February 25, 2008

Thomasenia P. Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, S.E.
Washington, D.C. 20463

Re: Complaint Against Senator John McCain and John McCain 2008, Inc.

Dear Ms. Duncan:

Pursuant to the Commission’s rules, 11 C.F.R. §111.4, the Democratic National Committee (“DNC”), 430 S. Capitol Street, S.E. Washington, D.C. 2003, files this complaint against U.S. Senator John McCain (R-Ariz.), P.O. Box 16118, Arlington, VA 22215, a candidate for the nomination of the Republican Party for President of the U.S., and John McCain 2008, Inc. (the “McCain Campaign”), P.O. Box 16118, Arlington, VA 22215, the principal campaign committee of Senator McCain for his campaign for the Presidential nomination, for violations which have occurred or are about to occur, of the Presidential Matching Payment Account Act, 26 U.S.C. §§9031 et seq. (the “Matching Payment Act”), and the Commission’s regulations.

In summary, in order to obtain the Commission’s certification of matching funds, Senator McCain signed a binding agreement with the Commission to accept a spending limit and the other conditions of receiving those funds. He has now announced that he is unilaterally breaking that agreement and that he intends simply to ignore and flout the law—specifically, to ignore the all legal requirements to which he agreed and that are still binding on him. As the Chairman of the Commission has already advised him, Senator McCain is not free to do that without the Commission’s approval. And there is no possibility that he will obtain such approval because he has already violated a key condition for being let out of the matching funds program: he has pledged matching funds as collateral for a loan to his campaign.

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Contributions to the Democratic National Committee are not tax deductible.

Not authorized by any candidate or candidate’s committee.
I. **Factual Background**

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. (Exhibit 1 hereto). In that Candidate Agreement and Certification letter, Senator McCain agreed to all of the provisions set forth in the Commission’s rules, 11 C.F.R. §§9033.1 and 9033.2, including his express agreement that his campaign would not exceed the applicable spending limit.

On December 20, 2007, the Commission announced that it had certified Senator McCain to receive federal matching funds. (Commission News Release, Dec. 20, 2007, attached hereto as Exhibit 2). As the Commission explained in the release, to “become eligible for matching funds, candidates must raise a threshold amount” and “[o]ther requirements to be declared eligible include agreeing to an overall spending limit of approximately $50 million, abiding by spending limits in each state, using public funds only for legitimate campaign-related expenses, keeping financial records and permitting an extensive campaign audit.” Senator McCain agreed to all of these conditions in his Candidate Agreement letter.

On January 31, 2008, the McCain Campaign filed, with its year-end report, a Schedule C-1 (Exhibit 3) disclosing that the Campaign had obtained a $4,000,000 line of credit from Fidelity & Trust Bank (the “Bank”), and had drawn $2,971,697 of that line of credit. The loan documents consist of a Business Loan Agreement, dated as of Nov. 14, 2007 (the “Loan Agreement,” attached hereto as Exhibit 4); a Commercial Security Agreement dated as of Nov. 14, 2007, between the Campaign and the Bank (the “Security Agreement,” attached hereto as Exhibit 5); a Promissory Note in the principal amount of $3 million, made by the Campaign to the Bank (the “Note”); and a Loan Modification Agreement dated Dec. 17, 2007 (the “Modification Agreement,” attached hereto as Exhibit 6).

In its February 20, 2008 report, the McCain Campaign disclosed that it has expended, through January 31, 2008, approximately $49,600,000. Since that time, almost another month has passed, during which Senator McCain has been actively campaigning and, on information and belief, has been expending considerable additional sums.

On February 6, 2007, Senator McCain sent a letter to the Commission announcing that he and his campaign are withdrawing from participation in the federal primary-election funding program established by the Matching Payment Act. On February 7, 2007, counsel for the McCain Campaign sent a letter to the U.S. Treasury announcing that the Senator and his campaign are withdrawing from the program. (Copies of the letters are attached hereto as Exhibit 7).

On February 19, 2008, Commission Chairman David Mason sent a letter to Senator McCain advising him that the Commission considers his February 6, 2008 letter
“as a request that the Commission withdraw its previous certifications” and that just as
the law “required an affirmative vote of four Commissioners to make these certifications,
it requires an affirmative vote of four Commissioners to withdraw them.”

II. Legal Analysis

The Commission’s rules, 11 C.F.R. §9033.1, require a candidate seeking to
become eligible to receive primary matching fund payments “to agree in a letter signed
by the candidate to the Commission” that the candidate and the candidate’s campaign
will comply with the legal conditions set out in that regulation. Senator McCain signed
and submitted such a letter (Exhibit 1 hereto). In Advisory Opinion 2003-35, the
Commission ruled that such a letter constitutes “a binding contract with the
Commission,” id. at 2, and that any request for withdrawal from the matching funds
program will be treated as a request, “in effect, [as to] whether the Commission would
consent to a rescission of this contract. Id.

