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FEDERAL ELECTION COMMISSION  
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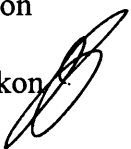
May 7, 2004


**AGENDA ITEM**  
For Meeting of: 05-13-04


**SUBMITTED LATE**


MEMORANDUM


TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

Rosemary C. Smith   
Associate General Counsel

Mai T. Dinh   
Assistant General Counsel

Robert M. Knop   
Staff Attorney

Subject: Draft AO 2004-13

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 13, 2004.

1 ADVISORY OPINION 2004-13  
2  
3 Ken Morley  
4 Campaign Manager  
5 Allyson Schwartz for Congress  
6 8253 Bustleton Avenue, Suite 102  
7 Philadelphia, PA 19152  
8

**DRAFT**

9 Dear Mr. Morley:

10  
11 This responds to your letter of April 18, 2004, requesting an advisory opinion on  
12 behalf of Allyson Schwartz for Congress (“the Committee”). Your request focuses on the  
13 application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and  
14 Commission regulations to any transfer of personal funds from the primary election to the  
15 general election by Ms. Schwartz’s general election opponent, Ms. Melissa Brown.

16 ***Background***

17 The Committee is the principal campaign committee of Allyson Schwartz (“the  
18 Candidate”), who won the Democratic nomination for Pennsylvania’s 13<sup>th</sup> Congressional  
19 district in that State’s primary election, held on April 27, 2004. The Candidate’s  
20 opponent in the general election is Ms. Melissa Brown (“the Opposing Candidate”), who  
21 secured the Republican nomination for Pennsylvania’s 13<sup>th</sup> Congressional district on the  
22 same day.

23 The Opposing Candidate spent significant amounts of personal funds in three  
24 previous campaigns (1998, 2000, and 2002) to represent Pennsylvania’s 13<sup>th</sup>  
25 Congressional district in the United States House of Representatives. You state that if the  
26 Opposing Candidate spends enough from personal funds to trigger the provisions of the  
27 so-called Millionaires’ Amendment in the 2004 general election, the Candidate intends to

1 take full advantage of the increased individual contribution and coordinated party  
2 expenditure limits that the Millionaires' Amendment provides. You present two  
3 questions concerning the Opposing Candidate's expenditures from personal funds and  
4 your ability to accept contributions above the \$2,000 limitation under the Millionaires'  
5 Amendment.

6 ***Legal Analysis and Conclusions***

7 *1. If, before the primary election, the Opposing Candidate contributes to her*  
8 *campaign personal funds that remain on hand after the date of the primary, would these*  
9 *funds be considered "expenditures from personal funds" in the general election if those*  
10 *remaining funds are transferred to the general election campaign? If the Opposing*  
11 *Candidate transfers personal funds exceeding \$350,000 from the primary election*  
12 *campaign to the general election campaign, would the Opposing Candidate be required*  
13 *to file an FEC Form 10?*

14 Yes, a transfer of personal funds from the Opposing Candidate's primary election  
15 campaign to her general election campaign would be considered an "expenditure from  
16 personal funds" in the general election. Therefore, the Opposing Candidate must file an  
17 FEC Form 10 if her authorized committee transfers more than \$350,000 of her personal  
18 funds to her general election campaign.

19 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L.  
20 107-155 (Mar. 27, 2002)) (BCRA) took effect. As amended by BCRA, the Act contains  
21 a set of provisions collectively referred to as the "Millionaires' Amendment." See 2  
22 U.S.C. 441a-1 and 441a(i). The Millionaires' Amendment provisions applicable to

1 elections for the United States House of Representatives are in 2 U.S.C. 441a-1.<sup>1</sup> The  
2 Commission's interim final rules implementing the Millionaires' Amendment, located  
3 primarily in 11 CFR part 400, took effect on February 26, 2003. *See* Interim Final Rules  
4 on Increased Contribution and Coordinated Party Expenditure Limits for Candidates  
5 Opposing Self-Financed Candidates ("Interim Final Rules"), 68 Fed. Reg. 3970 (Jan. 27,  
6 2003).

