

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

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

DRAFT ADVISORY OPINION 2010-26 is now available for comment. It was requested by Representative Brian Baird and is scheduled to be considered by the Commission at its public meeting on Thursday, November 18, 2010.

If you wish to comment on DRAFT ADVISORY OPINION 2010-26, 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 November 17, 2010.
- 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>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).**
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.**
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.**
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.**

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 2010-26, 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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2010 NOV 10 P 2: 56

November 10, 2010

AGENDA ITEM

For Meeting of 11-18-10

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *AR*
Assistant General Counsel

Joshua S. Blume *JSB*
Attorney

Subject: Draft AO 2010-26 (Baird)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 18, 2010

Attachment

1 **ADVISORY OPINION 2010-26**

2

3 **The Honorable Brian Baird**

DRAFT

4 **Member of Congress**

5 **2350 Rayburn HOB**

6 **Washington, D.C. 20515**

7

8 **Dear Representative Baird:**

9 **We are responding to your advisory opinion request concerning the application of**
10 **the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission**
11 **regulations, to the use of campaign funds from Representative Baird’s campaign**
12 **committee (“Baird for Congress”) to pay temporary storage costs associated with your**
13 **planned move back to your home State following your retirement from Congress at the**
14 **end of the current term.**

15 **The Commission concludes that under the circumstances you describe, the cost of**
16 **such temporary storage is an ordinary and necessary expense incurred in connection with**
17 **your duties as a holder of Federal office. Therefore, the use of campaign funds to pay**
18 **this cost is not personal use of campaign funds, and is permissible under the Act and**
19 **Commission regulations.**

20 ***Background***

21 **The facts presented in this advisory opinion are based on your letter received on**
22 **October 1, 2010.**

23 **Representative Brian Baird is a Member of the U.S. House of Representatives**
24 **from Washington State’s 3rd District. Representative Baird plans to retire from Congress**
25 **at the expiration of the current congressional term and is planning to move himself and**

1 his family out of his Washington, D.C. residence and back to his home in Washington
2 State.

3 As part of the preparations for the move, the Baird family moved almost one-
4 half of its personal household items into a commercial, off-site storage facility. This was
5 done solely to create additional space in the Washington, D.C. house to facilitate the
6 family's preparation for the move. It was not done to create more living space or to make
7 a material improvement to the house. The items at the storage facility are fully packed
8 and will remain in storage for approximately four months, from mid-August to mid-
9 December 2010. The Baird family will not access them until the actual move to
10 Washington State takes place.

11 Representative Baird states that the Baird family is paying the full and normal
12 rental charge to store the items. Neither Representative Baird nor the members of his
13 family have any personal, commercial, or political affiliation with the storage company.

14 ***Question Presented***

15 *May a retiring Member of Congress use campaign funds to pay the cost of*
16 *temporarily storing household items as part of the Member's preparations for moving*
17 *himself and his family back to the Member's home State?*

18 ***Legal Analysis and Conclusions***

19 Yes, the retiring Member of Congress may use campaign funds to pay the cost of
20 temporarily storing the household items because payments for these expenses are not
21 personal use of campaign funds under 2 U.S.C. 439a.

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

14 The Act and Commission regulations provide that the use of campaign funds to
15 pay for certain items enumerated in a non-exhaustive list are *per se* personal use. *See*
16 2 U.S.C. 439a(b)(2)(A)-(I); 11 CFR 113.1(g)(1)(i)(A)-(J). The payment involved here is
17 not for an item on this list. For items not on the list, the Commission determines on a
18 case-by-case basis whether an expense would fall within the definition of "personal use."
19 11 CFR 113.1(g)(1)(ii).

20 The Commission has considered whether Members of Congress may use
21 campaign funds to move themselves, family members, or household or office furnishings
22 between their home States and Washington, D.C. on several previous occasions. In
23 Advisory Opinion 1980-138 (Murkowski), the Commission concluded that a Senator-

1 elect could use campaign funds to pay the expense of moving himself and his family to
2 Washington, D.C., because the expense was an “ordinary and necessary expense”
3 incurred in connection with the duties of a Federal officeholder.¹ In Advisory Opinion
4 1987-11 (Zorinsky), the Commission treated expenses associated with closing a deceased
5 Senator’s Washington, D.C. office and moving his surviving spouse back to the home
6 State as “ordinary and necessary expenses in connection with the duties of a Federal
7 officeholder.” Subsequently, in Advisory Opinion 1996-14 (de la Garza), the
8 Commission concluded that a retiring Member of Congress could use campaign funds to
9 pay for the cost of moving from his house in the Washington, D.C. area to his home State
10 and to pay for the cost of transporting his personal household effects and furnishings to
11 his residence in his home State. In that advisory opinion, the Commission reasoned that
12 because a Member’s moving expenses from his home State to the Washington, D.C. area
13 are ordinary and necessary to the Member’s assumption of office, moving expenses
14 associated with the Member’s return to his home State upon retirement are also ordinary
15 and necessary expenses incurred in connection with ending his duties as a Federal
16 officeholder.

