

SANDLER, REIFF & YOUNG, P.C.

August 19, 2008

By Facsimile and Hand Delivery

The Honorable Donald F. McGahn II, Chairman
The Honorable Steven T. Walther, Vice Chairman
The Honorable Ellen L. Weintraub, Commissioner
The Honorable Caroline C. Hunter, Commissioner
The Honorable Cynthia L. Bauerly, Commissioner
The Honorable Matthew S. Petersen, Commissioner

Re: Meeting of August 21, 2008—Agenda Documents 08-17 and 08-17A

Dear Commissioners:

We are writing on behalf of our client, the Democratic National Committee (“DNC”), to object to consideration of the above-referenced agenda items at the Commission’s open meeting scheduled for August 21, 2008. The basis for this objection is that there is no pending request before the Commission by Senator John McCain (R-Ariz.), candidate for the Republican Party nomination for President of the U.S., to be released from his obligations under the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§9031 *et seq.* (the “Matching Payment Act”).

Senator McCain has made no such request. Rather he simply decided unilaterally to withdraw from the matching funds program and has *already* violated his obligations under the Matching Payment Act. That violation is the subject of a pending, open enforcement proceeding initiated by an administrative complaint filed by the DNC on February 25, 2008. The Commission’s final consideration of the subject matter of that administrative complaint, at an open meeting, and in the absence of any investigation, would be a clear violation of the law.

I. Background

Although some of the pertinent facts are set out in Agenda Document 08-17, it is important for the Commission to review the key sequence of events:

On August 13, 2007, Senator McCain submitted his signed Candidate Agreement and Certification to the Commission, seeking certification of eligibility to receive matching funds under the Matching Payment Act. Of course, in that signed Candidate Agreement, the Senator agreed to abide by all the legal conditions for receiving the matching funds, including the expenditure limitation.

On November 14, 2007, Senator McCain obtained a \$4 million line of credit by pledging that he would apply for public matching funds and use those funds as collateral if he did not achieve a certain measure of electoral success in the New Hampshire Republican presidential preference primary. The McCain campaign actually received \$2.9 million from the bank at that time, using this line of credit.

On December 17, 2007, the McCain Campaign signed a modification to the line of credit, obligating the campaign to abide by the spending limit as long as the line of credit remained in effect.

On December 20, 2007, the Commission announced that it had certified Senator McCain to receive federal matching funds, creating a binding contract between Senator McCain and the U.S. Government.

Senator McCain was then due actually to receive matching funds on January 2, 2008. The only reason he did not was because “there was such a shortage in the Matching Payment Program account that no candidates received a payment until mid-February.” Agenda Document 08-17 at 4.

On February 6, 2008, Senator McCain sent a letter to the Commission stating unequivocally that “I, on behalf of myself and John McCain 2008, Inc., my principal campaign committee am withdrawing from participation in the federal primary-election funding program....” Agenda Doc. 08-17 Attachment 1. A letter dated February 7, 2008 from Trevor Potter, General Counsel of the McCain Campaign, to the Commission stated that the Senator and the campaign “have withdrawn from participation in the federal primary-election fund program established by the” Matching Payment Act. (That letter is not attached to Agenda Doc. 08-17; a copy is attached hereto for ready reference).

Senator McCain and his campaign then proceeded to violate his obligations under the Candidate Agreement and Certification and the Matching Payment Act by, among other things, significantly exceeding the expenditure limitation set forth in 26 U.S.C. §9035 and 11 C.F.R. §§9032.6 and 9035.1.

On February 25, 2008, the DNC filed an administrative complaint with the Commission, in proper form, setting out the pertinent facts and asking the Commission to find reason to believe that Senator McCain and the McCain Campaign have violated the

Matching Payment Act, and to conduct an investigation. The DNC has not been notified by the Commission of any action taken on the administrative complaint.

