



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2000-12

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Dear Mr. Bauer and Mr. Potter:

This refers to your letter dated May 24, 2000, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), the Presidential Primary Matching Payment Act ("the Matching Act") and Commission regulations to a proposal to use Federal matching funds to pay for certain expenses of now inactive Presidential candidates, former Senator Bill Bradley and Senator John McCain, including those of their campaign staff and volunteers to attend and participate in the national nominating conventions of their respective political parties.

FACTUAL BACKGROUND

This request is made on behalf of Bill Bradley for President, Inc. ("the Bradley Committee") and McCain 2000, Inc. ("the McCain Committee"), the principal campaign committees of Mr. Bradley and Senator McCain, respectively.

Mr. Bradley and Senator McCain each sought the nominations of the Democratic Party and Republican Party, respectively, for President of the United States in 2000. Each

has qualified for and received Federal matching funds. On March 9, 2000, each separately made a public statement indicating that he would not compete in any other primaries and caucuses. The Commission thereafter concluded that neither candidate was actively seeking nomination for election in more than one State, as provided for in 11 CFR 9033.5. Since then, each candidate's campaign has consistently filed statements with the Commission showing net outstanding campaign obligations.¹ In the course of their campaigns, Mr. Bradley earned 419 delegates and Senator McCain earned 250 delegates.²

You state that neither former candidate has “released” his delegates. You affirm that each has preserved the opportunity for a distinctive voice at the convention, and full participation in convention activities. You explain that both candidates will maintain contact with and receive continued support from those delegates through the summer nomination conventions, and will be otherwise active at these conventions, as described below. The convention activities important to the candidates and their delegates include:

1. Travel to and from the convention.
2. Meetings with delegates and supporters in various state delegations, to thank them for their support and encourage them to remain active on the issues that initially motivated their support.
3. Attendance at receptions hosted by their campaigns, at which they would have the opportunity to thank their delegates, supporters and staffs, and maintain dialogue and debate with them about the direction of their party on important issues.
4. Attendance at fundraising events for their campaigns, in order to retire primary election debts.
5. Participation in the official proceedings of the conventions in various ways, including speeches.

You propose that each committee would pay for staff and volunteers to prepare for and attend the convention, to the extent that their presence is necessary to support the candidates in these activities. You state that the committees request that the Commission interpret the Matching Act, 26 U.S.C. §9031 *et seq.*, to allow them to pay costs relating to their convention activities as “qualified campaign expenses,” or alternatively, to approve other means of lawful payment of the described expenses.

¹ The Commission notes that taking together the most recent Statement of Net Outstanding Campaign Obligations filed by each campaign, with the most recent matching fund disbursements to each, the Bradley Committee has net outstanding obligations of \$306,567 (of which the Bradley Committee estimates \$50,000 is convention related expense) while the McCain Committee has net outstanding obligations of \$690,427 (of which \$430,000 is estimated by the McCain Committee to be convention related expense).

² In a phone conversation with counsel for Senator McCain and Mr. Bradley, it was confirmed that neither of them are delegates to the nominating conventions. It was further indicated that none of the staff personnel or volunteers considered in this request are convention delegates.

ACT AND COMMISSION REGULATIONS

Under the Matching Act, a “qualified campaign expense” is a purchase, payment, distribution, loan, advance, deposit, or gift of money or of anything of value incurred by a candidate or his authorized committee in connection with his campaign for nomination for election, the incurring of which does not constitute a violation of the law. 26 U.S.C. §9032(9). The Commission’s regulations state that all contributions received by an individual from the date he or she becomes a candidate and all Federal matching payments received by the candidate shall be used only to defray qualified campaign expenses or to repay loans or otherwise restore funds (other than contributions which were received and expended to defray qualified campaign expenses) which were used to defray qualified campaign expenses. 11CFR 9034.4(a)(1). Section 9034.4(a)(1) also contains an exception for expenses incurred after a candidate becomes ineligible for matching funds; these expenses are generally not “qualified” campaign expenses, except for certain “winding-down” costs. *See* 11 CFR 9034.4(b)(3) and (a)(3).

