount of a contribution that can be matched. (With a \$1,000 per donor limit and a \$250 matchable amount, past presidential campaigns traditionally received primary matching funds in the range of 25-35% of overall receipts. In the 2000 election, the candidate receiving the largest amount of matching funds, \$15.4 million, fell short of 50% of the \$33 million base spending limit and was even further from the overall limit of about \$40 million.)

Because 26 U.S.C. § 9034(b) cross references the expenditure limitation in 2 U.S.C. § 441a(b)(1)(A), if the amendment discussed above is made to 2 U.S.C. § 441a(b)(1)(A), no additional amendment to 26 U.S.C. § 9034(b) would be necessary, as the public funding component would automatically rise to a maximum of 50% of any increased overall primary spending limit.

4. The Maximum Matchable Amount Should Be Doubled.

In light of the doubling of the individual contribution limit from \$1,000 per election to \$2,000 per election, we recommend that the maximum matchable amount be likewise doubled from \$250 per donor to \$500 per donor. (26 U.S.C. § 9034(a).) This will help make the public funding program worthwhile for candidates. Without this change, candidates would receive a relatively small public funding inducement compared to previous election cycles (\$250 out of a possible donation of \$2,000 versus \$250 out of a possible donation of \$1,000). Even with the increased overall spending limit suggested above, some candidates might find the advantages of the public funding program insufficient to warrant participation. Replacing the \$250 amount in 26 U.S.C. § 9034(a) with \$500 would increase the maximum matchable amount.

5. Congress Should Increase the Qualification Threshold for Primary Matching Funds.

Another area that Congress should address to modernize the public funding program concerns the qualification threshold for primary matching funds.

Congress is permitted to condition the receipt of public funds on candidates making a showing that they have significant, broad-based political support. The current matching funds eligibility requirements, which have not been adjusted for inflation since 1974, no longer require any meaningful showing of popular support. To be eligible to receive matching funds, a candidate must simply raise \$5,000 in each of at least 20 States, with the qualifying contributions not exceeding \$250 per donor. (26 U.S.C. § 9033(b)(3).) This means that with 20 donors in each of 20 States—a total of only 400 donors and \$100,000—a candidate can qualify for public funding. Some presidential candidates receive 400 such contributions in a single week or even in a single day.

We offer several alternatives to consider. First, Congress could increase the current dollar amounts to account for the over 200% increase in inflation since 1974. This would mean that the threshold to receive matching funds would be \$15,000 in each of 20 States, for a total of at least 1,200 donors and \$300,000. A second approach would be to

increase the threshold to \$25,000 in each of 20 states, which would require at least 100 donors in each State and at least \$500,000. A third approach would be to increase the matching funds threshold to \$50,000 in each of at least 20 States, making the requirement at least 200 donors in each State and the total needed at least \$1,000,000. Congress could amend 26 U.S.C. § 9033(b)(3) and (4) in conformance with any of these proposals.

We recognize that any increase in the eligibility threshold may mean that some candidates that otherwise could qualify for matching funds will not be able to do so. This was a dilemma faced by Congress when it created the program almost 30 years ago. It should be noted that of the ten candidates that received matching funds in the 2000 presidential primary elections, only one had not raised over \$1 million in contributions by individuals by the end of 2000. We are confident that Congress could devise a formula that meets the proper balance. In any event, we believe that any change in the formula should apply even-handedly to major party and minor party candidates.

6. Options for Financing the Presidential Public Funding Program.

Increasing the overall spending limit, the public funding limit, and the maximum matchable amount would increase the cost of the primary matching fund program. In recent election cycles, this particular program has cost as much as \$65 million (an annualized cost of approximately \$16 million). Assuming that increasing the maximum matchable amount from \$250 to \$500 would approximately double the cost of the program (the highest possible estimate), and that increasing the public funding limit from about \$19 million to about \$37.5 million would raise that amount by another 50% (only a handful of candidates get close to the limit), the primary funding program could be expected to grow to a four-year cost of approximately \$195 million. That \$130 million increase works out to an annualized increase of approximately \$33 million.

To pay for that increase, Congress could consider increasing the check-off amount. (26 U.S.C. § 6096(a).) If Congress keeps the current check off system, an increase of \$2 (to \$5 per taxpayer) would generate about 40 million additional dollars *if* the current number of taxpayers checking YES (about 20 million) remains steady. On the other hand, if the number checking YES dropped to only 17 million, the \$34 million generated probably would not be sufficient because the 3 million person drop would decrease the funding otherwise projected to be available for the overall program by \$9 million.

