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December 5, 2003

AGENDA ITEM
For Meeting of: 12-11-03
SUBMITTED LATE

Memorandum

To: The Commission

Through: James A. Pehrkon

From: Lawrence H. Norton
General Counsel

James A. Kahl
Deputy General Counsel

Rosemary C. Smith
Acting Associate General Counsel

John C. Vergelli
Acting Assistant General Counsel

Esa L. Sferra
Attorney

Subject: Draft AO 2003-31

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

DRAFT

1 ADVISORY OPINION 2003-31

2 Marc E. Elias, Esq.
3 Brian G. Svoboda, Esq.
4 Perkins Coie, LLP
5 607 Fourteenth Street, NW
6 Washington, DC 20005-2011
7
8 Dear Messrs. Elias and Svoboda:

9 This responds to your letter dated October 7, 2003, requesting an advisory opinion
10 on behalf of Senator Mark Dayton. Your request concerns the application of the Federal
11 Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to
12 certain campaign expenses paid for by the Senator with personal funds and later
13 reimbursed by his principal campaign committee for the purposes of the "Millionaire's
14 Amendment" of the Bipartisan Campaign Reform Act of 2002 ("BCRA").

15 ***Background***

16 You state that Senator Dayton is a candidate for the U.S. Senate in 2006 and that
17 his principal campaign committee is Mark Dayton for Minnesota 2006 ("the Committee").[1]
18 Senator Dayton expects to incur personally certain campaign expenses that are not travel-
19 related. He also expects to incur travel expenses on his personal credit card in excess of
20 $1,000 that the Committee will reimburse, but not within 60 days of the closing date of the
21 billing statement on which the charges will first appear. He also expects to incur travel
22 expenses in excess of $1,000 without using his credit card and will not receive
23 reimbursement within 30 days of the date on which the expenses were incurred. You
24 characterize these expenses as "expenditures" that will be treated initially as

[1] On April 11, 2003, Senator Dayton filed a revised Statement of Candidacy with the Secretary of the Senate.

1 "contributions" and "reimbursable expenditures."

2 Senator Dayton indicated on his Statement of Candidacy that he does not intend to
3 make expenditures from personal funds in excess of the threshold amount under the
4 Commission regulations implementing the Millionaire's Amendment. You state that
5 Senator Dayton does not want to trigger increased contribution and coordinated party
6 expenditure limits for his opponents, as provided by the Millionaire's Amendment. To
7 date, no one else had filed a Statement of Candidacy for the 2006 Minnesota Senate
8 election.

9 ***Question Presented***

10 Will any of the following payments permanently constitute an expenditure from
11 personal funds within the meaning of the Millionaire's Amendment where these payments
12 are initially treated as contributions by Senator Dayton:

13 (a) Payments by Senator Dayton for campaign-related travel expenses
14 exceeding $1,000 that are reimbursed by the Committee more than 30 days
15 after the date on which the expense was incurred.

16 (b) Payments by Senator Dayton by personal credit card for campaign-related
17 travel expenses exceeding $1,000 that are reimbursed by the Committee
18 more than 60 days after the closing date of the credit card billing statement
19 on which the expense first appears.

20 (c) Payments by Senator Dayton for other campaign expenses not involving
21 travel that are subsequently reimbursed by the Committee.

1 ***Legal Analysis and Conclusions***

2 For two reasons, the Commission concludes that the above payments by Senator
3 Dayton would permanently constitute expenditures from personal funds within the
4 meaning of the Millionaire's Amendment, even if subsequently reimbursed by the
5 Committee.

