

February 19, 1998

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 1998-01 is available for public comments under this procedure. It was requested by Ralph L. Lotkin on behalf of Congressman Earl F. Hilliard, Hilliard for Congress Campaign. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 1998-01 will be on the Commission's agenda for its public meeting of Thursday, February 26, 1998.

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 12:00 noon (E:ST) on February 25, 1998.

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 comments timely received 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 Disclosure Division.

CONTACTS

Press inquiries: Ron Harris (202) 219-4155

Commission Secretary: Marjorie Emmons (202) 219-4145

Other inquiries:

**To obtain copy of draft AO 1998-01 contact Public Records Office-
Public Disclosure Division (202) 219-4140, or 800-424-9530.**

**For questions about comment submission procedure contact
N. Bradley Litchfield, Associate General Counsel, (202) 219-3690.**

ADDRESSES

Submit single copy of written comments to:

**Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463**



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 19, 1998

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble 
General Counsel

N Bradley Litchfield 
Associate General Counsel

Jonathan M. Levin 
Senior Attorney

Subject: Draft AO 1998-01

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 26, 1998

Attachment

1 **ADVISORY OPINION 1998-1**

2
3 **Ralph L. Lotkin**
4 **Cochran & Lotkin**
5 **201 Massachusetts Avenue, N.E.**
6 **Suite C-1**
7 **Washington, D.C. 20002**

DRAFT

8
9 **Dear Mr. Lotkin:**

10
11 **This responds to your letter dated January 12, 1998, on behalf of Congressman**
12 **Earl F. Hilliard and his principal campaign committee, concerning the application of the**
13 **Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission**
14 **regulations to the use of campaign funds to pay for expenses he will incur for services**
15 **provided by your law firm, Cochran & Lotkin.**

16 **Mr. Hilliard is the Congressman from the Seventh District of Alabama. He was**
17 **first elected in 1992. Since 1992, his principal campaign committee has been the Hilliard**
18 **for Congress Campaign ("the Committee"). He is also a candidate for re-election in**
19 **1998.**

20 **On December 3 and 10, 1997, a two-part series of articles appeared in *The Hill*, a**
21 **weekly newspaper that covers Congress and other aspects of government and politics,**
22 **making allegations of impropriety in the conduct of Mr. Hilliard, the Committee, his**
23 **district congressional office, and businesses and charities that are owned and controlled**
24 **by Mr. Hilliard and his family. Mr. Hilliard has denied any allegation of wrongdoing.**
25 **Mr. Hilliard and the Committee wish to use the Committee's funds to defray expenses**
26 **incurred with your law firm for services related to these allegations. You believe that**
27 **such expenses would be campaign-related, and "necessary" to his campaign, because "the**
28 **bulk of specific allegations raised in the press primarily relate to the Congressman's use**
29 **of his campaign fund or his performance as an elected official and because of the**
30 **likelihood that the allegations will be raised as issues in the 1998 election." You state that**
31 **you have been, and will be advising Mr. Hilliard on his dealings with the media, law**
32 **enforcement and oversight entities, and the House Committee on Standards of Official**
33 **Conduct ("House Ethics Committee").**

1 The Commission notes that an article in the January 29, 1998, issue of *Roll Call*
2 disclosed that the House Ethics Committee was opening a self-initiated inquiry, based on
3 the articles in *The Hill*, into whether Mr. Hilliard's use of campaign funds and district
4 office resources violated House rules. The *Roll Call* article also indicated that the inquiry
5 may explore Mr. Hilliard's business activities before he was elected.

6 You have categorized the allegations in the articles of December 3 and 10 as
7 raising the following general issues: (1) the "validity" and amount of Committee
8 disbursements to certain businesses or charities; (2) the possible use of Committee funds
9 for personal purposes; (3) the circumstances and "validity" of certain Committee loans to
10 specified individuals; (4) whether annual reports filed by Mr. Hilliard pursuant to the
11 Ethics in Government Act contain proper and complete disclosure; (5) the propriety of
12 certain aspects of the operation of Mr. Hilliard's congressional office; (6) whether
13 contributions made to the Committee have been fully disclosed; and (7) whether
14 campaign and official resources have been improperly commingled. In addition, you
15 state that the articles include references to certain transactions that are not directly related
16 to Mr. Hilliard's candidate or officeholder status. These include allegations relating to
17 matters that may have occurred before he became a Member of Congress. You assert,
18 however, that it has become necessary for Mr. Hilliard to respond to these other
19 allegations because their inclusion in the articles will cause them to become campaign
20 issues, and Mr. Hilliard has already "been forced to respond in a campaign, or official,
21 context." For the purposes of this opinion, these allegations will be considered an eighth
22 category.

