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December 14, 2004

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COMMISSION
OFFICE OF GENERAL
COUNSEL

2004 DEC 14 A 11: 49

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

Re: Advisory Opinion Request

Dear Mr. Norton:

This letter constitutes a request for an advisory opinion, pursuant to 11 C.F.R. § 112.1 (2004), on behalf of Ken Salazar, the Senator-elect from Colorado, and Salazar for Senate (the "Salazar Committee"), Mr. Salazar's principal campaign committee (collectively, "Requestors"). This advisory opinion request concerns the Salazar Committee's spending of contributions it raised during the 2004 election cycle under increased contribution limits pursuant to the "Millionaires' Amendment." This letter replaces the request the Salazar Committee submitted to the Commission on December 6, 2004.

Factual Background

Mr. Salazar was the Democratic candidate for Senate from Colorado in the 2004 general election. His Republican opponent in that election was Peter Coors.

On October 23, 2004, Pete Coors for Senate, Inc. (the "Coors Committee"), Mr. Coors's principal campaign committee, filed with the Secretary of the Senate a 24-Hour Notice of Expenditure from Candidate's Personal Funds, on FEC Form 10, indicating that Mr. Coors had spent $1,051,000.00 in personal funds in connection with the general election. The Salazar Committee received a copy of this filing that evening.

[56971-0001/DA043170.061]

As the provisions of the Millionaires' Amendment permit, on October 24, 2004 the Salazar Committee began raising funds from individuals under an increased contribution limit of $6,000. From that date through the November 2, 2004 general election the Salazar Committee raised $1,308,533 in contributions. Of this amount, $564,046 was attributable to the portion of individual contributions raised pursuant to the Millionaires' Amendment that exceeded the normal $2,000 limit.

Between October 24, 2004 and December 6, the Salazar Committee paid $1,610,641 in campaign expenses in connection with the 2004 general election. As of that date, over $100,000 in 2004 campaign expenses were outstanding and were being processed for payment.

Legal Framework

The Millionaires' Amendment to the Federal Election Campaign Act (the "Act") permits a candidate running against a self-financing opponent to raise funds from individual donors under increased contribution limits in certain circumstances, and in some cases benefit from unlimited coordinated party spending. *See* 2 U.S.C. § 441a(i) (2004). Access to higher limits is determined by comparing the "opposition personal funds amount," which is a measure of the self-funding candidate's personal spending calculated according to a mathematical formula, with the "threshold amount," a number that differs from state to state. *See* 11 C.F.R. §§ 400.10, 400.40.

If the opposition personal funds amount exceeds twice the threshold amount, the non-self-funding candidate may raise funds from individual donors in amounts higher than the usual $2,000 per election limit. *See* 2 U.S.C. § 441a(i); 11 C.F.R. § 400.40. The amount of the new limit increases incrementally as the difference grows between the opposition personal funds amount and the threshold amount. *See* 11 C.F.R. § 400.40.

For purposes of the Millionaires' Amendment, the primary election and the general election are treated as two separate "election cycles." *See* 11 C.F.R. § 400.2. The comparisons are therefore calculated separately for each election, and if increased limits are triggered, the limits only apply for that particular election.

Each non-self-funding candidate that has access to increased limits must refund, within fifty days of the election, all "excess contributions" that are not spent in connection with that election. 11 C.F.R. § 400.51. For this purpose, an "excess contribution" is the amount of each contribution raised in an amount above the usual

$2,000 limit that is not otherwise spent "in connection with the election" to which it relates. *See* 11 C.F.R. §§ 400.6, 400.50.

Requestors understand that the Salazar Committee could have used any "reasonable accounting method" to determine whether it spent all of the contributions it raised in excess of the usual $2,000 limit to pay for campaign expenses in connection with the 2004 general election. Requestors seek this advisory opinion to confirm this understanding, and also to confirm that the Salazar Committee was permitted to use a "last-in, first-out" accounting method for this purpose.[1]

Legal Discussion

Using a last-in, first-out method of accounting, the Salazar Committee has determined that it has spent all of the funds it raised in excess of the $2,000 limit pursuant to the Millionaires' Amendment. All of these funds were spent to pay obligations incurred as a result of the 2004 election, and none remain in the Salazar Committee's accounts. It therefore has no "excess contributions" remaining, and believes it need not refund any contributions raised pursuant to the Millionaires' Amendment. Requestors ask the Commission to confirm this understanding.

The Salazar Committee referred to previous guidance suggested by the Commission's Office of General Counsel in concluding that a last-in, first-out accounting method is appropriate for use under these circumstances. Addressing a similar issue, the Office of General Counsel endorsed the use of a "reasonable accounting method," such as the last-in, first-out method established in 11 C.F.R. § 110.3(c)(4), to determine the portion of personal funds spent in the primary election that transfers to the general election for Millionaires' Amendment purposes. Office of General Counsel, Draft Advisory Opinion 2004-13.

Requestors understand that the refund requirement is inapplicable here, as the Salazar Committee has spent all of the funds it raised pursuant to the Millionaires' Amendment and therefore has no excess contributions remaining in its accounts to spend on any future election. The provision is intended to prevent non-self-funding candidates from gaining an unfair advantage in future elections by using contributions

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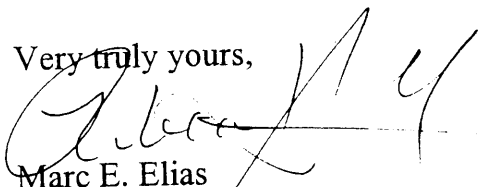
[1] The "last-in, first-out" method is a recognized reasonable accounting method. *See, e.g.*, 11 C.F.R. § 110.3(c)(4). The Salazar Committee's use of this method fairly reflected its budgetary decisions based on the availability of amounts raised pursuant to the Millionaires' Amendment.

raised under increased limits in future campaigns. The Commission confirmed this in its discussion of the provision in its Explanation and Justification of the Millionaires' Amendment regulations. Interim Final Rule: Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates; 68 Fed. Reg. 3,970, 3,985 (Jan. 27, 2003). This concern is not present here.

Requestors therefore ask the Commission to confirm that the Salazar Committee was permitted to use a "last-in, first-out" accounting method to determine it has no "excess contributions" remaining, and therefore need not refund any portion of contributions raised pursuant to the Millionaires' Amendment.

Please do not hesitate to call us should you have any questions about this matter.

Very truly yours,



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and Salazar for Senate