Repayments from primary election committees are required to be deposited in the Matching Payment Account. (26 U.S.C. § 9038(d).) Repayments from general election and convention committees, however, are required to be deposited in the “general fund of the Treasury.” (26 U.S.C. § 9007(d) (general election repayments); 26 U.S.C. § 9008(h) (convention repayments).) Congress could determine that all repayments of taxpayer designated funds should benefit the public financing programs. Amending 26 U.S.C. § 9007(d) would accomplish this for both general election and convention committees because the convention committee provision (26 U.S.C. § 9008(h)) cross-references the general election committee provision.

C. Even if Major Structural Changes to the Matching Funds Program Are Not Made, Congress Should Alleviate the Projected Shortfall in Matching Funds for 2004 and Eliminate the State-by-State Primary Spending Limits.

The foregoing discussion relates primarily to our recommendation that Congress make substantial changes to the matching funds program. Even if Congress decides not to make major changes to the program, it should nonetheless consider the Federal Election Commission's longstanding recommendations to address the temporary matching funds shortfall projected for 2004 and the cumbersome State-by-State primary spending limits.

1. Congress Should Address the Potential Temporary Matching Funds Shortfall in 2004.

The Commission has previously urged Congress to focus primarily on a fairly discrete problem in the presidential public funding program. Specifically, because the funding mechanism for the program has not kept pace with the growth in payouts, and because the Department of Treasury has treated check-off proceeds expected to come in from January through July as 'unavailable' when calculating the general election 'set aside' and the remaining primary matching fund account balances, the primary candidates have experienced temporary shortfalls in matching fund payments in the last two elections.

The temporary shortfall in matching funds that has occurred in the past two presidential elections may recur in 2004. Under the most realistic assumptions, it appears that the January 2004 payout may be only about 53 cents on the dollar. The funds considered 'available' by the Department of Treasury will be about \$19.3 million, the funds to which candidates will be entitled will be about \$36.6 million, and the payouts therefore will have to be reduced accordingly. February and March payouts also will be less than 100%, but by the April 2004 payouts, the temporary shortfall will have been cured under this projection. This is because the check-off proceeds flowing into Treasury Department accounts will be adequate to make up the earlier deficiencies.

The temporary shortfall causes participating candidates to resort to short term borrowing which can involve significant interest charges. A shortfall complicates the matching fund payment process due to the need for repeated calculations of the available matching fund account balances and tracking the 'make up' payments needed to make candidates whole as matching fund proceeds become available.

In light of this, we recommend that Congress, at a minimum, index the current \$3 check-off amount to inflation. The check-off amount has not been adjusted since 1993; inflation alone would justify at least an increase to \$3.50 per taxpayer. Assuming the current number of taxpayers checking YES stayed steady, this would bring in an additional \$10 million per year—almost certainly enough to forestall a similar shortfall in the matching funds account by the 2008 election.

A more immediate fix— something that would alleviate the shortfall even for the 2004 election—would be a simple change in the statute that would direct the Department of Treasury to rely on the January to July projected check off proceeds when evaluating the funds that are ‘available’ for the general election ‘set aside’ and the funds that therefore remain for primary matching fund payouts. As noted above, under the existing statute, the Department of Treasury must pay convention entitlements in the year before the presidential election and then must ‘set aside’ funds for the projected general election payouts. Whatever is left after these calculations may be placed in the primary matching fund account. The Department of Treasury has interpreted the statute to mean that projected proceeds coming in from January through July (when the general election payouts actually will have to be made) cannot be considered “available” when the ‘set aside’ calculation is made. Thus, the general election ‘set aside’ relies only on proceeds actually in Treasury accounts, thereby disregarding the January through July expected proceeds. This means that the funds placed in the primary matching fund account is reduced by the same amount. (In the January 2000 time frame, this reduced the matching fund’s balance by about \$57 million.)

Simply changing the statutory provision (26 U.S.C. § 9037) to “will be available” would authorize the Department of Treasury to rely on expected January to July check off proceeds when calculating the ‘set aside,’ and would thereby make the same amount available for the early matching fund payouts. It would be understood that calculations of expected check off proceeds, just like calculations of expected payouts, would be based on sound statistical methods to produce a cautious, conservative estimate of funds that will be available to pay general election and other expenses.

2. The State-by-State Primary Spending Limits Should be Abolished.

Finally, we continue to believe that Congress should eliminate the primary State-by-State spending limits. (2 U.S.C. § 441a(b)(1)(A).) These limits serve no compelling purpose. The overall spending limit preserves the attraction and effectiveness of the public funding program, and the public funding limit assures that the amount of public funds used will not be unchecked.