Perkins Coie

Marc Erik Elias
PHONE: (202) 434-1609
FAX: (202) 654-9126
EMAIL: MElias@perkinscoie.com

607 Fourteenth Street N.W.
Washington, D.C. 20005-2003
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

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AOR 2008-09

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Senator Frank Lautenberg and Lautenberg for Senate

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of Senator Frank Lautenberg and Lautenberg for Senate. As you are aware, on June 26, 2008, the Supreme Court expressly struck down two provisions of the so-called Millionaire's Amendment as violating the First Amendment of the United State Constitution. *Davis v. Federal Election Commission*, __ U.S. ___, 128 S.Ct. 2759 (2008). We wish to confirm that as a result of this ruling, the Commission no longer will seek to enforce the provision in the Millionaire's Amendment that pertains to loan repayment.

I. Introduction

Mr. Lautenberg is a United States Senator from the State of New Jersey. He has loaned his principal campaign committee, Lautenberg for Senate, $1,650,000.00 towards his June 3, 2008 primary election. This loan is reported on the Committee's reports to the Commission.

2 U.S.C. § 441a(j) provides:

> Any candidate who incurs personal loans made after the effective date of the Bipartisan Campaign Reform Act of 2002 in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions

> made to such candidate or any authorized committee of such candidate after the date of such election.

Were the FEC to continue to enforce this provision, Lautenberg for Senate would not be allowed to repay the candidate's loan in excess of $250,000, from any contributions made after the date of the primary election. *Id.*; *see also* 11 C.F.R. § 116.11. The result would be that the Committee would be unable to raise the additional funds necessary to meet its repayment obligation to the Senator.

II. Discussion

The Federal Election Campaign Act (FECA), and regulations promulgated thereunder, limit the amount of contributions a federal candidate and his or her authorized committee may receive from an individual and the amount the party may devote to coordinated campaign expenditures. The Act and regulations also establish a system of disclosure of campaign contributions and expenditures and a process for debt retirement. These rules normally apply equally to all competitors for a seat. However, the Millionaire's Amendment, added to FECA as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 109, fundamentally altered this scheme: It treated self-financing candidates differently from other candidates in order to "level the electoral opportunities for candidates of different personal wealth." *Davis*, 128 S.Ct. at 2764 (quoting Brief for FEC at 34).

The Millionaire's Amendment attempted to accomplish the goal of "reduc[ing] the natural advantage that wealthy individuals possess in campaigns for federal office," *see id.* at 2773, in several ways:

First, it provided for increased contribution and party spending limits for opponents of self-financing candidates who spend significant personal funds on their campaigns. 2 U.S.C. §§ 441a(i), 441a-1(a)(1). Meanwhile, the self-financing candidate remained subject to the normal limitations. *See id.*; *see also* §§ 441a(a)(1)(A), (a)(3)(A), (c), (d).

Second, in order to implement the asymmetrical contribution limits, the amendment required the self-financing candidate to comply with more onerous disclosure rules. Self-financing candidates were required to file an initial "declaration of intent" revealing the amount of personal funds the candidate intends to spend in excess of $350,000. They also had to make additional disclosures to the other candidates, their national parties, and the FEC, as expenditures exceed certain benchmarks. *Id.* §§ 434(6)(B), 441a-1(b)(1)(B).

Third, the amendment treated the personal funds loaned to a campaign by a self-financing candidate differently from other debts. Specifically, it allowed a candidate committee to repay personal loans made by the candidate in excess of $250,000 only from contributions made *before* the election date. *Id.* § 441a(j). *Cf.* 2 U.S.C. § 433(d); 11 C.F.R. § 116.7 (governing repayment of other debts).

In *Davis*, the Supreme Court considered two of the above provisions—the contribution limits and disclosure requirements for House candidates, found in sections 319(a) and (b) of BCRA. The Court unequivocally rejected both as "antithetical to the First Amendment." 128 S.Ct. at 2764. In so holding, the Court emphasized that a candidate has a "First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Id.* at 2771. (quoting *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976)). The right to spend personal funds for campaign speech is fundamental, the Court wrote. *Id.* Thus, not only is Congress prohibited from placing a cap on personal expenditures, it also cannot impose a penalty on candidates who "robustly exercise" their First Amendment right to spend personal funds, unless doing so would serve a compelling state interest. *Id.* Reducing the natural advantage that wealthy individuals possess in campaigns for federal office, the Court made clear, is not "a legitimate government objective." *Id.* at 2773.

The Court's reasoning applies with equal force to the personal loan provision, 2 U.S.C. § 441a(j). That provision was part and parcel of the Millionaire's Amendment, and an integral part of Congress' attempt to reduce the advantage of wealthy candidates. *See* 147 Cong. Rec. S3233-06, S3249 (Apr. 2, 2001). Indeed, the personal loan provision is part of the same section of BCRA as the asymmetrical contribution limit that applies to self-financing Senate candidates: section 304(a).[1]

Like the asymmetrical contribution limits, the personal loan provision imposes significant burdens on the basis of a candidate's decision to spend his own money for campaign speech. Candidates who self-finance with a loan in excess of $250,000 cannot continue to raise money to pay back that loan after the election date. Candidates who do not self-finance are subject to no such restriction in their debt repayment. Just as different contribution limits "for candidates who are competing against each other . . . impermissibly burden[] [the self-financed candidate's] right to spend his own money for

[1] *Davis* struck down the Millionaire's Amendment contribution limits and disclosure requirements for House candidates, found in sections 319(a) and (b) of BCRA. The corresponding Senate provisions are found in sections 304(a) and (b) of BCRA. These provisions are unquestionably unconstitutional under *Davis* and cannot be enforced. Critically, section 304(a) also contains the loan provision at issue here. As an inseparable part of a clearly invalid statutory section, the loan provision would not be enforceable even if it were not independently unconstitutional.

campaign speech," *Davis*, 128 S.Ct. at 2771, so too do more onerous restrictions for repayment of loans. Under *Davis*, Congress' desire to reduce the natural advantage of wealthy candidates is simply not a legitimate state interest that can justify the burden on a candidate's First Amendment right to spend personal funds.

Accordingly, the personal loan provision of the Millionaire's Amendment is constitutionally suspect under the Court's ruling in *Davis*, as is the regulation enforcing this provision at 11 C.F.R. § 116.11. Therefore we wish to confirm our understanding that Lautenberg for Senate is not required to, within 20 days of the election date, treat the portion of the outstanding balance of the personal loan that exceeds $250,000, minus the amount of cash on hand as of the day after the election, as a contribution from the candidate. *See id.*

Please do not hesitate to call me should you have any questions about this request.

Very truly yours,

Marc Erik Elias