



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 10, 2006

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2006-06

Mr. Brandon Hall
Campaign Manager
Busby for Congress
P.O. Box 712
Cardiff by the Sea, CA 92007

Dear Mr. Hall:

We are responding to your advisory opinion request on behalf of Francine Busby for Congress (“the Committee”) concerning the application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the upcoming special general election in California’s 50th Congressional District. Because Ms. Busby is participating in the special general election, all expenditures from personal funds that she or her opponent(s) in the special general election made or make between November 3, 2004 and April 11, 2006, must be aggregated as expenditures for the special general election, for Millionaires’ Amendment purposes. The application of the Millionaires’ Amendment provisions between April 12, 2006 and June 6, 2006 vary depending on whether there are two elections on June 6, 2006 or just one, as discussed in greater detail below.

Background

The facts presented in this advisory opinion are based on your letter received on February 14, 2006.

The Committee is the principal campaign committee of Francine Busby, a candidate for Congress in California’s 50th Congressional District. She is a candidate both in the special general election to replace former Congressman Randy “Duke” Cunningham for the remainder of the 109th Congress (“Special General Election”), and in

the regular primary election to nominate a Democratic Party candidate for the same seat in the 110th Congress (“Primary Election”).

Under California law, the Special General Election will be held on April 11, 2006. That election is open to all qualified candidates, regardless of party affiliation. If a candidate receives a majority of the votes cast, he or she will be declared the winner. If no candidate receives a majority of the votes cast, then a runoff election will be held among the top vote-getters of each qualified political party. At present, two Democratic candidates, several Republican candidates, and one Libertarian candidate are on the ballot in the Special General Election.

Should a runoff election (“Special General Runoff”) be required, it will be held on June 6, 2006 – the same day as the Primary Election. Unlike the Special General Election, in the Primary Election the candidates of each political party are only running against each other for their party’s nomination. Most, if not all, of the candidates currently running in the Special General Election are also running in the Primary Election for their respective political party’s nomination.

Question Presented

How do the provisions of the Millionaires’ Amendment apply to the April 11, 2006, Special General Election and the June 6, 2006, Primary Election in California’s 50th Congressional District?

Legal Analysis and Conclusions

On November 6, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (“BCRA”) took effect. As amended by BCRA, the Act contains a set of provisions collectively referred to as the “Millionaires’ Amendment.” See 2 U.S.C. 441a(i) and 441a-1 . The Millionaires’ Amendment provisions applicable to elections for the United States House of Representatives are set forth in 2 U.S.C. 441a-1.¹ See also 11 CFR 400.21(b), 400.31(e), and 400.41.

Under the Millionaires’ Amendment, candidates may solicit, receive, and spend contributions from individuals exceeding the contribution limit in 2 U.S.C. 441a(a)(1)(A) if they are running against self-financed candidates who make expenditures from their personal funds that exceed certain amounts. See 2 U.S.C. 441a-1(a)(1)(A) and 11 CFR 400.41(b)(1). 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-1(a)(1)(C) and 11 CFR 400.41(b)(2). The Millionaires’ Amendment

¹ 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.

also requires that candidates and/or their principal campaign committees comply with a number of new reporting and notification requirements. *See, e.g.*, 2 U.S.C. 441a-1(b) and 11 CFR 400.20, 400.21, 400.22, and 400.30(b)(2).

The provisions of the Millionaires' Amendment apply separately to each election cycle. *See* 2 U.S.C. 431(25) and 11 CFR 400.2(a). For Millionaires' Amendment purposes, an "election cycle" is defined as the period beginning on the day after the date of the most recent election for the specific office or seat that a candidate is seeking and ending on the date of the next election for that office or seat. *Id.* Primary elections and general elections are considered to be separate election cycles and a runoff election is considered to be part of the election cycle of the election that necessitated the runoff. *Id.*

Accordingly, for candidates in the Special General Election, the election cycle began on November 3, 2004, the day after the last general election, and ends on April 11, 2006, the day of the Special General Election. *See* 2 U.S.C. 431(25) and 11 CFR 400.2(a). If no winner is declared on April 11th, the Special General election cycle still began on November 3, 2004, but ends on June 6, 2006, the date of the Special General Runoff. *Id.* For candidates in the Special General Election who are also in the Primary Election, the election cycle for the Primary Election commences on April 12, 2006, the day after the Special General Election, and ends on June 6, 2006, the date of the Primary Election.² *Id.*

An expenditure from personal funds³ made during a particular election cycle is made for the purpose of influencing that election, unless designated for a different election campaign on FEC Form 3Z-1. *See* 11 CFR 104.19. An expenditure from personal funds is considered made on the date the funds are deposited into the account designated by the candidate's authorized committee as the campaign depository, under 11 CFR 103.1 and 103.2, on the date the instrument transferring the funds is signed, or on the date the contract obligating the personal funds is executed, whichever is earlier. 11 CFR 400.4(b).

