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Washington, DC 20463

2008 APR 10 P 2:13

April 10, 2008

AGENDA ITEM

For Meeting of: 04-17-08

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: Draft AO 2008-02

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 17, 2008.

Attachment

1 ADVISORY OPINION 2008-02

2

3 Todd Goldup

4 P.O. Box 338

5 Clifton Park, NY 12065

6

7 Dear Mr. Goldup:

DRAFT

8 We are responding to your advisory opinion request concerning the application of
9 the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission
10 regulations to the use of campaign funds for the payment of candidate salary, childcare
11 and vehicle expenses. The Commission concludes that your principal campaign
12 committee may not use campaign funds to pay you a candidate salary under the
13 circumstances presented, but may use campaign funds to pay for childcare and vehicle
14 expenses, because they are otherwise authorized expenditures in connection with the
15 campaign and would not exist irrespective of your candidacy.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 March 7, 2008, your telephone conversation with Commission staff on March 12, 2008,
19 and your email received on March 17, 2008.

20 You are a candidate for the 20th Congressional District of New York,¹ and
21 Goldup for Congress serves as your principal campaign committee.²

22 You are a homemaker, and you had no earned income during the year prior to
23 becoming a candidate for the U.S. House of Representatives. You have two minor
24 children: a seven-year-old and a three-year-old. Your wife works full-time.

¹ Commission records indicate that you filed your Statement of Candidacy on February 12, 2008.

² Commission records indicate that Goldup for Congress filed its Statement of Organization on February 21, 2008.

1 You are at the beginning stages of your campaign and do not currently travel very
2 frequently for campaign purposes. However, you anticipate that you will travel on a full-
3 time basis throughout the 20th Congressional District of New York. Due to your
4 anticipated campaign travels, you state that your three-year-old child will require full-
5 time daycare at about \$200 per week. Your seven-year-old child will require occasional
6 after school childcare, and once school is out for the summer beginning in June, she will
7 require full-time daycare at about \$200 per week.

8 You have one family car. Due to the shortage of space in certified daycare
9 facilities near your home, you anticipate that you will need to travel about 20 miles per
10 day to take your child(ren) to and from daycare. This travel will result in additional
11 mileage on the family car. You also anticipate that you will incur additional mileage on
12 the family car once you begin traveling full-time throughout the 20th Congressional
13 District of New York for campaign purposes. You state that the daycare for your two
14 children and the additional vehicle costs would not exist but for your candidacy.

15 ***Questions Presented***

- 16 1. *May Goldup for Congress use campaign funds to pay you a candidate salary?*
17
18 2. *May Goldup for Congress use campaign funds to pay for the childcare expenses*
19 *described in your request?*
20
21 3. *May Goldup for Congress use campaign funds to pay for the vehicle expenses*
22 *described in your request?*
23

24 ***Legal Analysis and Conclusions***

25
26 *Question 1. May Goldup for Congress use campaign funds to pay you a*
27 *candidate salary?*

1 No, Goldup for Congress may not use campaign funds to pay you a candidate
2 salary.

3 The Act identifies six categories of permissible uses of contributions accepted by
4 a Federal candidate, including otherwise authorized expenditures in connection with the
5 candidate's campaign for Federal office. *See* 2 U.S.C. 439a(a)(1); *see also*
6 11 CFR 113.2. Contributions accepted by a candidate may not, however, be converted to
7 "personal use" by any person. *See* 2 U.S.C 439a(b)(1); 11 CFR 113.2. Commission
8 regulations define "personal use" as "any use of funds in a campaign account of a present
9 or former candidate to fulfill a commitment, obligation or expense of any person that
10 would exist irrespective of the candidate's campaign or duties as a Federal officeholder."
11 11 CFR 113.1(g); *see also* 2 U.S.C 439a(b)(2).

