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AGENDA ITEM
For Meeting of: 8-27-09

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR for U.S.R.*
Assistant General Counsel

Esther D. Heiden *EDH*
Attorney

Subject: Draft AO 2009-20 (Visclosky for Congress)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 27, 2009.

Attachment

1 ADVISORY OPINION 2009-20

2

3 Dr. Michael C. Malczewski

4 Visclosky for Congress

5 P.O. Box 10003

6 Merrillville, IN 46411-0003

7

8 Dear Dr. Malczewski:

DRAFT

9 We are responding to your advisory opinion request on behalf of Visclosky for
10 Congress (the “Committee”), concerning the application of the Federal Election
11 Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the use
12 of campaign funds to pay legal fees and expenses incurred by Representative Visclosky’s
13 current and former congressional staff members in connection with a Federal
14 investigation of Representative Visclosky.

15 The Commission concludes that the Committee may use campaign funds to pay
16 legal fees and expenses incurred by Representative Visclosky’s current and former
17 congressional staff in connection with the Federal investigation of Representative
18 Visclosky’s and other legal proceedings as described below, because the allegations
19 relate to Representative Visclosky’s campaign and duties as a Federal officeholder, and
20 the legal fees and expenses would not exist irrespective of Representative Visclosky’s
21 campaign or duties as a Federal officeholder. The use of campaign funds to pay for any
22 such employee’s representation in legal proceedings regarding allegations that are not related
23 to Representative Visclosky’s campaign activity or duties as a Federal officeholder, however,
24 would constitute an impermissible personal use.

1 ***Background***

2 The facts presented in this advisory opinion are based on your letter received on
3 July 9, 2009, and telephone conversations with Commission attorneys.

4 Peter J. Visclosky is the U.S. Representative from the First District of Indiana.
5 He is a member of the House Committee on Appropriations and the Appropriations
6 Subcommittee on Defense, and is Chairman of the Appropriations Subcommittee on
7 Energy and Water Development. The Committee is Representative Visclosky's principal
8 campaign committee.

9 According to media reports provided, the FBI and Federal prosecutors are
10 investigating whether a lobbying firm, PMA Group, made improper political
11 contributions to Representative Visclosky and other members of the U.S. House of
12 Representatives. Media reports state that the FBI executed a search warrant at PMA
13 headquarters in November 2008, and that Federal prosecutors "are looking into the
14 possibility that a prominent lobbyist may have funneled bogus campaign contributions to
15 . . . lawmakers."¹ Although many of the details of the Federal investigation are not public
16 at this time, media reports indicate that the investigation centers on more than 500,000
17 dollars in alleged campaign contributions from PMA Group and its clients to three
18 congressmen, including Representative Visclosky.² The media reports also discuss
19 appropriations earmarks purportedly obtained by Representative Visclosky for PMA
20 Group clients, several of whom also allegedly made contributions to Representative

¹ David D. Kirkpatrick, *Lobbyist Inquiry Appears to Be Widening*, N.Y. TIMES, Feb. 11, 2009, available at <http://www.nytimes.com/2009/02/11/us/politics/11inquire.html?ref=politics>.

² Kevin Nevers, *Lobbying Firm Facing FBI Probe Has History of Donations to Visclosky*, CHESTERTON TRIBUNE (Ind.), Feb. 13, 2009, available at http://chestertontribune.com/Northwest%20Indiana/21397%20lobbying_firm_facing_fbi_probe_h.htm.

1 Visclosky's re-election campaign.³ Recently, as part of the ongoing Federal
2 investigation, Representative Visclosky's former Chief of Staff was served with a grand
3 jury subpoena to produce documents. See 155 Cong. Rec. H6017 (daily ed. June 2, 2009)
4 (communication from Chief of Staff of Representative Visclosky).

5 ***Question Presented***

6 *May the Committee use campaign funds to pay legal expenses incurred by*
7 *Representative Visclosky's current and former congressional staff in connection with a*
8 *Federal investigation of the PMA Group and Representative Visclosky's conduct as a*
9 *candidate for and a member of the House of Representatives, and any other legal*
10 *proceedings that involve the same allegations?*

11 ***Legal Analysis and Conclusions***

12 Yes, the Committee may use campaign funds to pay legal fees and expenses
13 incurred by Representative Visclosky's current and former congressional staff in
14 connection with a Federal investigation into the alleged provision of illegal campaign
15 contributions by the PMA Group and its clients to the Committee, and Representative
16 Visclosky's allegedly improper earmarking of appropriations for clients of PMA, and any
17 other legal proceedings that involve the same allegations. The allegations relate to
18 Representative Visclosky's campaign or duties as a Federal officeholder, or both, and the
19 legal fees and expenses would not exist irrespective of Representative Visclosky's
20 campaign or duties as a Federal officeholder. The Committee may not, however, use
21 campaign funds to pay current or former congressional staff members' legal fees or

³ *Id.*; see also Henry C. Jackson, *Visclosky's Ties to Troubled PMA Group Run Deep*, CHICAGO TRIBUNE, March 2, 2009, available at <http://archives.chicagotribune.com/2009/mar/02/news/chi-ap-in-viscloskydonation>.

1 expenses regarding allegations unrelated to Representative Visclosky’s campaign or
2 duties as a Federal officeholder.

3 The Act identifies six categories of permissible uses of contributions accepted by
4 a Federal candidate. They include: (1) otherwise authorized expenditures in connection
5 with the candidate’s campaign for Federal office; (2) ordinary and necessary expenses
6 incurred in connection with the duties of the individual as a holder of Federal office; and
7 (3) any other lawful purpose not prohibited by 2 U.S.C. 439a(b). 2 U.S.C. 439a(a);
8 11 CFR 113.2(a)-(e).

