

RECEIVED

By Office of the Commission Secretary at 3:53 pm, Mar 05, 2021



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 21-14-A
AGENDA ITEM
For meeting of March 11, 2021
SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Shana M. Broussard *SMB*
Chair

Ellen L. Weintraub *ELW*
Commissioner

DATE: March 5, 2021

RE: Draft Interpretive Rule on Use of Campaign Funds by Members of Congress for
Personal and Residential Security

Attached is a Draft Interpretive Rule on the Use of Campaign Funds by Members of Congress. We request that this draft be placed on the Agenda to be discussed at the March 11, 2021 Open Meeting. The Draft is being made public in advance of the Commission's March 11 Open Meeting in order to invite public comment. We request to hold over a vote until the Open Meeting of March 25, 2021, in order for the Commission to consider any comments received.

Members of the public may submit written comments on this Draft Interpretive Rule. Any comments on the draft must be received by March 18, 2021 and should be addressed to the Commission Secretary, personalsecurityrule@fec.gov.

DRAFT

1 **FEDERAL ELECTION COMMISSION**

2 **[Notice 2021-XX]**

3 **Use of Campaign Funds by Members of Congress for Personal and Residential**
4 **Security**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Notice of interpretive rule.

7 **SUMMARY:** The Federal Election Commission is providing guidance to members of
8 Congress on the use of campaign funds to pay for personal and residential security.

9 **DATES:** Effective on [Insert date of publication in *FEDERAL REGISTER*].

10 **FOR FURTHER INFORMATION CONTACT:** Robert Knop, Assistant General
11 Counsel, rknop@fec.gov, (202) 694-1650 or (800) 424-9530.

12 **SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act (the
13 “Act”) identifies six categories of permissible uses of contributions accepted by a federal
14 candidate, two of which are “ordinary and necessary expenses incurred in connection
15 with the duties of the individual as the holder of Federal office,” and “any other lawful
16 purpose” not prohibited by 52 U.S.C. 30114(b). 52 U.S.C. 30114(a); *see also* 11 CFR
17 113.2(a)-(e). Under the Act and Commission regulations, contributions accepted by a
18 candidate may not be converted to “personal use” by any person. 52 U.S.C. 30114(b)(1);
19 11 CFR 113.2(e). Conversion to personal use occurs when a contribution or amount is
20 used “to fulfill any commitment, obligation, or expense” of a federal officeholder “that
21 would exist irrespective” of the federal officeholder’s duties. 52 U.S.C. 30114(b)(2); *see*
22 *also* 11 CFR 113.1(g).

1 The Act and Commission regulations provide a non-exhaustive list of items that
2 would constitute a prohibited personal use *per se*. 52 U.S.C. 30114(b)(2)(A)-(I); 11 CFR
3 113.1(g)(1)(i)(A)-(J). For items not on this list, the Commission determines on a case-
4 by-case basis whether such expenses would fall within the definition of “personal use.”
5 11 CFR 113.1(g)(1)(ii). The Commission has long recognized that if a candidate “can
6 reasonably show that the expenses at issue resulted from campaign or officeholder
7 activities, the Commission will not consider the use to be personal use.” Personal Use of
8 Campaign Funds, 60 FR 7862, 7867 (Feb. 9, 1995).

9 In recent years, the Commission has issued a number of advisory opinions
10 authorizing the use of campaign funds for the installation of, or improvements to, a
11 residential security system to protect against threats to officeholders’ physical safety, on
12 the grounds that the need for such security expenses would not exist if not for the
13 officeholders’ activities or duties. The Commission first considered this issue in the
14 context of direct threats to individual officeholders, and then with respect to the
15 heightened threat environment experienced by federal officeholders as a group.

16 In Advisory Opinion 2020-06 (Escobar), Advisory Opinion 2011-17 (Giffords),
17 Advisory Opinion 2011-05 (Terry), and Advisory Opinion 2009-08 (Gallegly), members
18 of Congress faced specific and ongoing threats to the safety of themselves and their
19 families. The facts presented in those advisory opinions suggested that the threats were
20 motivated by the members’ public roles as federal officeholders, candidates, or both. In
21 all four instances, the U.S. Capitol Police or the House Sergeant at Arms recommended
22 specific security upgrades to the members’ homes due to the continuing threats.

1 The Commission concluded in each instance that the expenses for the proposed
2 security upgrades would not have existed irrespective of the members' duties as federal
3 officeholders or candidates. Therefore, the Commission concluded that the use of
4 campaign funds to pay for the non-structural security upgrades or lighting and wiring
5 improvements recommended by the Capitol Police and Sergeant at Arms would not
6 constitute a prohibited personal use of campaign contributions under the Act or
7 Commission regulations. *See* Advisory Opinion 2020-06 (Escobar) at 3; Advisory
8 Opinion 2011-17 (Giffords) at 3; Advisory Opinion 2011-05 (Terry) at 4; Advisory
9 Opinion 2009-08 (Gallegly) at 4.

