RYAN, PHILLIPS, UTRECHT & MACKINNON*
ATTORNEYS AT LAW
* Nonlawyer Partner
1133 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20006

(202) 293-1177
Facsimile (202) 293-3411

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Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Notice of Proposed Rulemaking 2003-8
Public Financing of Presidential Candidates and
Nominating Conventions

Dear Ms. Dinh:

These comments are submitted in response to the Commission's Notice of Proposed Rulemaking ("NPR") regarding the regulations governing publicly financed presidential campaigns. They are submitted based upon the law firm's collective experience representing presidential candidates since 1984 and are not submitted on behalf of any particular presidential candidate or firm client.

Overall, we urge the Commission to review these proposed regulations as an opportunity to simplify the rules governing publicly financed presidential campaigns. Simplification, however, does not mean imposing arbitrary deadlines and limitations. Many of the audit issues that are raised in the NPR have arisen, not because of the statute or the FEC regulations. Rather, they have arisen because of new approaches taken by the auditors from one campaign to the next seeking to dispute candidate disbursements as nonqualified campaign expenses. Once candidates have established their eligibility to receive primary matching funds, they should be given wide latitude in determining how to spend those funds. Disclosure serves the interest of the public in protecting the use of public funds. The attempt to limit the use of matching funds for winding down is yet another example of the attempt to identify issues that are created by the auditors in the first place, set up as a "problem" and then result in additional regulations that further complicate the public financing process.

Winding Down Costs

The Commission should not put any limitation on the amount or timing of winding down costs. The limitations proposed are contrary to public policy and would result in great

disparity between campaigns in terms of their ability to defend themselves in the audit, in enforcement matters, in other investigations, and in challenging repayment determinations. The NPR seems to imply that winding down should only be spent on matters that are unique to presidential committees. There is no support for such a limiting definition. Any comparison to non-publicly funded campaigns is inapposite since those committees do not have to contend with a spending limit or with an FEC audit.

Time Limit

Limiting winding down costs to the term of the audit would ignore numerous other winding down obligations of a campaign, and is unrealistic from a "real world" perspective. The proposal to limit the time period for winding down is based solely on the audit process. This proposal would completely disregard the wide variety of forums and issues in addition to the audit itself that presidential committees must contend with after the campaign. All of these are time-consuming and resource consuming, and experience has demonstrated that it cannot be predicted how long it will take to resolve all matters or how much it will cost to defend against or resolve these matters.

Enforcement Actions. The FEC does not allow campaigns to terminate their reporting obligation until such time as all enforcement matters are closed. It makes no sense to refuse to allow a candidate to make use of matching funds to pay for continued reporting obligations and legal expenses in defending itself in an enforcement action. In fact, virtually every presidential audit generates an enforcement action that is not even forwarded to the Office of General Counsel until after the Final Audit Report is issued. Rarely is a presidential candidate even notified of the enforcement action until after the repayment determination is made. Based on the staff proposal regarding time limitations on winding down expenses, a candidate could be ordered to make a surplus repayment, and then have to raise additional funds to continue its reporting to the FEC and to defend itself in enforcement actions.[1] This makes no sense and would be grossly unfair – particularly to candidates who do not become President and who are not holding other federal office. The unsuccessful candidates often find it virtually impossible to raise additional funds after the election is over, much less 2 years later after the audit is over.

Repayment Challenges. The Presidential Primary Matching Payment Account Act specifically provides that candidates have the right to challenge an FEC repayment determination in court. Under the staff proposal, candidates would not be able to use public funds to defray the expenses of such a challenge. In the past, presidential candidates have successfully challenged repayment determinations or have reached settlement with the FEC only after filing suit. These campaigns included the 1976 Carter campaign, the 1980 Reagan campaign, the 1980 Kennedy campaign, the 1988 Dukakis and Simon campaigns, and the 1992 Bush-Quayle campaign. These actions to challenge repayment determinations have not been frivolous. In several instances the courts have held that the Commission's repayment determination was contrary to law. There is no basis for denying a committee the right to challenge a repayment determination by effectively depriving candidates of the funds with which to make a challenge.

[1] Certainly, if the FEC is going to limit the winding down time period to the length of the audit, it is imperative that the Commission overhaul the enforcement process to ensure that enforcement matters are resolved or closed by the end of the audit process.

