

November 25, 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 2003-31 is available for public comments under this procedure. It was requested by Marc Elias and Brian Svoboda, on behalf of the Senator Mark Dayton. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-31 will be on the Commission's agenda for its public meeting of Thursday December 4, 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 3, 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 2003-31 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**

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2003 NOV 25 A 11:49

November 25, 2003

Memorandum

AGENDA ITEM
For Meeting of: 12-04-93

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
Law Clerk

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 4, 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 *Questions Presented*

10 Will any of the following payments constitute an expenditure from personal funds
11 within the meaning of the Millionaire's Amendment where these payments are initially
12 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 constitute expenditures from personal funds within the meaning of the
4 Millionaire's Amendment.

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

21 An expenditure from personal funds under the Millionaire's Amendment is "an
22 expenditure made by a candidate using personal funds; and a contribution or loan made by

1 a candidate using personal funds or a loan secured using such funds to the candidate's
2 authorized committee." 2 U.S.C. 434(a)(6)(B)(i). The Commission's regulations at 11
3 CFR 400.4(a) define an expenditure from personal funds as "(1) An expenditure made by a
4 candidate, using the candidate's personal funds, for the purpose of influencing the election
5 in which he or she is a candidate; (2) A contribution or loan made by a candidate to the
6 candidate's authorized committee, using the candidate's personal funds"

7 Under the Act and Commission regulations, a Senate candidate may make
8 unlimited expenditures from personal funds, including unlimited contributions to his or her
9 own campaign. 11 CFR 110.10(a); *see* Advisory Opinion 1997-10. A candidate makes an
10 expenditure or contribution from "personal funds" if the funds used are from the
11 candidate's assets, income, or a portion of jointly owned assets. 11 CFR 100.33 and
12 110.10(b). A candidate is an agent of his or her primary campaign committee when
13 making disbursements in connection with his or her campaign. 2 U.S.C. 432(e)(2).

14 A payment by a Senate candidate from his or her personal funds for campaign
15 expenses is an expenditure because such a payment is made for the purpose of influencing
16 an election for Federal office. 2 U.S.C. 431(9)(A)(i); 11 CFR 100.111(a). Such a payment
17 by an individual, including a candidate,² may be a contribution if not reimbursed according
18 to 11 CFR 116.5. *See also* 11 CFR 100.52(a) (including advances of money in the
19 definition of contribution). Under section 116.5(b) there are exceptions for certain
20 unreimbursed travel expenses, as well as certain reimbursed travel expenses. Any

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

9 *Application to Your Question*

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

21 The non-travel expenses paid for by Senator Dayton are both expenditures and
22 contributions under the Act's definitions of "expenditure" and "contribution." 2 U.S.C.

1 431(8) and (9); 11 CFR 100.111 and 100.52. Further, under 11 CFR 116.5(b) the non-
2 travel expenses paid for by Senator Dayton are contributions since they are campaign
3 expenses paid for with personal funds and do not fall within the exceptions for travel-
4 related expenses. 11 CFR 116.5(b); *see also* 11 CFR 100.79.

5 Similarly, the travel expenses paid for by Senator Dayton are expenditures and
6 contributions under the Act's definitions of "expenditure" and "contribution." 2 U.S.C.
7 431(8) and (9); 11 CFR 100.111 and 100.52.³ The travel expenses exceeding \$1,000 paid
8 for by Senator Dayton are contributions and expenditures that do not fall within the
9 statutory exceptions for certain travel-related expenses for two reasons. First, these travel
10 expenses will be reimbursed, and the statutory exception from the definition of
11 "contribution" applies only to unreimbursed travel expenses that do not exceed \$1,000 in
12 aggregate per single election. 2 U.S.C. 431(8)(B)(iv). Second, these expenses exceed
13 \$1,000 per election. *See* 2 U.S.C. 431(8)(B)(iv); 11 CFR 100.79 and 100.139. When they
14 are reimbursed, the Committee will not reimburse Senator Dayton within the time periods
15 prescribed by the regulatory exception for reimbursed travel-related expenses. *See* 11 CFR
16 116.5(b).

17 The Committee should report these expenses paid for by Senator Dayton as in-kind
18 contributions made to the Committee when Senator Dayton's payments exceed \$200 in
19 aggregate for the election cycle, and reimbursement does not bring the amount below \$200
20 before the end of the reporting period. 11 CFR 104.13(a)(1) and 104.3(a)(4)(i); Advisory
21 Opinions 1992-1 (non-travel campaign related expenses exceeding \$200 per calendar year

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 required to be reported as in-kind contributions) and 1990-9 (expenditures from personal
2 funds should be reported as in-kind contributions). The Committee should report the in-
3 kind contributions as memo entries and, unlike other in-kind contributions, the Committee
4 should report a disbursement when Senator Dayton is actually reimbursed. 11 CFR
5 104.13(a) and Advisory Opinion 1992-1. The disbursements to Senator Dayton, when
6 reported, should note the memo entry to which they relate.⁴ If the Committee reimburses
7 Senator Dayton in a reporting period after the reporting period in which Senator Dayton
8 incurs the campaign expense, then the Committee must also report the debt owed if it
9 exceeds \$500 or has been outstanding for more than 60 days. 11 CFR 104.11. In addition,
10 since these expenses paid for by Senator Dayton are also expenditures from personal funds
11 for the purposes of the Millionaire's Amendment, the Committee must report on FEC
12 Form 10 when they in aggregate exceed twice the threshold amount.⁵ 11 CFR 400.21(a)
13 and 400.24(a).

14 At this time, the absence of an opponent to Senator Dayton makes it unclear if the
15 Millionaire's Amendment will be triggered. The increased limits are triggered when the
16 OPFA exceeds twice the threshold amount. Whether the OPFA exceeds twice that
17 amount, however, depends on a calculation of the OPFA, a formula in which Senator
18 Dayton's expenditures from personal funds amount is only one of at least two variables.⁶

⁴ 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).

⁵ The threshold amount is \$300,000 in the 2006 Minnesota Senate race.

⁶ The OPFA formula depends on the date of calculation. See 11 CFR 400.10.

1 The OPFA cannot be determined without a figure for the aggregate expenditures from
2 personal funds of Senator Dayton's opponent.

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

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

20

21

22

1

Sincerely,

2

3

Bradley A. Smith

4

Vice Chairman

5

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