



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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December 16, 2003

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** James A. Pehrkon  
Staff Director

**FROM:** Lawrence H. Norton  
General Counsel

Rosemary C. Smith  
Acting Associate General Counsel

John C. Vergelli  
Acting Assistant General Counsel

Esa L. Sferra  
Attorney

**Subject:** Revised Draft AO 2003-31

**AGENDA ITEM**  
For Meeting of: 12-18-03

**SUBMITTED LATE**

Attached is a revised draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 18, 2003.

Attachment

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**

**DRAFT**

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           **Senator Dayton is a candidate for the U.S. Senate in 2006 and his principal**  
17    **campaign committee is Mark Dayton for Minnesota 2006 ("the Committee").<sup>1</sup> You state**  
18    **that Senator Dayton expects to incur personally certain campaign expenses that are not**  
19    **travel-related. He also expects to incur travel expenses on his personal credit card in**  
20    **excess of \$1,000 that the Committee will reimburse, but not within 60 days of the closing**  
21    **date of the billing statement on which the charges will first appear. He also expects to**  
22    **incur travel 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.**

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<sup>1</sup> On April 11, 2003, Senator Dayton filed a revised Statement of Candidacy with the Secretary of the Senate.

1           Senator Dayton indicated on his Statement of Candidacy that he does not intend to  
2 make expenditures from personal funds in excess of the threshold amount under the  
3 Commission regulations implementing the Millionaire's Amendment.

4 ***Question Presented***

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

- 8           (a)    Payments by Senator Dayton for campaign-related travel expenses  
9                exceeding \$1,000 that are reimbursed by the Committee more than 30 days  
10              after the date on which the expense was incurred.
- 11           (b)   Payments by Senator Dayton by personal credit card for campaign-related  
12              travel expenses exceeding \$1,000 that are reimbursed by the Committee  
13              more than 60 days after the closing date of the credit card billing statement  
14              on which the expense first appears.
- 15           (c)   Payments by Senator Dayton for other campaign expenses not involving  
16              travel that are subsequently reimbursed by the Committee.

17 ***Legal Analysis and Conclusions***

18           The Commission concludes that the payments by Senator Dayton described in (c)  
19 will permanently constitute expenditures from personal funds under the Millionaire's  
20 Amendment, even if subsequently reimbursed by the Committee. The above payments for  
21 travel expenditures in (a) and (b) will permanently constitute expenditures from personal

1 funds because the Committee will not reimburse Senator Dayton until after the expiration  
2 of the appropriate time period.

3 Under the Act and Commission regulations, a Senate candidate may make  
4 unlimited expenditures from personal funds, including unlimited contributions to his or her  
5 own campaign. 11 CFR 110.10(a); see Advisory Opinion 1997-10. In BCRA, Congress  
6 provided that a candidate opposing a self-financed candidate may under certain  
7 circumstances accept contributions from individuals under increased contribution limits,  
8 and that the coordinated party expenditure limits for national and State political party  
9 committees are not applicable. 2 U.S.C. 441a(i) (Senate); 11 CFR 400.40; 2 U.S.C. 441a-1  
10 (House); 11 CFR 400.41. For Senate candidates, the increased limits are triggered when  
11 the "opposition personal funds amount" ("OPFA")<sup>2</sup> exceeds twice the "threshold  
12 amount."<sup>3</sup> 2 U.S.C. 441a(i)(1)(C)(i). In determining the OPFA, the candidates'  
13 "expenditures from personal funds" are taken into account. In addition, under the  
14 Millionaire's Amendment, each candidate must report when his or her expenditures from  
15 personal funds exceed twice the threshold amount. 2 U.S.C. 434(a)(6)(B)(iii); 11 CFR  
16 400.21(a).

17 An expenditure from personal funds under the Millionaire's Amendment is "an  
18 expenditure made by a candidate using personal funds; and a contribution or loan made by  
19 a candidate using personal funds or a loan secured using such funds to the candidate's

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<sup>2</sup> The "opposition personal funds amount" is based on the difference between the aggregate amount of expenditures from personal funds that a candidate and an opposing candidate each make in the same election. For the complete definition, see 2 U.S.C. 441a(i)(1)(D) and 11 CFR 400.10.

<sup>3</sup> The threshold amount for Senate elections for purposes of the Millionaire's Amendment is the sum of \$150,000 plus an amount equal to the voting age population of the State of the candidate multiplied by \$0.04, which is \$300,000 for the purposes of the 2006 Minnesota Senate race. 2 U.S.C. 441a(i)(1)(B); 11 CFR 400.9(a).

