

## **PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2011-05 is now available for comment. It was requested by Representative Lee Terry, and is scheduled to be considered by the Commission by tally vote on Wednesday, March 30, 2011.

If you wish to comment on DRAFT ADVISORY OPINION 2011-05, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on March 30, 2011.
- 4) The Commission will generally not accept comments received after the deadline. 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.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

## **FOR FURTHER INFORMATION**

Press inquiries:	Judith Ingram Press Officer (202) 694-1220
Commission Secretary:	Shawn Woodhead Werth (202) 694-1040
Comment Submission Procedure:	Rosemary C. Smith Associate General Counsel (202) 694-1650

**Other inquiries:**

To obtain copies of documents related to Advisory Opinion 2011-05, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

**ADDRESSES**

Office of the Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Office of General Counsel  
ATTN: Rosemary C. Smith, Esq.  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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2011 MAR 29 P 12:02

March 29, 2011

**MEMORANDUM**

TO: The Commission

FROM: Christopher Hughey *pch*  
Acting General Counsel

Rosemary C. Smith *RCJ*  
Associate General Counsel

Amy L. Rothstein *ALR*  
Assistant General Counsel

Jessica Selinkoff *JS*  
Attorney

Subject: AO 2011-05 (Rep. Lee Terry)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be considered by 48-hour tally vote on March 30, 2011.

Attachment

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2011 MAR 29 P 12: 02

1 ADVISORY OPINION 2011-05

2

3 The Honorable Lee Terry

4 Member of Congress

5 Lee Terry for Congress

6 P.O. Box 540098

7 Omaha, NE 68154

8

9 Dear Representative Terry:

**DRAFT**

10 We are responding to your advisory opinion request concerning the application of  
11 the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission  
12 regulations to the use of campaign funds to pay for enhanced security at your home.

13 The Commission concludes that because the need for enhanced security at your  
14 home is due to threats to you stemming from your role as a Member of Congress and a  
15 candidate for Federal office, the use of campaign funds to pay for such upgrades does not  
16 constitute personal use of campaign funds, and is permissible under the Act and  
17 Commission regulations.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on  
20 March 16, 2011.

21 Representative Lee Terry is a Member of the U.S. House of Representatives from  
22 Nebraska's 2nd Congressional District. Lee Terry for Congress (the "Committee") was,  
23 and remains, his principal campaign committee. Representative Terry was both a Federal  
24 officeholder and a candidate for re-election to the House of Representatives when the  
25 events giving rise to this request occurred.

26 In October 2008, an individual reportedly became angry at receiving campaign  
27 literature from Representative Terry and caused several disturbances at Representative

1 Terry's congressional office. After Representative Terry's congressional staff informed  
2 the individual that he should register his complaint with Representative Terry's campaign  
3 staff, the individual stated that he knew where Representative Terry's residence was and  
4 that he would go to the residence to voice his anger. As a result of this threat, the local  
5 Sheriff's office increased its patrol presence in Representative Terry's neighborhood.

6 On December 31, 2008, the individual left voicemails at the Nebraska Governor's  
7 office indicating that he had "a right to show up at" Representative Terry's residence  
8 whenever he desired to do so. Representative Terry altered his New Year's Eve plans in  
9 response to this threat in order to stay home with his three young sons. The local  
10 Sheriff's office again increased its patrol presence in Representative Terry's  
11 neighborhood.

12 On April 22, 2009, in the middle of the night, a person left at the front step of  
13 Representative Terry's residence campaign literature from Representative Terry's 2008  
14 campaign. This literature was addressed to the individual. In an investigative interview  
15 with law enforcement, an acquaintance of the individual stated that the individual "is  
16 striving against the abuse of power by public officials."<sup>1</sup>

17 The individual was later charged with two counts of stalking and nine counts of  
18 intimidation by telephone. The victims were a reporter who had reported about the April  
19 22 incident at Representative Terry's home and the local Sheriff. During the  
20 proceedings, the trial judge increased the bond for the individual to \$1 million because of  
21 the individual's continuing illegal harassing conduct. The individual pled guilty to two  
22 counts of intimidation by telephone and was incarcerated from March 18, 2010 until

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<sup>1</sup> The individual has also previously been found guilty and sentenced for stalking the Nebraska Attorney General.

1 August 4, 2010. The individual once again resides in Representative Terry's  
2 congressional district.

3 Since the individual's release from custody, he has been observed by law  
4 enforcement, on several occasions, driving past Representative Terry's congressional  
5 office and through Representative Terry's neighborhood.

6 Representative Terry consulted the U.S. Capitol Police about the incidents with  
7 the individual. The U.S. Capitol Police recommended the installation of various  
8 components of a security system, including CCTV video surveillance, at Representative  
9 Terry's home. The local Sherriff's office also recommended the installation of a security  
10 system that includes video surveillance. While Representative Terry has previously  
11 installed a security alarm system at his home, he now wants to install an exterior CCTV  
12 system, the estimated cost of which will not exceed \$5000. Representative Terry  
13 confirmed that the security upgrades will not result in any structural improvements to, or  
14 increase the value of, Representative Terry's property.

15 ***Question Presented***

16 *May Representative Terry use campaign contributions to offset the costs of*  
17 *installing the recommended additional security measures to his home?*

18 ***Legal Analysis and Conclusions***

19 Yes, Representative Terry may use campaign contributions to offset the costs of  
20 installing the recommended additional security measures to his home because these costs  
21 would not constitute personal use of campaign funds under 2 U.S.C. 439a(b).