Other Investigations. Presidential candidate committees have been involved in other non-FEC investigations. These included the Department of Justice Campaign Finance Task Force after the 1996 presidential campaign, a criminal investigation into the embezzlement of funds from a 1992 presidential primary candidate, and the investigation conducted by the Senate Governmental Affairs Committee after 1996. Candidates should be allowed to use public funds to defend themselves in such actions.

Other Lawsuits. Campaigns also often have civil actions that can drag on for years. Examples of these types of actions include insurance liability claims and vendor disputes. These types of cases are unpredictable and sometimes are filed substantially after the end of the campaign.

There are no valid policy reasons for setting an arbitrary time limit within which a campaign must successfully resolve all matters, virtually none of which are under their control. Making the audit easier for the auditors is not a valid reason to limit the time period.

Under the staff proposal, it is conceivable that, if the Commission disallows these matters as legitimate winding down expenses, the FEC could declare that a committee has a surplus and require the committee to make a surplus repayment. The committee, faced with these ongoing future winding down costs would have to raise new funds, subject to the contribution limits to defray these expenses. This is not only unfair, it would also put candidates who are not successful in obtaining the nomination in an impossible position. It is extremely difficult for a candidate who has not won to raise funds to repay debts, and even harder for such a candidate to raise funds to defray ongoing legal costs.

The statutory provision cited in the staff proposal on page 18488 of the Federal Register, Vol. 68, No. 72 (April 15, 2003), contemplates a completely different system than that actually administered by the FEC. It envisions that all issues related to the campaign are concluded within a six-month period after the candidate's date of ineligibility, including the audit and repayment determinations and enforcement matters. It was included in the initial version of the public financing law prior to the evolution of the audit process. The FEC audit process has become an enormous undertaking that requires substantial allocation of resources both during a campaign and during the winding down process. In addition to the detailed level of the audit, the process has also become one in which the purpose seems at least in part to "catch" a campaign rather than simply to verify that the reported receipts and disbursements of a campaign were actually disclosed correctly. The concept of "qualified campaign expense" has taken on a meaning that changes from cycle to cycle and has resulted in the disallowance of perfectly legitimate campaign expenses because they are not fully backed by onerous documentation burdens.

If the FEC is going to further limit what constitutes winding down costs or other qualified campaign expenses, then it is time for a complete overhaul of the audit and related enforcement process.

Limitation on Amount

For similar reasons, limitation on the amount of winding down costs should also be rejected.

Limitation by percentage of the spending limit. Winding down costs are not necessarily related to the amount of expenditures made by a campaign. To a limited degree, the amount of work required to pay bills and reconcile vendor accounts may be related to the overall spending by the campaign, but even that is not necessarily the case. Some campaigns that are under-funded may have greater winding down costs because they did not have sufficient resources for compliance during the campaign. They may have more post-election clean-up work to do than fully funded campaigns, and the amount of this work depends on factors unrelated to the total amount of money they raised or spent. Many have relied on volunteers to perform compliance functions or administrative and bookkeeping functions while fully funded campaigns have the resources to hire professional experienced staff to perform these same functions. Indeed, there have been campaigns in the past where the auditors had to reconstruct records in order even to do the audit. Arbitrary limitations on the amount of winding down costs cannot possibly make that type of situation any better. They can only make it worse.

Other winding down matters such as the number of enforcement actions or other legal matters and investigations is in no way related to the total amount of expenditures. The number of enforcement matters and investigations are not even related to the level of compliance by a campaign. They are more often than not politically motivated. Nor is the cost of defending against an enforcement action related to the total amount of money raised and spent by the campaign. There are many enforcement actions that have resulted in lengthy factual investigations by the FEC involving presidential and other campaigns that did not raise and spend the largest amounts of money. As any review of enforcement matters would reveal, the amount of legal fees and investigative costs has to do with the nature of the allegations and the breadth of the investigation – not with the amount of money spent by the campaign.

Flat Limitation. For the same reasons set forth above, there is similarly no basis for establishing a flat arbitrary limit on the amount of permissible winding down costs.