The discussion below describes how the Millionaires' Amendment regulations apply during the Special General and Primary election cycles.

Special General Election Cycle: November 3, 2004 – April 11, 2006

Candidates participating in the Special General Election must aggregate all expenditures from personal funds made during the Special General Election Cycle (November 3, 2004 through April 11, 2006). For purposes of the Millionaires' Amendment those expenditures are considered expenditures for the Special General

² The relevant election cycle for candidates participating only in the Primary Election (*i.e.*, who are not running in the Special General Election) began on November 3, 2004 and ends on June 6, 2006.

³ *See* 11 CFR 400.4 for definition of "expenditure from personal funds." *See also* 2 U.S.C. 441a-1(b)(1)(A).

Election. *See* discussion *supra*; 2 U.S.C. 431(25) and 11 CFR 400.2(a). Thus, if Ms. Busby's total expenditures from personal funds exceed \$350,000 at any time during the Special General Election Cycle, the Committee must, within 24 hours, file with the Commission an Initial Notification of Expenditures from Personal Funds ("Initial Notification") on FEC Form 10. *See* 11 CFR 400.21(b) and 400.24(b). The Committee must also send a copy of this form to *all* candidates running in the Special General Election and to the national party committees of those candidates. *See id.* After filing an Initial Notification, every time Ms. Busby's expenditures from personal funds aggregate in excess of \$10,000, the Committee must, within 24 hours, file with the Commission an Additional Notification of Expenditures from Personal Funds ("Additional Notification") on FEC Form 10 and send a copy of that form to those who received copies of the Initial Notification. *See* 11 CFR 400.22(b) and 400.24(b). During the Special General Election Cycle, Ms. Busby and the Committee are not required to send a copy of FEC Form 10 to any opposing candidates in the Primary Election or to their national party committees, unless those opposing candidates are also participating in the Special General Election.⁴

If the Committee receives a copy of FEC Form 10 filed by one of Ms. Busby's opponents in the Special General Election before April 11, 2006, the Committee must calculate the "opposition personal funds amount" to determine whether it qualifies for increased individual contributions and increased coordinated party expenditures. *See* 11 CFR 400.30(b)(1) and 400.10 (defining "opposition personal funds amount"). The Committee may also obtain constructive notification of the FEC Form 10 by downloading the form from the FEC's website. *See* 11 CFR 400.30(b)(1), (d).

Likewise, for Millionaires' Amendment purposes, any expenditures from personal funds made by Ms. Busby's opponents during the Special General Election Cycle are also considered expenditures for the Special General Election. *See* discussion *supra*; 2 U.S.C. 431(25) and 11 CFR 400.2(a). Therefore, for Millionaires' Amendment purposes, if any of Ms. Busby's opponents in the Special General Election files a FEC Form 10 with the Commission – even if the opposing candidate designates the expenditure as in connection with the Primary Election – the expenditure is considered an expenditure for the Special General Election. *Id.* Thus, Ms. Busby or the Committee may download that FEC Form 10 (if they have not received it) and treat it as filed for the Special General Election.

In calculating the opposition personal funds amount, the Committee would normally take into account the gross receipts advantage as determined using the FEC Form 3Z-1 filed by each candidate in his or her 2005 Year End Report. *See* 11 CFR 400.10(a)(3). However, FEC Form 3Z-1 does not provide information regarding gross receipts with respect to special elections. Thus, the Committee should not include the

⁴ The relevant election cycle for candidates participating only in the Primary Election (*i.e.*, who are not running in the Special General Election) began on November 3, 2004 and ends on June 6, 2006. During the Special General Election Cycle, candidates participating *only* in the Primary Election should aggregate all expenditures from personal funds and, if those expenditures aggregate in excess of \$350,000 prior to April 11, 2006, they should file FEC Form 10 with the Commission and send copies of that form to all opposing candidates who are also *only* participating in the Primary Election as well as to the national party committees of those candidates.

gross receipts amounts in calculating the opposition personal funds amount for the Special General Election Cycle. Consequently, the Committee will calculate the opposition personal funds amount as follows: the opposing candidate's aggregate expenditures from personal funds as of the date of calculation minus Ms. Busby's aggregate expenditures from personal funds as of the date of calculation. If the opposition personal funds amount makes the Committee eligible for increased coordinated party expenditures (*i.e.*, if it exceeds \$350,000), the Committee must file FEC Form 11 with the Commission and with Ms. Busby's national and State party committees within 24 hours of receiving the FEC Form 10. *See* 11 CFR 400.30(b)(2).