If on the date of ineligibility a candidate has net outstanding campaign obligations, that candidate may continue to receive matching payments provided that on the date of payment there are remaining net outstanding campaign obligations. 11 CFR 9034.1(b). The candidate's net outstanding campaign obligations equal the difference between the total of all outstanding obligations for qualified campaign expenses as of the candidate's date of ineligibility, plus estimated necessary winding down costs, less the total of cash on hand, capital assets, other assets and receivables. 11 CFR 9034.5(a). The amount submitted as the total of outstanding campaign obligations shall not include any accounts payable for non-qualified campaign expenses. 11 CFR 9034.5(b)(1). Matching payments received after the date of ineligibility pursuant to 11 CFR 9034.1(b) may be used to defray the candidate’s net outstanding campaign obligations, but may not be used to continue to campaign unless the candidate reestablishes eligibility. 11 CFR 9034.4(a)(3)(ii).

In addition to the costs to defray the candidate’s net outstanding campaign obligations, qualified campaign expenses for a candidate past the date of ineligibility include “winding down” costs. 11 CFR 9034.4(a)(3); 11 CFR 9034.4(b)(3). These are associated with the termination of political activity, such as the costs of complying with the post election requirements of the Act and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies. A candidate may receive and use matching funds for these purposes either after the candidate has notified the Commission in writing of withdrawal from the campaign for nomination, or after the date of the party's nominating convention, if he has not withdrawn before the convention. 11 CFR 9034.4(a)(3)(i).

Gifts and monetary bonuses to committee employees, consultants and volunteers in recognition for campaign-related activities or services (provided that such gifts do not exceed \$150 total per individual and the total of all gifts does not exceed \$20,000) are

also qualified campaign expenses. 11 CFR 9034.4(a)(5)(i). In the case of monetary bonuses for committee employees and consultants in recognition for campaign-related activities or services, the regulations require that they be awarded pursuant to a written contract made prior to the date of ineligibility and be paid no later than thirty days after the date of ineligibility. 11 CFR 9034.4(a)(5)(ii).

Under the Act and Commission regulations, a candidate and the candidate's committee have wide discretion in making expenditures to influence the candidate's election, but may not convert campaign funds to the personal use of the candidate or any other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d);

Commission regulations provide guidance regarding what would be considered personal use of campaign funds. Personal use is defined as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR 113.1(g), see Advisory Opinions 2000-02 and 1996-34. Under 11 CFR 113.2(a)(2), excess campaign funds may be used to pay any ordinary and necessary expenses incurred in connection with one's duties as a holder of Federal office. Commission regulations list a number of purposes that would constitute personal use. 11 CFR 113.1(g)(1)(i). Where a specific use is not listed as personal use, the Commission makes a determination on a case-by-case basis. 11 CFR 113.1(g)(1)(ii). Travel expenses, including subsistence expenses incurred during travel, are among those expenses to be analyzed on a case-by-case basis. If such travel involves both personal activities and campaign or officeholder related activities, the incremental expenses that result from personal activities are personal use, unless the person benefiting reimburses the campaign within thirty days for the amount of those expenses. 11 CFR 113.1(g)(1)(ii)(C).

