



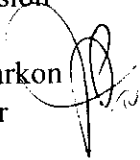
FEDERAL ELECTION COMMISSION
Washington, DC 20463


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FEDERAL ELECTION COMMISSION
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December 4, 2003


MEMORANDUM


TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

Rosemary C. Smith 
Acting Associate General Counsel

Mai T. Dinh 
Acting Assistant General Counsel

J. Duane Pugh 
Senior Attorney

Subject: Draft AO 2003-35

AGENDA ITEM
For Meeting of: 12-11-03

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 11, 2003.

Attachment

1 Nonetheless, candidates and their principal campaign committees can delay the
2 payment of any Matching Payments until they have reached a final decision to accept
3 them. Commission regulations specifically permit a candidate to “submit the threshold
4 submission simultaneously with *or subsequent to* his or her submission of the candidate
5 agreement and certifications required by 11 CFR 9033.1 and 9033.2.” 11 CFR 9036.1(a)
6 (emphasis added). In this manner, candidates and their principal campaign committees
7 may simply withhold their threshold submission until they determine they are prepared to
8 accept the Matching Payments and participate in the public funding programs.

9 Congressman Gephardt and the Committee submitted their Threshold Submission
10 with their Candidate and Committee Agreement. Their only legal option to delay
11 payment is to request that the Commission withdraw its certification, which will rescind
12 the Agreement entirely. No provision of law would prevent Congressman Gephardt and
13 the Committee from submitting another Candidate and Committee Agreement and
14 Certifications at a later point, and any matchable contributions may be included in a
15 subsequent Threshold Submission.

16 This response constitutes an advisory opinion concerning the application of the
17 Act and Commission regulations to the specific transaction or activity set forth in your
18 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
19 of the facts or assumptions presented, and such facts or assumptions are material to a

1 2003, the Committee filed a letter signed by Congressman Gephardt, which contained the
2 requisite provisions of Candidate and Committee Agreements and Certifications under
3 26 U.S.C. 9033 and 11 CFR 9033.1 and 9033.2, and a Threshold Submission, which,
4 according to the Committee, documented contributions from 1315 contributors in 21
5 States for a total of \$321,479 in matchable contributions. On December 3, 2003, the
6 Commission certified to the Secretary of the United States Department of Treasury that
7 Congressman Gephardt and the Committee are entitled to an initial payment of \$100,000
8 from the Presidential Primary Matching Payment Account on or after January 1, 2004.
9 The Committee has indicated that the Commission's certification will not be pledged as
10 security for any loan during the Committee's reconsideration of its participation in the
11 Matching Payment Act's public funding program. Congressman Gephardt and the
12 Committee presented an additional submission for payment of primary matching funds on
13 December 1, 2003, which is under review.

14 *Questions Presented*

15 1. After the Commission has certified a candidate and his or her principal campaign
16 committee eligible to receive payments under the Matching Payment Act, and prior to the
17 payment date for any such payments, may the candidate and the principal campaign
18 committee withdraw from the public funding program?

19 If the answer to question 1 is yes:

20 2. Is the Committee required to refund any contributions? Is there a required
21 timetable for any such refunds?

22 3. Is the Committee required to obtain the authorization of any contributors to retain
23 their contributions? Is there a required method for such authorizations?

1 3. *If the answer to question 1 is yes, is the Committee required to obtain the*
2 *authorization of any contributors to retain their contributions? Is there a required*
3 *method for such authorizations?*

4 For the same reasons discussed in response to question 2, the Committee is not
5 required to obtain authorizations from any contributors to retain their contributions,
6 should the Commission withdraw its certification of the Committee's eligibility to receive
7 Matching Payment funds.