23 Although you do not describe the allegations with any greater specificity, you
24 have enclosed the articles from *The Hill* with your request. The substance of the
25 allegations can be briefly restated, and attributed to the relevant categories, as follows:

26 **Categories 1, 2, and 3** - The campaign allegedly made excessive payments and
27 loans to Hilliard businesses and charities and Hilliard family members that amounted to a
28 subsidization of those entities or individuals. These included allegedly excessive
29 payments for advertisements on a Hilliard-controlled radio station that was not
30 broadcasting at the time, as well as excessive insurance premium payments to a Hilliard-

1 owned insurance company that may have only handled burial policies. Other allegedly
2 improper disbursements by the Committee included questionable payments for rent in a
3 Hilliard-owned building that housed other Hilliard businesses, excessive payments to
4 family members for salaries and consulting fees, and interest-free loans to family
5 members and Hilliard-controlled charities.

6 *Category 4* - According to the articles, Mr. Hilliard repeatedly failed to make full
7 disclosure of his business interests to the House Ethics Committee.

8 *Categories 5 and 7* - The articles suggested that Mr. Hilliard's Birmingham
9 district office was used improperly for activities of the Committee and Hilliard
10 businesses. The articles claim that the district office manager was also employed by the
11 Committee and Hilliard businesses, and that she conducted campaign activities and
12 Hilliard business activities from that office resulting in improper payments from Federal
13 funds. Excessive rental payments for the Montgomery district office allegedly were
14 made for the benefit of a state college president who owned the office building and was a
15 business associate of Mr. Hilliard.

16 *Category 6* - Mr. Hilliard's 1992 House campaign reports reflected a large
17 negative cash balance for several months suggesting the possibility that there were
18 contributions from an undisclosed source.

19 *Category 8* - The December 3 article also reported alleged improper activities by
20 Mr. Hilliard or Hilliard businesses and charities, that may have occurred while Mr.
21 Hilliard was a candidate or Federal officeholder but that, by themselves, were not directly
22 related to his campaign or officeholder duties. These allegations include the failure of
23 Hilliard businesses to pay taxes in a timely manner, a default by Mr. Hilliard and five
24 other investors in a golf course on a \$300,000 loan from the city of Birmingham, and the
25 overstatement by a Hilliard business of its assets. The December 10 article was
26 principally devoted to allegations of irregular dealings between 1988 and 1992 (the
27 period prior to Mr. Hilliard's service in Congress) as to a Hilliard-owned radio station
28 and the station's improper relationship with a State college and its president, resulting in
29 the alleged unlawful use of tax funds.

1 You list the following services that your firm has either provided or intends to
2 provide in response to the allegations:

3 (a) You have reviewed and will continue to monitor the allegations made against Mr.
4 Hilliard and reported in the media.

5 (b) You have conferred with Mr. Hilliard regarding these allegations.

6 (c) You will independently investigate the factual allegations, interview witnesses,
7 confer with individuals and with attorneys for various individuals or governmental
8 entities, and review documents in order to work with Mr. Hilliard in responding to the
9 allegations.

10 (d) You will conduct legal research and assist Mr. Hilliard with regard to his and the
11 Committee's interactions with appropriate oversight agencies, including the Commission,
12 and entities in the executive or legislative branch.

13 (e) You have reviewed the Act, Commission regulations, and advisory opinions with
14 regard to the issue of the use of campaign funds to pay your firm.

15 As you know, the Commission has historically recognized that candidates have
16 wide discretion in making expenditures to influence their election. However, the Act
17 prohibits the conversion of campaign funds to personal use. 2 U.S.C. §439a; 11 CFR
18 113.2(d); see also Advisory Opinions 1997-12, 1997-2, 1996-45, and 1996-24.