12 The Act and Commission regulations list a number of expense categories that
13 would constitute personal use, including "[s]alary payments by a candidate's principal
14 campaign to a candidate in excess of the lesser of: the minimum salary paid to a Federal
15 officeholder holding the Federal office that the candidate seeks; or the earned income that
16 the candidate received during the year prior to becoming a candidate."
17 11 CFR 113.1(g)(1)(i)(I); *see also* 2 U.S.C. 439a(b)(2)(A) – (I).

18 Here, the lesser of the minimum salary paid for the House seat you are seeking or
19 the earned income that you received during the year prior to becoming a candidate is the
20 latter, because, as a homemaker, you did not have any earned income in the last year
21 before becoming a candidate for the House. Thus, the Commission concludes that
22 Goldup for Congress may not use campaign funds to pay you a candidate salary.

1 *Question 2. May Goldup for Congress use campaign funds to pay for the*
2 *childcare expenses described in your request?*

3 Yes, Goldup for Congress may use campaign funds to pay for the childcare
4 expenses described in your request during the pendency of your campaign.

5 As discussed above, the Act identifies six categories of permissible uses of
6 contributions accepted by a Federal candidate, including otherwise authorized
7 expenditures in connection with the candidate's campaign for Federal office. *See*
8 2 U.S.C. 439a(a)(1); *see also* 11 CFR 113.2. Contributions accepted by a candidate may
9 not, however, be converted to "personal use" by any person. *See* 2 U.S.C 439a(b)(1);
10 11 CFR 113.2.

11 The Act and Commission regulations do not list childcare expenses as an expense
12 category that would constitute personal use. *See* 2 U.S.C. 439a(b)(2);
13 11 CFR 113.1(g)(1)(i). Accordingly, the Commission considers on a case-by-case basis
14 whether the use of campaign funds for childcare expenses constitutes "personal use." *See*
15 11 CFR 113.1(g)(1)(ii).

16 Although section 113.2 (describing permissible non-campaign use of funds in a
17 campaign account) does not specifically include childcare expenses, your situation is
18 similar to the facts presented in Advisory Opinion 1995-42 (McCrery). In that advisory
19 opinion, a Federal candidate and his wife, who was "an integral part of [the Federal
20 candidate's] campaign team," traveled extensively within the candidate's congressional
21 district for campaign purposes. Accordingly, the candidate's 20-month-old child required
22 occasional childcare. The Commission specifically approved the use of campaign funds
23 to pay for occasional childcare because such expenses "[would] be incurred only as a

1 direct result of campaign activity and would not otherwise exist.” Advisory Opinion
2 1995-42 (McCrery); *see also* 11 CFR 113.1(g).

3 Similarly here, you expect to incur additional childcare expenses as a direct result
4 of your campaign activity. Because you are currently a full-time homemaker, you state
5 that your anticipated campaign travels throughout the 20th Congressional District of New
6 York will require full-time daycare for your three-year-old child at about \$200 per week.
7 Additionally, your seven-year-old will require occasional after school daycare, and once
8 school is out for the summer in June, she will require full-time daycare at about \$200 per
9 week. The Commission concludes that such expenses are otherwise authorized
10 expenditures in connection with your campaign when incurred during the pendency of
11 your campaign and would not exist irrespective of your campaign. *See*
12 2 U.S.C. 439a(a)(1) and (b); 11 CFR 113.1(g); *see also* Advisory Opinion 1995-42
13 (McCrery). The fact that your situation requires full-time childcare, rather than the
14 occasional childcare presented in Advisory Opinion 1995-42, does not change the
15 analysis. Thus, Goldup for Congress may use campaign funds to pay for the daycare
16 expenses of your two minor children as described in your request, during the pendency of
17 your campaign.³

18 *Question 3. May Goldup for Congress use campaign funds to pay for the vehicle*
19 *expenses described in your request?*

³ Your request does not indicate whether you will pay for the daycare expenses with campaign funds or advance personal funds pending reimbursement by Goldup for Congress. Generally, the advance of personal funds to pay for a campaign expense constitutes an in-kind contribution. *See* 11 CFR 116.5. Goldup for Congress should not report the advance unless, at the end of the reporting period, the amount of previous contributions in the election cycle from you to Goldup for Congress, plus the amount of the advance, minus the amount of the reimbursement is greater than \$200. *See* Advisory Opinions 1996-20 (Lucas) and 1992-01 (Faulkner).

