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By Office of the Commission Secretary at 11:30 am, Jul 12, 2022



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 22-27-B
AGENDA ITEM
For meeting of July 14, 2022
SUBMITTED LATE

July 12, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

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Subject: Draft AO 2022-07 (Swalwell) Draft B

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 a.m. (Eastern Time) on July 14, 2022.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2022-07

2

3 Rebecca J. Olson, Esq.

4 Miller & Olson, LLP

5 400 Capitol Mall, Suite 1545

6 Sacramento, CA 95814-4434

7

8 Dear Ms. Olson:

DRAFT B

9 We are responding to your advisory opinion request on behalf of Congressman
10 Eric Swalwell and Swalwell for Congress (the “Committee”) concerning the application
11 of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and
12 Commission regulations to the proposed use of campaign funds to pay certain of
13 Congressman Swalwell’s childcare expenses. Commission regulations state that certain
14 expenses for travel, or portions of travel, involving campaign or officeholder activities do
15 not constitute personal use when a candidate committee uses campaign funds to pay for
16 them. The Commission concludes that it is similarly not personal use for the Committee
17 to use campaign funds to pay Congressman Swalwell’s childcare expenses that result
18 directly from such travel, or any portion of such travel.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 May 26, 2022.

22 Congressman Swalwell currently represents California Congressional District 15.
23 He also serves as Co-Chair of the House Democratic Steering and Policy Committee,
24 which is a party leadership position that can be held only by a Member of Congress. His
25 duties as Co-Chair “include getting more Democrats elected to Congress.”¹ In addition,

¹ Advisory Opinion Request (“AOR”) at AOR001.

1 Congressman Swalwell is a candidate for California Congressional District 14 in the
2 2022 elections. The Committee is his principal campaign committee.²

3 Congressman Swalwell and his wife work full-time and have three young children
4 at home. Congressman Swalwell often pays for childcare when conducting campaign
5 activities locally. In addition, Congressman Swalwell “is often expected to travel and be
6 away from home, including overnight,” “[a]s part of his duties as” an officeholder,
7 candidate, and fundraiser for other Democratic candidates.³ Further, “because of his
8 status as a well-known member of Congress,” Congressman Swalwell also receives
9 invitations, including invitations from foreign governments for information gathering
10 visits, “that may require him and sometimes his spouse to be away for multiple days.”⁴

11 ***Questions Presented***

- 12 1. *May Congressman Swalwell use campaign funds to pay for overnight childcare if*
13 *he travels for campaign events for his campaign or other campaigns, if his spouse*
14 *is not available to care for the children?*
15
16 2. *May Swalwell for Congress pay for childcare expenses for Congressman*
17 *Swalwell’s children if he travels at the request of foreign governments or other*
18 *entities because of his status as a Member of Congress? If yes, would that include*
19 *the expenses for overnight childcare as well?*
20

21 ***Legal Analysis and Conclusions***

- 22 1. *May Congressman Swalwell use campaign funds to pay for overnight childcare if*
23 *he travels for campaign events for his campaign or other campaigns, if his spouse*
24 *is not available to care for the children?*
25

² See Swalwell for Congress, Statement of Candidacy, FEC Form 2 (Jan. 15, 2022), <https://docquery.fec.gov/pdf/513/202201159474990513/202201159474990513.pdf> (last viewed June 21, 2022)

³ AOR001.

⁴ *Id.*

1 2. *May Swalwell for Congress pay for childcare expenses for Congressman*
2 *Swalwell's children if he travels at the request of foreign governments or other*
3 *entities because of his status as a Member of Congress? If yes, would that include*
4 *the expenses for overnight childcare as well?*
5

6 Yes, Congressman Swalwell may use campaign funds to pay for overnight
7 childcare if he travels for campaign events for his campaign or other campaigns to the
8 extent such expenses would not exist irrespective of Congressman Swalwell's campaign
9 or duties as a holder of federal office.

