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For meeting of December 17, 2015
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December 16, 2015

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DAP*
Acting General Counsel

Adav Noti *AN*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Subject: AO 2015-13 (Reid) Draft B

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on December 17, 2015.

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 <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2015-13

2

3 Marc E. Elias, Esq.

4 Jonathan S. Berkon, Esq.

5 David J. Lazarus, Esq.

6 Perkins Coie LLP

7 700 13th Street NW, Suite 600

8 Washington, DC 20005-3960

9

DRAFT B

10 Dear Messrs. Elias, Berkon, and Lazarus:

11 We are responding to your advisory opinion request on behalf of Senator Harry Reid
12 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the
13 “Act”), and Commission regulations to two proposed uses of funds: the use of Senator Reid’s
14 campaign funds to pay costs for an assistant to perform certain tasks after his retirement from
15 federal office; and the use of leadership PAC funds to pay the costs of winding down the Senate
16 office after Senator Reid retires. The Commission concludes that Senator Reid may use
17 campaign funds to pay the costs of an assistant to arrange for review, transportation, and storage
18 of archival and office materials but that the use of campaign funds to pay for the assistant’s other
19 proposed tasks would be impermissible personal use. The Commission further concludes that
20 the leadership PAC may pay the Senate office’s winding down costs.

21 ***Background***¹

22 Senator Reid was elected to the House of Representatives in 1982, elected to the U.S.
23 Senate in 1986, and chosen as Senate Democratic Leader in 2004. He served as Senate Majority
24 Leader for eight years. On March 27, 2015, Senator Reid announced that he would not seek re-
25 election in 2016 and would retire from the Senate. Senator Reid’s campaign committee most

¹ The facts presented in this advisory opinion are based on your letter received on October 23, 2015, and email received on October 28 (collectively, “Advisory Opinion Request” or “AOR”) as well as on information from public disclosure reports filed with the Commission.

1 recently reported a cash-on-hand balance of \$540,299 with no debts or obligations owed by the
2 committee.²

3 Senator Reid represents that he will have “substantial post-retirement obligations” that
4 would not exist but for his tenure as a federal officeholder, particularly his tenure as Senate
5 Democratic Leader and Senate Majority Leader. AOR at AOR001. Senator Reid intends to hire
6 a full-time assistant to help him meet these obligations. The assistant would review, organize,
7 and arrange for transportation and storage of archival and office materials; arrange Senate-related
8 correspondence; fact-check and draft materials relating to Senator Reid’s tenure in office;
9 schedule and organize appearances in which Senator Reid will discuss his tenure in office; and
10 perform related clerical tasks.

11 The Advisory Opinion Request notes that former Speakers of the House receive
12 government funds to assist with “post-retirement duties,”³ but because similar government
13 funding is not available to former Senate leaders, Senator Reid wishes to use campaign funds to
14 pay an assistant to help with the duties described above. Senator Reid intends to use campaign
15 funds to pay the assistant for as long as the need to do these tasks exists. AOR006. Senator Reid
16 represents that the assistant will not be a family member and will not assist with any activity
17 described in 11 C.F.R. § 113.1(g)(1)(i), which provides that certain uses of campaign funds are
18 *per se* unlawful personal uses.

19 Senator Reid also seeks to have his leadership PAC pay some or all of the costs of
20 winding down his Senate office. Senator Reid represents that the leadership PAC funds would

² See Friends for Harry Reid, FEC Form 3 at 2 (Oct. 15, 2015),
<http://docquery.fec.gov/pdf/044/201510160200266044/201510160200266044.pdf>.

³ AOR002; *see also* 2 U.S.C. § 5125-29 (enumerating entitlements such as office, furniture, and staff for former Speakers of the House of Representatives for five years after leaving office).

1 not be used prior to the expiration of Senator Reid’s term in office. Senator Reid’s leadership
2 PAC most recently reported a cash-on-hand balance of \$60,804.⁴

3 ***Questions Presented & Legal Analysis***

4

5 1. *May Senator Reid use campaign funds to pay the salary and related costs of an assistant*
6 *who will exclusively engage in tasks arising from the officeholder’s tenure in office?*

7 The Commission concludes that Senator Reid may use campaign funds to pay the salary
8 and related costs of an assistant to arrange for review, transportation, and storage of archival and
9 office materials but that the use of campaign funds to pay for the assistant’s other proposed tasks
10 would be impermissible personal use.