The DNC filed an action under 2 U.S.C. §437g(a)(8), challenging the Commission's failure to act on the administrative complaint. Because the 120-day period had not expired, that action was dismissed. *DNC v. FEC*, CA No. 08-0639 (D.D.C., May 14, 2008). On June 24, 2008, the DNC filed a new section 437g(a)(8) action. C.A. No. 08-01083 (D.D.C.).

II. Discussion

Agenda Doc. 08-17 begins by stating that its purpose "is to address the Commission's options for *responding to a request* by Senator John McCain . . . to be released from his obligations under the President Primary Matching Payment Account Act..." (emphasis added). But no such request exists. None was ever made. There is *no* request for action by Senator McCain pending before the Commission.

Rather, Senator McCain clearly and unequivocally declared, in his letter of February 6, 2008 (Agenda Doc. Attachment 1) that "I . . . am withdrawing from participation in the federal primary election funding program established by" the Matching Payment Act. To underscore the finality and unilateral nature of this action, Senator McCain's counsel sent a letter to the Commission the very next day, February 7, confirming that Senator McCain and the McCain Campaign "*have withdrawn* from participation" in the matching funds program. (Letter from Trevor Potter, attached hereto, emphasis added). Thus there is no matter on which the Commission has been asked to act in this regard.

Senator McCain, then, did not ask to be "released from his obligations." He simply declared himself released, and then proceeded to violate those obligations, in particular, by violating the applicable spending limit. Based on its FEC disclosure reports, the McCain Campaign has exceeded the applicable spending limit of approximately \$56.8 million by well over \$50 million.

On February 25, 2008, the DNC filed an administrative complaint alleging that Senator McCain's violation of the conditions to which he agreed in his Candidate Agreement and Certification constituted a violation of the Matching Payment Act and the Commission's rules. No final action has been taken on that complaint and it remains an open enforcement matter.

As the Commission represented to the Court in the first 437g(a)(8) case filed by the DNC, "At this time, jurisdiction over the DNC's administrative complaint rests with the Commission." FEC's Statement Regarding the Commission's Status and the Court's Jurisdiction, *DNC v. FEC*, CA 08-00639 (JDB) (D.D.C., filed April 28, 2008) at p. 7. That is, this is an open, pending enforcement matter.

In these circumstances, what the Office of General Counsel is proposing is that the Commission rule on the merits of the DNC's administrative complaint at the open meeting on August 21. The DNC's complaint is the only matter on which the Commission could purport to be acting, in taking up Agenda Document 08-17; there is no other matter, proceeding or request before the Commission.

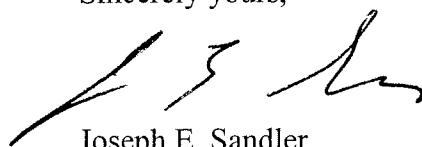
It would be a clear violation of the law for the Commission to take up this matter at the meeting on August 21. First, the Commission clearly has not conducted any investigation as required by the Federal Election Campaign Act of 1971 as amended ("FECA"), 2 U.S.C. §437g(a)(2).

Second, the Commission cannot consider the merits of a pending enforcement matter at an open meeting. To do so would violate 2 U.S.C. § 437g(a)(1), which prohibits any notification or investigation relating to an open enforcement matter from being made public. The Commission's rules likewise make clear that all Commission meetings pertaining to "any notification or investigation that violation of the Act has occurred," which is defined to include "consideration of any...matter related to the Commission's enforcement activity," must be closed to the public. 11 C.F.R. §§2.4(a)(1) & (2).

For this reason, the DNC objects to consideration of Agenda Documents 08-17 and 08-17A and requests that they be removed from the Commission's agenda for its open meeting of August 21, 2008.

Thank you for your time and attention to this important matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'J. Sandler', written in a cursive style.

Joseph E. Sandler
General Counsel, Democratic National Committee

cc: Thomesinia P. Duncan, Esq., General Counsel
Hon. Mary Dove, Secretary