6 In BCRA, Congress provided that a candidate opposing a self-financed candidate
7 may under certain circumstances accept contributions from individuals under increased
8 contribution limits, and that the coordinated party expenditure limits for national and State
9 political party committees are not applicable. 2 U.S.C. 441a(i) (Senate); 11 CFR 400.40; 2
10 U.S.C. 441a-1 (House); 11 CFR 400.41. For Senate candidates, the increased limits are
11 triggered when the "opposition personal funds amount" ("OPFA") (2 U.S.C.
12 441a(i)(1)(D)) exceeds twice the "threshold amount" (2 U.S.C. 441a(i)(1)(B)). 2 U.S.C.
13 441a(i)(1)(C)(i). The coordinated party expenditure limits do not apply when the OPFA
14 exceeds ten times the threshold amount. 2 U.S.C. 441a(i)(1)(C)(iii)(III); 11 CFR
15 400.40(b)(3). The threshold amount for U.S. Senate elections for purposes of the
16 Millionaire's Amendment is the sum of $150,000 plus an amount equal to the voting age
17 population of the State of the candidate multiplied by $0.04. 2 U.S.C. 441a(i)(1)(B); 11
18 CFR 400.9(a). In determining the OPFA, the candidates' "expenditures from personal
19 funds" are taken into account. In addition, under the Millionaire's Amendment, each
20 candidate must report when his or her expenditures from personal funds exceed twice the
21 threshold amount. 2 U.S.C. 434(a)(6)(B)(iii); 11 CFR 400.21(a).

1 An expenditure from personal funds under the Millionaire's Amendment is "an
2 expenditure made by a candidate using personal funds; and a contribution or loan made by
3 a candidate using personal funds or a loan secured using such funds to the candidate's
4 authorized committee." 2 U.S.C. 434(a)(6)(B)(i). The Commission's regulations at 11
5 CFR 400.4(a) define an expenditure from personal funds as "(1) An expenditure made by a
6 candidate, using the candidate's personal funds, for the purpose of influencing the election
7 in which he or she is a candidate; (2) A contribution or loan made by a candidate to the
8 candidate's authorized committee, using the candidate's personal funds . . . ."
9 Under the Act and Commission regulations, a Senate candidate may make
10 unlimited expenditures from personal funds, including unlimited contributions to his or her
11 own campaign. 11 CFR 110.10(a); *see* Advisory Opinion 1997-10. A candidate makes an
12 expenditure or contribution from "personal funds" if the funds used are from the
13 candidate's assets, income, or a portion of jointly owned assets. 11 CFR 100.33 and
14 110.10(b). A candidate is an agent of his or her primary campaign committee when
15 making disbursements in connection with his or her campaign. 2 U.S.C. 432(e)(2).
16 A payment by a Senate candidate from his or her personal funds for campaign
17 expenses is an expenditure because such a payment is made for the purpose of influencing
18 an election for Federal office. 2 U.S.C. 431(9)(A)(i); 11 CFR 100.111(a). Such a payment
19 by an individual, including a candidate,[2] may be a contribution if not reimbursed according
20 to 11 CFR 116.5. *See also* 11 CFR 100.52(a) (including advances of money in the

[2] Although section 116.5 does not specifically reference a candidate in the exemption for travel-related expenses, the Commission has applied this section to candidates. *See* Advisory Opinions 2002-5 (noting in footnote 12 that section 116.5 would apply to a candidate's travel expenses if the expenses did not fall under rules for allocating expenses between personal and campaign funds at 11 CFR 106.3(d)), and 1992-1 (applying section 116.5 to non-travel-related expenses paid for with a candidate's personal funds).

1 definition of contribution). Under section 116.5(b) there are exceptions for certain
2 unreimbursed travel expenses, as well as certain reimbursed travel expenses. Any
3 unreimbursed campaign-related transportation or subsistence expense paid for by an
4 individual, including a candidate, that does not exceed $1,000 in aggregate for a single
5 election is not a contribution or expenditure. 2 U.S.C. 431(8)(B)(iv); 11 CFR 100.79 and
6 100.139. Any reimbursed campaign-related transportation or subsistence expense paid for
7 by an individual, including a candidate, is not a contribution if it is reimbursed by the
8 campaign within 30 days from the date the expense was incurred, or in the case of payment
9 with a personal credit card, within 60 days after the closing date of the billing statement on
10 which the expense first appears. 11 CFR 116.5(b).

