

June 11, 2009

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions shortly before the Commission votes on the draft.

DRAFT ADVISORY OPINION 2009-10 is available for public comments under this procedure. It was requested by Michael Malczewski on behalf of Visclosky for Congress.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on June 15, 2009.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. 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.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

**CONTACTS**

Press inquiries: Judith Ingram (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2009-10, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at [www.fec.gov](http://www.fec.gov).

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

**MAILING ADDRESSES**

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

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



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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June 11, 2009

**MEMORANDUM**

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Amy L. Rothstein *ALR*  
Assistant General Counsel

Esther D. Heiden *EDH*  
Attorney

Subject: Draft AO 2009-10 (Visclosky for Congress)

Attached is a proposed draft of the subject advisory opinion. We set June 15, 2009, as the deadline for public comments on the attached draft. We plan to circulate the draft advisory opinion for a 48-hour tally-vote on June 15, 2009.

Attachment

1 ADVISORY OPINION 2009-10

2  
3 Dr. Michael C. Malczewski  
4 Visclosky for Congress  
5 P.O. Box 10003  
6 Merrillville, IN 46411-0003

7  
8 Dear Dr. Malczewski:

9 We are responding to your advisory opinion request on behalf of Visclosky for  
10 Congress (the "Committee"), concerning the application of the Federal Election  
11 Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the use  
12 of campaign funds to pay legal fees and expenses incurred by Representative Visclosky  
13 in connection with a Federal investigation.

14 The Commission concludes that the Committee may use campaign funds to pay  
15 legal fees and expenses incurred by Representative Visclosky in connection with the  
16 Federal investigation and other legal proceedings as described below, because the  
17 allegations relate to Representative Visclosky's campaign and duties as a Federal  
18 officeholder, and the legal fees and expenses would not exist irrespective of  
19 Representative Visclosky's campaign or duties as a Federal officeholder. The use of  
20 campaign funds to pay for Representative Visclosky's representation in legal proceedings  
21 regarding allegations that are not related to his campaign activity or duties as a Federal  
22 officeholder, however, would constitute an impermissible personal use.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letter received on  
25 March 31, 2009, and telephone conversations with Commission attorneys.

1           Representative Visclosky is the U.S. Representative from the First District of  
2 Indiana. He is a member of the House Committee on Appropriations and the  
3 Appropriations Subcommittee on Defense, and is Chairman of the Appropriations  
4 Subcommittee on Energy and Water Development. Visclosky for Congress is  
5 Representative Visclosky's principal campaign committee.

6           According to media reports contained in the advisory opinion request, the FBI and  
7 Federal prosecutors are investigating whether a lobbying firm, PMA Group, made  
8 improper political contributions to Representative Visclosky and other members of the  
9 U.S. House of Representatives. Media reports state that the FBI executed a search  
10 warrant at PMA headquarters in November 2008, and that Federal prosecutors "are  
11 looking into the possibility that a prominent lobbyist may have funneled bogus campaign  
12 contributions to...lawmakers." David D. Kirkpatrick, *Lobbyist Inquiry Appears to Be*  
13 *Widening*, N.Y. TIMES, Feb. 11, 2009,  
14 <http://www.nytimes.com/2009/02/11/us/politics/11inquire.html?ref=politics>. Although  
15 many of the details of the Federal investigation are not public at this time, media reports  
16 indicate that the investigation centers on more than \$500,000 dollars in alleged campaign  
17 contributions from PMA Group and its clients to three congressmen, including  
18 Representative Visclosky. Kevin Nevers, *Lobbying Firm Facing FBI Probe Has History*  
19 *of Donations to Visclosky*, CHESTERTON TRIBUNE (Ind.), Feb. 13, 2009,  
20 [http://chestertontribune.com/Northwest%20Indiana/21397%20lobbying\\_firm\\_facing\\_fbi](http://chestertontribune.com/Northwest%20Indiana/21397%20lobbying_firm_facing_fbi)  
21 [\\_probe\\_h.htm](#). The media reports also discuss appropriations earmarks purportedly  
22 obtained by Representative Visclosky for PMA Group clients, several of whom also  
23 allegedly made contributions to Representative Visclosky's re-election campaign. *Id.*;

1 *see also* Henry C. Jackson, *Visclosky's Ties to Troubled PMA Group Run Deep*,  
2 CHICAGO TRIBUNE, March 2, 2009,  
3 <http://archives.chicagotribune.com/2009/mar/02/news/chi-ap-in-viscloskydonation>.

4 ***Question Presented***

5 *May the Committee use campaign funds to pay legal expenses incurred by*  
6 *Representative Visclosky in connection with a Federal investigation of the PMA Group*  
7 *and Representative Visclosky's conduct as a candidate for and a member of the House of*  
8 *Representatives, and any other legal proceedings that involve the same allegations?*

9 ***Legal Analysis and Conclusions***

10 Yes, the Committee may use campaign funds to pay legal fees and expenses  
11 incurred by Representative Visclosky in connection with a Federal investigation into the  
12 alleged provision of illegal campaign contributions by the PMA Group and its clients to  
13 the Committee, and Representative Visclosky's allegedly improper earmarking of  
14 appropriations for clients of PMA, and any other legal proceedings that involve the same  
15 allegations, because the allegations relate to Representative Visclosky's campaign or  
16 duties as a Federal officeholder, or both, and the legal fees and expenses would not exist  
17 irrespective of Representative Visclosky's campaign or duties as a Federal officeholder.  
18 The Committee may not, however, use campaign funds to pay legal fees or expenses  
19 regarding allegations unrelated to Representative Visclosky's campaign or duties as a  
20 Federal officeholder.

