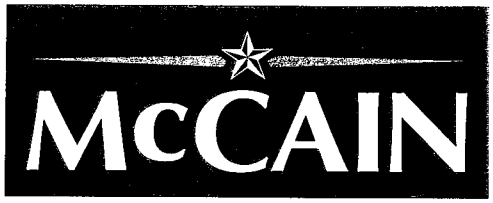

February 25, 2008

VIA HAND DELIVERY

Chairman David Mason
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: John McCain 2008, Inc.

Chairman Mason:

This responds to your February 19, 2008 letter concerning Senator John McCain's February 6, 2008 withdrawal from the federal primary-election matching funds program established by the Presidential Primary Matching Payment Account Act ("the Program").

The Federal Election Commission recognized in Advisory Opinion 2003-35 (Gephardt for President) that the Supreme Court's *Buckley* opinion found the Program to be constitutional because the Program is voluntary. As a result, candidates have a constitutional right to withdraw from the Program. The Commission in *Gephardt* expressed its view that this constitutional right to withdraw was conditioned on the candidate not receiving Program funds from the U.S. Treasury and not pledging Program certifications received from the FEC as security for private financing. The campaign has received no funds from the U.S. Treasury, and has notified the Treasury that it will not accept any such funds. Consistent with the reports to the FEC noted in your letter, the campaign did not use its federal matching fund certifications as security for the campaign's bank loan, as discussed further below.

Two previous presidential candidates were certified by the FEC as qualified to participate in the Program and withdrew prior to receiving federal funds. Democratic National Committee Chair Howard Dean (a presidential candidate during the 2003-2004 election cycle) qualified for the Program in June of 2003, but withdrew on November 12, 2003. Similarly, Republican candidate Elizabeth Dole withdrew from the Program on December 17, 1999 after qualifying earlier that year.

In your letter, you stated your belief that "Just as 2 USC Section 437c(c) required an affirmative vote of four Commissioners to make these certifications, it requires an affirmative vote of four Commissioners to withdraw them." We respectfully disagree with this conclusion for the following reasons: First, 2 USC 437c(c) contains no such requirement as a condition for withdrawal. This was recognized by an FEC spokesperson who accurately told the Associated Press that although "[t]he statute says a vote of four commissioners is required to certify someone as eligible, . . . [t]here is nothing in the statute that talks about withdrawing from the

program." Second, the FEC's regulations are similarly silent on the subject. Third, your letter cites Advisory Opinion 2003-35, issued to former Congressman Gephardt, which outlined procedures the Commission chose to follow in that instance. The procedure included an affirmative vote by the Commission accepting Congressman Gephardt's withdrawal from the Program (a similar procedure was followed in the Dole and Dean withdrawals). However, this Advisory Opinion does not establish a legal *requirement* that the Commission must approve all withdrawals from the Program. As you are aware, the statute *prohibits* the Commission from establishing regulatory requirements through an Advisory Opinion. 2 USC 437f(b). The Commission has not taken the numerous additional steps through a formal rulemaking procedure with notice and comment that would be necessary to incorporate the *Gephardt* Advisory Opinion procedures into its regulations and make them binding on the Commission and on candidates participating in the Program.

This is particularly important in light of the extraordinary circumstances in which we and the Commission find ourselves at this time. Senator McCain submitted his withdrawal letter on February 6th of this year, and as your February 19th letter notes, the FEC does not currently have the minimum number of Commissioners necessary to constitute a quorum and conduct business. We believe this necessarily means that the Commission cannot determine at this time whether a vote is required to recognize and accept Senator McCain's withdrawal (as you conclude) or whether his withdrawal occurred automatically upon his February 6th notification (as we believe is the case). Accordingly, we understand the current status to be that once a quorum exists, the Senator's withdrawal letter will be presented to the Commission for its decision on whether any further action is required. Even if the Commission concludes that a vote is necessary, we are confident that the Commission will find that its role is "ministerial" in function, and that the Program's voluntary nature requires it to recognize that Senator McCain's withdrawal from the Program was effective as of February 6th.