APPLICATION TO PROPOSAL

Commission policy in previous Presidential primary campaign audits

The Commission has generally concluded in its audits of past Presidential primary campaigns that national nominating convention expenses are non-qualified campaign expenses since they do not relate to seeking the nomination when the candidate has withdrawn from the election.³ See 26 U.S.C. §9032(9). In the 1984 presidential cycle, the Commission determined that Friends of George McGovern made non-qualified campaign expenses when it incurred expenditures related to "preparatory [staff] work" for the Democratic National Convention. Final Audit Report for Friends of George McGovern, approved February 6, 1985, p. 5-6; see also, Addendum to Final Audit Report for Friends of George McGovern, approved February 19, 1986, p. 5-7. In that same

³ Additionally, the Commission's Explanation and Justification for its regulations cites convention expenses as an example of non-qualified campaign expenses. See Explanation and Justification, 11 CFR Parts 9007 and 9038, 50 Fed. Reg. 9422 (March 8, 1985) (discussing convention-related expenses as an example of non-qualified campaign expenses in the context of repayment calculations).

cycle, the Commission determined that Hollings for President, Inc., should make a repayment for incurring non-qualified campaign expenses related to convention hotel and airline ticket purchases. Final Audit Report for Hollings for President, Inc., approved February 19, 1986, p. 6-7. A similar repayment determination for convention-related, non-qualified campaign expenses was issued in the 1988 presidential election cycle for the Albert Gore, Jr. for President Committee, Inc. Final Audit Report for Albert Gore, Jr. for President Committee, Inc., approved July 13, 1989, p. 10-12. In more recent audits, the Commission reaffirmed that convention expenses are non-qualified expenses.⁴

Most recently, the D.C. Circuit upheld the Commission's determination that certain convention expenses incurred by Americans for Robertson, Inc. were non-qualified. These expenses included activities to bolster the support and enthusiasm of Dr. Robertson's elected delegates, but which the Robertson campaign claimed as fundraising and debt retirement activities because they were filmed for use in later fundraising videos. *Robertson v. FEC*, 45 F.3d 486, 492 (D.C. Cir. 1995).

Use of Federal matching funds for specific expenses

Convention travel

As noted above, the Commission has in past audit matters specifically determined that the expenses necessary to travel to and attend a Presidential nominating convention are non-qualified expenses for candidates who are no longer seeking the party's nomination, which is the case with Mr. Bradley and Senator McCain. The Commission concludes that, in general, expenses related to the convention travel of the candidate or their staff and volunteers are not qualified campaign expenses. However, there are certain specific situations among the expenses and activities you propose that would permit the use of Federal matching funds for the described expenses, including travel to the conventions.⁵

⁴ See the Final Audit Report for the Tsongas Committee, Inc. approved December 16, 1994, p. 63 which notes the view of the Tsongas committee that while "valid arguments exist that such disbursements are qualified campaign expenses, the [Tsongas] Committee recognizes that the Commission previously has rejected these arguments in the context of other audits." *Id.* Your request also cites the final audit report on Paul Simon for President. In that audit report, the Simon Committee had been asked as an initial matter to produce documentation substantiating its claim that the convention expenses at issue were fundraising expenses. The Simon Committee failed to produce the documentation, and the related expenses were included in the amount which the Commission determined the campaign was obligated to repay to the Treasury. See Final Audit Report for Simon for President, approved August 29, 1991, p.4-9. However, on an unrelated procedural issue, the U.S. Court of Appeals for the D.C. Circuit later reversed the Commission's determinations and canceled the Committee's repayment obligation. *Simon v. FEC*, No. 93-1252 (D.C. Cir., May 5, 1995).

⁵ The Commission assumes that the travel expenses would include transportation (e.g. airfare and taxi fare), hotel or other lodging, and per diem subsistence for the candidates and their spouses, and for the campaign staff and volunteers.

Meetings and receptions to thank delegates⁶

The Commission notes that 11 CFR 9034.4(a)(5) specifically discusses gifts to “committee employees, consultants and volunteers” for “campaign-related activities or services.” “Thank-you” receptions and meetings would fall into this category of qualified campaign expenses. The Commission notes that the cited regulation limits the amount expended per individual to \$150, and that the total spent for such gifts cannot exceed \$20,000 for the entire campaign. 11 CFR 9034.4(a)(5). Therefore, to the extent that such meetings are restricted to attendees who served the Bradley or McCain campaigns in the capacity of a committee employee, consultant or volunteer, the expenses of such meetings and receptions are qualified expenses. This regulation, which is otherwise specific as to the amounts that can be paid, does not allow the payment of travel expenses to attend or organize these events as qualified expenses.