22 The Act identifies six categories of permissible uses of contributions accepted by  
23 a Federal candidate. They are: (1) otherwise authorized expenditures in connection with

1 the candidate's campaign for Federal office; (2) ordinary and necessary expenses  
2 incurred in connection with the duties of the individual as a holder of Federal office;  
3 (3) contributions to organizations described in 26 U.S.C. 170(c); (4) transfers, without  
4 limitation, to national, State, or local political party committees; (5) donations to State  
5 and local candidates subject to the provisions of State law; and (6) any other lawful  
6 purpose not prohibited by 2 U.S.C. 439a(b). 2 U.S.C. 439a(a); *see also* 11 CFR  
7 113.2(a)-(e).

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

14 The Act and Commission regulations provide a non-exhaustive list of items that  
15 would constitute personal use, none of which applies here. *See* 2 U.S.C. 439a(b)(2)(A)-  
16 (I); 11 CFR 113.1(g)(1)(i)(A)-(J). For items not on this list, such as payments for home  
17 security systems, the Commission determines on a case-by-case basis whether an expense  
18 would fall within the definition of "personal use." 11 CFR 113.1(g)(1)(ii). The  
19 Commission has long recognized that if a candidate "can reasonably show that the  
20 expenses at issue resulted from campaign or officeholder activities, the Commission will  
21 not consider the use to be personal use." Explanation and Justification for Final Rules on  
22 Personal Use of Campaign Funds, 60 FR 7862, 7867 (Feb. 9, 1995).

1           The Commission has previously concluded that payments for a home security  
2 system under circumstances very similar to those presented here do not constitute  
3 personal use under the Act and Commission regulations. Advisory Opinion 2009-08  
4 (Gallegly) concerned Representative Gallegly, an officeholder and candidate for Federal  
5 office, whose home was approached on several occasions by an individual who may have  
6 constituted an ongoing threat to the safety of Representative Gallegly and members of  
7 Representative Gallegly's family. The facts suggested that the individual was motivated  
8 by Representative Gallegly's public role as a candidate and activities as a Member of  
9 Congress. The proposed security upgrades to Representative Gallegly's home were  
10 recommended by the U.S. Capitol Police specifically because of the continuing threat  
11 posed by this individual. Additionally, the recommended security upgrades, which were  
12 estimated to cost slightly more than those proposed by Representative Terry here, would  
13 not involve any structural improvements to, and were not intended to increase the value  
14 of, the Congressman's home. Based on these facts, the Commission concluded that the  
15 individual's actions would not have occurred had Representative Gallegly not been a  
16 Member of Congress or a candidate for re-election, and that the expenses for the  
17 proposed upgrades to the Congressman's security system would not exist irrespective of  
18 the Congressman's campaign or duties as a Federal officeholder.

19           In the facts presented in this request, the individual appears to be similarly  
20 motivated by both Representative Terry's campaign and his role as a Member of  
21 Congress. The individual reportedly became angry initially at receiving campaign  
22 literature from Representative Terry. The individual has left campaign literature  
23 addressed to him at the front step of Representative Terry's residence. A law



1 enforcement interview indicates that the individual “is striving against the abuse of power  
2 by public officials.” The individual has caused several disturbances and engaged in  
3 behavior related to Representative Terry’s home that the local Sheriff considers to be a  
4 threat. The individual appears to have a history of stalking, harassment, and threats and,  
5 now that he is no longer incarcerated, may continue to pose a risk to Representative Terry  
6 at his family home. The U.S. Capitol Police recommend additional security measures,  
7 including the installation of CCTV video surveillance, at Representative Terry’s home.  
8 The U.S. Capitol Police notes that its recommendations are in accordance with “standard  
9 countermeasures.” The proposed security upgrades would not result in any structural  
10 improvements to, and are not intended to increase the value of, Representative Terry’s  
11 property.

12       Based on these facts, the Commission concludes that the individual’s actions  
13 would not have occurred had Representative Terry not been a Member of Congress or a  
14 candidate for re-election. The expenses for the proposed upgrades to the Congressman’s  
15 security system would not exist irrespective of the Congressman’s campaign or duties as  
16 a Federal officeholder. Therefore, the use of campaign funds to pay for these security  
17 system upgrades would not constitute personal use of campaign contributions, and would  
18 not be prohibited by the Act or Commission regulations. 2 U.S.C. 439a(b).

19       This response constitutes an advisory opinion concerning the application of the  
20 Act and Commission regulations to the specific transaction or activity set forth in your  
21 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
22 of the facts or assumptions presented, and such facts or assumptions are material to a  
23 conclusion presented in this advisory opinion, then the requestor may not rely on that

1 conclusion as support for its proposed activity. Any person involved in any specific  
2 transaction or activity which is indistinguishable in all its material aspects from the  
3 transaction or activity with respect to which this advisory opinion is rendered may rely on  
4 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
5 conclusions in this advisory opinion may be affected by subsequent developments in the  
6 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.  
7 The cited advisory opinion is available on the Commission's website, [www.fec.gov](http://www.fec.gov), or  
8 directly from the Commission's Advisory Opinion searchable database at  
9 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Cynthia L. Bauerly  
Chair