10 The Commission has also previously considered the implications of the
11 heightened threat environment faced by members of Congress collectively, necessitating
12 increased residential security measures even if an individual member has not received
13 direct threats. In Advisory Opinion 2017-07 (Sergeant at Arms), the Commission
14 considered information from the House Sergeant at Arms about the threats faced by
15 members of Congress due to their status as federal officeholders, and his
16 recommendation, as chief law enforcement official for the U.S. House of
17 Representatives, that members of the U.S. House of Representatives use residential
18 security systems due to the threat environment. Advisory Opinion Request, Advisory
19 Opinion 2017-07 (Sergeant at Arms) (June 21, 2017). In light of that information, the
20 Commission concluded that certain costs of installing or upgrading home security
21 systems would constitute ordinary and necessary expenses incurred in connection with
22 members' duties as federal officeholders, and that therefore members of Congress may
23 use campaign funds to pay for reasonable costs associated with home security systems.

1 See Advisory Opinion 2017-07 (Sergeant at Arms) at 3. The Commission’s conclusion in
2 that advisory opinion was limited to the use of campaign funds for residential “non-
3 structural security devices” and the Commission specifically authorized the use of
4 campaign funds for the installation or upgrade of “cameras, sensors, distress devices, and
5 similar non-structural security devices, as well as locks, in and around a member’s
6 residence.” *Id.*

7 In recent years, the incidence of threats against members of Congress has
8 increased. In his 2017 request, the House Sergeant at Arms characterized the increase in
9 threats as “the new daily threat environment faced by Members of Congress.” Advisory
10 Opinion Request at AOR001, Advisory Opinion 2017-07 (Sergeant at Arms).
11 Specifically, the House Sergeant at Arms stated that in calendar year 2016, the United
12 States Capitol Police investigated 902 threatening communications received by members,
13 and in the first six months of 2017, they investigated 950 such communications. *Id.* A
14 letter received in January 2021 from the National Republican Senatorial Committee and
15 the National Republican Congressional Committee seeking an advisory opinion request
16 from the Commission identified multiple instances of threats against members of
17 Congress, including incidences of vandalism at the homes of Senator Mitch McConnell
18 and Speaker of the House Nancy Pelosi¹, confrontations of members of Congress at
19 airports in the D.C. region², and threats against members of Congress related to the
20 second impeachment trial of President Donald Trump, including “plots to attack members

¹ See Allyson Waller, Homes of Mitch McConnell and Nancy Pelosi Are Reported Vandalized, New York Times, Jan. 2, 2021, <https://www.nytimes.com/2021/01/02/us/mcconnell-pelosi-house-vandalized.htm>

² Alex Moe and Alicia Victoria Lozano, Travel security tightened for members of Congress after harassment, NBC News, Jan. 9, 2021, <https://www.nbcnews.com/politics/congress/travel-security-tightened-members-congress-after-harassment-n1253647>

1 of Congress during travel to and from the Capitol complex during the trial.³ Letter from
2 Jessica Johnson, Chris Winkelman, Ryan Dollar, and Erin Clark at 6 (January 26, 2021)
3 (“NRSC and NRCC Letter”)⁴. On January 6, 2021, an armed mob stormed the U.S.
4 Capitol, temporarily stopping Congress’ counting of the Electoral College results of the
5 November 2020 presidential election.⁵ Following the insurrection attempt at the U.S.
6 Capitol, members of Congress reportedly told their party leadership that they were “in
7 fear for their lives and the lives of their families.”⁶

8 The Commission is cognizant that “these types of threats necessitate a proactive
9 rather than reactive response. Members are unfortunately no longer able to wait until
10 confirmation of a threatening communication before taking prudent steps to protect
11 themselves and their family.” Advisory Opinion 2017-07 (Sergeant at Arms) (citing
12 Comment of Rep. Gregg Harper (July 12, 2017)). The Commission believes that
13 guidance concerning the Commission’s interpretation of when the use of campaign funds
14 for security purposes is permissible will assist members to expeditiously take safety
15 measures recommended by the U.S. Capitol Police.

16 As described above, the Commission has previously addressed requests to use
17 campaign funds for security purposes through the advisory opinion process. However,

³ Michael Balsamo, AP source: Lawmakers threatened ahead of impeachment trial, Associated Press, Jan. 25, 2021, <https://apnews.com/article/lawmakers-trump-impeachment-trial-b9a44a269d6cfeee28e79b46572d28a6>

⁴ https://www.fec.gov/files/legal/aos/2021-03/202103_R1.pdf

⁵ AP Photos: Scenes of violence at U.S. Capitol shock world, Associated Press, Jan. 6, 2021, <https://apnews.com/article/joe-biden-donald-trump-electoral-college-elections-de812995a8c7cbea5c1de56a3d1aa007>

⁶ Jamie Gangel, Marshall Cohen, and Annie Grayer, Members of Congress fear for their lives and security after deadly riot, sources say, CNN, Jan. 15, 2021, <https://www.cnn.com/2021/01/14/politics/capitol-hill-lawmakers-security-concerns/index.html>