19 Commission regulations at 11 CFR 113.1(g) define personal use for the purposes of this
20 prohibition. Generally, personal use is "any use of funds in a campaign account of a
21 present or former candidate to fulfill a commitment, obligation, or expense of any person
22 that would exist irrespective of the candidate's campaign or duties as a Federal
23 officeholder." 11 CFR 113.1(g). The rules list certain uses of campaign funds that will
24 be considered *per se* personal use. 11 CFR 113.1(g)(1)(i).¹ Other uses of campaign

¹ Under section 113.1(g)(1)(i), personal use includes, but is not limited to, funds used for the following purposes: household food items; funeral, cremation or burial expenses; clothing; tuition payments not associated with training campaign staff; mortgage, rent or utility payments for the personal residence of a candidate; tickets to non-campaign or non-officeholder entertainment; dues, fees or gratuities to nonpolitical organizations, unless related to a specific fundraising event; and salary payments to family members, unless paid for bona fide, campaign-related services.

1 funds will be examined on a case by case basis using the general definition of personal
2 use. 11 CFR 113.1(g)(1)(ii).²

3 Your law firm serves as legal counsel to Mr. Hilliard and his authorized campaign
4 committee. Under the personal use rules, expenses for attorney services are among those
5 uses that will be examined on a case by case basis using the general definition of personal
6 use. 11 CFR 113.1(g)(1)(ii)(A). See Advisory Opinions 1997-12, 1996-24, and 1995-23.
7 Thus, the use of campaign funds for attorney fees and expenses that would exist even if
8 Mr. Hilliard were not a candidate or Member of Congress would be a conversion to
9 personal use. Conversely, the use of campaign funds to pay legal expenses that would
10 not exist absent his candidacy or Federal officeholder status would be permissible.

11 In two recent advisory opinions, the Commission has addressed the ability of a
12 Member of Congress to use campaign funds to respond to allegations involving, to a large
13 extent, conduct that was not directly officeholder or campaign related. Advisory
14 Opinions 1997-12 and 1996-24. In Advisory Opinion 1996-24, the allegations related to
15 matters of marital status, compliance with local construction codes, veterans benefits
16 eligibility, and certain tax deductibility issues. In Advisory Opinion 1997-12, the
17 allegations pertained directly to the business relationship of the Member with individuals
18 who were convicted of Federal crimes unrelated to his campaign or the conduct of his
19 office. The Member was named as an unindicted co-conspirator and incurred legal
20 expenses in testifying at a grand jury proceeding prior to the trial of one of the
21 individuals.

22 The Commission acknowledged that, ordinarily, legal expenses associated with
23 refuting or responding to allegations about one's private business activities would be
24 considered personal in nature because, standing alone, such matters are unrelated to
25 campaign or officeholder activity and might be incurred by any person who is both

² In explaining the application of the case-by-case approach, the Commission:
reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use
of campaign funds. If the candidate can reasonably show that the expenses at issue
resulted from campaign or officeholder activities, the Commission will not consider the
use to be personal use.

Explanation and Justification, Commission Regulations on Personal Use of Campaign Funds, 60 Fed. Reg.
7862, 7867 (February 9, 1995).

1 prominent in a given community and the subject of similar allegations. The Commission
2 recognized, however, that the activities of candidates and officeholders may receive
3 heightened scrutiny and attention in the news media because of their status as candidates
4 and officeholders. Advisory Opinions 1997-12 and 1996-24. It stated that the obvious
5 need for a candidate to respond to allegations that result from this elevated scrutiny would
6 not exist irrespective of the candidate's campaign or officeholder status. *Id.*
7 Consequently, the Commission developed an approach to an authorized committee's
8 payment for attorney services that takes into account the high level of media attention
9 focused on the officeholder, as well as the unavoidable overlap between the legal services
10 needed to respond to the press and to respond in legal proceedings, even when the media
11 reported allegations are not directly related to campaign or officeholder activity.

12 The approach is stated in Advisory Opinion 1997-12 as follows:

13 1) any legal expense that relates directly and exclusively to dealing with
14 the press, such as preparing a press release, appearing at a press
15 conference, or meeting or talking with reporters, would qualify for 100%
16 payment with campaign funds because (the person is) a candidate or
17 Federal officeholder;

18
19 2) any legal expense that relates directly to allegations arising from
20 campaign or officeholder activity would qualify for 100% payment with
21 campaign funds;

22
23 3) 50% of any legal expense not covered by 1 above that does not
24 directly relate to allegations arising from campaign or officeholder activity
25 can be paid for with campaign funds because (the person is) a candidate or
26 Federal officeholder and (is) providing substantive responses to the press
27 (beyond *pro forma* "no comment" statements).
28

