



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 3, 1983

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1983-9

Robert I. Bogin
Ross and Bogin, P.C.
Suite 802
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Bogin:

This responds to your letter of March 16, 1983, on behalf of the Curry Exploratory Committee ("the Committee") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and the Presidential Primary Matching Payment Account Act ("the Matching Fund Act"), to the making of loans to the Committee.

Your letter states that the Committee was formed on February 8, 1983, to determine whether Charles E. Curry should become a candidate for the Democratic nomination for President. Judge Curry is not now a candidate and prefers to avoid at this time any action that would make him a candidate. However, if it is determined that his candidacy is feasible and desirable, the Committee may make a recommendation to Judge Curry that he become a candidate for his party's nomination for President. Judge Curry may act on that recommendation and become a candidate.

At this time, and in connection with the Committee's "testing the waters" effort, Judge Curry plans to lend the Committee in excess of \$50,000 of his personal funds. You add that if and when it is decided by Judge Curry that he should become a candidate for his party's nomination, it is possible that the Committee may not have sufficient funds to reduce the outstanding loan balance below \$50,000. In addition, the Committee may be unable to reduce the outstanding loan balance for at least ten days after he became a candidate. However, the Committee would reduce the outstanding loan balance below \$50,000 as soon as it has the funds to do so. Shortly thereafter (i.e. after the loan balance is reduced below \$50,000) Judge Curry may seek eligibility to receive matching payments pursuant to the Matching Fund Act. You note that for purposes of the

opinion request, Judge Curry would be able to comply with all requirements necessary to establish his eligibility to be certified for matching funds. You then ask: "Under these circumstances, will Judge Curry be eligible to receive matching funds pursuant to the Matching Payment Act."

Under the Matching Fund Act, no candidate may knowingly make expenditures from personal funds, or the personal funds of the candidate's immediate family, in connection with the candidate's campaign for nomination for election to the office of President in excess of, in the aggregate, \$50,000. 26 U.S.C. 9035(b) and 11 CFR 9035.2(a).* A loan by a candidate to his or her authorized campaign committee would be included within the term "expenditure" for purposes of 9035. See 2 U.S.C. 431(9) and 26 U.S.C. 9032(9); see also 11 CFR 9032.9(a)(1). The Commission's regulations require candidates who seek to become eligible to receive Presidential primary matching fund payments to certify that they (or their authorized committees) have not and will not incur expenditures in connection with their campaigns for nomination that exceed the limitations in 26 U.S.C. 9035. 11 CFR 9033.2(b)(2).

As you indicate, Commission regulations also set forth exemptions from the definition of contribution and expenditure which permit an individual to finance a variety of activities to assist in making a determination of whether to become a candidate for Federal office. The specific regulations which grant the "testing the waters" exemption from the definitions of contribution and expenditure provide, in part, that "funds received and payments made solely for the purpose of determining whether an individual should become a candidate" are not contributions or expenditures. 11 CFR 100.7(b)(1); 11 CFR 100.8(b)(1). Receipts and disbursements which fall within the exemption do not result in the occurrence of a contribution or expenditure, and therefore do not by themselves cause the person to become a candidate under the Act. However, if and when the individual becomes a candidate, the regulation has a retroactive or carryback effect in that the financing of all activities coming within the exemption must be reported and otherwise treated as contributions and expenditures for purposes of the Act and regulations. Advisory Opinions 1982-19 and 1982-3, copies enclosed.

Accordingly, while the loans Judge Curry proposes to make to the Committee for costs coming within the testing the waters exemption would not constitute contributions or expenditures at the time they are made, as soon as Judge Curry becomes a presidential candidate those loans would become, retroactively, contributions by Judge Curry and expenditures for purposes of the expenditure limitations in 26 U.S.C. 9035. Were it not for another provision of the regulations concerning the testing the waters exemptions, Judge Curry would be unable to make the necessary certification to the Commission as specified in 11 CFR 9033.2(b)(2) and would not be eligible to receive matching fund payments.

The regulations at 11 CFR 101.3, however, provide that contributions received by a candidate prior to becoming a candidate, that are not in compliance with the Act, must be returned to the contributor within ten (10) days after the individual becomes a candidate. The Commission has interpreted this provision to allow a person testing the waters to receive and expend funds which would otherwise be prohibited under the Act, as long as the funds are returned to the contributors involved within the ten day period. Advisory Opinion 1982-19, copy enclosed. This regulation must therefore be read in conjunction with the earlier cited regulation at 11 CFR 9033.2(b)(2)

which requires candidates seeking primary matching funds to certify that they have not and will not exceed the expenditure limitation of 26 U.S.C. 9035.

The Commission concludes that if the funds loaned by Judge Curry which exceed \$50,000 are returned to him within ten days of the date he becomes a candidate under the Act, he will be able to certify that he has not and will not incur expenditures which are in excess of the limitations under 26 U.S.C. 9035 (and 11 CFR 9035), provided that is otherwise the case. Accordingly, Judge Curry could become eligible to receive matching fund payments. The Commission advises that Judge Curry should expressly state in his certification pursuant to 11 CFR 9033.2(b)(2) that at one time he made disbursements that would have exceeded the personal expenditure limitation of 26 U.S.C. 9035 and should explain the details of reimbursement.

If the funds loaned by Judge Curry which exceed \$50,000 are not returned to him within ten days of his becoming a candidate, he would not be able to certify that he has not and will not incur expenditures which are in excess of the limitations of 26 U.S.C. 9035 (and 11 CFR 9035), and he would not be eligible to receive matching fund payments.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Danny L. McDonald
Chairman for the Federal Election Commission

Enclosures (AO 1982-3 and 1982-19)

* The citations to the matching fund regulations are citations to the newly prescribed revisions of those regulations. The revised regulations were prescribed by the Commission effective April 4, 1983. See 48 Fed. Reg. 14347, 16237 (1983). The text of the new regulations cited herein is found at 48 Fed. Reg. 5234-5251 (1983).