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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of: 08-29-06

August 22, 2006

MEMORANDUM

TO: The Commission

THROUGH: Patrina M. Clark *PM CLK*
Staff Director

FROM: Lawrence H. Norton *LHN (by the)*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

J. Duane Pugh *JDP*
Acting Assistant General Counsel

Robert M. Knop *RMK*
Attorney

Subject: Draft AO 2006-21

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 29, 2006.

Attachment

1 ADVISORY OPINION 2006-21

2

3 Matthew S. Butler
4 Campaign Manager
5 Cantwell 2006
6 PO Box 12740
7 Seattle, WA 98111

DRAFT

8

9 Dear Mr. Butler:

10 We are responding to your advisory opinion request on behalf of Cantwell 2006,
11 concerning the application of the Federal Election Campaign Act of 1971, as amended
12 (the "Act"), and Commission regulations to expenditures from personal funds made by
13 another candidate, Michael S. McGavick, before the State of Washington's primary
14 election and whether such spending triggers the application of the Millionaires'
15 Amendment for Senator Cantwell. The Commission concludes that Mr. McGavick is
16 not Senator Cantwell's "opposing candidate" in the primary election, so Mr. McGavick's
17 expenditures from personal funds made before the primary election will not trigger the
18 provisions of the Millionaires' Amendment for Senator Cantwell or Cantwell 2006.
19 However, any personal funds that were contributed by Senator Cantwell or Mr.
20 McGavick to either of their respective authorized committees before the primary election,
21 and that are retained by either committee for use in the general election campaign, will be
22 expenditures from personal funds in connection with the general election. Senator
23 Cantwell and Mr. McGavick must use a reasonable accounting method to determine the
24 amount of personal funds available for use in the general election campaign.

25 ***Background***

26 The facts presented in this advisory opinion are based on your letter received on
27 July 11, 2006.

1 Senator Maria Cantwell is a Democratic candidate for reelection to the U.S.
2 Senate from Washington State in the upcoming election. Cantwell 2006 is Senator
3 Cantwell's principal campaign committee. Michael S. McGavick is a Republican
4 candidate seeking election to the U.S. Senate from Washington State. The Democratic
5 primary election and the Republican primary election will both be held on September 19,
6 2006, and the general election will be held on November 7, 2006. There are five
7 Democratic candidates and six Republican candidates on the September 19 primary ballot
8 for United States Senator in Washington State.¹

9 Cantwell 2006 anticipates that Mr. McGavick will spend a significant amount of
10 his personal funds for "communications attacking Senator Cantwell" before the primary
11 election, should he choose to spend personal funds in connection with the Senate race.

12 Cantwell 2006 intends to raise funds under the increased individual contribution
13 limits provided by the Millionaires' Amendment,² to the fullest extent permitted by the
14 Act, Commission regulations, and the Commission's interpretation of the law.

¹ See Washington Secretary of State, *2006 Candidates Who Have Filed*, http://www.vote.wa.gov/Elections/CandidatesWhoHaveFiled_BallotOrder.aspx (last visited August 15, 2006).

² The Act, as amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), contains a set of provisions collectively referred to as the "Millionaires' Amendment." See 2 U.S.C. 441a(i) and 441a-1. Under the Millionaires' Amendment, a candidate may solicit, receive, and spend contributions from individuals under increased contribution limits if the candidate is running against a self-financed opponent who makes "expenditures from their personal funds" that exceed certain amounts. See 2 U.S.C. 441a(i)(1)(A)-(C) and 11 CFR 400.40(b). Additionally, national and State party committees may make coordinated party expenditures in excess of the normally applicable coordinated party expenditure limit, in 2 U.S.C. 441a(d), on behalf of candidates opposing self-financed candidates. See 2 U.S.C. 441a(i)(1)(C)(iii)(III) and 11 CFR 400.40(b)(3). The Millionaires' Amendment also requires that candidates and/or their principal campaign committees comply with a number of specific reporting and notification requirements. See, e.g., 2 U.S.C. 434(a)(6)(B) and 11 CFR 400.20, 400.21, 400.22, and 400.30(b)(2).