10 Under the Act and Commission regulations, a candidate's authorized committee
11 may use campaign funds for several specific purposes, including "for otherwise
12 authorized expenditures in connection with the campaign for Federal office of the
13 candidate or individual" and "for ordinary and necessary expenses incurred in connection
14 with duties of the individual as a holder of Federal office." Additionally, an authorized
15 committee has wide latitude to use campaign funds "for any other lawful purpose" that
16 does not constitute conversion of campaign funds to "personal use."⁵ The Act and
17 Commission regulations define "personal use" as the use of campaign funds "to fulfill
18 any commitment, obligation, or expense of a person that would exist irrespective of the
19 candidate's election campaign" or duties as a federal officeholder.⁶

20 The Act and Commission regulations provide a non-exhaustive list of expenses
21 that, when paid using campaign funds, constitute *per se* personal use.⁷ For expenses not
22 included on this list, the Commission determines, on a case-by-case basis, whether the

⁵ See 52 U.S.C. § 30114(a)(1)-(2), (a)(6); 11 C.F.R. § 113.2(a), (e).

⁶ 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g).

⁷ See 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1 (g)(1)(i).

1 use is a prohibited “personal use” — that is, whether the expense would exist irrespective
2 of the candidate’s campaign or federal officeholder duties.⁸ Officeholder duties include
3 fact-finding meetings and appearances or speeches made in an official capacity.⁹

4 The Act and Commission regulations do not expressly address childcare
5 expenses. The Commission, accordingly, determines whether the proposed use of
6 campaign funds for childcare expenses would exist irrespective of the candidate’s
7 campaign for federal office or federal officeholder duties.

8 In previous advisory opinions, the Commission has considered whether federal
9 candidates may use campaign funds to pay childcare costs incurred as a result of their
10 own campaigns. In Advisory Opinion 2018-06 (Liuba for Congress), for example, a
11 federal candidate who had given up her in-home consulting work in order to campaign
12 and hired a caregiver for her children proposed to use campaign funds to pay childcare
13 expenses when her campaign responsibilities prevented her from caring for the children
14 herself.¹⁰ Similarly, in Advisory Opinion 2019-13 (MJ for Texas), a federal candidate
15 who had left her job to work full-time on her campaign proposed to use campaign funds
16 to pay for full-time daycare for her children when her campaign activities prevented her
17 from providing the care herself.¹¹ In both advisory opinions, the Commission concluded
18 that the candidates could use campaign funds to pay childcare expenses to the extent the

⁸ See 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g)(1)(ii).

⁹ 11 C.F.R. § 113.2(a), (a)(1); *see also* 11 C.F.R. § 113.1(g)(5) (“the use of campaign funds for an expense that would be a political expense under the rules of the United States House of Representatives or an officially connected expense under the rules of the United States Senate is not personal use to the extent that the expense is an expenditure under subpart D of [11 C.F.R.] part 100 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office”).

¹⁰ Advisory Opinion 2018-06 (Liuba for Congress) at 1-2.

¹¹ Advisory Opinion 2019-13 (MJ for Texas) at 1-2.

1 expenses were a “direct result of campaign activity,” because such expenses would not
2 have existed irrespective of the candidates’ campaigns.¹²

3 The requestors state that Congressman Swalwell’s campaign activities will
4 occasionally require him to be away from home overnight, and that he will incur
5 expenses for overnight childcare during those times when his wife is unavailable to care
6 for their children. To the extent that Congressman Swalwell’s overnight childcare
7 expenses will be a direct result of Congressman Swalwell’s travel for his own campaign
8 activities, the Commission concludes that those expenses would not exist irrespective of
9 his campaign and, therefore, may be paid with campaign funds.¹³ This conclusion is
10 consistent with the Commission’s conclusions in Advisory Opinion 2018-06 (Liuba for
11 Congress) and Advisory Opinion 2019-13 (MJ for Texas).

12 Although the Commission has not explicitly addressed whether an authorized
13 committee may use campaign funds to pay for childcare needs that arise from a
14 candidate’s or officeholder’s travel for another candidate’s campaign or for official
15 events based on his status as an officeholder, the Commission’s analysis and conclusions
16 in the previous advisory opinions apply equally here.

17 Congressman Swalwell serves as Co-Chair of the House Democratic Steering and
18 Policy Committee. His official House website states that he “was selected by Democratic
19 Leader Pelosi and elected by [his] colleagues to help lead this committee, which sets the

¹² Advisory Opinion 2018-06 (Liuba for Congress) at 3, Advisory Opinion 2019-13 (MJ for Texas) at 3; *see also* Advisory Opinion 1995-42 (McCrery) at 2 (approving proposed use of campaign funds to pay Congressman’s childcare expenses when he and his wife attend campaign events, where childcare expenses result only from campaign activity and otherwise would not exist).

