



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 28, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2009-20

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's current and former congressional staff members in connection with a Federal investigation of Representative Visclosky.

The Commission concludes that the Committee may use campaign funds to pay legal fees and expenses incurred by Representative Visclosky's current and former congressional staff in connection with the Federal investigation of Representative Visclosky's 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 any such employee's representation in legal proceedings regarding allegations that are not related to Representative Visclosky's 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 July 9, 2009, and telephone conversations with Commission attorneys.

Peter J. 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. The Committee is Representative Visclosky's principal campaign committee.

According to media reports provided, 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."¹ 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.² 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.³ Recently, as part of the ongoing Federal investigation, Representative Visclosky's former Chief of Staff was served with a grand jury subpoena to produce documents. *See* 155 Cong. Rec. H6017 (daily ed. June 2, 2009) (communication from Chief of Staff of Representative Visclosky).

Question Presented

May the Committee use campaign funds to pay legal expenses incurred by Representative Visclosky's current and former congressional staff 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's current and former congressional staff 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. The allegations relate to

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.

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>.

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 current or former congressional staff members' 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 include: (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; and (3) 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); *see also* 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 determines on a case-by-case basis whether an expense would fall within the definition of "personal use." 11 CFR 113.1(g)(1)(ii). Commission regulations specifically provide that "legal expenses" are subject to a case-by-case determination. 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 Expenditures; Reports by Political Committees; 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.⁴ *See, e.g.*, Advisory Opinions 2009-10 (Visclosky), 2008-07 (Vitter), 2006-35 (Kolbe), 2005-11 (Cunningham), and 2003-17 (Treffinger).

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.

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 Commission has previously concluded that 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. Advisory Opinion 2009-10 (Visclosky).

Current and former staff members in Representative Visclosky's House office are involved in the Federal investigation because of their current and former employment relationships with Representative Visclosky in his capacity as a U.S. Congressman and a candidate. Therefore, based on the representations made in the advisory opinion request and accompanying news articles, the Commission concludes that current and former office staff members' 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's current and former congressional staff 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 . . . representation in legal proceedings regarding any allegations that are not related to [the Congressman's] campaign activity or duties as a Federal officeholder would constitute an impermissible personal use." Advisory Opinions 2009-10 (Visclosky) and 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* 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).

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