The legal effect of Senator McCain's withdrawal—whether it is found to occur automatically via his letter of February 6th or is later ratified by vote of the new Commissioners—will be the same: Senator McCain will not be subject to the Program's spending limitations after February 6, 2008. We understand that you believe this is a matter that can only be decided by the full Commission when a quorum is present, and we are confident that the full Commission will concur with us it considers the question. Both as a candidate and as a Member of Congress, Senator McCain is hopeful that the Senate will move expeditiously to confirm new Commissioners so that the FEC may conduct all of its important business, including a review of these issues.

Your letter also requests that we provide additional information to the FEC concerning the rationale for concluding that the campaign's bank line of credit was not secured with federal matching fund certifications. John McCain 2008 has already placed the loan documents on the public record at the FEC, as required by law. Today, the bank, through its attorneys, unequivocally stated that the matching fund certifications held by the campaign were never collateral for the line of credit. I am attaching a copy of the letter I received. It concludes:

> Accordingly, the bank does not now have, nor did it ever receive from the Committee, a security interest in any certification for matching funds. Any finding or determination to

the contrary would be wholly inconsistent with the language of the loan documents, the intent and understanding of the parties and basic principles of banking, security and uniform commercial code law.

News services report today that the Democratic National Committee ("DNC") has filed a complaint with the Commission concerning this loan, citing these very documents. Accordingly, we expect to respond as provided in 2 USC 437g to the DNC's complaint with whatever additional information may be necessary to explain any further grounds for the conclusion that no Program certifications received by Senator McCain and John McCain 2008 constituted security for private financing.

I trust this information, and any that we may provide in response to the DNC complaint, will answer any questions which you, or the Commission when a quorum exists, may have concerning these issues.

Sincerely Yours,

Trevor Potter
Counsel
John McCain 2008

cc: The Honorable Judith Tillman, Commissioner, Dept. of the Treasury Financial Management Service

Encl: Letter from Counsel for Fidelity & Trust Bank, dated February 25, 2008

DICKSTEINSHAPIRO LLP

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TEL (202) 420-2200 | FAX (202) 420-2201 | dicksteinshapiro.com

February 25, 2008

Mr. Trevor Potter
John McCain 2008, Inc.
PO Box 16118
Arlington, VA 22215

Re: Fidelity & Trust Bank Loan

Dear Trevor,

We understand that a number of questions have been raised regarding the loan made by Fidelity & Trust Bank to John McCain 2008, Inc. (the "Committee"). In that regard, we offer the following perspective at the bank's request:

As outside counsel for the bank, we worked closely with the bank and the Committee since the inception of the lending relationship. At the outset, and with guidance provided by FEC Advisory Opinion 2003-35, we were mindful of two potentially competing concerns: (i) the bank having adequate assurance of loan repayment, and (ii) the Committee retaining flexibility to withdraw from the matching funds program (which we understand might not be possible if certifications for matching funds were pledged as collateral).

After the bank determined that adequate assurances of loan repayment existed without obtaining a pledge of any certification for matching funds, the loan terms were carefully drafted to exclude from the bank's collateral any matching funds certification (so as to assure that the Committee retained the flexibility to withdraw from the program in accordance with the principles of Advisory Opinion 2003-35). The fact that there was no pledge of any certification for matching funds is further evidenced by the fact that covenants were included within the loan documents that expressly required the Committee to pledge, in the future, and if (and only if) certain specified events occurred after the Committee were to withdraw from the program (such as the Committee's re-entry into the program), future certifications of matching funds as collateral for the loan. It is our understanding that, to date, none of those events have occurred. Accordingly, the bank does not now have, nor did it ever receive from the Committee, a security interest in any certification for matching funds. Any finding or determination to the contrary would be wholly inconsistent with the language of the loan documents, the intent and understanding of the parties and basic principles of banking, security and uniform commercial code law.

Sincerely,

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