

November 4, 2003

**NOTICE AO DRAFT COMMENT PROCEDURES**

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2003-35 is available for public comments under this procedure. It was requested by Stephen G. Murphy, on behalf of Gephardt for President Inc.. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-35 will be on the Commission's agenda for its public meeting of Thursday December 11, 2003.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EST) on December 10, 2003.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

**CONTACTS**

**Press inquiries: Ron Harris (202) 694-1220**

**Acting Commission Secretary: Mary Dove (202) 694-1040**

**Other inquiries:**

**To obtain copy of draft AO 2003-35 contact Public Records Office-  
Public Disclosure Division (202) 694-1120, or 800-424-9530.**

**For questions about comment submission procedure contact  
Rosemary C. Smith, Acting Associate General Counsel, (202) 694-1650.**

**ADDRESSES**

**Submit single copy of written comments to:**

**Commission Secretary  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463**



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**DRAFT**  
FEDERAL ELECTION COMMISSION  
SECRETARY

2003 DEC -4 11:38

December 4, 2003

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** James A. Pehikon  
Staff Director *JAP*

**FROM:** Lawrence H. Norton  
General Counsel *LHN*

Rosemary C. Smith  
Acting Associate General Counsel *RCS*

Mai T. Dinh  
Acting Assistant General Counsel *MTD*

J. Duane Pugh  
Senior Attorney *JDP*

**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 **ADVISORY OPINION 2003-35**

2 **Mr. Steven G. Murphy**  
3 **Campaign Manager**  
4 **Gephardt for President, Inc.**  
5 **1620 L Street, NW**  
6 **Suite 600**  
7 **Washington, DC 20036**

8 **Dear Mr. Murphy:**

9       **This responds to your letter dated November 5, 2003, requesting an advisory**  
10 **opinion on behalf of Gephardt for President, Inc. ("the Committee"), concerning whether**  
11 **the Federal Election Campaign Act of 1971, as amended ("the Act"), the Presidential**  
12 **Primary Matching Payment Account Act ("the Matching Payment Act"), and**  
13 **Commission regulations, permit a candidate in the Presidential primary elections to**  
14 **withdraw from the Matching Payment Act's public funding program after the Federal**  
15 **Election Commission has certified to the United States Treasury that the candidate is**  
16 **eligible to receive matching funds under that program, but prior to the payment date for**  
17 **such funds.**

18 ***Background***

19       **Gephardt for President, Inc., is Congressman Richard A. Gephardt's principal**  
20 **campaign committee as he seeks the 2004 nomination of the Democratic Party for**  
21 **election to the office of President of the United States. Congressman Gephardt filed his**  
22 **Statement of Candidacy with the Commission on January 6, 2003, and the Committee**  
23 **filed its Statement of Organization on the next day, January 7, 2003. On November 4,**

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 4. Will any of the legal requirements imposed as a result of participation in the  
2 public funding program under the Matching Payment Act continue to apply to the  
3 Committee after it withdraws from the program?

4 5. In the alternative, may the payment scheduled for January 2, 2004, from the  
5 United States Treasury to the Committee be deferred until a later date to preserve the  
6 Committee's option to withdraw from the program prior to receiving funds?

7 *Legal Analysis and Conclusions*

8 The answer to your first question is yes, and the answer to the rest of your  
9 questions is no.

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

14 Congressman Gephardt and the Committee have executed a binding contract with  
15 the Commission in the Candidate Agreements and Certifications. Furthermore, both  
16 sides have partially performed in accordance with the terms of that contract: the  
17 Congressman and the Committee by submitting the documentation for the contributions  
18 in the Threshold Submission, and the Commission by examining the Candidate  
19 Agreements and Certifications and the Threshold Submission for compliance with  
20 applicable requirements and, more significantly, by certifying to the Treasury that  
21 Congressman Gephardt and the Committee are entitled to a payment of \$100,000 from  
22 the Presidential Primary Matching Payment Account on or after January 1, 2004.

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 the program is voluntary also leads to the conclusion that rescission of the Candidate and  
2 Committee Agreements and Certifications is appropriate prior to the payment date for any  
3 Matching Payment funds.