11 *Application to Your Question*

12 Because Senator Dayton's payments from personal funds for the campaign
13 expenses listed in (a), (b), and (c), above will not be reimbursed in accordance with section
14 116.5, and because they do not fall within the statutory exception to the definition of
15 "contribution" applicable to certain travel expenses, they will be both expenditures and
16 contributions under 2 U.S.C. 431(8) and (9), and thus will constitute expenditures from
17 personal funds within the meaning of the Millionaire's Amendment. 2 U.S.C.
18 434(a)(6)(B)(i); 11 CFR 400.4(a)(1) and (2). These payments, which you appropriately
19 characterize as "expenditures . . . that were initially treated as contributions," are both
20 expenditures and contributions under the Act because they constitute a payment made, and
21 a loan or something of value given, for the purpose of influencing an election for Federal
22 office. 11 CFR 100.111 and 100.52.

1 The non-travel expenses paid for by Senator Dayton are both expenditures and
2 contributions under the Act's definitions of "expenditure" and "contribution." 2 U.S.C.
3 431(8) and (9); 11 CFR 100.111 and 100.52. Further, under 11 CFR 116.5(b) the non-
4 travel expenses paid for by Senator Dayton are contributions since they are campaign
5 expenses paid for with personal funds and do not fall within the exceptions for travel-
6 related expenses. 11 CFR 116.5(b); *see also* 11 CFR 100.79.

7 Similarly, the travel expenses paid for by Senator Dayton are expenditures and
8 contributions under the Act's definitions of "expenditure" and "contribution." 2 U.S.C.
9 431(8) and (9); 11 CFR 100.111 and 100.52.[3] The travel expenses exceeding $1,000 paid
10 for by Senator Dayton are contributions and expenditures that do not fall within the
11 statutory exceptions for certain travel-related expenses for two reasons. First, these travel
12 expenses will be reimbursed, and the statutory exception from the definition of
13 "contribution" applies only to unreimbursed travel expenses that do not exceed $1,000 in
14 aggregate per single election. 2 U.S.C. 431(8)(B)(iv). Second, theses expenses exceed
15 $1,000 per election. *See* 2 U.S.C. 431(8)(B)(iv); 11 CFR 100.79 and 100.139. When they
16 are reimbursed, the Committee will not reimburse Senator Dayton within the time periods
17 prescribed by the regulatory exception for reimbursed travel-related expenses. *See* 11 CFR
18 116.5(b).

19 The Committee should report these expenses paid for by Senator Dayton as in-kind
20 contributions made to the Committee when Senator Dayton's payments exceed $200 in
21 aggregate for the election cycle, and reimbursement does not bring the amount below $200

[3] Travel expenses paid for by a candidate from personal funds are also reportable expenditures by the candidate's principal campaign committee if the travel is campaign-related. 11 CFR 106.3(b)(1).

1 before the end of the reporting period. 11 CFR 104.13(a)(1) and 104.3(a)(4)(i); Advisory
2 Opinions 1992-1 (non-travel campaign related expenses exceeding $200 per calendar year
3 required to be reported as in-kind contributions) and 1990-9 (expenditures from personal
4 funds should be reported as in-kind contributions). The Committee should report the in-
5 kind contributions as memo entries[4] on Schedule A and, unlike other in-kind contributions,
6 the Committee should report a disbursement when Senator Dayton is actually reimbursed.
7 11 CFR 104.13(a) and Advisory Opinion 1992-1. The disbursements to Senator Dayton,
8 when reported, should note the memo entry to which they relate.[5] If the Committee
9 reimburses Senator Dayton in a reporting period after the reporting period in which
10 Senator Dayton incurs the campaign expense, then the Committee must also report the debt
11 owed if it exceeds $500 or has been outstanding for more than 60 days. 11 CFR 104.11.
12 The fact that Senator Dayton may subsequently receive reimbursement from the
13 Committee for these expenses does not change their character as expenditures from
14 personal funds. Neither the Millionaire's Amendment nor the Commission rules and forms
15 implementing it contemplate reductions in expenditures from personal funds. The OPFA
16 is calculated using the "aggregate amount[s]" of expenditures from personal funds for the
17 candidate and the opposing candidate. 2 U.S.C. 441a(i)(1)(D). The word "aggregate" used
18 as an adjective is defined as a whole, "or sum; total; combined" as compared with the
19 adjective "net" defined as "remaining after deductions . . . ." The Random House

