AGENDA DOCUMENT NO. 11-25

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2011 MAY 20 P 1:20

AGENDA ITEM

For Meeting of 5/26/11

May 20, 2011

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey pch
Acting General Counsel

Rosemary C. Smith RCS by pch
Associate General Counsel

Robert M. Knop RMK
Assistant General Counsel

Neven F. Stipanovic NFS by RMK
Attorney

Subject: AO 2011-07 (Fleischmann for Congress) – Drafts A and B

Attached are two proposed drafts (Drafts A and B) of the subject advisory opinion. We have been asked to place these drafts on the agenda for May 26, 2011.

Attachments

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ADVISORY OPINION 2011-07

Randall B. Hebert
Treasurer
Chuck Fleischmann for Congress, Inc.
Henderson, Hutcherson, McCullough, PLLC
1200 Market Street
Chattanooga, TN 37402

DRAFT A

Dear Mr. Hebert:

We are responding to your advisory opinion request on behalf of Chuck Fleischmann for Congress, Inc. (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 of a former campaign consultant.

The Commission concludes that the Committee may not use campaign funds to pay the legal fees and expenses described in this request because such payment would constitute personal use under the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on April 21, 2011, and public disclosure reports filed with the Commission.

Chuck Fleischmann is the U.S. Representative from the Third District of Tennessee. The Committee is Representative Fleischmann's principal campaign committee. In the 2010 primary election, Representative Fleischmann won the Republican Party nomination for the Third District of Tennessee over his opponent, Ms. Robin T. Smith.

During the 2010 campaign, Mr. John Bruce Saltsman, Jr. was a consultant employed by S&S Strategies LLC. *See* Request at 1; Committee's July 2010 Quarterly Report, FEC Form 3, Schedule A. Through S&S Strategies LLC, Mr. Saltsman provided campaign advice to then-candidate Fleischmann. *See* Request at 1. Mr. Saltsman is currently Chief of Staff for Representative Fleischmann's Congressional office.

Mr. Saltsman has been sued by Mr. Mark A. Winslow for tortious interference with a contractual relationship and defamation. Mr. Winslow was a campaign staffer for then-candidate Robin T. Smith during the 2010 Republican Party primary election. *See* Complaint at 1, *Winslow v. Saltsman*, No. 11-C229 (Davidson County, Tenn. Cir. Ct. filed Jan. 18, 2011).

Mr. Winslow's complaint alleges that Mr. Saltsman "improperly obtained" and disseminated to the press a confidential employment agreement between Mr. Winslow and his former employer, the Tennessee Republican Party. Further, the complaint alleges that then-candidate Fleischmann used Mr. Winslow's employment agreement during the campaign to attack his opponent, Ms. Smith. Mr. Saltsman, moreover, allegedly made defamatory statements about Mr. Winslow to the press. Lastly, the complaint alleges that Ms. Smith was defeated in large part due to Mr. Saltsman's actions.

Question Presented

May the Committee use campaign funds to pay legal fees and expenses of a campaign consultant arising from a civil suit against the campaign consultant brought by an employee of the candidate's opponent during the 2010 election?

Legal Analysis and Conclusions

No, the Committee may not use campaign funds to pay these legal fees and expenses because such payment would constitute personal use under the Act and Commission regulations.

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, 7867 (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. For example, "legal expenses associated with a divorce or charges of driving under the influence of alcohol will be treated as personal, rather than campaign or officeholder related." *Id.*

Here, the Committee seeks to use campaign funds to pay the legal expenses of a person other than the candidate. Representative Fleischmann is not a party to the underlying civil suit, nor is he seeking to use campaign funds to pay for his own legal fees. Rather, the legal fees would be used entirely for the purpose of representing Mr. Saltsman. In Advisory Opinion 1998-01 (Hilliard), the Commission concluded that campaign funds may not be used to pay legal expenses that are primarily for the purposes of representing persons other than the candidate. *See* Advisory Opinion 1998-01