In that Advisory Opinion, the Commission held that as a matter of policy, the
Commission would grant such consent “to withdraw a certification of a candidate’s
eligibility to receive Matching Payment Act funds prior to the payment date for any such
funds to such candidate or his or her committee upon receipt of a written request signed
by the candidate, provided that the certification of funds has not been pledged as security
for private financing.” Id. at 4 (emphasis added).

In the case of Senator McCain, first, the Commission has not granted any consent
to the Senator or the McCain Campaign to rescind the Senator’s “binding contract with
the Commission” A.O. 2003-35 at 2, i.e., his Candidate Agreement and Certification
letter (Exhibit 1 hereto). Therefore, as of this time, Senator McCain and the McCain
Campaign are still bound by that Candidate Agreement and Certification letter and are
not free to withdraw unilaterally from the matching funds program or to ignore their legal
obligations under the Candidate Agreement and Certification letter.

Second, even if and when the Commission considers the Senator’s and McCain
Campaign’s requests to withdraw, those requests should not be granted because the
Senator and his Campaign have already violated one of the key conditions for granting
such a request: that they not pledge the initial certification of matching funds, i.e., the
initial determination of eligibility to receive matching funds, as security for private
financing. In fact, they have already done so.

To be sure, the Schedule C-1 filed by the Campaign indicated that the collateral
pledged for the loan excludes “certification for federal matching funds” and “public
financing.” (Exhibit 3). The Loan Agreement (Exhibit 4) also represents, on page 4, that
“any certification of matching funds eligibility currently possessed by [the Campaign] or
obtained before January 1, 2008 and the right of” Senator McCain and the Campaign “to
receive payment under these certifications are not collateral” for the loan. In fact,
however, the Campaign did effectively pledge future matching funds to be received under the initial certification, as collateral for the loan, in several ways:

(1) In the Loan Agreement, under “Affirmative Covenants,” a provision entitled “Additional Requirements” provides that if the McCain Campaign withdraws from the matching funds program before the end of 2007 but Senator McCain does not win the New Hampshire primary or place within 10 points of the winner, Senator McCain will continue his candidacy, reapply for public matching funds and grant to the Bank, “as additional collateral for the Loan, a first priority perfected security interest in and to” all of the Campaign’s “right, title and interest to the matching fund program.” Taken in combination with the fact that Senator McCain and the Campaign had already applied for and received the certification for matching funds, this provision can only be interpreted as a present encumbrance, however conditional, of the Campaign’s future interest in and entitlement to matching funds, as part of the security for the line of credit.

That conclusion is reinforced by a negative covenant, appearing under “negative Covenants,” on page 3 of the Loan Agreement, under the subheading “Indebtedness and Liens.” In that section, the Campaign agrees that it will not, without the Bank’s consent, “transfer, mortgage, assign, pledge, lease grant a security interest in or encumber” any of the Campaign’s “assets, including without limitation any of Borrower’s right, title or interest in and to the public matching fund program or any matching fund entitlement thereunder, whether now existing or hereafter arising....” This negative covenant clearly implies that the Bank assumes it has a perfected security interest in all future rights of the Campaign to receive matching funds under the initial determination of eligibility.

(2) The Loan Agreement also includes a provision, on page 4, entitled “Compliance with the Federal Election Commissions Matching Funds Program,” in which the Campaign agrees with the Bank that, while the Loan Agreement is in effect, the Campaign “shall not exceed overall or state spending limits set forth in the Federal Matching Funds program, if applicable.” The only reason for inclusion of such a provision would be to ensure that the Campaign will continue to be entitled to receive matching funds so that the Bank can treat them as part of the Collateral.

The Modification Agreement, made on December 17, 2007 (Exhibit 6), before the Senator and Campaign purported to withdraw from the matching funds program, amends that provision to make it applicable “irrespective of whether Borrower [the Campaign] is subject to such program as of any applicable date of determination.” Thus, the Bank obtained a covenant from the Campaign to abide by the spending cap while the Loan Agreement is in effect regardless of whether or not the Campaign considered itself to be participating in the matching funds program. Again, the only conceivable purpose and effect of such a covenant would be to ensure that matching funds could be received and be available as collateral for the loan.
The Security Agreement (Exhibit 5), on page 1 under the provision entitled “Collateral Description,” describes the collateral being pledged for the line of credit as including, generally, all “accounts, … deposit accounts, money, other rights to payment and performance….” The next to last sentence of this description states that, “any certification of matching fund eligibility, including related rights, currently possessed by Grantor [the Campaign] or obtained before January 1, 2008, are not themselves being pledged as security…and are not themselves collateral for the indebtedness…” (emphasis added).