7 Assuming all the necessary prerequisites are met, the Millionaires' Amendment  
8 operates to allow: (1) candidates running against self-financed opponents to solicit,  
9 receive, and spend individual contributions above the usual individual contribution limit  
10 in 2 U.S.C. 441a(a)(1)(A) (11 CFR 110.1); and (2) national and State party committees to  
11 make coordinated party expenditures in excess of the normally applicable coordinated  
12 party expenditure limit, in 2 U.S.C. 441a(d), on behalf of candidates opposing self-  
13 financed candidates. *See generally*, 2 U.S.C. 441a-1; 11 CFR part 400. The  
14 Millionaires' Amendment also requires candidates and/or their principal campaign  
15 committees to comply with a number of new reporting and notification requirements. *Id.*

16 One of the primary factors in determining whether the individual contribution and  
17 coordinated party expenditure limits will be increased in a particular race is the aggregate  
18 amount of the self-financed candidate's expenditures from personal funds. *See* 2 U.S.C.  
19 441a-1(b)(1)(A). The Commission's regulations implementing the Millionaires'  
20 Amendment define "expenditure from personal funds" as follows:

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<sup>1</sup> The Millionaires' Amendment contains separate provisions for candidates for the U.S. House of Representatives and candidates for the U.S. Senate. Because you are a candidate for the U.S. House of Representatives, this advisory opinion refers only to the provisions that address candidates for the U.S. House of Representatives.

1 (a) *Expenditure from personal funds* means the aggregation of all the  
2 following:

3 (1) An expenditure made by a candidate, using the candidate's personal  
4 funds, for the purpose of influencing the election in which he or she  
5 is a candidate;

6 (2) A contribution or loan made by a candidate to the candidate's  
7 authorized committee, using the candidate's personal funds (*see* 11  
8 CFR 100.33 for definition of *personal funds*);

9 (3) A loan by any person to the candidate's authorized committee that is  
10 secured using the candidate's personal funds (*see* 11 CFR 100.33  
11 for definition of *personal funds*); and

12 (4) Any obligation to make an expenditure from personal funds that is  
13 legally enforceable against the candidate.

14 11 CFR 400.4(a).

15 An expenditure from personal funds is considered made on the date the  
16 funds are deposited into the account designated by the candidate's authorized  
17 committee as the campaign depository, under 11 CFR 103.1 and 103.2, on the  
18 date the instrument transferring the funds is signed, or on the date the contract  
19 obligating the personal funds is executed, whichever is earlier. 11 CFR 400.4(b).<sup>2</sup>

20 An expenditure from personal funds made during a primary election campaign

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<sup>2</sup> According to the reports filed by the Opposing Candidate's principal campaign committee, the Opposing Candidate loaned \$175,000 to her committee on September 30, 2003.

1 would be considered to be for the purpose of influencing the primary election, unless  
2 designated for the general election campaign on FEC Form 3Z-1. *See* 11 CFR 104.19.  
3 Under 11 CFR 110.3(c)(3), any carryover of unused primary funds to the general election  
4 campaign is considered a transfer, regardless of whether an actual financial transaction  
5 occurs. Any portion of the expenditure from personal funds that is not used for primary  
6 expenses and is transferred to the general election campaign under 11 CFR 110.3(c)(3)  
7 would be considered an expenditure from personal funds for the general election because  
8 this amount is available to be spent on the Opposing Candidate's general election  
9 campaign.<sup>3</sup> In this instance, the date the expenditure from personal funds was made  
10 would be the date the funds are transferred to the general election campaign. The  
11 Opposing Candidate and/or the Opposing Candidate's principal campaign committee  
12 must use a reasonable accounting method such as the one described in 11 CFR  
13 110.3(c)(4) to determine the portion of the amount transferred that constitutes the  
14 Opposing Candidate's personal funds. If the transferred funds exceed \$350,000, the  
15 Opposing Candidate has triggered the Millionaires' Amendment for the general election  
16 and must file an FEC Form 10. Additionally, if the transferred funds are less than  
17 \$350,000, they must be aggregated with other expenditures from personal funds for the  
18 Opposing Candidate's general election campaign to determine if and when she or her  
19 principal campaign committee must file the Initial Notification of Expenditures from  
20 Personal Funds (FEC Form 10). (*See* below.)

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<sup>3</sup> Neither the Act nor Commission regulations expressly address transfers of personal funds between a candidate's primary and general election campaigns. To not treat such transfers as expenditures from personal funds for the general election, however, would circumvent the underlying purpose of the Millionaires' Amendment.