(Hilliard) at n.4. The "other persons" in that instance referred to businesses and charities owned by the candidate.[1]

The Commission, nonetheless, has approved, in one instance, the use of campaign funds for legal fees of current and former congressional staff members. Advisory Opinion 2009-20 (Visclosky). That Advisory Opinion is relevant here because Mr. Saltsman is on the current staff of Representative Fleischmann, and is a former consultant to Representative Fleischmann's campaign. The Commission concludes, however, that the circumstances in Advisory Opinion 2009-20 (Visclosky) are materially different from those presented here. Congressional staffers in that instance incurred legal fees associated with the Federal government investigation of Representative Visclosky, for allegedly improper receipt of campaign contributions and obtaining earmarked appropriations for clients of a lobby group. In particular, the staff members had received, or expected to receive, grand jury subpoenas to produce documents related to the investigation. The underlying investigation, therefore, was directly related to the alleged actions of Representative Visclosky.[2]

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[1] The issue in that advisory opinion was whether campaign funds may be used to pay for legal fees related to media allegations of improper conduct by the candidate, his principal campaign committee, district congressional office, and businesses and charities owned by the candidate. Some of the allegations, including those regarding the improper conduct of the candidate-owned businesses and charities, were not campaign related. Nonetheless, the request stated that these allegations were campaign issues, and that the candidate had been forced to respond to them in a campaign or official context. *See* Advisory Opinion 1998-01 (Hilliard) at 2. In this context, the Commission approved the use of campaign funds to pay for legal fees of the candidate, as well as his principal campaign committee and the district congressional office, but not for other persons.

[2] In one other instance, the Commission has approved use of campaign funds legal expenses related to media inquiries and allegations concerning both a candidate and the candidate's spouse. Advisory Opinion 1996-24 (Cooley). Specifically, the campaign funds paid for conferences between the candidate, his spouse, and the candidate's legal counsel. The campaign funds, however, were primarily used to pay legal fees of the candidate.

Here, in contrast, the relationship between the underlying civil lawsuit and Representative Fleischmann's campaign or officeholder duties is significantly more attenuated. Although Mr. Saltsman currently is Representative Fleischmann's Chief of Staff, he was not a campaign staffer at the time the alleged events occurred, or at any other point in the campaign. Mr. Saltsman advised the campaign, but he did so as an employee of another company, S&S Strategies LLC. The Committee's reports filed with the Commission show that the Committee made disbursements for consulting services to S&S Strategies LLC, but not to Mr. Saltsman. *See* Committee's July 2010 Quarterly Report, 2010 Post-Election Report, and 2010 Year-End Report. In effect, S&S Strategies LLC acted as a third party vendor in relation to the Committee. Legal fees incurred by an employee of a vendor are a step further removed from the candidate's campaign than was the case in Advisory Opinion 2009-20 (Visclosky). Vendors are in the business of providing goods and services. *See e.g.*, 11 CFR 116.1(d) (defining a commercial vendor). As such, vendors have an arm's length relationship with the candidate or a political committee and can protect themselves contractually against legal expenses arising from the candidate's campaign. For example, a vendor may include an indemnification clause in its contract with the candidate or a political committee that would cover such legal expenses. Permitting the use of campaign funds in the circumstances presented here could open the door to uses of campaign funds for legal expenses of vendors that would exist irrespective of the candidate's election campaign or individual's duties as a Federal officeholder.

Moreover, it is unclear from the request what role Mr. Saltsman played in then-candidate Fleischmann's campaign. Mr. Winslow's complaint alleges that Mr. Saltsman

"acted as a message and media consultant and assisted with shaping and creating campaign advertisements, or attack ads, directed at Ms. Smith." *See* Complaint at 5. But the Committee itself merely states that Mr. Saltsman was a "campaign consultant," without any information about Mr. Saltsman's role with the campaign.[3] *See* Request at 1. The exact nature of the relationship between Mr. Saltsman and the campaign, therefore, is unclear. Without additional information about Mr. Saltsman's role in the campaign, no conclusions may be drawn about the relationship between the campaign and Mr. Saltsman's conduct alleged in the complaint. There is no information in the request that Mr. Saltsman was acting on behalf of the campaign or within the scope of his duties for the campaign, or that his actions were known, discussed, approved of, or acquiesced to by the campaign.