The arbitrary and unfair nature of the proposal to limit the amount of winding costs is demonstrated by the analysis included in the NPR which states on page 18487: "Of all 13 publicly funded committees in the 2000 presidential elections, five primary committees had winding down expenses that would have exceeded the proposed amount limitation." Although the NPR states that there were 13 publicly funded campaigns, there were only ten that received primary matching funds. That means that of the ten candidates who received primary matching funds, 50% of them would have exceeded the proposed winding down cost limitation in the 2000 cycle. There is no valid public policy reason to deprive these campaigns of the funds to successfully wind down and resolve all outstanding campaign issues.

We believe that the end result of this proposed change would be that many presidential primary campaigns in each cycle would be subject to surplus repayments because legitimate winding down costs were either too high under an arbitrary amount limitation or outside the arbitrary time period. The FEC would then demand a surplus repayment and these candidates would then have to raise private funds to defend themselves and defray these costs months or years after they are out of the race. This would be fundamentally unfair and serves no valid purpose.

This proposal also raises the issue of how the FEC auditors calculate the point at which candidates have no more matching funds in their account. Their methodology has not always been the same. It is important that the Commission understand how this will be calculated so that it does not result in further unfairness to campaigns.

If the Commission is going to adopt any further restrictions on winding down costs, either with an arbitrary limit on time or amount, then it must provide some alternative to make it easier for campaigns to pay for compliance expenses. The major thrust of the last several changes to the public financing regulations is antithetical to the goal of encouraging compliance. Limitation on the timing of creating GELAC, limitation on the percentage of funds allowable for legal and accounting to 15% of the primary spending limit and now the proposal to limit winding down either to an arbitrary time or percentage all combine to give an incentive to the campaign not to spend money on compliance.

Therefore, we recommend that the Commission permit the creation of a Primary Legal and Accounting Compliance Fund. This could be used for the payment of legal and accounting compliance costs related to the primary and would provide an incentive to campaigns to have good compliance procedures. Under the current rules, since every dollar spent on compliance (particularly for an under-funded campaign) is a dollar that cannot be used for political purposes, there is an incentive to skimp on compliance costs. The Commission has the same authority to create a compliance fund for the primary as it had for the general election. We are not aware of any general election candidate who has misspent GELAC funds and there is no reason to believe that the circumstances would be any different with a primary legal and accounting fund. Moreover, in order to insure against that possibility, the Commission can provide clear guidance as to what expenditures are permissible from a legal and accounting fund. This would create a clear incentive to candidates to adopt strong compliance procedures.

Excess GELAC Funds

The Commission should clarify in its regulations that excess GELAC funds may be used in a manner consistent with the use of other excess campaign funds. GELAC funds are all private contributions and not public funds, so there is no basis for treating them in a different manner than other excess funds.

Redesignations

The Commission should revise its regulations to allow presidential campaigns to redesignate and reattribute contributions under the same rules now applicable to non-publicly financed campaigns. In addition, such redesignated and reattributed contributions should be matchable after the contributors have received notice and the 60 day period has expired.

Credit Card Contributions

We have been advised by the Audit Division that their practice in the past has been to allow matching of credit card contributions only when the campaign has retained the entire credit card number. Most credit card processing vendors only retain the last four digits of a card number because of security concerns. Requiring a campaign to obtain and retain this

information places an unnecessary burden on campaign and places them in the position of maintaining information at great risk. While this does not necessarily need to be clarified in the regulations, we recommend that the Commission consider this issue and develop a process by which credit card contributions can be matched without the entire card number.

Candidate Salary

We concur with the proposal in the NPR to permit presidential candidates to receive a salary from their campaigns, beginning January 1 of the year preceding the election. Under the present rules, members of Congress and incumbent presidents and vice presidents are able to maintain their salaries while they are candidates. Challengers are either unable to receive any earned income or have to worry about taking a reduction in pay to avoid their employer becoming a prohibited contributor. Candidate salaries would be limited to prior income levels or to the salary of the position whichever is lower. This would be sufficient to guard against candidates receiving any type of windfall from a campaign. The salary payments would be publicly disclosed, providing the voters with complete information about the use of campaign funds for this purpose. We urge the Commission to adopt this proposal.

Conclusion

We thank the Commission for the opportunity to comment on the NPR and once again urge the Commission not to make any changes in the rules governing publicly financed presidential campaigns that make it more difficult for candidates to pay for compliance with the law or place additional undue fundraising burdens on them in order to defend their campaigns and wind up their activities.

Sincerely,

Lyn Utrecht

Eric Kleinfeld

Jim Lamb