Perkins Coie

607 Fourteenth Street N.W.
Washington, D.C. 20005-2011
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

December 10, 2003

VIA FACSIMILE

Mary Dove
Acting Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion Request 2003-31

Dear Ms. Dove:

On behalf of Senator Mark Dayton, we write to comment on the General Counsel's draft response to Advisory Opinion Request 2003-31. We had intended to comment on the General Counsel's earlier draft, dated November 25, 2003, but were advised by the Office of General Counsel that a revised draft was forthcoming and that comments should be withheld until that time. We never received the revised draft, which was released on December 5, 2003 and which we retrieved ourselves from the Commission's web site. An amendment to the revised draft was faxed to us on the afternoon of December 9.

The core question that we posed on Senator Dayton's behalf is whether his personal spending on behalf of his campaign continues to count toward the threshold for triggering relief for others under the Millionaires' Amendment, even after the campaign has reimbursed him for that spending.

The Millionaires' Amendment is silent on this question. The eligibility of a candidate's opponents for higher limits depends on the "aggregate amount of expenditures from personal funds" that the candidate makes in that election. 2 U.S.C. § 441a-1(a)(2)(A)(i). *See also* 11 C.F.R. § 400.10(b). Neither the statute nor the rule elaborates on what the "aggregate amount of expenditures" means. At the very least, both the statute and the rule are open to the interpretation that reimbursed personal spending does not count permanently against the thresholds for triggering opponent access to higher limits.

We respectfully suggest that a better reading of the statute and rule would be to exclude reimbursed personal spending from the Millionaires' Amendment calculations:

First, under Commission rules, reimbursed spending does not usually create permanent consequences to the competitive balance between candidates. For example, personal spending by a publicly funded presidential primary candidate does not necessarily count toward the limits placed by 26 U.S.C. § 9035 and 11 C.F.R. § 9035.2. When the candidate uses a credit card to make campaign expenditures, the spending only counts against the $50,000 limit if "the full amount due, including any finance charge, is not paid by the committee within 60 days after the closing date of the billing statement on which the charges first appear." 11 C.F.R. § 9035.2(a)(2). This rule applies to travel and non-travel related expenses alike. *Compare to* 11 C.F.R. § 116.5(b)(1) (allowing 60-day reimbursement only for travel and subsistence without triggering a contribution).

Similarly, a loan "is a contribution to the extent that it remains unpaid." 11 C.F.R. § 100.52(b)(2). If it was initially made within the contribution limits, it "is no longer a contribution" to the extent it is repaid. *Id.* An individual's contributions must be added only "to the balance of all unpaid loans and any other contributions from that individual to determine whether he or she has exceeded the contribution limitations." Amendments to Federal Election Campaign Act of 1971; Regulations Transmitted to Congress, 45 Fed. Reg. 15,080, 15,081 (1980).

Finally, spending by publicly funded presidential primary candidates often counts only temporarily toward the national and state spending limits. *See* 11 C.F.R. § 106.2(b)(2)(i)(C) (crediting refunds for broadcast time back to state expenditure limits when the time is "purchased but not used"). *See also* Financial Control and Compliance Manual for Presidential Primary Candidates Receiving Public Financing, at 178-83 (2000) (providing that expenses incurred by a campaign to transport the media count initially toward the national expenditure limit, but are debited from the limit when reimbursed by the media).

The Commission should treat this situation no differently. If Senator Dayton buys a $10 printer cartridge for the campaign on Monday, and is reimbursed in full on Tuesday, the result would be a temporary contribution to his campaign, and thus an "expenditure[] from personal funds." 11 C.F.R. § 400.10(b). Yet there is no reason

why that $10 should permanently count toward the Millionaires' Amendment threshold. Had others bought the toner and been reimbursed, they still could have written $2,000 checks for the same election. *See* 45 Fed. Reg. at 15,081. Were Senator Dayton a publicly funded presidential primary candidate, and had he paid for the toner on his credit card, the expense would not have counted against his $50,000 personal spending limit. *See* 11 C.F.R. § 9035.2(a)(2).

Second, the interpretation adopted by the General Counsel's draft does not serve the purpose of the Millionaires' Amendment, which is "to allow a candidate to respond to very large expenditures of personal funds by an opposing candidate." Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 68 Fed. Reg. 3,970, 3,977 (2002). Under that interpretation, candidates could trigger the Millionaires' Amendment without providing any real combination of resources to their campaign. A series of reimbursed expenditures, made over and over again with the same personal funds, could still trigger relief for opponents. This concern would be especially relevant in small states where the threshold amount is low.

Third, requiring candidates to count all their reimbursed expenses toward the threshold would make tracking their Millionaires' Amendment obligations even more complicated, if that is even possible. Even when candidates did not have personal wealth that equaled the threshold amount, they would still have to worry about triggering the Millionaires' Amendment by repeatedly advancing funds. They would have to track carefully their reimbursed expenses not only for FEC reporting purposes, but for Millionaires' Amendment purposes also.

Senator Dayton recognizes and shares the Commission's desire to implement the Millionaires' Amendment in a manner faithful to the statutory design. However, in an area of the law that is already extremely complicated, where public comment is still being sought as to the proper means of implementation, the Commission should be especially careful to avoid creating unnecessary and unintended consequences for the regulated community. As now written, the General Counsel's draft is apt to do just that.

Accordingly, we urge the Commission to revise the draft advisory opinion to address the concerns stated herein.

Very truly yours,

Marc E. Elias
Brian G. Svoboda
Counsel to Senator Dayton

cc: Lawrence M. Norton, Esq.
Esa Sferra, Esq.