

August 28, 2006

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel.

Today, DRAFT ADVISORY OPINION 2006-25 is available for public comments under this procedure. It was requested by Clea Mitchell, Esq. on behalf of Senator Jon L. Kyl and Jon Kyl for U.S. Senate.

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 5:30 pm (Eastern Time) on August 29, 2006.

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 AO 2006-25, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

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

MAILING ADDRESSES

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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2006 AUG 28 P 1:16

August 28, 2006

MEMORANDUM

TO: The Commission

THROUGH: Patrina M. Clark *PME*
Staff Director

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

Rosemary C. Smith *RS*
Associate General Counsel

J. Duane Pugh *JDP*
Acting Assistant General Counsel

Robert M. Knop *RMK*
Attorney

Subject: Draft AO 2006-25

Attached is a proposed draft of Advisory Opinion 2006-25. The subject advisory opinion request was made public on August 17, 2006, and therefore the deadline for written comments on the request itself is August 28, 2006. See 2 U.S.C. 437f(d); 11 C.F.R. 112.3(e). OGC has set August 29, 2006, as the deadline for comments on the attached draft. OGC plans to circulate a draft of Advisory Opinion 2006-25 as a tally-vote item on August 30, 2006.

Attachment

1 **ADVISORY OPINION 2006-25**

2
3 **Cleta Mitchell, Esq.**
4 **Foley & Lardner LLP**
5 **Washington Harbour**
6 **3000 K St., NW, Suite 500**
7 **Washington, DC 20007**

DRAFT

8
9 **Dear Ms. Mitchell:**

10 **We are responding to your advisory opinion request on behalf of United States**
11 **Senator John L. Kyl and Jon Kyl for U.S. Senate, his principal campaign committee,**
12 **concerning the application of the Federal Election Campaign Act of 1971, as amended**
13 **(the "Act"), and Commission regulations to expenditures from personal funds made by**
14 **another candidate, Jim Pederson, before the State of Arizona's primary election and**
15 **whether such spending triggers the application of the Millionaires' Amendment for**
16 **Senator Kyl. The Commission concludes that Mr. Pederson is not Senator Kyl's**
17 **"opposing candidate" in the primary election, so Mr. Pederson's expenditures from**
18 **personal funds made before the primary election will not trigger the Millionaires'**
19 **Amendment for Senator Kyl or Jon Kyl for U.S. Senate.**

20 ***Background***

21 **The facts presented in this advisory opinion are based on your letter received on**
22 **August 14, 2006.**

23 **Senator Jon L. Kyl is seeking reelection to the U.S. Senate from Arizona, and he**
24 **is a candidate for the Republican nomination. Jon Kyl for U.S. Senate is Senator Kyl's**
25 **principal campaign committee. Jim Pederson is a Democratic candidate seeking election**
26 **to the U.S. Senate from Arizona. The Republican primary election and the Democratic**
27 **primary election will both be held on September 12, 2006, and the general election will**

1 be held on November 7, 2006. There are two Republican candidates and one Democratic
2 candidate on the September 12 primary ballot for United States Senator in Arizona.¹

3 To date, Mr. Pederson has filed seven 24-Hour Notices of Expenditures from the
4 Candidate's Personal Funds (Form 10s) with the Secretary of the Senate and the
5 Commission. Those notices indicate that Mr. Pederson has made aggregate expenditures
6 from personal funds of \$4,591,098 during the primary election cycle. You assert that as
7 of June 30, 2006, Mr. Pederson's principal campaign committee had spent \$3,725,000 of
8 Mr. Pederson's personal funds. Of that, you estimate that at least \$1,590,063.36 was
9 spent on opposition research concerning Senator Kyl and on television, Internet, and
10 radio advertisements criticizing Senator Kyl. You do not indicate how much Senator Kyl
11 has spent on opposition research concerning Mr. Pederson or on television, Internet, and
12 radio advertisements criticizing Mr. Pederson.

13 Senator Kyl and Jon Kyl for U.S. Senate intend to raise funds under the increased
14 individual contribution limits provided by the Millionaires' Amendment,² should the
15 Commission determine that Mr. Pederson's expenditures from personal funds made

¹ See Arizona Secretary of State, *2006 Primary Election, Full Listing*, <http://www.azsos.gov/election/2006/Primary/FullListing.htm> (last visited Aug. 17, 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 candidates may solicit, receive, and spend contributions from individuals under increased contribution limits if the candidate is running against self-financed opponent who makes "expenditures from [his or her] 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 before the primary election trigger the application of the Millionaires' Amendment for
2 Senator Kyl.

3 ***Question Presented***

4 ***May Senator Kyl consider any of Mr. Pederson's expenditures from personal funds made***
5 ***before the primary election to be in connection with the general election?***

6
7 ***Legal Analysis and Conclusions***

8 No, Mr. Pederson's expenditures from personal funds made before the primary
9 election will be expenditures from personal funds made in connection with the primary
10 election only, and will not trigger application of the Millionaires' Amendment for
11 Senator Kyl because Mr. Pederson is not Senator Kyl's "opposing candidate" in the
12 primary election.