1 authorized committee." 2 U.S.C. 434(a)(6)(B)(i). The Commission's regulations at 11  
2 CFR 400.4(a) define an expenditure from personal funds as "(1) An expenditure made by a  
3 candidate, using the candidate's personal funds, for the purpose of influencing the election  
4 in which he or she is a candidate; (2) A contribution or loan made by a candidate to the  
5 candidate's authorized committee, using the candidate's personal funds . . . ." A candidate  
6 makes an expenditure or contribution from "personal funds" if the funds used are from the  
7 candidate's assets, income, or a portion of jointly owned assets. 11 CFR 100.33 and  
8 110.10(b). A candidate is an agent of his or her primary campaign committee when  
9 making disbursements in connection with his or her campaign. 2 U.S.C. 432(e)(2).

10 A payment by a Senate candidate from his or her personal funds for campaign  
11 expenses is an expenditure and a contribution, unless an exception applies. 2 U.S.C.  
12 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). There are two relevant  
13 exceptions to the definition of "contribution." 2 U.S.C. 431(8)(B)(iv); 11 CFR 116.5(b).  
14 First, any campaign-related transportation or subsistence expense paid for by an individual,  
15 including a candidate, that does not exceed \$1,000 in aggregate for a single election and is  
16 not reimbursed by the campaign is not a contribution or expenditure. 2 U.S.C.  
17 431(8)(B)(iv); 11 CFR 100.79 and 100.139. Second, any reimbursed campaign-related  
18 transportation or subsistence expense paid for by an individual, including a candidate,<sup>4</sup> is  
19 not a contribution if it is reimbursed by the campaign within 30 days from the date the  
20 expense was incurred, or in the case of payment with a personal credit card, within 60 days

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<sup>4</sup> Although section 116.5 does not specifically mention 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 after the closing date of the billing statement on which the expense first appears. 11 CFR  
2 116.5(b).

3 While the wording of the exception in 11 CFR 116.5(b) removes certain  
4 reimbursed travel expenses from the definition of "contribution," there is no explicit  
5 mention of the definition of "expenditure." Nevertheless, the Commission recognizes that  
6 for the purposes of the Millionaire's Amendment, all expenditures made by the candidate  
7 from personal funds will also constitute a contribution made by the candidate from  
8 personal funds. Therefore, for the purposes of the Millionaire's Amendment, it is  
9 appropriate to exclude from the definition of expenditures campaign-related travel  
10 expenses paid for by a candidate with personal funds that are reimbursed by the  
11 candidate's authorized committee within the time limits proscribed by section 116.5(b)(2).<sup>5</sup>

12 *Application to Your Question*

13 Senator Dayton's payments from personal funds for the campaign expenses listed  
14 in (a), (b), and (c), above will be both expenditures and contributions under 2 U.S.C.  
15 431(8) and (9), and thus will constitute expenditures from personal funds within the  
16 meaning of the Millionaire's Amendment. 2 U.S.C. 434(a)(6)(B)(i); 11 CFR 400.4(a)(1)  
17 and (2). These payments, which you appropriately characterize as "expenditures . . . that  
18 were initially treated as contributions," are both expenditures and contributions under the

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<sup>5</sup> For the purposes of the Millionaire's Amendment, a travel expense paid for by a candidate with personal funds that exceeds \$1,000 per election becomes an expenditure and contribution, and thus an expenditure from personal funds, on the 31st day after the expense is incurred, or 61st day after the closing date of the billing cycle on which the charge first appears in the case payment with a credit card, on which the expense remains unreimbursed. A candidate's principal campaign committee must report within 24 hours when a candidate makes an expenditure from personal funds that 1) causes the aggregate expenditures from personal funds to exceed twice the threshold amount, or 2) is after the filing of the initial notification that expenditures from personal funds exceed twice the threshold amount. 11 CFR 400.21(a) and 400.22(a). To comply with these reporting requirements, a principal campaign committee must report unreimbursed travel expenses exceeding \$1,000 per election by day 32, or day 62 in the case of payment with a credit card.

1 Act because they constitute a payment made, and a loan or something of value given, for  
2 the purpose of influencing an election for Federal office. 11 CFR 100.111 and 100.52.  
3 Senator Dayton's payments for the travel expenses are expenditures and contributions  
4 because they do not fall within the exceptions to the definitions of "expenditure" and  
5 "contribution" for travel expenses, as interpreted above. These exceptions do not apply  
6 because the Committee will reimburse Senator Dayton, but not within the appropriate time  
7 period prescribed in 11 CFR 116.5(b).