1 **Questions Presented**

2 1. *May Senator Cantwell consider any of Mr. McGavick's expenditures from*
3 *personal funds made before the primary election to be in connection with*
4 *the general election?*

5
6 2. *If Senator Cantwell or Mr. McGavick contributes personal funds to the*
7 *respective candidate's authorized committee before the primary election*
8 *and that committee retains cash-on-hand for use in the general election*
9 *campaign, would those funds be expenditures from personal funds in*
10 *connection with the general election?*

11
12 **Legal Analysis and Conclusions**

13 *Question 1: May Senator Cantwell consider any of Mr. McGavick's expenditures from*
14 *personal funds made before the primary election to be in connection with the general*
15 *election?*

16 No, Mr. McGavick's expenditures from personal funds made before the primary
17 election will be expenditures from personal funds made in connection with the primary
18 election only, and will not trigger application of the Millionaires' Amendment for
19 Senator Cantwell because Mr. McGavick is not Senator Cantwell's "opposing candidate"
20 in the primary election.

21 The increased individual contribution limits and coordinated party expenditure
22 limits provided by the Millionaires' Amendment apply separately to each election cycle
23 as mandated by the Act. *See* 2 U.S.C. 431(25) ("[A] primary election and a general
24 election shall be considered to be separate elections"); *see also* 11 CFR 400.2(b). An
25 "election cycle" is defined as the period beginning on the day after the date of the most
26 recent election for the specific office or seat that a candidate is seeking and ending on the
27 date of the next election for that office or seat. *See* 2 U.S.C 431(25); 11 CFR 400.2;

28 *Increased Contribution and Coordinated Party Expenditure Limits for Candidates*

1 *Opposing Self-Financed Candidates; Interim Final Rule*, 68 Fed. Reg. 3970, 3975 (Jan.
2 27, 2003).³

3 These provisions of the Millionaires' Amendment are triggered by expenditures
4 from personal funds⁴ made by an "opposing candidate." *See* 2 U.S.C. 441a(i)(1)(C) and
5 (D); *see also* 68 Fed. Reg. at 3976. Although the Act does not define the phrase
6 "opposing candidate," Commission regulations define "opposing candidate" separately
7 for primary election cycles and general election cycles, consistent with the Act's
8 application of the Millionaires' Amendment separately to each election cycle. *See* 2
9 U.S.C. 431(25); 11 CFR 400.2 and 400.3.⁵ In a primary election cycle, an "opposing
10 candidate" is "another candidate seeking the nomination of the same political party for
11 election to the office of Senator . . . that the candidate is seeking." 11 CFR 400.3(a). *See*
12 *also* 68 Fed. Reg. at 3976. As noted in the advisory opinion request, the Commission
13 specifically sought comment when it promulgated the Interim Final Rule on whether it
14 should define "opposing candidate" at 11 CFR 400.3(a) "to include candidates seeking

³ The primary election cycle began on November 8, 2000, the day after the last general election, and will end on September 19, 2006, the date of the primary election. The general election cycle will begin on September 20, 2006, the day after the primary election, and will end on November 7, 2006, the date of the general election.

⁴ An "expenditure from personal funds" means the aggregation of all of the following: (1) an expenditure made by the candidate using the candidate's personal funds; (2) a contribution or loan made by the candidate to the candidate's authorized committee using the candidate's personal funds; (3) a loan to the candidate's authorized committee that is secured using the candidate's personal funds; and (4) any obligation to make an expenditure from personal funds that is legally enforceable against the candidate. *See* 2 U.S.C. 434(a)(6)(B)(i); 11 CFR 400.4; 68 Fed. Reg. at 3976.

⁵ The Commission defined "opposing candidate" separately for each election cycle because the operative provisions of the Millionaires' Amendment are triggered by expenditure of personal funds by "an opposing candidate," 2 U.S.C. 441a(i)(1)(D), and these operative provisions apply only with respect to a particular election cycle. *See Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates; Interim Final Rule*, 68 Fed. Reg. 3970, 3976 (Jan. 27, 2003); *see also* 2 U.S.C. 441a(i)(1)(D)(ii) (opposition personal funds amount considers "gross receipts of a candidate's authorized committee during any election cycle"); 2 U.S.C. 441a(i)(1)(B) (threshold amount determined "with respect to an election cycle").

