RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2006 JUL 13 P 3:32

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2006 JUL 11 A 9:13

AOR 2006-21

July 6, 2006

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion Request

Dear Mr. Norton:

I am writing on behalf of Cantwell 2006 (the "Committee"), the principal campaign committee of Senator Maria Cantwell, pursuant to 2 U.S.C. § 437f, to seek an advisory opinion from the Federal Election Commission on its interpretation of 2 U.S.C. § 441a(i) (the "Millionaires' Amendment").

INTRODUCTION

Senator Cantwell is a Democratic candidate for reelection in Washington State. Her opponent is Mike McGavick, a Republican candidate with substantial personal funds. Neither Senator Cantwell nor Mr. McGavick has a viable opponent in their respective primary elections, which will be held on September 19, 2006.

In the absence of any viable primary opponent, the Committee anticipates that Mr. McGavick will spend a significant amount of personal funds to fund public communications attacking Senator Cantwell, should he choose to spend personal funds in connection with this Senate race. Given that the Washington State primary will occur only 49 days before the general election, the Committee anticipates that Mr. McGavick's expenditures for communications attacking Senator Cantwell will be made prior to the September 19 primary, in an effort to prevent Senator Cantwell

P.O. Box 12740 • Seattle, Washington 98111

from gaining eligibility to the increased contribution limits available under the Millionaires' Amendment.

If Mr. McGavick spends enough personal funds to trigger the provisions of the Millionaires' Amendment, the Committee intends to utilize the increased individual contribution and coordinated party expenditure limits that the Millionaires' Amendment provides to the fullest extent permitted by the Act, Commission regulations, and the Commission's interpretation of the law. To that aim, the Committee seeks guidance from the Commission on the following two questions:

1. For Millionaires' Amendment purposes only, will Mr. McGavick's "expenditures from personal funds" made before September 19, 2006 for the purpose of influencing the general election, to pay for communications that attack Senator Cantwell, be treated as "expenditures from personal funds" for the general election?

2. If Mr. McGavick contributes personal funds to his authorized committee before September 19, 2006 and then seeks to transfer the funds to his general election account after the primary, will the Commission treat all the funds as expenditures of personal funds in connection with the general election, or will the Commission consider the cash on hand from which the transfer is made to consist of the funds most recently received by Mr. McGavick's authorized committee, similar to the method set forth in 11 C.F.R. § 110.3(c)(5)?

LEGAL DISCUSSION

As part of the Bipartisan Campaign Reform Act of 2002, Congress passed the Millionaires' Amendment in an effort to level the playing field between self-financed candidates and their opponents. In response to a self-financed candidate's spending above a certain amount, the Millionaires' Amendment permits the opponent of a self-financed candidate the opportunity to raise funds under increased contribution limits and to accept coordinated expenditures from a political party in excess of the limits prescribed by 2 U.S.C. § 441a(d).

The Millionaires' Amendment is triggered by expenditures from personal funds by an "opposing candidate" in the same election. *See* 2 U.S.C. § 441a(D)(i). However, the Act does not define "opposing candidate." In its interim final rules, the Commission defined "opposing candidate" for purposes of a primary election as "another candidate seeking the nomination of the same political party for election to the office of Senator." 11 C.F.R. § 400.3(a).

Through such a narrow definition of "opposing candidate," the Commission provided no mechanism for leveling the playing field when a self-financed candidate who faces no opposition in the primary makes expenditures from personal funds attacking his opponent for the general election. The Commission acknowledged this potential problem in the interim rules themselves:

> The Commission seeks comment as to whether "opposing candidate" should be expanded to include candidates seeking *another* political party's nomination for the same office. Under such an expanded definition, for example, a self-financed candidate seeking the nomination of political party ABC would be an "opposing candidate" where his or her personal funds are intended to influence the primary of political party XYZ by working to defeat whichever candidate of political party XYZ is judged to be the strongest opponent of the self-financed candidate in the general election.

Interim Final Rule on Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 68 *Fed. Reg.* 3970, 76 (Jan. 27, 2003).

Here, where there will be a late primary held less than 60 days before the general election and neither candidate has any viable opponents in the primary, the Commission should interpret the Act in the manner that is most faithful to the statutory scheme established by Congress, but that does not contradict the Commission's interim rules. To that end, the Committee requests clarification on how the definition of "expenditure from personal funds" is interpreted in this context.

As defined in the Commission's interim rules, "expenditure from personal funds" means "[a]n expenditure made by a candidate, using the candidate's personal funds, for the purpose of influencing the election **in which he or she is a candidate.**" 11 C.F.R. § 400.4 (emphasis added). Similarly, the Commission's Explanation and Justification states, "Paragraph (a)(1) follows the definition of 'expenditure' in 11 CFR part 100, subparts D and E. It includes payments made directly by the candidate for purposes of influencing the election **in which he or she is a candidate.**" 68 *Fed. Reg.* at 3976 (emphasis added).

In the event that Mr. McGavick makes expenditures from personal funds to pay for communications that attack Senator Cantwell, who is not a candidate in Mr. McGavick's upcoming election, his expenditures for communication attacking Senator Cantwell will not be made in connection with his primary election, but rather in connection with the general election. When a self-financed candidate makes an "expenditure from personal funds" for a communication that attacks a clearly identified candidate, the payment should be considered made in connection with an election in which the clearly identified candidate is participating. It defies the logic of the Millionaires' Amendment – and common sense – to permit one candidate to expend personal funds for public communications that attack another candidate for the same office without considering those "expenditures from personal funds" to be in connection with the election in which the clearly identified candidate will be participating.

For this reason, the Committee requests the Commission's confirmation that for Millionaires' Amendment purposes only, Mr. McGavick's "expenditures from personal funds" for public communications that attack Senator Cantwell must be considered made in connection with the general election.

In addition, the Committee seeks confirmation that the Commission intends to treat all of Mr. McGavick's personal funds provided to his current authorized committee and subsequently transferred to his general election account as counting towards his opposition personal funds amount for the general election. In the alternative, the Committee seeks confirmation that the Commission will apply a LIFO accounting method similar to the one adopted by the Commission in 11 C.F.R. § 110.3(c)(5).

CONCLUSION

For these reasons, the Committee respectfully requests issuance of an advisory opinion.

Very truly yours,

Matthew S. Butler
Campaign Manager
Cantwell 2006