



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

June 18, 2009

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2009-10

Dr. Michael C. Malczewski  
Visclosky for Congress  
P.O. Box 10003  
Merrillville, IN 46411-0003

Dear Dr. Malczewski:

We are responding to your advisory opinion request on behalf of Visclosky for Congress (the "Committee"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the use of campaign funds to pay legal fees and expenses incurred by Representative Visclosky in connection with a Federal investigation.

The Commission concludes that the Committee may use campaign funds to pay legal fees and expenses incurred by Representative Visclosky in connection with the Federal investigation and other legal proceedings as described below, because the allegations relate to Representative Visclosky's campaign and duties as a Federal officeholder, and the legal fees and expenses would not exist irrespective of Representative Visclosky's campaign or duties as a Federal officeholder. The use of campaign funds to pay for Representative Visclosky's representation in legal proceedings regarding allegations that are not related to his campaign activity or duties as a Federal officeholder, however, would constitute an impermissible personal use.

### ***Background***

The facts presented in this advisory opinion are based on your letter received on March 31, 2009, and telephone conversations with Commission attorneys.

Representative Visclosky is the U.S. Representative from the First District of Indiana. He is a member of the House Committee on Appropriations and the Appropriations Subcommittee on Defense, and is Chairman of the Appropriations Subcommittee on Energy and Water Development. Visclosky for Congress is Representative Visclosky's principal campaign committee.

According to media reports contained in the advisory opinion request, the FBI and Federal prosecutors are investigating whether a lobbying firm, PMA Group, made improper political contributions to Representative Visclosky and other members of the U.S. House of Representatives. Media reports state that the FBI executed a search warrant at PMA headquarters in November 2008, and that Federal prosecutors "are looking into the possibility that a prominent lobbyist may have funneled bogus campaign contributions to...lawmakers." David D. Kirkpatrick, *Lobbyist Inquiry Appears to Be Widening*, N.Y. TIMES, Feb. 11, 2009, <http://www.nytimes.com/2009/02/11/us/politics/11inquire.html?ref=politics>. Although many of the details of the Federal investigation are not public at this time, media reports indicate that the investigation centers on more than \$500,000 dollars in alleged campaign contributions from PMA Group and its clients to three congressmen, including Representative Visclosky. Kevin Nevers, *Lobbying Firm Facing FBI Probe Has History of Donations to Visclosky*, CHESTERTON TRIBUNE (Ind.), Feb. 13, 2009, [http://chestertontribune.com/Northwest%20Indiana/21397%20lobbying\\_firm\\_facing\\_fbi\\_probe\\_h.htm](http://chestertontribune.com/Northwest%20Indiana/21397%20lobbying_firm_facing_fbi_probe_h.htm). The media reports also discuss appropriations earmarks purportedly obtained by Representative Visclosky for PMA Group clients, several of whom also allegedly made contributions to Representative Visclosky's re-election campaign. *Id.*; see also Henry C. Jackson, *Visclosky's Ties to Troubled PMA Group Run Deep*, CHICAGO TRIBUNE, March 2, 2009, <http://archives.chicagotribune.com/2009/mar/02/news/chi-ap-in-viscloskydonation>.

### ***Question Presented***

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

### ***Legal Analysis and Conclusions***

Yes, the Committee may use campaign funds to pay legal fees and expenses incurred by Representative Visclosky in connection with a Federal investigation into the alleged provision of illegal campaign contributions by the PMA Group and its clients to the Committee, and Representative Visclosky's allegedly improper earmarking of

appropriations for clients of PMA, and any other legal proceedings that involve the same allegations, because the allegations relate to Representative Visclosky's campaign or duties as a Federal officeholder, or both, and the legal fees and expenses would not exist irrespective of Representative Visclosky's campaign or duties as a Federal officeholder. The Committee may not, however, use campaign funds to pay legal fees or expenses regarding allegations unrelated to Representative Visclosky's campaign or duties as a Federal officeholder.

The Act identifies six categories of permissible uses of contributions accepted by a Federal candidate. They are: (1) otherwise authorized expenditures in connection with the candidate's campaign for Federal office; (2) ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office; (3) contributions to organizations described in 26 U.S.C. 170(c); (4) transfers, without limitation, to national, State, or local political party committees; (5) donations to State and local candidates subject to the provisions of State law; and (6) any other lawful purpose not prohibited by 2 U.S.C. 439a(b). 2 U.S.C. 439a(a); 11 CFR 113.2(a)-(e).

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

The Act and Commission regulations provide a non-exhaustive list of items that would constitute personal use *per se*, none of which applies here. For items not on this list, the Commission makes a determination on a case-by-case basis whether an expense would fall within the definition of "personal use." 11 CFR 113.1(g)(1)(ii). Further, Commission regulations specifically provide a non-exhaustive list of uses, including "legal expenses," that are subject to a case-by-case determination. *Id.* Accordingly, the Commission analyzes the payment of legal fees and expenses with campaign funds on a case-by-case basis under 11 CFR 113.1(g)(1)(ii)(A).

The Commission has long recognized that if a 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 for Final Rules on Personal Use of Campaign Funds, 60 FR 7862, 67 (Feb. 9, 1995). Legal fees and expenses, however, "will not be treated as though they are campaign or officeholder related merely because the underlying proceedings have some impact on the campaign or the officeholder's status." *Id.* at 7868. The Commission has concluded that the use of campaign funds for legal fees and expenses does not constitute personal use when the legal proceedings involve allegations directly relating to the candidate's campaign or duties as a Federal officeholder. *See, e.g.,* Advisory Opinions 2008-07 (Vitter), 2006-35 (Kolbe for Congress), 2005-11 (Cunningham), and 2003-17 (Treffinger).

As discussed above, the advisory opinion request and accompanying media reports indicate that the Federal government is investigating campaign contributions allegedly made by PMA Group and its clients to Representative Visclosky. Additionally, the reports discuss appropriations earmarks purportedly obtained by Representative Visclosky for various PMA Group clients. The allegations concern Representative Visclosky's campaign and duties as a Federal officeholder because Representative Visclosky allegedly received the contributions in question as part of his campaign, and his alleged actions regarding the congressional appropriations process are directly related to his duties as a Federal officeholder. Therefore, based on the representations made in the advisory opinion request and accompanying news articles, the Commission concludes that the legal fees and expenses associated with the Federal investigation would not exist irrespective of Representative Visclosky's campaign or duties as a Federal officeholder. Accordingly, the Committee may use campaign funds to pay legal fees and expenses incurred by Representative Visclosky in connection with the Federal investigation into the alleged provision of illegal campaign contributions by the PMA Group and its clients to the Committee, and Representative Visclosky's allegedly improper earmarking of appropriations for clients of PMA, and any other legal proceedings that involve the same allegations.

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

In accordance with 2 U.S.C. 432(c), the Committee must maintain appropriate documentation of any disbursements made to pay legal expenses incurred in connection with the Federal investigation and other legal proceedings. *See also* 11 CFR 102.9(b) and 104.11. In addition, the Committee must report all funds disbursed for such legal expenses as operating expenditures, noting the payee's full name, address, and a detailed description of the purpose of the payment. 11 CFR 104.3(b)(2) and (4).

This advisory opinion does not address whether the Committee may use campaign funds to pay legal expenses incurred in responding to the press in connection with the Federal investigation, as that question was not presented in the advisory opinion request.

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

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

On behalf of the Commission,

(signed)  
Steven T. Walther  
Chairman