1 the Act only authorizes the Commission to issue an advisory opinion in response to a
2 “complete written request” from a person about “a specific transaction or activity by the
3 person.” 52 U.S.C. 30108(a); *see also* 11 CFR 112.1(b). “Requests presenting a general
4 question of interpretation, or posing a hypothetical situation, or regarding the activities of
5 third parties, do not qualify as advisory opinion requests.” 11 CFR 112.1(b); *see also*
6 H.R. Rep. 96-422 at 20 (“Advisory Opinions may not be issued in response to a request
7 posing a hypothetical situation or to a request regarding the activities of third parties”).
8 Although advisory opinions may be relied upon by “any person involved in any specific
9 transaction or activity which is indistinguishable in all its material aspects from the
10 transaction or activity with respect to which [the] advisory opinion is rendered,” *see* 52
11 U.S.C. 30108(c)(1)(B), the Commission cannot issue general guidance not tied to a
12 specific transaction or activity through an advisory opinion.

13 In light of the seriousness and immediacy of the current threat environment, the
14 Commission is issuing this interpretive rule to provide guidance to all members of
15 Congress on circumstances under which they may use campaign funds to pay for security
16 purposes.

17 **I. Residential Security**

18 The Commission interprets “ordinary and necessary expenses incurred in
19 connection with duties of [an] individual as a holder of Federal office,” 52 U.S.C.
20 30114(a)(2), to include an expense for the installation (or upgrade) and monitoring costs
21 of cameras, sensors, distress devices, and similar non-structural security devices
22 (including any wiring and lighting necessary for the function of such security devices), as
23 well as locks, in and around a member’s residence if: (1) reasonably specific and

1 ongoing threats of physical harm exist as to members of Congress due to their status as
2 federal officeholders; (2) the U.S. Capitol Police, the Office of the Sergeant at Arms of
3 the U.S. House of Representatives, or the Office of the Sergeant at Arms of the U.S.
4 Senate (collectively, “U.S. Capitol Law Enforcement Offices”) has recommended that
5 members of Congress use residential security systems; and (3) the use of campaign funds
6 for residential security is for the installation or upgrading of residential security systems
7 at the member’s home, including necessary lighting and wiring enhancements necessary
8 for the proper functioning of a residential security system.

9 House Sergeant at Arms Paul D. Irving, in his request in AO 2017-07 (Sergeant at
10 Arms), stated, “It is my position that Members of the U.S. House of Representatives
11 require a residential security system due to the threat environment.” It is the
12 Commission’s understanding that this recommendation remains active. To the extent that
13 this understanding is correct, the condition that a U.S. Capitol Law Enforcement Office
14 recommend that members of Congress use a residential security system remains satisfied.

15 **II. Personal Security Personnel**

16 The Commission interprets “ordinary and necessary expenses incurred in
17 connection with duties of [an] individual as a holder of Federal office,” 52 U.S.C.
18 30114(a)(2), to include an expense for personal security personnel if: (1) reasonably
19 specific and ongoing threats of physical harm exist as to members of Congress due to
20 their status as federal officeholders; (2) one or more of the U.S. Capitol Law Enforcement
21 Offices has recommended that members of Congress use personal security personnel due
22 to the heightened threat environment facing members of Congress generally or that the
23 individual member use personal security personnel due to a specific threat to the member

1 related to his or her officeholder status; and (3) the use of campaign funds for personal
2 security personnel is for the member or the member's immediate family, including a
3 spouse, minor children, or other relatives residing with the member.

4 The Commission is issuing this interpretive rule in light of the current heightened
5 threat environment. The Commission notes that any material decline in the overall threat
6 environment – as judged, for example, by the U.S. Capitol Police or the Sergeants at
7 Arms of the U.S. House of Representatives or the U.S. Senate – may affect the
8 continuing applicability of this interpretive rule. This interpretive rule will expire two
9 years after the effective date; the Commission may issue a new interpretive rule based on
10 the threat environment facing members of Congress at that time.

11 The Commission emphasizes that the use of campaign funds for security purposes
12 is not limited to the circumstances described above. Any individual who wishes to use
13 campaign funds for specific purposes or activity not covered by this interpretive rule may
14 submit an advisory opinion request to the Commission pursuant to 52 U.S.C. 30108 and
15 11 CFR 112.1.

16 This document is an interpretive rule explaining the Commission's interpretation of
17 existing statutory and regulatory provisions and, therefore, does not constitute an agency
18 action requiring notice of proposed rulemaking, opportunities for public participation,
19 prior publication, or delay in effective date under 5 U.S.C. 553 of the Administrative
20 Procedure Act. It does not bind any members of the general public, nor does it create or
21 remove any rights, duties, or obligations. The provisions of the Regulatory Flexibility
22 Act, which apply when notice and comment are required by the Administrative Procedure
23 Act or another statute, do not apply. *See* 5 U.S.C. 603(a).

1
2
3
4
5
6
7
8
9

On behalf of the Commission,

Shana M. Broussard
Chair
Federal Election Commission

10 DATED: _____
11 BILLING CODE: 6715-01-P