Fundraising events to retire qualified primary election debts

As noted above, as long as the Bradley and McCain committees have remaining net outstanding campaign obligations, they remain qualified to receive matching payments, even though they are no longer seeking the Presidential nominations of their respective parties. Fundraising expenses to retire these campaign obligations are qualified campaign expenses and may be paid from Federal matching funds. The Commission concludes that these expenses may be incurred with regard to fundraising events conducted by the Bradley and McCain committees and held at the respective nominating conventions. Further, because fundraising activity denotes a broader area of activity for political campaigns than the specific regulations concerning gift and bonus events to thank delegates, Mr. Bradley and Senator McCain may use Federal matching funds to pay their travel expenses to attend the specific fundraising events that are held at the convention. Federal matching funds may also be used to pay the travel expenses of campaign staff who participate in the organizing and administration of the fundraising events.⁷

There are, however, several limitations which must be emphasized. First, if Senator McCain or Mr. Bradley or members of their staffs participate in other parts of the convention, expenses allocable to the portion of their attendance for any other part of the convention would be non-qualified expenses.⁸ Second, for fundraising expenses to be

⁶ The Commission finds no difference between expenses for delegate meetings and receptions, as outlined in your request, and so considers them together.

⁷ As guidance for which campaign personnel may be considered event organizers, the committees may rely upon the list of individuals considered linked to a campaign as described in 11 CFR 110.6(b)(2)(i): an individual who is an employee or a full-time volunteer working for the candidate’s authorized committee and those who are expressly authorized by the campaign to engage in fundraising and who hold a significant position within the campaign organization.

⁸ The Commission recognizes that this may require Mr. Bradley and Senator McCain to allocate their travel expenses in the same manner that Federal candidates are required to allocate their travel expenses on a particular trip between those aspects that are campaign related and those that are personal and not campaign related. By analogy, see 11 CFR 113.1(g)(1)(ii)(C) and Advisory Opinion 1996-19 (Congressman

considered qualified, they must be for specific fundraising events, such as fundraising receptions and fundraising dinners. For example, expenses associated with the attendance of the candidates, and their staff or delegates, at convention events solely because such participation may be featured in video productions or other promotional materials that may be used in campaign fundraising efforts after the conventions are held are not qualified expenses.⁹ Finally, such expenses will be considered qualified if used for this purpose only to the extent that at the time of the convention, the Bradley and McCain committees have outstanding net obligations. If it is determined, either prior to the convention or subsequent to the convention, that at the time of the convention itself the financial situation of either committee was such that there were no outstanding net obligations, then any expenses for the fundraising purposes described above become non-qualified expenses. Federal matching funds already used for these purposes would have to be repaid. *See* 26 U.S.C. §9038(b)(2), 11 CFR 9034.4(a)(1) and 9038.2(b)(2)(A).¹⁰

Participation in official convention events

Unlike the expenses related to holding fundraising events and events organized to thank delegates who are committee employees, consultants or volunteers, expenses related to participation in the official convention proceedings have no relationship to “winding down” expenses. They also do not fall into any other category of qualified campaign expenses, as noted in the preceding discussion. Therefore, expenses incurred by the Bradley and McCain Committees to cover costs specifically related to participating in the official proceedings of the national conventions are not qualified campaign expenses.

Availability of other funds for convention expenses

You ask whether “other registered federal political committees” may be allowed to pay the expenses described in your request. You ask for clarification of any issues associated with this proposal, including whether such payments would be regarded as “operating expenses” of such a committee. The Commission can provide only a partial response to this inquiry because you have not provided a complete description of the material and relevant facts. *See* 11 CFR 112.1(c). In this limited response (which should not be taken as a full exploration of all of the possible sources of funding or the issues involved), the Commission must also address each of the candidates separately since each has a different status under the Act and Commission regulations.

attending convention as delegate must reimburse campaign for non-campaign related portion of his travel expenses).