1 *another* political party's nomination for the same office." *Id.* (emphasis in original). The
2 Commission noted that this approach would constitute an "expanded definition" of the
3 term "opposing candidate." *Id.* No changes to 11 CFR 400.3(a) have been promulgated
4 after the Interim Final Rule became effective. Thus, the Commission's current rule does
5 not permit the interpretation of "opposing candidate" that Cantwell 2006 proposes.
6 Accordingly, only expenditures from personal funds made by an opposing candidate
7 running in the same primary, and made during that primary election cycle, affect the
8 application of the Millionaires' Amendment during that primary election cycle.

9 Because Mr. McGavick is not "another candidate seeking the nomination of the
10 *same political party*" as Senator Cantwell, Mr. McGavick is not Senator Cantwell's
11 "opposing candidate" in the primary election. 11 CFR 400.3(a) (emphasis added). Thus,
12 Mr. McGavick's expenditures from personal funds made before the primary election will
13 not trigger the Millionaires' Amendment for Senator Cantwell. Accordingly, for
14 purposes of increased contribution limits and increased coordinated party expenditure
15 limits, Senator Cantwell must consider only expenditures from personal funds made by
16 her opposing candidates for the Democratic nomination to determine whether the
17 Millionaires' Amendment is triggered for her primary election.

18 *Question 2: If Senator Cantwell or Mr. McGavick contributes personal funds to the*
19 *respective candidate's authorized committee before the primary election and that*
20 *committee retains cash-on-hand for use in the general election campaign, would those*
21 *funds be expenditures from personal funds in connection with the general election?*

22 Yes, any personal funds contributed by Senator Cantwell or Mr. McGavick to
23 either of their respective authorized committees before the primary election that are

1 retained by either committee for use in the general election campaign would be
2 expenditures from personal funds in connection with the general election.

3 Any portion of a candidate's expenditures from personal funds that is not used for
4 expenses in the primary election campaign, and is therefore available for use in the
5 general election campaign, would be an expenditure from personal funds for the general
6 election. *See* Advisory Opinion 2006-06 (Busby). The candidate's committee must use a
7 reasonable accounting method such as the one described in 11 CFR 110.3(c)(4), which
8 considers transferred cash-on-hand to consist of the funds most recently received by the
9 transferor committee, to determine the portion of the amount transferred that constitutes
10 the candidate's personal funds. *See* 11 CFR 110.3(c)(4); Advisory Opinion 2006-06
11 (Busby).

12 Accordingly, if Senator Cantwell transfers any cash-on-hand for use in the general
13 election campaign, she must use a reasonable accounting method, such as the accounting
14 method in 11 CFR 110.3(c)(4), to determine the amount, if any, of her personal funds
15 transferred from her primary election campaign to her general election campaign.

16 Similarly, if Mr. McGavick transfers any cash-on-hand for use in the general election
17 campaign, he must use a reasonable accounting method, such as the method in 11 CFR
18 110.3(c)(4), to determine the amount, if any, of his personal funds transferred from his
19 primary election campaign to his general election campaign. Additionally, any amount of
20 a candidate's personal funds transferred to the general election campaign will be used to
21 determine if increased contribution limits and coordinated party expenditure limits apply
22 for the candidate's general election opponent.

1 Once either candidate determines that expenditures from personal funds exceed
2 the threshold amount, *see* 2 U.S.C. 441a(i)(1)(B) and 11 CFR 400.9(a), then that
3 candidate’s authorized committee must file with the Commission, within 24 hours, an
4 Initial Notification of Expenditures from Personal Funds (“Initial Notification”) on FEC
5 Form 10. *See* 11 CFR 400.21(a) and 400.24(a). The authorized committee must also
6 send a copy of this form to each opposing candidate and the Secretary of the Senate. *See*
7 *id.*

8 This response constitutes an advisory opinion concerning the application of the
9 Act and Commission regulations to the specific transaction or activity set forth in your
10 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
11 of the facts or assumptions presented, and such facts or assumptions are material to a
12 conclusion presented in this advisory opinion, then the requestor may not rely on that
13 conclusion as support for its proposed activity.

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Sincerely,

Michael E. Toner
Chairman

Enclosure (Advisory Opinion 2006-06)