11 The Act and Commission regulations identify five categories of permissible non-
12 campaign uses of campaign funds, including the “ordinary and necessary expenses incurred in
13 connection with duties of the individual as a holder of Federal office” and “any other lawful
14 purpose” that is not personal use. 52 U.S.C. § 30114(a)(2), (6); 11 C.F.R. § 113.2(a), (e).
15 Conversion to personal use occurs when funds in a campaign account are used “to fulfill any
16 commitment, obligation or expense . . . that would exist irrespective of the candidate’s election
17 campaign or . . . duties as a holder of Federal office.” 52 U.S.C. § 30114(b)(2); *see also* 11
18 C.F.R. § 113.1(g); *see also* 11 C.F.R. § 113.1(g)(5) (specifying that any use of funds that is
19 personal use “will not be considered . . . an ordinary and necessary expense incurred in
20 connection with the duties of a holder of Federal office”).

21 In 1989, Congress amended the Act to ensure that the personal use prohibition would
22 apply to all current and former members of Congress. *See* Ethics Reform Act of 1989, Public

⁴ *See* Searchlight Leadership Fund, FEC Form 3X at 2 (July 31, 2015),
<http://docquery.fec.gov/pdf/502/201507319000486502/201507319000486502.pdf>.

1 Law 101-194, § 504, 103 Stat. 1716, 1755 (restricting previous grandfather provision that had
2 exempted from personal use rules certain members elected to office prior to 1980). The
3 legislative history of the Ethics Reform Act of 1989 indicates that Congress was particularly
4 interested in prohibiting the conversion of campaign funds to personal use by former
5 officeholders (or their estates) after they have retired, been defeated, or died. *See* 135 Cong.
6 Rec. S15968-69 (daily ed. Nov. 17, 1989) (statement of Sen. Nickels). As explained in the
7 legislative history, the Ethics Reform Act of 1989 therefore amended the personal use provision
8 to clarify that it would be impermissible for a former Senator to use (or, in the case of a deceased
9 officeholder, have the estate use) campaign funds for personal purposes as essentially “an illegal
10 pension fund.” *See* 135 Cong. Rec. S15969-70 (daily ed. Nov. 17, 1989) (statement of Sen.
11 Shelby). Thus, the question presented here is whether the duties for which Senator Reid wishes
12 to hire an assistant using campaign funds would exist irrespective of the Senator’s duties as an
13 officeholder, even after he leaves office. *See* Advisory Opinion 2001-03 (Meeks) (applying
14 section 113.1(g)(5)’s personal use restriction to funds spent to defray officeholder expenses);
15 Advisory Opinion 1996-9 (Exon) (analyzing permissible post-retirement transfer of funds for
16 impermissible conversion to personal use).

17 All of Senator Reid’s assistant’s proposed tasks would occur after Senator Reid has left
18 office and, therefore, has no more officeholding duties. Nonetheless, Commission regulations
19 provide that the “costs of winding down the office of a former Federal officeholder for a period
20 of 6 months after [leaving] office” are included among the “ordinary and necessary expenses
21 incurred in connection with” the duties of the individual as a holder of federal office. 11 C.F.R.
22 § 113.2(a)(2). This six-month winding down period “acts as a safe harbor” and is intended “to
23 ensure that former officeholders have ample time to close down their offices.” *See* Expenditures;

1 Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7873
2 (Feb. 9, 1995). It “does not preclude a former officeholder who can demonstrate that he or she
3 has incurred ordinary and necessary winding down expenses more than six months after leaving
4 office from using campaign funds to pay those expenses.” *Id.*