13 The Millionaires' Amendment mandates that its increased individual contribution
14 limits and coordinated party expenditure limits shall apply separately to primary and
15 general elections. See 2 U.S.C. 431(25) ("[A] primary election and a general election
16 shall be considered to be separate elections"); see also 11 CFR 400.2(b). An "election
17 cycle" is defined as the period beginning on the day after the date of the most recent
18 election for the specific office or seat that a candidate is seeking and ending on the date
19 of the next election for that office or seat. See 2 U.S.C 431(25); 11 CFR 400.2; *Increased*
20 *Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-*
21 *Financed Candidates; Interim Final Rule*, 68 Fed. Reg. 3970, 3975 (Jan. 27, 2003).³

³ The primary election cycle began on November 8, 2000, the day after the last general election, and will end on September 12, 2006, the date of the primary election. The general election cycle will begin on September 13, 2006, the day after the primary election, and will end on November 7, 2006, the date of the general election.

1 These provisions of the Millionaires' Amendment are triggered by expenditures
2 from personal funds⁴ made by an "opposing candidate." *See* 2 U.S.C. 441a(i)(1)(C) and
3 (D); *see also* 68 Fed. Reg. at 3976. Although the Act does not define the phrase
4 "opposing candidate," Commission regulations define "opposing candidate" separately
5 for primary election cycles and general election cycles, consistent with the Act's
6 application of the Millionaires' Amendment separately to the primary and general
7 election cycles. *See* 2 U.S.C. 431(25); 11 CFR 400.2 and 400.3.⁵ In a primary election
8 cycle, an "opposing candidate" is "another candidate seeking the nomination of the same
9 political party for election to the office of Senator . . . that the candidate is seeking." 11
10 CFR 400.3(a). *See also* 68 Fed. Reg. at 3976. With situations like the one presented in
11 this advisory opinion in mind, the Commission specifically sought comment when it
12 promulgated the Interim Final Rule on whether it should define "opposing candidate" at
13 11 CFR 400.3(a) "to include candidates seeking *another* political party's nomination for
14 the same office." *Id.* (emphasis in original). The Commission noted that this approach
15 would constitute an "expanded definition" of the term "opposing candidate." *Id.* No
16 changes to 11 CFR 400.3(a) have been promulgated after the Interim Final Rule became

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 effective. Thus, the Commission's current rule does not permit the interpretation of
2 "opposing candidate" that Senator Kyl and Jon Kyl for U.S. Senate propose. See
3 Advisory Opinions 2006-21 (Cantwell) and 2006-6 (Busby). Accordingly, only
4 expenditures from personal funds made by an opposing candidate running in the same
5 primary, and made during that primary election cycle, affect the application of the
6 Millionaires' Amendment during that primary election cycle. See *id.* This classification
7 of expenditures as being in connection with either the primary election or the general
8 election based on the date the expenditures are made is similar to the Commission's
9 longstanding approach in determining whether Presidential candidate expenditures are
10 attributed to the primary or general election. See 11 CFR 9034.4(e).

11 Because Mr. Pederson is not "another candidate seeking the nomination of the
12 *same political party*" as Senator Kyl, Mr. Pederson is not Senator Kyl's "opposing
13 candidate" in the primary election. 11 CFR 400.3(a) (emphasis added). Thus, Mr.
14 Pederson's expenditures from personal funds made before the primary election will not
15 trigger the Millionaires' Amendment for Senator Kyl. Whether Mr. Pederson has any
16 primary opposition⁶ and the purpose of his expenditures from personal funds do not
17 change this result.⁷ Similarly, Senator Kyl's expenditures from personal funds made
18 before the primary will trigger the Millionaires' Amendment for his opponent in the

⁶ Under the Commission's regulations, an election in which a candidate is unopposed is treated as a separate election for purposes of the contribution limits. See 11 CFR 110.1(j)(2).

⁷ Your request cites 11 CFR 102.9(e) for the proposition that Mr. Pederson should be required to characterize some portion of his expenditures from personal funds made before the primary election as expenditures made in connection with the general election. However, section 102.9(e) applies not to *expenditures* made by a committee prior to the primary election but, rather, to *contributions* designated for the general election received prior to the primary election. See 11 CFR 102.9(e). As such, your citation of section 102.9(e) in the context of this advisory opinion is inapposite.

1 Republican primary, but not for Mr. Pederson who is running in a different primary.
2 Accordingly, for purposes of increased contribution limits and increased coordinated
3 party expenditure limits, Senator Kyl must consider only expenditures from personal
4 funds made by his opposing candidate for the Republican nomination during the primary
5 election cycle.⁸

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

12
13 Sincerely,
14

15
16
17 Michael E. Toner
18 Chairman
19

20 Enclosure (Advisory Opinions 2006-21 and 2006-6)

⁸ If either Mr. Pederson or Senator Kyl transfers any cash-on-hand to the general election campaign, however, he must use a reasonable accounting method, such as the accounting method in 11 CFR 110.3(c)(4), to determine the amount, if any, of his personal funds transferred from the primary election campaign to the general election campaign. *See* Advisory Opinions 2006-21 (Cantwell) and 2006-6 (Busby). Any amount of a candidate's personal funds transferred to the general election campaign will be used to determine if increased contribution limits and coordinated party expenditure limits apply for the candidate's general election opponent. *See id.*