1           2. *If the answer to question 1 is yes, when and how may the Committee begin to*  
2 *benefit from the increased individual contribution and coordinated party expenditure*  
3 *limits? If the Opposing Candidate should fail to file timely FEC Form 10, would the*  
4 *Candidate nevertheless become eligible for the increased limits and, if so, under what*  
5 *circumstances?*

6           The Act requires that the Candidate receive the Opposing Candidate's notification  
7 of expenditures from personal funds before she can accept contributions under the  
8 increased limits. 2 U.S.C. 441a-1(a)(3)(A). Similarly, 11 CFR 400.30(b) and (d) require  
9 the Candidate to wait until she or the Committee receives FEC Form 10 before she can  
10 determine whether she is eligible for the increased limits.

11           As stated above, the Millionaires' Amendment requires candidates for the U.S.  
12 House of Representatives (or their principal campaign committees) to file an Initial  
13 Notification of Expenditures from Personal Funds, when the candidate's aggregate  
14 expenditures from personal funds for a given election exceed \$350,000. *See* 2 U.S.C.  
15 441a-1(b)(1)(C); 11 CFR 400.21. On the Initial Notification (FEC Form 10), candidates  
16 for the U.S. House of Representatives (or their principal campaign committees) must  
17 state, among other things, the aggregate amount of the candidate's expenditures from  
18 personal funds in connection with the relevant election. *See* 2 U.S.C. 441a-1(b)(1)(E); 11  
19 CFR 400.23. After filing an Initial Notification, every time a candidate for the U.S.  
20 House of Representatives makes additional expenditures from personal funds in excess of  
21 \$10,000, the candidate (or the candidate's principal campaign committee) must file an  
22 Additional Notification of Expenditures from Personal Funds ("Additional Notification").  
23 *See* 2 U.S.C. 441a-1(b)(1)(D); 11 CFR 400.22.

1 Pursuant to 11 CFR 400.30(b)(1), the Candidate and the Committee must not  
2 accept any contribution that exceeds the usual limit until the Candidate or the Committee  
3 has received either actual notification via FEC Form 10 from the Opposing Candidate (or  
4 her authorized committee) or constructive notification by obtaining a copy of the FEC  
5 Form 10 filed by the Opposing Candidate (or her authorized committee) with the  
6 Commission. The Candidate and the Committee must also calculate the opposition  
7 personal funds amount to determine whether they are eligible to accept increased  
8 contributions. *Id.* If eligible, the Candidate or the Committee must file an FEC Form 11  
9 with the Commission and her national party committee. 11 CFR 400.30(b)(2). In  
10 addition, a national or State party committee is prohibited from making increased  
11 coordinated expenditures on behalf of the Candidate or the Committee until it has  
12 received: (1) actual or constructive notice that the FEC Form 10 indicates that the  
13 Opposing Candidate's aggregate expenditures from personal funds exceed the applicable  
14 threshold amount; and (2) actual or constructive notice that the FEC Form 11 indicates  
15 that the opposition personal funds amount entitles the Candidate to benefit from increased  
16 coordinated party expenditures. 11 CFR 400.30(c)(1).

17 As the Commission explained when it promulgated the interim final rules  
18 implementing the Millionaires' Amendment, the concept of "constructive notification"  
19 was added to the regulation to account for situations where a candidate did not receive an  
20 Initial or Additional Notification that the opposing candidate filed with the Commission  
21 or with the candidate's national party committee. *See* Interim Final Rules, 68 Fed. Reg.  
22 at 3982. A candidate or his or her authorized committee will be considered to have  
23 received constructive notification when either one obtains a copy of an FEC Form 10



1 filed by an opposing candidate with the Commission. 11 CFR 400.30(d). Neither the  
2 Act nor the regulations provide an exception, however, for situations where an opposing  
3 candidate simply fails to file a required FEC Form 10 in the first place. Consequently,  
4 the Committee must refrain from accepting increased individual contributions until it  
5 receives actual or constructive notification on FEC Form 10 that the Opposing Candidate  
6 has made expenditures from personal funds aggregating in excess of \$350,000 and it files  
7 an FEC Form 11 indicating that it is entitled to benefit from the Millionaires'  
8 Amendment. In addition, the Candidate's national and State party committees must not  
9 make increased coordinated party expenditures on behalf of the Candidate or the  
10 Committee until it receives actual or constructive notification on FEC Forms 10 and 11  
11 indicating that they may make increased coordinated party expenditures under the  
12 Millionaires' Amendment.

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

19

20

Sincerely,

21

22

Bradley A. Smith

23

Chairman