5 The Commission has previously concluded that part of the first category of Senator
6 Reid’s assistant’s tasks — arranging for review, transportation, and storage of archival and office
7 materials — is incurred in connection with the duties of the individual as a holder of federal
8 office as a “cost of winding down the office” and, moreover, is not personal use. *See* Advisory
9 Opinion 2013-05 (Gallegly) at 2-3 (citing 11 C.F.R. §§ 113.2(a)(2), 116.1(a)). In Advisory
10 Opinion 2013-05 (Gallegly), the Commission concluded that United States Representative who
11 was retiring after 26 years in office could permissibly spend campaign funds for up to a year to
12 archive and store his congressional materials as an expense necessary to wind down his office
13 after his “extensive tenure.” *See* Advisory Opinion 2013-05 (Gallegly). The duration of Senator
14 Reid’s time in Congress, including his service as Senate Democratic Leader for more than 11
15 years, support the request’s statement that Senator Reid may need more than six months after
16 leaving office to pay for staff assistance in arranging for review, transportation, and storage of
17 archival and office materials as part of the ordinary and necessary expenses incurred in
18 connection with winding down his Senate office. Given Senator Reid’s 30 years of service in the
19 Senate, the Commission concludes that he may permissibly use campaign funds to pay an
20 assistant to help review, transport, and store office materials for longer than the six-month period
21 specified in 11 C.F.R. § 113.2(a)(2).⁵

⁵ The request does not ask, and the Commission does not address, whether Senator Reid’s campaign committee could raise additional, post-retirement funds to pay the expenses described in the request.

1 The Commission notes, however, that the assistant’s other proposed tasks — managing
2 “officially-related” correspondence; fact-checking and drafting materials; and scheduling and
3 organizing appearances — would relate to materials and activities that arise only after Senator
4 Reid leaves office. Accordingly, these are not winding down costs of his Senate office within
5 the meaning of 11 C.F.R. § 113.2(a)(2). As noted above, the Commission must therefore
6 determine whether these costs would be for “any other lawful purpose” under the Act and
7 Commission regulations or converted to personal use. *See* 52 U.S.C. § 30114(b)(2); 11 C.F.R.
8 § 113.1(g).

9 Once Senator Reid leaves office, he will no longer have duties as an officeholder. Thus,
10 the correspondence he receives, the material he writes, and the speeches he gives will be purely
11 in his capacity as a private citizen. A private individual is of course free to employ an assistant
12 to help with such tasks, but the tasks themselves arise out of the individual’s choice to engage in
13 the writing and speaking activities, not out of any “duties” imposed by virtue of law or
14 officeholder status. The Commission therefore concludes that the expenses incurred by Senator
15 Reid for a personal assistant to perform the proposed tasks (other than those to wind down the
16 office under 11 C.F.R. § 113.2(a)(2)) would exist irrespective of Senator Reid’s campaign
17 activities or “duties as a Federal officeholder.” 11 C.F.R. § 113.1(g). Thus, the use of campaign
18 funds to pay Senator Reid’s personal assistant for the enumerated tasks after Senator Reid leaves
19 office would constitute personal use. *See* 11 C.F.R. § 113.2(a). As such, Senator Reid may not
20 use campaign funds to pay these expenses as proposed.

21 2. *May Senator Reid use leadership PAC funds to pay wind-down costs of his Senate office?*

22 Yes, under the Act and Commission regulations, Senator Reid’s leadership PAC may use
23 PAC funds to pay winding down costs of Senator Reid’s Senate office.

1 A leadership PAC is a political committee that is established, financed, maintained or
2 controlled by a federal candidate or individual holding federal office but is not an authorized
3 committee of the candidate or individual and is not affiliated with an authorized committee of the
4 candidate or individual. *See* 11 C.F.R. § 100.5(e)(6); *see also* Leadership PACs, 68 Fed. Reg.
5 67,013, 67,014 (Dec. 1, 2003) (explaining that “monies [leadership PACs] receive are given to
6 other Federal candidates to gain support when the officeholder seeks a leadership position in
7 Congress, . . . used to make contributions to party committees, . . . or donated to candidates for
8 State and local office”). To the extent that “leadership PACs are used to pay for costs that could
9 and should otherwise be paid for by a candidate’s authorized committee, such payments are in-
10 kind contributions” from the leadership PAC to the authorized committee and are subject to
11 contribution limitations. Leadership PACs, 68 Fed. Reg. at 67,017; *see also* 11 C.F.R.
12 § 100.52(d) (including in-kind contributions in definition of “contribution”); 11 C.F.R.
13 § 113.1(g)(6) (providing that third-party defrayals of candidate’s expenses that would otherwise
14 constitute personal use are contributions to that candidate).

