

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2008-09 is available for public comments under this procedure. It was requested by Marc E. Elias, Esq., on behalf of Senator Frank Lautenberg and Lautenberg for Senate.

Draft Advisory Opinion 2008-09 is scheduled to be on the Commission's agenda for its public meeting of Thursday, August 21, 2008.

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 12:00pm noon (Eastern Time) on August 20, 2008.

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 timely received comments 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 Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to 2008-09, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *pch for*
General Counsel

Rosemary C. Smith *RS*
Associate General Counsel

Robert M. Knop *RMK 6/12*
Assistant General Counsel

Joanna Waldstreicher *JW*
Attorney

Subject: Draft AO 2008-09

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 21, 2008.

Attachment

1 **ADVISORY OPINION 2008-09**

2 **Marc E. Elias, Esq.**
3 **Perkins Coie LLP**
4 **607 Fourteenth Street, NW**
5 **Washington, DC 20005-2011**

DRAFT

6 **Dear Mr. Elias:**

7 **We are responding to your advisory opinion request on behalf of Senator Frank**
8 **Lautenberg and Lautenberg for Senate (“the Committee”), concerning the severability of**
9 **a provision of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) dealing with the**
10 **repayment of personal loans made by a candidate to his or her authorized campaign**
11 **committee. The Commission concludes that the Supreme Court did not address the**
12 **constitutionality of the loan repayment provision in *Davis v. Federal Election***
13 ***Commission*, 554 U.S. ___, 128 S. Ct. 2759 (2008) (“*Davis*”), and that the loan**
14 **repayment provision is severable from the provisions of the Millionaires’ Amendment**
15 **found to be unconstitutional in *Davis*. Therefore, the loan repayment provision applies to**
16 **Senator Lautenberg and the Committee’s proposed repayment of Senator Lautenberg’s**
17 **loans.**

18 ***Background***

19 **The facts presented in this advisory opinion are based on your letter received on**
20 **July 25, 2008, as well as publicly available information, including reports filed with the**
21 **Commission.**

22 **The Committee is the principal campaign committee for Senator Frank**
23 **Lautenberg, who is a United States Senator from the State of New Jersey. Senator**
24 **Lautenberg has loaned the Committee a total of \$1,650,000.00 in connection with his**
25 **June 3, 2008 primary election. The Committee has reported these loans to the**

1 Commission. As of the closing date of the 2008 July Quarterly Report, the Committee
2 has not yet repaid these loans to Senator Lautenberg.¹

3 On June 26, 2008, the Supreme Court issued its decision in *Davis*, which struck
4 down as unconstitutional certain provisions of BCRA pertaining to increased campaign
5 contribution limits for opponents of self-financing candidates and related disclosure
6 requirements.

7 ***Question Presented***

8 *Does the loan repayment provision of BCRA apply to Senator Lautenberg and the*
9 *Committee, in light of the Supreme Court's ruling in Davis?*

10 ***Legal Analysis and Conclusions***

11 Yes, the provision of BCRA concerning repayment of candidates' personal loans
12 applies to Senator Lautenberg and the Committee. *Davis* did not address this provision,
13 and it is severable from the Millionaires' Amendment provisions that were struck down
14 as unconstitutional.

15 Under the loan repayment provision of BCRA and the Commission's
16 implementing regulations, if a candidate makes a personal loan to his or her authorized
17 campaign committee in connection with an election, the committee "shall not repay
18 (directly or indirectly), to the extent such loans exceed \$250,000, such loans from any
19 contributions made to such candidate or any authorized committee of such candidate after
20 the date of such election." 2 U.S.C. 441a(j); 11 CFR 116.11, 116.12. In *Davis*, the
21 Supreme Court addressed only "the constitutionality of federal election law provisions

¹ See Report of Receipts and Disbursements for Lautenberg for Senate, Inc., filed July 15, 2008, available at <http://images.nictusa.com/cgi-bin/fecimg/?C00382457>.