In addition, no allegation is made in Mr. Winslow's complaint that Mr. Saltsman acted at the request of either Representative Fleischmann or the Committee, or even merely with their knowledge. Nor does the Committee indicate that this litigation might become an issue for Representative Fleischmann as an officeholder or candidate for reelection, unlike in Advisory Opinion 2009-20 (Visclosky). Indeed, the complaint does not allege any improper conduct by either Representative Fleischmann or by the Committee. While Representative Fleischmann allegedly benefited from Mr. Saltsman's activity, this alone would not justify the use of campaign funds to pay Mr. Saltsman's legal fees.

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[3] Indeed, Mr. Saltsman reportedly described to the press his involvement with the campaign as one of a "'general consultant' and not as one who handles the day-to-day," and that his 'main living these days' was not made off of politics, but [he] certainly [does] like to help out good candidates when [he] can." *See* Saltsman to Bring a Little 'Magic' to Neophyte's Congressional Campaign, nashvillepost.com, available at http://nashvillepost.com/print/26441 (last visited 04/26/2011).

The Commission, thus, concludes that the present circumstances are much closer to those presented in Advisory Opinion 1998-01 (Hilliard) than in Advisory Opinion 2009-20 (Visclosky). Therefore, the underlying legal proceeding does not involve allegations directly relating to the Representative Fleischmann's campaign or duties as a Federal officeholder. Accordingly, the Committee may not use campaign funds to pay legal fees described in this request.

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 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. The cited advisory opinions are available on the Commission's Web site, www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Cynthia L. Bauerly
Chair

ADVISORY OPINION 2011-07

Randall B. Hebert
Treasurer
Chuck Fleischmann for Congress, Inc.
Henderson, Hutcherson, McCullough, PLLC
1200 Market Street
Chattanooga, TN 37402

DRAFT B

Dear Mr. Hebert:

We are responding to your advisory opinion request on behalf of Chuck Fleischmann for Congress, Inc. (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 of a former campaign consultant.

The Commission concludes that the Committee may use campaign funds to pay the legal fees and expenses described in this request because such payment would not constitute personal use under the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on April 21, 2011, and public disclosure reports filed with the Commission.

Chuck Fleischmann is the U.S. Representative from the Third District of Tennessee. The Committee is Representative Fleischmann's principal campaign committee. In the 2010 primary election, Representative Fleischmann won the Republican Party nomination for the Third District of Tennessee over his opponent, Ms. Robin T. Smith.

During the 2010 campaign, Mr. John Bruce Saltsman, Jr. was a consultant employed by S&S Strategies LLC. *See* Request at 1; Committee's July 2010 Quarterly Report, FEC Form 3, Schedule A. Through S&S Strategies LLC, Mr. Saltsman provided campaign advice to then-candidate Fleischmann. *See* Request at 1. Mr. Saltsman is currently Chief of Staff for Representative Fleischmann's Congressional office.

Mr. Saltsman has been sued by Mr. Mark A. Winslow for tortious interference with a contractual relationship and defamation. Mr. Winslow was a campaign staffer for then-candidate Robin T. Smith during the 2010 Republican Party primary election. *See* Complaint at 1, *Winslow v. Saltsman*, No. 11-C229 (Davidson County, Tenn. Cir. Ct. filed Jan. 18, 2011).