⁹ *See FEC v. Robertson*, 45 F.3d at 492.

¹⁰ Under 11 CFR 9033.11 Presidential campaign committees have the burden of proving that a disbursement is a qualified campaign expense. As regards possible fundraising expenses at the nominating conventions, both committees should provide, at the time each campaign is audited, documentation that directly links each expense to a specific fundraising event. For example, they should document and describe the role of each individual campaign staffer working for the event and should provide copies of the solicitation materials used in promoting the event (i.e. invitations) as well as any solicitation materials used at the event itself.

Senator McCain

While Senator McCain has ended his campaign for his party's Presidential nomination, he is still a Federal candidate for election to the U.S. Senate.¹¹ In Advisory Opinion 1996-34, the Commission considered the situation of a Federal candidate and also a Member of Congress who, though not a delegate, wished to attend his party's national convention. The Commission considered that the candidate would be involved in events which included major donors to his campaign and would otherwise be engaging in fundraising activity related to his Congressional campaign. The Commission also noted that, as a Member of Congress, the candidate would meet with constituents to discuss issues of importance to his district. Considering these circumstances, the Commission concluded that the use of his campaign funds would not constitute personal use since the candidate would be involved in campaign related or office holder related activities. *See* Advisory Opinion 1996-34.

If Senator McCain plans to engage in similar activity at the convention, he could use funds from his Senate committee to pay for his convention expenses. Campaign funds could also be used to pay for the expenses of campaign staff members and volunteers necessary to conduct these activities. *See* Advisory Opinion 1996-20. Contributions, subject to the limitations and prohibitions of the Act, may be made to his Senate campaign to pay for these expenses. Senator McCain could also use funds from his non-connected PAC, Straight Talk America, for these expenses, if he plans to engage in similar activity on behalf of that committee.

Mr. Bradley

Mr. Bradley's position differs from that of Senator McCain. Like Senator McCain, Mr. Bradley is no longer actively seeking his party's Presidential nomination and is not himself a delegate. However, unlike Senator McCain, Mr. Bradley is neither a candidate for another Federal office, nor a current Member of Congress.

Commission records indicate that Mr. Bradley has formed a non-connected political committee, Time Future Inc., which originally was his former Senate campaign committee, Bill Bradley for U.S. Senate. The Commission notes that the personal use restrictions would attach to any funds in Time Future Inc., that remained from his former Senate campaign committee. *See* 11 CFR 113.2(e)(5) and Advisory Opinion 1993-22. However, as in Advisory Opinion 1996-34, Mr. Bradley's attendance at the convention could involve events which would include major donors to this committee and Mr. Bradley may be otherwise be engaging in fundraising activity for this committee, and Mr. Bradley's attendance at the convention could promote this committee's goals. If Mr. Bradley plans to engage in similar activity at the convention, he could use funds from

¹¹ According to reports filed with the Commission by Senator McCain's Senate campaign committee, McCain for Senate '04 has received contributions and made expenditures over \$5,000 thereby qualifying Senator McCain as a Federal candidate under 2 U.S.C. §431(2)(A).

Time Future, Inc. for the proposed convention-related expenses, with the same restrictions and provisions as expressed above with regard to Senator McCain.

The Commission expresses no opinion regarding application of any rules of the U.S. Senate or the Ethics in Government Act to the described activities, because these issues are not within its jurisdiction. For the same reason, the Commission does not express any views as to any Federal or other tax ramifications.

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

Sincerely,

(signed)

Darryl R. Wold
Chairman

Enclosures (AOs 2000-02, 1996-34, 1996-20, 1996-19, 1993-22, and 1991-21)