If the Committee determines that it is eligible to receive increased individual contributions, it may begin soliciting contributions up to \$6,300 per individual contributor (three times the current individual contribution limit of \$2,100) for use only during the Special General Election Cycle. *See* 2 U.S.C. 441a-1(a)(1)(A) and 11 CFR 400.41. The Committee must stop accepting such increased contributions during the Special General Election Cycle, however, if: (1) it reaches the proportionality provision limit; (2) Ms. Busby's own expenditures from personal funds make her ineligible for increased limits; or (3) the opposing candidate whose expenditures from personal funds entitled the Committee to receive increased contributions ceases to be a candidate.⁵ *See* 2 U.S.C. 441a-1(a)(1) and (a)(3); 11 CFR 400.31 and 400.32.

The manner in which the provisions of the Millionaires' Amendment will apply between April 12, 2006, and June 6, 2006, depends on the outcome of the Special General Election. If one candidate receives a majority of the votes on April 11, 2006, then no Special General Runoff will occur. If no candidate receives a majority of the votes, however, the Special General Runoff will take place on the same date as the Primary Election. The application of the Millionaires' Amendment's provisions to each of these two scenarios is discussed below.

Scenario 1 – No Special General Runoff: April 12 – June 6, 2006

If one candidate wins the Special General Election and no Special General Runoff takes place, then the Special General Election Cycle will end on April 11, 2006. For those candidates that participated in the Special General Election, the Primary Election Cycle will begin on April 12, 2006. Accordingly, the Committee must dispose of all "excess contributions"⁶ it received during the Special General Election Cycle within 50 days after April 11, 2006. *See* 2 U.S.C. 441a-1(a)(4) and 11 CFR 400.51. It may not spend any of these excess contributions on the Primary Election, or any other election, and it may not seek to have any such excess contributions redesignated by the

⁵ The Committee could also continue to accept increased contributions if another opposing candidate remaining in the Special General Election made sufficient expenditures from personal funds to entitle the Committee to do so.

⁶ "Excess contributions" are contributions made at the increased limit but not spent in connection with the election to which they relate. *See* 2 U.S.C. 441a-1(a)(4) and 11 CFR 400.50.

contributors for the Primary Election or for any other election. *See* 2 U.S.C. 441a-1(a)(4); 11 CFR 400.50, 400.51, 400.52, 400.53, and 400.54.

Under 11 CFR 110.3(c)(3), any carryover of unused funds from one election cycle to another (or from a previous Federal campaign committee to a current Federal campaign committee) is a transfer, regardless of whether the candidate maintains different committees or different campaign accounts for different elections. Any portion of Ms. Busby's expenditures from personal funds that was not used for expenses in the Special General Election Cycle that is transferred to the Primary Election Cycle under 11 CFR 110.3(c)(3) will be considered an expenditure from personal funds for the Primary Election. Ms. Busby and/or the Committee must use a reasonable accounting method such as the one described in 11 CFR 110.3(c)(4) to determine the portion of the amount transferred that constitutes the candidate's personal funds.

In the case of such a transfer, the date the expenditure from personal funds is made is the date the funds are transferred to the Primary Election Cycle, *i.e.*, April 12, 2006. If the aggregate of the transferred funds and other expenditures from personal funds for the Primary Election Cycle exceeds \$350,000, Ms. Busby will trigger the Millionaires' Amendment for the Primary Election and must file an Initial Notification on FEC Form 10 with the Commission and with all opposing candidates in the Democratic Primary Election. This Initial Notification must be filed by April 13, 2006. *See* 11 CFR 400.21(b) and 400.24(b).

On April 12, 2006, the Committee should check the Commission's website to see if any of Ms. Busby's Democratic opponents in the Primary Election who did not also participate in the Special General Election filed any FEC Form 10s with the Commission between November 3, 2004 and April 11, 2006. If any such opposing candidates did file one or more FEC Form 10s, the Committee will obtain constructive notification of such filings as of the date on or after April 12, 2006 that it downloads the opposing candidate's FEC Form 10s. Once it downloads the form(s), the Committee should determine whether it is eligible for increased contributions from individuals for the Primary Election Cycle.⁷

The Primary Election Cycle is a separate and distinct election cycle from the Special General Election Cycle. Thus, in calculating the opposition personal funds amount, expenditures from personal funds made during the Special General Election Cycle by any candidate running in the Special General Election must not be aggregated with expenditures from personal funds made during the Primary Election Cycle. Additionally, in calculating the opposition personal funds amount for the Primary Election Cycle, the Committee must include the gross receipts as reported in FEC Form 3Z-1 in the 2005 Year End reports. *See* 11 CFR 400.10(a)(3). Ms. Busby and the Committee must comply with the Millionaires' Amendment regulations set forth in 11 CFR part 400 as they normally would in any primary election.