21 The Act identifies six categories of permissible uses of contributions accepted by  
22 a Federal candidate. They are: (1) otherwise authorized expenditures in connection with  
23 the candidate's campaign for Federal office; (2) ordinary and necessary expenses

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

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

12 The Act and Commission regulations provide a non-exhaustive list of items that  
13 would constitute personal use *per se*, none of which applies here. For items not on this  
14 list, the Commission makes a determination on a case-by-case basis whether an expense  
15 would fall within the definition of “personal use.” 11 CFR 113.1(g)(1)(ii). Further,  
16 Commission regulations specifically provide a non-exhaustive list of uses, including  
17 “legal expenses,” that are subject to a case-by-case determination. *Id.* Accordingly, the  
18 Commission analyzes the payment of legal fees and expenses with campaign funds on a  
19 case-by-case basis under 11 CFR 113.1(g)(1)(ii)(A).

20 The Commission has long recognized that if a candidate “can reasonably show  
21 that the expenses at issue resulted from campaign or officeholder activities, the  
22 Commission will not consider the use to be personal use.” Explanation and Justification  
23 for Final Rules on Personal Use of Campaign Funds, 60 FR 7862, 67 (Feb. 9, 1995).

1 Legal fees and expenses, however, “will not be treated as though they are campaign or  
2 officeholder related merely because the underlying proceedings have some impact on the  
3 campaign or the officeholder’s status.” *Id.* at 7868. The Commission has concluded that  
4 the use of campaign funds for legal fees and expenses does not constitute personal use  
5 when the legal proceedings involve allegations directly relating to the candidate’s  
6 campaign or duties as a Federal officeholder. *See, e.g.*, Advisory Opinions 2008-07  
7 (Vitter), 2006-35 (Kolbe for Congress), 2005-11 (Cunningham), and 2003-17  
8 (Treffinger).

9 As discussed above, the advisory opinion request and accompanying media  
10 reports indicate that the Federal government is investigating campaign contributions  
11 allegedly made by PMA Group and its clients to Representative Visclosky. Additionally,  
12 the reports discuss appropriations earmarks purportedly obtained by Representative  
13 Visclosky for various PMA Group clients. The allegations concern Representative  
14 Visclosky’s campaign and duties as a Federal officeholder because Representative  
15 Visclosky allegedly received the contributions in question as part of his campaign, and  
16 his alleged actions regarding the congressional appropriations process are directly related  
17 to his duties as a Federal officeholder . Therefore, based on the representations made in  
18 the advisory opinion request and accompanying news articles, the Commission concludes  
19 that the legal fees and expenses associated with the Federal investigation would not exist  
20 irrespective of Representative Visclosky’s campaign or duties as a Federal officeholder.  
21 Accordingly, the Committee may use campaign funds to pay legal fees and expenses  
22 incurred by Representative Visclosky in connection with the Federal investigation into  
23 the alleged provision of illegal campaign contributions by the PMA Group and its clients

1 to the Committee, and Representative Visclosky's allegedly improper earmarking of  
2 appropriations for clients of PMA, and any other legal proceedings that involve the same  
3 allegations.

4       The Commission notes, however, that because many of the details of the Federal  
5 investigation are not public at this time, it is possible that portions of the investigation  
6 could involve allegations not related to Representative Visclosky's campaign or his  
7 duties as a Federal officeholder. "The use of campaign funds to pay for Representative  
8 [Visclosky's] representation in legal proceedings regarding any allegations that are not  
9 related to his campaign activity or duties as a Federal officeholder would constitute an  
10 impermissible personal use." Advisory Opinion 2005-11 (Cunningham).

11       In accordance with 2 U.S.C. 432(c), the Committee must maintain appropriate  
12 documentation of any disbursements made to pay legal expenses incurred in connection  
13 with the Federal investigation and other legal proceedings. *See also* 11 CFR 102.9(b) and  
14 104.11. In addition, the Committee must report all funds disbursed for such legal  
15 expenses as operating expenditures, noting the payee's full name, address, and a detailed  
16 description of the purpose of the payment. 11 CFR 104.3(b)(2) and (4).

17       This advisory opinion does not address whether the Committee may use campaign  
18 funds to pay legal expenses incurred in responding to the press in connection with the  
19 Federal investigation, as that question was not presented in the advisory opinion request.

20       The Commission expresses no opinion regarding the application of Federal tax  
21 law, other law, or the rules of the U.S. House of Representatives to the proposed  
22 activities, because those questions are not within the Commission's jurisdiction.

1           This response constitutes an advisory opinion concerning the application of the  
2 Act and Commission regulations to the specific transaction or activity set forth in your  
3 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
4 of the facts or assumptions presented, and such facts or assumptions are material to a  
5 conclusion presented in this advisory opinion, then the requestor may not rely on that  
6 conclusion as support for its proposed activity. Any person involved in any specific  
7 transaction or activity which is indistinguishable in all its material aspects from the  
8 transaction or activity with respect to which this advisory opinion is rendered may rely on  
9 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
10 conclusions in this advisory opinion may be affected by subsequent developments in the  
11 law including, but not limited to, statutes, regulations, advisory opinions, and case law.  
12 All cited advisory opinions are available on the Commission's website at  
13 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Steven T. Walther  
Chairman