The description of the collateral for the loan thus does not exclude but rather includes—as of the date of the Security Agreement—rights to receive matching funds that arise, i.e., that come into existence, after January 1, 2008, based on matchable contributions received and presentations in good order made after that date, even without any new certification of initial eligibility under section 9033.4 of the Commission’s rules. Again, then, under this language, the Campaign has made a current pledge and encumbrance of a future rights to receive funds under the matching funds program under and pursuant to the initial certification of matching payment eligibility made by the Commission in December 2007.

That conclusion is reinforced by the negative covenant appearing at the end of the Collateral Description, which provides that the Campaign “agrees not to sell, transfer, convey, pledge, hypothecate or otherwise transfer to any person or entity any of its present or future right, title and interest in and to the public matching fund program,….including related rights,” without the Bank’s consent. It makes no sense for the Security Agreement to include such a negative covenant unless it was intended that the Campaign is, in the Agreement, making a current pledge of future rights to receive matching funds.

Further, the Modification Agreement, made on December 14, 2007, changed the language of the exemption in the Collateral Description to exclude, from the Collateral, only those “certifications of matching funds eligibility, including related rights, now held by Grantor……,” in place of “currently possessed by Grantor or obtained before January 1, 2008.” This modification makes clear again that, although the initial amount certified in December 2007 may not be part of the Collateral, the Collateral will include future amounts of matching funds paid, based on future submissions, even though based on the initial certification of eligibility.

For these reasons, the Commission should find that the McCain Campaign and Senator McCain have pledged the certification of matching funds as security for private financing. Assuming the Commission treats the letter from Senator McCain (Exhibit 3 hereto) as a request for withdraw from the program, the Commission should deny that request.
In view of this situation, the Commission should also investigate whether the McCain Campaign has violated the reporting requirements of the Federal Election Campaign Act of 1971 as amended, 2 U.S.C. §434(b) and the Commission’s rules, 11 C.F.R. § 104.3(d)(1), by inaccurately stating on the Schedule C-1 filed with the Campaign’s end of year report, that the collateral for the loan does not include “certification for federal matching funds” or “public financing.”

It should also be noted that, apart from the ability to obtain the loan, the McCain Campaign has obtained a material, financial benefit from the certification of eligibility for matching funds through the ability to avail itself of the automatic right of access to the ballot, in some states. In certain states, a candidate who is certified as being eligible to receive federal matching funds is entitled to be placed on the presidential primary ballot and, if the candidate has not been so certified, his or her campaign must collect signatures on petitions in the proper form and file those petitions with the appropriate authorities—at some expense to the campaign—in order to be placed on the primary ballot. See, e.g., Kentucky Rev. Stat. §§118.581 & 118.591 (2008); file a certification from the Commission of qualification for federal matching funds or file petitions signed by 5,000 registered and qualified voters; Mont. Code. Ann. §13-10-404 (2008); qualify for federal matching funds or file petitions with signatures of 500 voters; 15 Del. Code Ann. §§3183-3184 (2008) (if candidate not eligible to receive payments from Presidential Primary Matching Payment Account, must file petition with at least 500 signatures of voters).

In any event, regardless of any future decision of the Commission, as of this time, Senator McCain and his campaign remain bound by the legal conditions to which they agreed in the Candidate Agreement and Certification, including compliance with the expenditure limitation. Yet the Senator and the Campaign have now informed the Commission that the Campaign no longer considers itself to be participating in the matching funds program (Exhibit 2), thus implying clearly that the Campaign intends to ignore and violate the conditions and requirements set forth in the Candidate Agreement and Certification letter.

Thus, Senator McCain and the McCain Campaign have violated, or are about to violate, the Matching Payment Act, 26 U.S.C. §9035, and the Commission’s rules, 11 C.F.R. Parts 9033 and 9035.
CONCLUSION

For the reasons stated above, the Commission should (1) find reason to believe, pursuant to 2 U.S.C. §437g(a)(2), that Senator John McCain and the McCain Campaign have committed, or are about to commit, a violation of Chapter 96 of Title 26 and of the Commission’s rules, and should conduct an investigation; and (2) pursuant to 26 U.S.C. §9040(c), petition the appropriate U.S. District Court for injunctive relief to implement and enforce the provisions of Chapter 96 against Senator McCain and the McCain Campaign.

Respectfully submitted,

[Signature]
Thomas McMahon
Executive Director

Sworn to and subscribed before me this 25th day of February 2008.

[Signature]
Wilma Simms
Notary Public in and for the District of Columbia

My commission expires:

Wilma Simms
Notary Public, District of Columbia
My Commission Expires 7/31/2012