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December 11, 2008

AOR 2008-22

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

Re: Senator Frank Lautenberg and Repayment of Debt from Prior Elections

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, his authorized committee (the "Committee"). Senator Lautenberg is a candidate for re-election in 2014 and is in the process of repaying debts from previous elections. He wishes to confirm that (1) he may use funds from his 2008 general election account to repay up to \$250,000 in debt owed to him for his 2008 primary loan to the Committee, and (2) the Committee may use funds raised for Senator Lautenberg's 2008 and 2014 re-election to repay \$1,090,000 in campaign debt owed to him from the 2002 election (which predated the effective date of the Bipartisan Campaign Reform Act of 2002).

I. 2008 Debt

Mr. Lautenberg is a United States Senator from the State of New Jersey. During his recent campaign for re-election, Senator Lautenberg lent his 2008 primary committee \$1,650,000. Of that amount, Senator Lautenberg wishes to seek repayment of up to \$250,000 from his 2008 general election account, as permitted under 2 U.S.C. § 441a(j) and 11 C.F.R. § 116.12. As stated in the Commission's regulations,

A candidate's authorized committee may repay to the candidate a personal loan, as defined in 11 CFR 116.11(a), of up to \$250,000 where the proceeds of the loan were

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used in connection with the candidate's campaign for election. The repayment may be made from contributions to the candidate or the candidate's authorized committee at any time before, on, or after the date of the election.

11 C.F.R. § 116.12;¹ *see also* 2 U.S.C. § 441a(j).

Moreover, Commission regulations permit an authorized committee that is winding down to assign debt to another authorized committee of the same candidate when certain conditions described below are met:

An authorized committee that qualifies as a terminating committee may assign debts to another authorized committee of the same candidate to the extent permitted under applicable state law provided that the authorized committee assigning the debts has no cash on hand or assets available to pay any part of the outstanding debts, and provided that the authorized committee assigning the debts was not organized to further the candidate's campaign in an election not yet held . . . An authorized committee that has assigned all its outstanding debts may terminate if –

(i) The authorized committee that has assigned the debts otherwise qualifies for termination under 11 CFR 102.3; and

(ii) The authorized committee that received the assigned debts notifies the Commission in writing that it has assumed the obligation to pay the entire amount owed and that it has assumed the obligation to report the debts, and any contributions received for the retirement of the assigned debts, in accordance with 11 CFR part 104. The assigned debts shall be disclosed on a separate schedule of debts and obligations attached to the authorized committee's reports. Contributions received for retirement of the assigned debts shall be disclosed on a separate schedule of receipts attached to the authorized committee's reports

11 C.F.R. § 116.2(c)(3). Although the form of the proposed debt repayment is slightly different than contemplated in section 116.2(c)(3) because the primary debt and general election funds are already with the same authorized committee, the substantive result that

¹ Section 116.12 also states that "[t]his section applies separately to each election." 11 C.F.R. § 116.12(b). As explained in the Commission's Explanation & Justification, this is to clarify that the primary and general elections each have their own \$250,000 limit for candidate loans made during each election. *See Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, Interim Final Rule, 68 Fed. Reg. 3970, 3975 (Jan. 23, 2003)*. This does not in any way prevent leftover funds raised for the general election from being used to wind down primary debt.

December 11, 2008

Page 3

the Committee seeks is the same: general election funds will be used to repay primary debt, now that the election is over and the Committee is repaying debts from the 2008 election cycle.

Importantly, the Commission has previously concluded under similar circumstances that use of campaign funds to repay candidate debt from a prior election is permissible. *See, e.g.,* FEC Advisory Opinions 2003-30 and 1989-22. The Bipartisan Campaign Reform Act and related regulations merely placed a \$250,000 limit on such a repayment under certain circumstances, but the change in the law did not alter an authorized committee's basic ability to use campaign funds to retire debt from a prior election.

For this reason, we wish to confirm that, consistent with Commission regulations and Commission precedent, the Committee may use 2008 general election funds to repay up to \$250,000 of candidate debt from the 2008 primary.

II. 2002 Debt

During his 2002 campaign, Senator Lautenberg lent the 2002 Committee \$1,510,000 towards his 2002 election. \$1,090,000 of that debt remains, and has been properly reported on the 2002 Committee's reports to the Commission.

It has long been the Commission's view that "contributions lawfully made with respect to an election in which a candidate participates as a candidate may be spent, in the discretion of the candidate or his/her authorized campaign personnel, for the purpose of retiring outstanding debts from a previous election." FEC Advisory Opinion 1989-22; *see also* FEC Advisory Opinions 1981-9 and 1980-143. Although the enactment of BCRA limited the use of funds to repay candidate loans in excess of \$250,000, it applies only to personal loans made after BCRA's effective date – and does not prohibit the use of funds to repay candidate loans from a prior election.

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.

December 11, 2008
Page 4

The effective date of BCRA was November 6, 2002, which occurred after Senator Lautenberg lent funds to his 2002 Committee. For this reason, we wish to confirm that the Act permits the full amount of Senator Lautenberg's 2002 debt to be repaid with funds raised for the 2008 re-election and for his 2014 re-election. See FEC Advisory Opinion 2003-30 (permitting Senator Fitzgerald to use his 2004 primary funds to repay in full candidate debt incurred before November 6, 2002).

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

Very truly yours,

A handwritten signature in black ink that reads "Marc E. Elias". To the right of the signature is a circular stamp containing the initials "MSA".

Marc E. Elias
Counsel to Senator Frank Lautenberg