[4] The contributions should be reported as memo entries on Schedule A to prevent inflating total contributions reported on line 6(a) of FEC Form 3. *See* Advisory Opinion 1992-1.
[5] Senator Dayton must provide the Committee with appropriate documentation of each expense exceeding $200 for which he pays. Appropriate documentation consists of a receipt or invoice from the payee, or a cancelled check, or in the case of payment by credit card, a monthly billing statement or customer receipt and the cancelled check used to pay the credit card account. 11 CFR 102.9(b)(2) and (2)(iii).

1 Dictionary of the English Language, The Unabridged Edition (1983); *see also* Bryan A.
2 Garner, A Dictionary of Modern Legal Usage (2d ed. 1995).

3 In addition, Congress provided in one of the variables used for OPFA calculation
4 for the subtraction of candidate contributions from personal funds. Congress did not make
5 a similar provision for the subtraction of any amounts in the variables for the "[g]reatest
6 aggregate amount of expenditures from personal funds" made by the candidate or opposing
7 candidate. 11 CFR 400.10(b) (variables "a," "b," and "c"). Further, the Commission rules
8 do not require a candidate to file a new Form 10 when a committee repays a loan made by
9 the candidate using personal funds to his or her authorized committee. *See generally* 11
10 CFR Part 400 Subpart B. If repayment of such loans, which constitute an expenditure
11 from personal funds, 11 CFR 400.4(a)(2), decreased the total amount of expenditures from
12 personal funds, the candidate would need to file a new Form 10 with the corrected,
13 decreased total expenditure from personal funds amount in line 12.

14 Since these expenses paid for by Senator Dayton are permanently expenditures
15 from personal funds for the purposes of the Millionaire's Amendment, the Committee must
16 report on FEC Form 10 when they in aggregate exceed twice the threshold amount.[6] 11
17 CFR 400.21(a) and 400.24(a).

18 At this time, the absence of an opponent to Senator Dayton makes it unclear if the
19 increased contribution limits and coordinated party limits permitted by the Millionaire's
20 Amendment will be triggered. The increased limits are triggered when the OPFA exceeds
21 twice the threshold amount. Whether the OPFA exceeds twice that amount, however,

[6] The threshold amount is $300,000 in the 2006 Minnesota Senate race.

1 depends on a calculation of the OPFA, a formula in which Senator Dayton's expenditures
2 from personal funds amount is only one of at least two variables.[7] The OPFA cannot be
3 determined without a figure for the aggregate expenditures from personal funds of Senator
4 Dayton's opponent.

5 This response constitutes an advisory opinion concerning the application of the Act
6 and Commission regulations to the specific transaction or activity set forth in your request.
7 *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the
8 facts or assumptions presented, and such facts or assumptions are material to a conclusion
9 presented in this advisory opinion, then the requestor may not rely on that conclusion as
10 support for its proposed activity.

11 The Commission notes that this advisory opinion analyzes the Act, as amended by
12 BCRA, and Commission regulations, including those promulgated to implement the
13 BCRA amendments, as they pertain to your proposed activities. On May 2, 2003, a three-
14 judge panel of the United States District Court for the District of Columbia ruled that a
15 number of BCRA provisions are unconstitutional and issued an order enjoining the
16 enforcement, execution, or other application of those provisions. *McConnell v. FEC,* 251
17 F.Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted,* 123 S.Ct. 2268 (U.S. argued Sept 8,
18 2003). Subsequently, the district court stayed its order and injunction in *McConnell v.*
19 *FEC,* 253 F. Supp. 2d 18 (D.D.C. 2003), pending review by the Supreme Court. The
20 Commission cautions that the legal analysis in this advisory opinion may be affected by
21 the eventual decision of the Supreme Court.

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[7] The OPFA formula depends on the date of calculation. *See* 11 CFR 400.10.

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3

4 Sincerely,

5

6 Ellen L. Weintraub

7 Chair

8 Enclosures (AOs 2002-5, 1997-10, 1992-1, 1990-9)