4 The Commission's previous resolution of similar issues is consistent with  
5 permitting rescissions prior to the payment of any Matching Payment funds. The  
6 Commission has withdrawn a certification of a candidate's eligibility to receive Matching  
7 Payment funds upon the candidate's request. See Commission Certification, LRA 561  
8 (Dec. 12, 1999). Although the candidate at issue in that matter, Elizabeth H. Dole, ceased  
9 to pursue the nomination of her party prior to her request, her withdrawal from the  
10 primary election did not require her to relinquish her claim to Matching Payment funds  
11 for qualified campaign expenses incurred prior to her withdrawal or for winding down  
12 expenses following her withdrawal. Other candidates in that election cycle received  
13 Matching Payment funds although their campaigns for nomination also had ceased prior  
14 to the initial payment of funds.

15 This withdrawal of a certification was distinguished from Advisory Opinion 1996-  
16 7. In that advisory opinion, the Commission refused to consider a candidate's eligibility  
17 for matching funds because the candidate at issue had stated his ideological opposition to  
18 accepting matching funds. On this basis, the Commission concluded that the candidate  
19 did not give the necessary assent to the Candidate Agreement under 26 U.S.C. 9033(a)  
20 and 11 CFR 9033.1(a)(2), and to all the conditions stated therein.

21 The Commission will also agree to rescind candidate agreements prior to the  
22 payment date for any certified Matching Payment funds because candidates and their  
23 principal campaign committees that have not received any matching funds and that have



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

1 with one business day to deliver a certification withdrawal to the Secretary of Treasury  
2 prior to his issuance of payments on the first business day of the Presidential election  
3 year.

4 2. *If the answer to question 1 is yes, is the Committee required to refund any*  
5 *contributions? Is there a required timetable for any such refunds?*

6 **Withdrawing from the public funding program under the Matching Payment Act**  
7 **does not impose any refund obligation on the Committee. The Commission has**  
8 **considered contributors' intent as to which election they are contributing toward and**  
9 **which limits their contributions count toward in certain circumstances. See, e.g.,**  
10 ***Contribution Limitations and Prohibitions; Final Rule, 67 Fed. Reg. 69928, 69930-31***  
11 **(Nov. 19, 2002). However, under the circumstances you presented, there is no question**  
12 **as to which election the contributions pertain. The presumed intent of contributors to the**  
13 **Committee was and is to assist in Congressman Gephardt's campaign seeking the 2004**  
14 **nomination of the Democratic Party for the office of President of the United States, and**  
15 **the Committee's use of such contributions for such purposes will satisfy that intent,**  
16 **without regard to whether other public funds are similarly employed.**

17 **In some instances, contributions to a publicly funded Presidential primary**  
18 **candidate may not be submitted for matching because the candidate elects not to submit**  
19 **them or is prohibited from submitting further contributions for matching. The**  
20 **Commission does not require that such contributions be refunded, because whether a**  
21 **contribution is matched by public funds is not an aspect of contributor intent that the**  
22 **Commission previously has considered sufficient to trigger refund obligations.**

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 examination pursuant to 11 CFR part 9038, although a Commission audit pursuant to  
2 2 U.S.C. 438(b) in the appropriate circumstances would remain a possibility. Other  
3 provisions required for Candidate and Committee Agreements, namely  
4 11 CFR 9033.1(b)(1) through (6), (8), (9), (11), and (12), would no longer apply to  
5 Congressman Gephardt and the Committee.

6 5. *If the answer to question 1 is yes, in the alternative, may the payment scheduled*  
7 *for January 2, 2004, from the United States Treasury to the Committee be deferred until*  
8 *a later date to preserve the Committee's option to withdraw from the program prior to*  
9 *receiving funds?*

10 The Matching Payment Act, Commission regulations, and Department of  
11 Treasury regulations all require that the Commission promptly certify amounts to which  
12 candidates are entitled to the Secretary of the Treasury, who is in turn required to pay the  
13 certified amount promptly, once the Presidential election year has begun. See  
14 26 U.S.C. 9036(a) (requiring the Commission to certify eligible payments within 10 days  
15 of candidate's eligibility); 26 U.S.C. 9037(b) (requiring the Secretary of the Treasury to  
16 transfer certified amounts to candidates promptly upon receipt of the Commission  
17 certification, once the Presidential election year has begun); see also 11 CFR 9033.4(b);  
18 11 CFR 9036.1(c); 11 CFR 9037.1; and 26 CFR 702.9037-2(a). Thus, the Commission  
19 and the Secretary of the Treasury lack discretion to delay certification of eligible  
20 payments or payments of certified amounts. Consequently, requests for such delays  
21 cannot be granted.

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 conclusion presented in this advisory opinion, then the requestor may not rely on that  
2 conclusion as support for its proposed activity.

3 Sincerely,

4 Ellen L. Weintraub  
5 Chair

6 Enclosures (AO 1996-7)