8 4. *If the answer to question 1 is yes, will any of the legal requirements imposed as a*
9 *result of participation in the public funding program under the Matching Payment Act*
10 *continue to apply to the Committee after it withdraws from the program?*

11 Because the Commission's withdrawal of its certification would constitute its
12 agreement to the rescission of the Candidate and Committee Agreements and
13 Certifications under 26 U.S.C. 9033 and 11 CFR 9033.1 and 9033.2, none of the
14 Matching Payment Act obligations that are imposed solely by virtue of that contract
15 would continue to apply to Congressman Gephardt, the Committee, or the Commission.
16 The Commission cautions that some of the provisions of the Agreement remain
17 applicable pursuant to other provisions of law, and Congressman Gephardt and the
18 Committee would remain subject to those obligations. For example,
19 11 CFR 9033.1(b)(10) requires the candidate and the candidate's authorized committee to
20 agree to comply with the applicable requirements of the Act. Of course, Congressman
21 Gephardt and the Committee would remain subject to the Act and Commission
22 regulations. Congressman Gephardt and the Committee would not, however, be required
23 to abide by the expenditure limitation in 11 CFR part 9035, or to permit an audit and

1 The Committee wishes to reconsider its decision to participate in the Matching
2 Payment Act public funding program and inquires, in effect, whether the Commission
3 would consent to a rescission of this contract. The Matching Payment Act does not
4 address a candidate who the Commission has certified as eligible to receive payments
5 under the Matching Payment Act who no longer wishes to participate in the Matching
6 Payment program. Nor do the Commission's regulations address such a situation.

7 The legislative history of the Matching Payment Act does not address certified
8 candidates withdrawing from the public funding programs. It does, however, expressly
9 recognize that a Presidential primary candidate's participation in the Matching Payment
10 Act public funding program is voluntary. *See* H.R. Conf. Rep. No. 93-1438, at 116
11 (1974) (referring to "candidates *who elect* to receive matching payments" (emphasis
12 added)). The Matching Payment Act's dependence on a candidate's written agreement
13 and certification in 26 U.S.C. 9033 implicitly recognizes the voluntary nature of the
14 matching payment program as well.

15 The Supreme Court held that the voluntary nature of all of the public funding
16 programs permits the related expenditure limits, while simultaneously striking down
17 expenditure limits that were not voluntarily accepted as part of a public funding program.
18 *See Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976) (stating: "Congress may engage in
19 public financing of election campaigns and may condition acceptance of public funds on
20 an agreement by the candidate to abide by specified expenditure limitations. Just as a
21 candidate may voluntarily limit the size of contributions he chooses to accept, he may
22 decide to forgo private fundraising and accept public funding.") *See also Buckley*, 424
23 U.S. at 88 n.120, 89 & n.123, 95, 99, 107-08, and 108-09. The importance of the fact that

1 not pledged any Commission certification of funds as security for private financing have
2 not yet received or used any of the funds in the matching payment account. The
3 Matching Payment Act, Commission regulations, and Department of Treasury regulations
4 all require the Secretary of the Treasury to achieve an equitable distribution of available
5 funds and to consider the sequence in which funds are certified for candidates.
6 26 U.S.C. 9037(b). In the event of a shortfall, the Secretary of the Treasury considers all
7 funds certified for all candidates in determining the equitable distribution of the available
8 funds among the eligible candidates. If the Commission withdraws its certification of
9 funds for any candidate, the Secretary of the Treasury will consider those funds available
10 for the other eligible candidates and will redistribute those funds. Thus, a rescission of a
11 candidate's agreement to participate in the Matching Payment program prior to the date
12 of payment by the Treasury for any certified Matching Payment funds to that candidate
13 would not prejudice the other recipients of Matching Payment funds.

14 Therefore, in light of the terms of the Matching Payment Act, its judicial
15 construction, its legislative history, and the other policy considerations discussed above,
16 the Commission would withdraw a certification of a candidate's eligibility to receive
17 Matching Payment Act funds prior to the payment date for any such funds to such
18 candidate or his or her committee upon receipt of a written request signed by the
19 candidate. The Commission's withdrawal of its certification would constitute its
20 agreement to a candidate's request to rescind the Candidate and Committee Agreements
21 and Certifications. With respect to the initial payment of matching funds on or after the
22 first day of the Presidential election year, the Commission cautions that it must receive
23 any such written request no later than December 30, 2003, to provide the Commission

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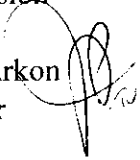
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