Mr. Winslow's complaint alleges that " in his compensated role with Mr. Fleischmann's congressional campaign, Mr. Saltsman acted as a message and media consultant and assisted with shaping and creating campaign advertisements, or attack ads, directed at Ms. Smith" and "improperly obtained" and disseminated to the press a confidential employment agreement between Mr. Winslow and his former employer, the Tennessee Republican Party. *See* Complaint at 5. Further, the complaint alleges that then-candidate Fleischmann used the employment agreement that Mr. Saltsman obtained during the campaign to attack his opponent, Ms. Smith, including in a television advertisement and during a radio interview. *Id.* at 5 and 6. Moreover, during the same radio program, Mr. Saltsman allegedly made defamatory statements about Mr. Winslow regarding the same issue. *Id.* at 6. Lastly, the complaint alleges Ms. Smith was defeated "in large part due to" Mr. Saltsman's actions. *Id.*

Question Presented

May the Committee use campaign funds to pay legal fees and expenses of a campaign consultant arising from a civil suit against the campaign consultant brought by an employee of the candidate's opponent during the 2010 election?

Legal Analysis and Conclusions

Yes, the Committee may use campaign funds to pay these legal fees and expenses because such payment is for a lawful purpose that would not constitute personal use under the Act and Commission regulations.

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, 7867 (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. Thus, 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 2009-10 (Visclosky), 2008-07 (Vitter), 2006-35 (Kolbe), 2005-11 (Cunningham), and 2003-17 (Treffinger). On the other hand, "legal expenses associated with a divorce or charges of driving under the influence of alcohol will be treated as personal, rather than campaign or officeholder related." Explanation and Justification for Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 FR 7862, 7867 (Feb. 9, 1995)

Here, the Committee seeks to use campaign funds to pay the legal expenses of a person who was working as a campaign consultant for the candidate, namely Mr. Saltsman. In Advisory Opinion 2009-20 (Visclosky), the Commission approved the use of campaign funds for the legal fees of persons other than the candidate. In that instance,

Representative Visclosky's current and former congressional staff members had received, or expected to receive, grand jury subpoenas to produce documents related to a Federal investigation of Representative Visclosky for alleged improper receipt of campaign contributions and obtaining earmarked appropriations for clients of a lobby group. The Commission concluded the staffers' expenses "would not exist irrespective of Representative Visclosky's campaign or duties as a Federal officeholder."[1]

Here, the civil lawsuit relates directly to Mr. Saltsman's activities conducted during, and for the sole purpose of furthering, Representative Fleischmann's campaign. As the complaint states, Mr. Saltsman acted as the campaign's message and media consultant and participated in the creation of campaign ads directed at Ms. Smith. In that capacity, Mr. Saltsman allegedly acquired and publicized plaintiff's employment agreement, including in the form of a campaign ad, which provides the basis of the lawsuit. Moreover, according to the complaint, Mr. Fleischmann used the materials Mr. Saltsman obtained as the basis for many of the attacks that Mr. Fleischmann made himself as a candidate against Ms. Smith. In fact, the complaint attributes Mr. Fleischmann's primary victory over Ms. Smith "in large part" to Mr. Saltman's actions. As a result, the complaint against Mr. Saltsman would not exist irrespective of Representative Fleischmann's campaign.

[1] In one other instance, the Commission has approved use of campaign funds legal expenses related to media inquiries and allegations concerning both a candidate and the candidate's spouse. Advisory Opinion 1996-24 (Cooley). Specifically, the campaign funds paid for, *inter alia*, conferences between the candidate, his spouse, and the candidate's legal counsel. *Cf.* Advisory Opinion 1998-01 (Hilliard), in which the Commission concluded that campaign funds may not be used to pay legal expenses that are primarily for the purposes of representing persons other than the candidate with respect to activities and transactions that occurred prior to, or did not relate directly to, the campaign or Representative Hilliard's duties as a Federal officeholders. *See* Advisory Opinion 1998-01 (Hilliard) at n.4.

Accordingly, the Commission concludes the Committee may use campaign funds to pay legal fees described in this request.

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 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. The cited advisory opinions are available on the Commission's Web site, www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Cynthia L. Bauerly
Chair