1 that, under certain circumstances, impose different campaign contribution limits on
2 candidates competing for the same congressional seat” and related disclosure
3 requirements in BCRA sections 319(a) and (b).² *Davis* at 2766; *see also Davis*,
4 Appendix. The *Davis* ruling did not address the constitutionality of the loan repayment
5 provision of BCRA section 304, codified at 2 U.S.C. 441a(j). The loan repayment
6 provision applies equally to all candidates, regardless of whether they or their opponents
7 have triggered the increased campaign contribution limits.

8 The Commission notes your contention that even if the loan repayment provision
9 is not independently unconstitutional, it is an inseparable part of BCRA section 304(a)³
10 and therefore unenforceable. BCRA’s severability provision, however, explicitly states
11 that the invalidation of one provision of BCRA will not affect the validity of any other
12 provisions of BCRA nor the application of such provisions to other persons and
13 circumstances. BCRA section 401, codified at 2 U.S.C. 454. It is a well-settled principle
14 of statutory construction that “[u]nless it is evident that the legislature would not have
15 enacted those provisions which are within its power, independently of that which is not,
16 the invalid part may be dropped if what is left is fully operative as a law.” *Buckley v.*
17 *Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co. v. Corporation*
18 *Commission*, 286 U.S. 210, 234 (1932)). In *Buckley*, the Supreme Court struck down

² The Commission intends to initiate a rulemaking shortly to conform its regulations to the Supreme Court’s decision in *Davis*.

³ Because the *Davis* decision struck down the contribution limits and related disclosure requirements for House candidates in BCRA sections 319(a) and (b), it also effectively precluded enforcement of the corresponding contribution limits and related disclosure requirements for Senate candidates in BCRA sections 304(a) and (b). *See* Press Release, Public Statement on the Supreme Court’s Decision in *Davis v. FEC*, July 25, 2008, available at <http://www.fec.gov/press/press2008/220080725millionaire.shtml>.

1 certain provisions of section 202 of the Federal Election Campaign Act of 1971, but
2 expressly upheld other provisions within the same subsection of the statute.

3 In the present case, it is not at all “evident” from the text, function, or legislative
4 history of the Millionaires’ Amendment that Congress intended the loan repayment
5 provision to be inextricably tied to the increased contribution limits of BCRA section
6 304(a). Although the loan repayment provision and the unconstitutional provisions
7 regarding increased contribution limits are both part of the same statutory subsection,
8 BCRA section 304(a), in fact, was codified in two separate provisions of 2 U.S.C. 441a:
9 one provides for the increased contribution limits and the other limits repayment of
10 personal loans. Functionally, the loan repayment provision can operate effectively
11 without the provisions invalidated by *Davis*. Because the loan repayment provision’s
12 operation does not depend upon the invalidated increased contribution limits or reporting
13 provisions, its validity is not affected by their invalidation. Indeed, in several instances
14 Congress addressed the loan repayment provision separately from the unconstitutional
15 provisions regarding increased contribution limits. *See, e.g.*, 147 Cong. Rec. S2450-51
16 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici); 147 Cong Rec. S2461-62 (daily
17 ed. Mar. 19, 2001) (statement of Sen. Domenici).

18 Accordingly, the loan repayment provision of BCRA is severable from the
19 Millionaires’ Amendment provisions that were struck down as unconstitutional in *Davis*.
20 The loan repayment provision, therefore, applies to Senator Lautenberg and the
21 Committee.

22 This response constitutes an advisory opinion concerning the application of the
23 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 requester may not rely on that
4 conclusion as support for its proposed activity. Any person involved in any specific
5 transaction or activity which is indistinguishable in all its material aspects from the
6 transaction or activity with respect to which this advisory opinion is rendered may rely on
7 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions
8 in this advisory opinion may be affected by subsequent developments in the law
9 including, but not limited to, statutes, regulations, advisory opinions and case law.

10

11
12
13
14
15
16
17

On behalf of the Commission,

Donald F. McGahn II
Chairman