8 The Committee should report these expenses paid for by Senator Dayton as in-kind  
9 contributions made to the Committee when Senator Dayton's payments exceed \$200 in  
10 aggregate for the election cycle, and reimbursement does not bring the amount below \$200  
11 before the end of the reporting period. 11 CFR 104.13(a)(1) and 104.3(a)(4)(i); Advisory  
12 Opinions 1992-1 (non-travel campaign related expenses exceeding \$200 per calendar year  
13 required to be reported as in-kind contributions) and 1990-9 (expenditures from personal  
14 funds should be reported as in-kind contributions). The Committee should report the in-  
15 kind contributions as memo entries<sup>6</sup> on Schedule A and, unlike other in-kind contributions,  
16 the Committee should report a disbursement when Senator Dayton is actually reimbursed.  
17 11 CFR 104.13(a) and Advisory Opinion 1992-1. The disbursements to Senator Dayton,  
18 when reported, should note the memo entry to which they relate.<sup>7</sup> If the Committee  
19 reimburses Senator Dayton in a reporting period after the reporting period in which

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<sup>6</sup> 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.

<sup>7</sup> 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 Senator Dayton incurs the campaign expense, then the Committee must also report the debt  
2 owed if it exceeds \$500 or has been outstanding for more than 60 days. 11 CFR 104.11.

3 The fact that Senator Dayton may subsequently receive reimbursement from the  
4 Committee for these expenses does not change their character as expenditures from  
5 personal funds. Neither the Millionaire's Amendment nor the Commission rules and forms  
6 implementing it contemplate reductions in expenditures from personal funds. The OPFA  
7 is calculated using the "aggregate amount[s]" of expenditures from personal funds for the  
8 candidate and the opposing candidate. 2 U.S.C. 441a(i)(1)(D). The word "aggregate" used  
9 as an adjective is defined as a whole, "or sum; total; combined" as compared with the  
10 adjective "net" defined as "remaining after deductions . . . ." The Random House  
11 Dictionary of the English Language, The Unabridged Edition (1983); *see also* Bryan A.  
12 Garner, *A Dictionary of Modern Legal Usage* (2d ed. 1995). The reporting provisions of  
13 both the Act and Commission regulations use the terms "aggregate" and "total"  
14 interchangeably. Political committees must disclose the "total amount of all receipts"  
15 including contributions from persons that "have an aggregate amount or value in excess of  
16 \$200 within the [ ] election cycle, in the case of an authorized committee . . . ." 2 U.S.C.  
17 434(b)(2) and (b)(3)(A); 11 CFR 104.3(a)(3) and (a)(4)(i). Similarly, section 434(b)(7)  
18 requires reporting of "the total sum of all contributions to such political committee,  
19 together with the total contributions less offsets to contributions . . . ." 2 U.S.C. 434(b)(7);  
20 11 CFR 104.3(a)(3)(v), and (b)(2)(v)(C). Offsets to contributions, including refunds, are  
21 reported as part of "total amount of disbursements," which would be unnecessary if the  
22 reported figure of "total contributions" included the subtraction of contribution offsets. 2

1 U.S.C. 434(b)(4)(F); 11 CFR 104.3(b)(2)(v). These three figures are reported on lines  
2 6(a), (b), and (c) of FEC Form 3, under the headings of "Total Contributions," "Total  
3 Contribution Refunds," and "Net Contributions."

4 In addition, Congress provided in one of the variables used for OPFA calculation  
5 for the subtraction of candidate contributions from personal funds. 2 U.S.C.  
6 441a(i)(1)(E)(ii) (definition of "gross receipts advantage"). Congress did not make a  
7 similar provision for the subtraction of any amounts in the variables for the "[g]reatest  
8 aggregate amount of expenditures from personal funds" made by the candidate or opposing  
9 candidate. 2 U.S.C. 441a(i)(1)(D)(i) and (ii); *see also* 11 CFR 400.10(b) (variables a  
10 through f). Further, the Commission rules do not require a candidate to file a new Form 10  
11 when a committee repays a loan made by the candidate using personal funds to his or her  
12 authorized committee. *See generally* 11 CFR Part 400 Subpart B. If repayment of such  
13 loans, which constitute an expenditure from personal funds, 11 CFR 400.4(a)(2), decreased  
14 the total amount of expenditures from personal funds, the candidate would need to file a  
15 new Form 10 with the corrected, decreased total expenditure from personal funds amount  
16 in line 12.

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

21 This response constitutes an advisory opinion concerning the application of the  
22 Act and Commission regulations to the specific transaction or activity set forth in your

1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
2 of the facts or assumptions presented, and such facts or assumptions are material to a  
3 conclusion presented in this advisory opinion, then the requestor may not rely on that  
4 conclusion as support for its proposed activity.

5

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Sincerely,

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8

Ellen L. Weintraub

9

Chair

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

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