⁷ The spending of Ms. Busby's opponents in the Primary Election Cycle will not trigger an increased party coordinated expenditure limit, because party committees cannot make coordinated party expenditures in connection with a primary election campaign, only in connection with a general election campaign. *See* 2 U.S.C. 441a(d) and 11 CFR 400.30(c)(1).

Scenario 2 – Special General Runoff & Primary: April 12 – June 6, 2006

If no candidate receives a majority of votes in the Special General Election on April 11, 2006, California will hold a Special General Runoff on June 6, 2006, the same date as the Primary Election. Under this scenario, between April 12, 2006 and June 6, 2006, candidates participating in both the Special General Runoff and the Primary Election will technically be in simultaneous election cycles: the continuation of the Special General Election Cycle that began on November 3, 2004 and the Primary Election Cycle.

As stated by Senator DeWine during consideration of the Millionaire's Amendment, "This amendment attempts to bring about equity and fairness and also, quite candidly, to increase the opportunity for all candidates to get their ideas to the public." See 147 CR S2537 (daily ed. March 20, 2001) (Sen. DeWine). Under the novel facts presented here, including the treatment of special elections under California law, while those candidates are technically running in two simultaneous election cycles, because the Special General Runoff and Primary Election date and office sought are precisely the same, the purposes of the Millionaires' Amendment are best effectuated by designating all personal expenditures by a candidate to both elections in which the candidate is participating.⁸ Otherwise, for purposes of the Millionaires' Amendment, a candidate in both elections could split his or her expenditures between the elections, and effectively double the personal funds threshold for filing the Initial Notification from \$350,000 to \$700,000.

Consequently, if Ms. Busby participates in both the Special General Runoff and the Primary Election, her expenditures from personal funds between April 12, 2006, and June 6, 2006, will count toward both elections. For example, if she makes a \$400,000 expenditure from personal funds during this time frame, that expenditure will be considered a \$400,000 expenditure from personal funds in connection with the Special General Runoff, as well as a \$400,000 expenditure from personal funds in connection with the Primary Election.⁹

The Committee must file the appropriate notification that may result from the aggregation (*e.g.* Initial Notification or Additional Notification). Expenditures from personal funds must also be used to calculate the opposition personal funds amount with regard to the Primary Election. This calculation must also take into account the gross receipts amounts on FEC Form 3Z-1 filed with the 2005 Year End reports.

⁸ This conclusion is limited to the specific circumstances seen here, where no candidate running in the Special General Runoff will be running against the same opposing candidate in *both* the Special General Runoff and the Primary Election.

⁹ In this example, with respect to Ms. Busby's Special General Runoff opponents, the Committee must aggregate all of her expenditures from personal funds made prior to April 12 with those made on or after April 12. With respect to Ms. Busby's Primary Election opponents, however, the Committee must aggregate only those expenditures from personal funds made between April 12 and June 6, 2006.

Likewise, if any of Ms. Busby's opponents in the Special General Runoff makes expenditures from personal funds between April 12th and June 6th, the Committee should count those expenditures against the opponent's threshold for the Special General Runoff, regardless of whether the opponent designates the personal expenditures to his or her Special General Runoff or Primary Election accounts. In calculating the opposition personal funds amount, the Committee must aggregate all expenditures from personal funds made during the Special General Election Cycle (November 3, 2003 to June 6, 2006), including expenditures designated to the Committee's Primary election account. However, the Committee should not include gross receipts amounts in this calculation because these amounts are attributed entirely to the Primary Election and not to the Special General Runoff.

In addition to the requirements discussed above, Ms. Busby and the Committee must comply with all other applicable requirements of the Millionaires Amendment regulations. These requirements include disposal of excess contributions after the Primary Election and repayment of personal loans. *See e.g.*, 2 U.S.C. 441a-1(a)(4) and 441(a)(j); *see also* 11 CFR part 400, subpart E and 11 CFR 116.11 and 116.12.

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

Sincerely,

(signed)

Michael E. Toner
Chairman