15 As discussed above, defraying the ordinary and necessary expenses incurred in
16 connection with the duties of federal office is a permissible non-campaign use of campaign funds
17 by a candidate’s authorized committee. As non-campaign expenses, these are costs that *may* be
18 paid with campaign funds. The question here, then, is whether these are costs that “could and
19 should” be paid for by Senator Reid’s campaign committee. *See* Leadership PACs, 68 Fed. Reg.
20 at 67,017.

21 The Commission addressed an example of a payment that could and should be paid with
22 campaign funds in Advisory Opinion 2002-05 (Hutchinson). In that opinion, a federal candidate
23 who was also a mayor traveled with a delegation from her city to Washington, DC. She

1 combined mayoral, campaign, and personal (sightseeing) activities during the trip and sought an
2 opinion regarding the appropriate spending of municipal corporation, campaign, and personal
3 funds for the trip's mixed uses. The Commission concluded that campaign funds "would have to
4 be used" for the campaign-related incremental travel costs of the trip. *Id.* at 4-5 and n.8.

5 Unlike the campaign-related expenses in that advisory opinion, however, the costs at
6 issue here concern ordinary and necessary expenses in connection with officeholding duties.⁶
7 The Commission concludes that the costs of winding down the Senate office are not costs that
8 *should* be paid with campaign funds by Senator Reid's campaign committee, for two reasons.

9 First, the costs of winding down the Senate office are in connection with the official
10 duties of the officeholder and not in connection with the campaign.⁷ Second, the Commission
11 has previously allowed persons other than a federal officeholder's campaign committee to make
12 payments to cover the costs of ordinary and necessary expenses incurred in connection with the
13 duties of that federal officeholder. *See* Advisory Opinion 2007-18 (Rangel) (concluding that
14 leadership PAC's payment for portrait of officeholder to be donated to House of Representatives
15 would not be in-kind contribution to the officeholder's campaign committee).

16 Consistent with that advisory opinion, the Commission concludes that payments to wind
17 down Senator Reid's Senate office as an ordinary and necessary expense incurred in connection

⁶ Senator Reid does not ask whether the leadership PAC may pay the campaign-related costs of winding down Senator Reid's campaign committee. A campaign's winding down costs can include the costs of complying with the Act as well as office space rental, staff salaries, and office supplies. *See, e.g.*, 11 C.F.R. § 116.1(a) (defining "terminating committee" that is winding down); 110.1(b)(3)(ii) (describing campaign's estimated winding down costs as part of net debts outstanding). This opinion does not address whether a campaign committee's winding down costs are costs that could and should be paid by the campaign committee.

⁷ The Commission expresses no opinion regarding whether payment by a leadership PAC of a senator's office winding down costs is permissible under the Senate Rules because those rules are outside the Commission's jurisdiction. *See, e.g., Prohibition on Unofficial Office Accounts*, U.S. Senate Select Comm. on Ethics, <http://www.ethics.senate.gov/public/index.cfm/prohibitiononunofficialofficeaccounts> (last visited Dec. 2, 2015) (limiting sources Senators may use to pay official expenses).

1 with the duties of a federal officeholder are not payments that could and should be paid by
2 Senator Reid's campaign committee. Accordingly, the leadership PAC's payments to wind
3 down Senator Reid's Senate office would not be contributions to Senator Reid's authorized
4 committee, and the Act and Commission regulations allow the leadership PAC to pay the
5 winding down costs of Senator Reid's Senate office as proposed.

6 This response constitutes an advisory opinion concerning the application of the Act and
7 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
8 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
9 assumptions presented, and such facts or assumptions are material to a conclusion presented in
10 this advisory opinion, then the requestor may not rely on that conclusion as support for his
11 proposed activity. Any person involved in any specific transaction or activity which is
12 indistinguishable in all its material aspects from the transaction or activity with respect to which
13 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. §
14 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
15 affected by subsequent developments in the law including, but not limited to, statutes,
16 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
17 on the Commission's website.

18
19 On behalf of the Commission,
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22
23 Ann M. Ravel
24 Chair