1 Yes, Goldup for Congress may use campaign funds to pay for the vehicle
2 expenses during the pendency of your campaign, as described below.

3 As discussed above, the Act identifies six categories of permissible uses of
4 contributions accepted by a Federal candidate, including otherwise authorized
5 expenditures in connection with the candidate's campaign for Federal office. *See*
6 2 U.S.C. 439a(a)(1); *see also* 11 CFR 113.2. Contributions accepted by a candidate may
7 not, however, be converted to "personal use" by any person. *See* 2 U.S.C 439a(b)(1);
8 11 CFR 113.2. The Commission analyzes whether the payment of vehicle expenses
9 constitutes personal use on a case-by-case basis under 11 CFR 113.1(g)(1)(ii)(D). If a
10 campaign committee uses campaign funds to pay expenses for a vehicle that is used for
11 both personal activities beyond a *de minimis* amount and campaign-related activities, the
12 portion of the vehicle expenses associated with the personal activities is personal use,
13 unless the person using the vehicle for personal activities reimburses the campaign
14 committee within thirty days. *Id.*

15 The Commission has previously considered the use of campaign funds for vehicle
16 expenses in Advisory Opinion 2001-03 (Meeks). In that advisory opinion, the
17 Commission approved a proposal, whereby a Federal candidate's principal campaign
18 committee would use campaign funds to purchase an automobile that would be used 95%
19 on campaign-related activity and 5% on personal use.⁴

20 Here, you anticipate that your campaign travels throughout the district and your
21 trips to and from your children's daycare will result in additional mileage on the family

⁴ In that advisory opinion, the Commission held that the personal use of the vehicle was *de minimis*, and thus required no reimbursement under 11 CFR 113.1(g)(1)(ii)(D). However, it concluded that the requestor's proposal to reimburse the campaign committee at the IRS standard mileage rate, while not required in that circumstance, was reasonable. *See* Advisory Opinion 2001-03 (Meeks).

1 car. Based on your assertion that the additional mileage is the direct result of your
2 campaign-related activities and would not exist irrespective of your candidacy, you may
3 use campaign funds to pay for the vehicle expenses referred to in your request, during the
4 pendency of your campaign. *See* 2 U.S.C. 439a(b)(2); 11 CFR 113.1(g). The
5 Commission has previously permitted a proposal to calculate mileage based on the IRS
6 standard mileage rate. *See* Advisory Opinion 2001-03 (Meeks). That standard is
7 currently 50.5 cents per mile.⁵

8 In addition, to document the campaign use and non-campaign use, a mileage log
9 that is updated with each use of the car would satisfy the recordkeeping requirements of
10 11 CFR 104.14(b), if maintained and retained as part of Goldup for Congress's
11 accounting records. *See also* 11 CFR 102.9(b)(1).

12 The Commission expresses no opinion regarding any tax ramifications of the
13 proposed activity, because these issues are not within its jurisdiction.

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

19

⁵ *See* Internal Revenue Service, Standard Mileage Rate (2008), available at <http://www.irs.gov/formspubs/article/0,,id=178004,00.html>; *see also* Internal Revenue Service, Rev. Proc. 2007-70 (The standard mileage rate is used in lieu of fixed and variable costs. "Items such as depreciation (or lease payments), maintenance and repairs, tires, gasoline (including all taxes thereon), oil, insurance, and license and registration fees are included in fixed and variable costs for this purpose.")

1 conclusion as support for its proposed activity. All cited advisory opinions are available
2 on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

3 Sincerely,

4

5 David M. Mason

6 Chairman