9 Under the Act and Commission regulations, contributions accepted by a candidate
10 may not be converted to “personal use” by any person. 2 U.S.C. 439a(b)(1); 11 CFR
11 113.2(e). The Act specifies that conversion to personal use occurs when a contribution or
12 amount is used “to fulfill any commitment, obligation, or expense of a person that would
13 exist irrespective of the candidate’s election campaign or individual’s duties as a holder
14 of Federal office.” 2 U.S.C. 439a(b)(2); *see also* 11 CFR 113.1(g).

15 The Act and Commission regulations provide a non-exhaustive list of items that
16 would constitute personal use *per se*, none of which applies here. For items not on this
17 list, the Commission determines on a case-by-case basis whether an expense would fall
18 within the definition of “personal use.” 11 CFR 113.1(g)(1)(ii). Commission regulations
19 specifically provide that “legal expenses” are subject to a case-by-case determination.
20 11 CFR 113.1(g)(1)(ii)(A).

21 The Commission has long recognized that if a candidate “can reasonably show
22 that the expenses at issue resulted from campaign or officeholder activities, the
23 Commission will not consider the use to be personal use.” Explanation and Justification

1 for Final Rules on Expenditures; Reports by Political Committees; Personal Use of
2 Campaign Funds, 60 FR 7862, 67 (Feb. 9, 1995). Legal fees and expenses, however,
3 “will not be treated as though they are campaign or officeholder related merely because
4 the underlying proceedings have some impact on the campaign or the officeholder’s
5 status.” *Id.* at 7868. The Commission has concluded that the use of campaign funds for
6 legal fees and expenses does not constitute personal use when the legal proceedings
7 involve allegations directly relating to the candidate’s campaign or duties as a Federal
8 officeholder.⁴ *See, e.g.*, Advisory Opinions 2009-10 (Visclosky), 2008-07 (Vitter),
9 2006-35 (Kolbe), 2005-11 (Cunningham), and 2003-17 (Treffinger).

10 As discussed above, the advisory opinion request and accompanying media
11 reports indicate that the Federal government is investigating campaign contributions
12 allegedly made by PMA Group and its clients to Representative Visclosky. Additionally,
13 the reports discuss appropriations earmarks purportedly obtained by Representative
14 Visclosky for various PMA Group clients. The Commission has previously concluded
15 that the allegations concern Representative Visclosky’s campaign and duties as a Federal
16 officeholder because Representative Visclosky allegedly received the contributions in
17 question as part of his campaign, and his alleged actions regarding the congressional
18 appropriations process are directly related to his duties as a Federal officeholder.
19 Advisory Opinion 2009-10 (Visclosky).

20 Current and former staff members in Representative Visclosky’s House office are
21 involved in the Federal investigation because of their current and former employment

⁴ Although the Commission has never addressed whether campaign funds may be used to pay legal expenses of an officeholder’s congressional staff, in Advisory Opinion 1996-24 (Cooley) the Commission approved use of campaign funds to pay legal expenses to respond to media inquiries and allegations concerning both a candidate and the candidate’s wife.

1 relationships with Representative Visclosky in his capacity as a U.S. Congressman and a
2 candidate. Therefore, based on the representations made in the advisory opinion request
3 and accompanying news articles, the Commission concludes that current and former
4 office staff members' legal fees and expenses associated with the Federal investigation
5 would not exist irrespective of Representative Visclosky's campaign or duties as a
6 Federal officeholder. Accordingly, the Committee may use campaign funds to pay legal
7 fees and expenses incurred by Representative Visclosky's current and former
8 congressional staff in connection with the Federal investigation into the alleged provision
9 of illegal campaign contributions by the PMA Group and its clients to the Committee,
10 and Representative Visclosky's allegedly improper earmarking of appropriations for
11 clients of PMA, and any other legal proceedings that involve the same allegations.

12 The Commission notes, however, that because many of the details of the Federal
13 investigation are not public at this time, it is possible that portions of the investigation
14 could involve allegations not related to Representative Visclosky's campaign or his
15 duties as a Federal officeholder. "The use of campaign funds to pay for . . .
16 representation in legal proceedings regarding any allegations that are not related to [the
17 Congressman's] campaign activity or duties as a Federal officeholder would constitute an
18 impermissible personal use." Advisory Opinions 2009-10 (Visclosky) and 2005-11
19 (Cunningham).

20 In accordance with 2 U.S.C. 432(c), the Committee must maintain appropriate
21 documentation of any disbursements made to pay legal expenses incurred in connection
22 with the Federal investigation and other legal proceedings. *See* 11 CFR 102.9(b) and
23 104.11. In addition, the Committee must report all funds disbursed for such legal

1 expenses as operating expenditures, noting the payee's full name, address, and a detailed
2 description of the purpose of the payment. 11 CFR 104.3(b)(2) and (4).

3 The Commission expresses no opinion regarding the application of Federal tax
4 law, other law, or the rules of the U.S. House of Representatives to the proposed
5 activities, because those questions are not within the Commission's jurisdiction.

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. Any person involved in any specific
12 transaction or activity which is indistinguishable in all its material aspects from the
13 transaction or activity with respect to which this advisory opinion is rendered may rely on
14 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
15 conclusions in this advisory opinion may be affected by subsequent developments in the
16 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
17 All cited advisory opinions are available on the Commission's website at
18 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Steven T. Walther
Chairman