17 The request states that the sole purpose of the temporary storage is to facilitate the
18 preparation of Representative Baird’s house for sale, and that the house is being sold
19 solely for the purpose of moving Representative Baird and his family back to his home

¹ When the Commission issued Advisory Opinion 1980-138 (Murkowski), neither the Act nor Commission regulations contained the “irrespective” test. The Commission relied on Advisory Opinion 1980-138 (Murkowski) as a basis for the “irrespective” test incorporated into the regulations in 1995. *See* Explanation and Justification for Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 FR 7862, 7863 (Feb. 9, 1995). This regulatory test was later codified by Congress in enacting the Bipartisan Campaign Reform Act. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, sec. 301, 116 Stat. 81, 95-96 (2002); 2 U.S.C. 439a(b)(2).

1 State as a consequence of his retirement from Congress. Under these circumstances, the
2 cost of temporarily storing the household items and effects is a part of the cost of moving
3 Representative Baird's family and its household items back to the home State upon the
4 officeholder's retirement from Congress. Based on the representations in the instant
5 advisory opinion request, the Commission concludes that Representative Baird may use
6 campaign funds to pay the costs of temporarily storing his household items in a
7 commercial storage facility.

8 As such, the cost is an ordinary and necessary expense incurred in connection
9 with Representative Baird's duties as a Federal officeholder. 2 U.S.C. 439a(a)(2); 11
10 CFR 113.2(a); *see also* Advisory Opinions 1980-138 (Murkowski), 1987-11 (Zorinsky),
11 and 1996-14 (de la Garza). Accordingly, the cost is not incurred to fulfill a commitment,
12 obligation, or expense of a person that would exist irrespective of Representative Baird's
13 duties as a holder of Federal office. 2 U.S.C. 439a(b)(2); 11 CFR 113.1(g).
14 Consequently, payment of this cost with campaign funds would not be a conversion of
15 campaign contributions to personal use, and would not be prohibited by the Act or
16 Commission regulations.

17 Baird for Congress must report all expenses that it makes consistent with this
18 advisory opinion. This should be done by reporting the expenses as "other
19 disbursements" on line 21 of FEC Form 3, "Report of Receipts and Disbursements for an
20 Authorized Committee," with the specific payee(s) and purpose noted. *See* 2 U.S.C.
21 434(b)(4); 11 CFR 104.3(b)(2) and (4)(vi); Advisory Opinion 1996-14 (de la Garza). If
22 Representative Baird has already expended personal funds to pay for temporarily storing
23 his household items in preparation for the move, he may receive reimbursement from

1 Baird for Congress to the extent that he made such payments under the conditions set
2 forth in this advisory opinion.² *See* Advisory Opinion 2008-07 (Vitter).

3 The Commission expresses no opinion regarding the application of the rules of
4 the U.S. House of Representatives to the proposed activities, because those rules are not
5 within the Commission's jurisdiction.

6 This response constitutes an advisory opinion concerning the application of the
7 Act and Commission regulations to the specific transaction or activity set forth in your
8 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
9 of the facts or assumptions presented, and such facts or assumptions are material to a
10 conclusion presented in this advisory opinion, then the requestor may not rely on that
11 conclusion as support for its proposed activity. Any person involved in any specific
12 transaction or activity which is indistinguishable in all its material aspects from the
13 transaction or activity with respect to which this advisory opinion is rendered may rely on
14 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
15 conclusions in this advisory opinion may be affected by subsequent developments in the
16 law including, but not limited to, statutes, regulations, advisory opinions and case law.
17

² Baird for Congress must amend its prior reports for the reporting periods during which Representative Baird made the payments and report Representative Baird's payments as entries on Schedule D, describing the nature of the debt and the purpose as storage expenses to be reimbursed, and including in that description the name and address of Representative Baird's payee. When Baird for Congress reimburses Representative Baird, it must report the expenditures on line 17 of Schedule B, noting the purpose as reimbursement for storage expenses and cross-referencing the descriptions on Schedule D. *See* Advisory Opinion 2008-07 (Vitter).

1 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen
Chairman