¹³ *See* 52 U.S.C. § 30114(a)(1), (b); 11 C.F.R. § 113.1(g).

1 Democratic policy agenda and nominates Democratic Members for committee
2 assignments.”¹⁴ The requestors describe the position of Co-Chair as “a party leadership
3 position that can only be held by a Member of Congress.”¹⁵

4 The requestors state that Congressman Swalwell’s duties as Co-Chair of the
5 House Democratic Steering and Policy Committee “include getting more Democrats
6 elected to Congress,”¹⁶ and he “often is expected to travel and be away from home,
7 including overnight,” “[a]s part of his duties.”¹⁷ The requestors further state that
8 Congressman Swalwell receives invitations, including invitations from foreign
9 governments for information-gathering visits, “because of his status as a well-known
10 [M]ember of Congress.”¹⁸ These invitations may require Congressman Swalwell and,
11 occasionally, his accompanying spouse, to be away from home for several days at a time.

12 Commission regulations state that certain expenses for travel, or portions of
13 travel, involving campaign or officeholder activities do not constitute personal use when
14 a candidate committee uses campaign funds to pay for them.¹⁹ The Commission

¹⁴ Congressman Eric Swalwell, Committee, Leadership and Caucuses, <https://swalwell.house.gov/about/committees-and-caucuses> (last viewed June 20, 2022).

¹⁵ AOR001.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See, e.g.*, 11 C.F.R. § 113.1(g)(1)(ii)(C) (providing that where “campaign funds [are used] to pay expenses associated with travel that involves both personal activities and campaign or officeholder activities, the incremental expenses that result from the personal activities are personal use, unless the person(s) benefiting from this use reimburse(s) the campaign account within thirty days for the amount of the incremental expenses”) and (g)(5) (political or officially connected expenses); Advisory Opinion 2005-09 (Dodd) at 3 (approving use of campaign funds to pay travel expenses of officeholder’s minor children when officeholder and spouse traveled to participate in functions directly connected to officeholder’s *bona fide* official responsibilities, because children’s travel costs “arise from Senator Dodd’s duties as a Federal officeholder”); Advisory Opinion 1995-20 (Roemer) (approving use of campaign funds to pay travel

1 concludes that it is similarly not personal use for the Committee to use campaign funds to
2 pay for Congressman Swalwell’s childcare expenses that directly result from such travel,
3 or any portion of such travel. To the extent that other expenses associated with the
4 travel, or a portion of the travel, would constitute personal use if paid for with campaign
5 funds, childcare expenses arising directly from that travel or that portion of travel would
6 also constitute “personal use.”

7 The Commission expresses no opinion regarding the application of the rules of the
8 U.S. House of Representatives to the proposed activities, because those rules are not within
9 the Commission’s jurisdiction.

10 This response constitutes an advisory opinion concerning the application of the
11 Act and Commission regulations to the specific transaction or activity set forth in your
12 request.²⁰ The Commission emphasizes that, if there is a change in any of the facts or
13 assumptions presented, and such facts or assumptions are material to a conclusion
14 presented in this advisory opinion, then the requestors may not rely on that conclusion as
15 support for their proposed activity. Any person involved in any specific transaction or
16 activity which is indistinguishable in all its material aspects from the transaction or
17 activity with respect to which this advisory opinion is rendered may rely on this advisory
18 opinion.²¹ Please note that the analysis or conclusions in this advisory opinion may be
19 affected by subsequent developments in the law including, but not limited to, statutes,
20 regulations, advisory opinions, and case law. Any advisory opinions cited herein are

expenses of candidate’s minor children, where expenditure was required for candidate and spouse to travel to candidate’s home district to participate in campaign events).

²⁰ See 52 U.S.C. § 30108.

²¹ See *id.* § 30108(c)(1)(B).

1 available on the Commission’s website. Advisory opinions do not address questions of
2 general law, hypothetical situations, the activities of third parties, or past activity.²²

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On behalf of the Commission,

Allen J. Dickerson
Chairman

²² See 11 C.F.R. § 112.1(b).