29 The allegations described in the first seven categories of issues listed above entail
30 improper funding practices or other conduct by the Committee, by Mr. Hilliard's district
31 congressional office, or by Mr. Hilliard himself with respect to disclosure to the House
32 Ethics Committee. As such, they arise directly out of Mr. Hilliard's status and conduct as
33 a Federal candidate or Member of Congress, and the expenses of responding to such
34 allegations would not arise irrespective of such status and conduct. Therefore, the legal
35 expenses for dealing with, and responding to, the press as to these allegations would be

1 100% payable by the Committee. These include the services described in items a and b
2 of your list of services and may also include some of the services described in item c. In
3 addition, the legal expenses for responding to any inquiries or investigations by oversight
4 agencies or other governmental entities with respect to those allegations, i.e., services
5 described in items c and d, as well as the research into the issue presented in your request,
6 which is stated in item e, would also be 100% payable by the Committee.

7 The allegations discussed in the eighth category of issues, however, present more
8 complicated circumstances. Some of these activities and transactions occurred prior to
9 Mr. Hilliard's 1992 House candidacy and service in the House. Others involve activities
10 that occurred since the 1992 campaign but, by themselves, do not relate directly to the
11 campaign or the duties of a Federal officeholder. If the House Ethics Committee
12 considers such activities, then your fees for responding to its review or investigation of
13 those activities will be 100% payable with campaign funds. Any review or investigation
14 by the House Ethics Committee of Mr. Hilliard and his efforts to respond to that
15 investigation would be directly related to his duties as a Federal officeholder. Moreover,
16 in accordance with Advisory Opinion 1997-12, the legal expenses that are directly and
17 exclusively related to responding to the press as to these allegations would be 100%
18 payable by the Committee.

19 With respect to inquiries or investigations by other oversight agencies or
20 governmental entities (not the House Ethics Committee), where the agency is reviewing
21 or investigating the allegations that do not directly arise from campaign or officeholder
22 activity, the Committee would be subject to greater restrictions in its payment for legal
23 expenses. The legal expenses for responding to an agency regarding its review or
24 investigation of activities occurring before Mr. Hilliard's 1992 candidacy would be, at
25 most, 50% payable by the Committee, and then only if necessary to provide substantive
26 responses to the press regarding such activities.³ Similarly, if an agency is investigating
27 or pursuing action against the businesses or charities for misconduct that occurred since
28 the 1992 candidacy began, but the agency is not pursuing actions arising from the

³ Such substantive responses may also include responses to a press entity's request for comment about the specific allegations where that press entity is preparing an article discussing the allegations.

1 campaign or the district offices, then, as a general rule, your charges would be 50%
2 payable by the Committee, if necessary for responding to the press as to those activities.
3 However, with respect to such an investigation or review, legal expenses associated with
4 responding to that agency's requests for information from the Committee, or for
5 information relating to the conduct of the district office would be 100% payable by the
6 Committee. Billings for legal expenses associated with an investigation that involves a
7 mixture of inquiries into the Committee or district office and press-reported irregularities
8 as to Mr. Hilliard's private businesses must be allocated in accordance with the previous
9 guidelines. The Commission emphasizes that no Committee funds may be used to
10 respond to government agencies as to activities in category eight if such expenses are not
11 necessary for responding to the press as to such activities.⁴

12 The cost of legal expenses consistent with this advisory opinion should be
13 reported as an operating expenditure by the Committee, with the purpose noted. 11 CFR
14 104.3(b)(2) and (b)(4)(i); Advisory Opinion 1997-12 and 1996-24. In addition, billing
15 documentation submitted by the firm to the Committee should provide sufficient details
16 as to the precise legal services rendered so that the Committee has adequate records to
17 determine which amounts are lawfully payable from campaign funds pursuant to this
18 opinion. See 11 CFR 102.9(b) and 104.14(b).

19 The Commission expresses no opinion as to the possible applicability of Federal
20 or State laws, including tax laws, or the rules of the House of Representatives, to the
21 matters presented in your request, since those issues are not within its jurisdiction.

⁴ The Commission also cautions that, with respect to activities in category eight, the Committee may not pay for legal expenses for responding to the press or to an agency that are primarily for the purposes of representing persons other than Mr. Hilliard.

