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For meeting of January 14, 2016
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January 12, 2016

MEMORANDUM

TO: The Commission

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

Adav Noti *AN*
Acting Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: AO 2015-13 (Reid) Draft C

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 January 14, 2016.

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 C

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 : (1) review, organize, and arrange for transportation and storage of
7 archival and office materials; (2) arrange Senate-related correspondence; (3) fact-check and draft
8 materials relating to Senator Reid’s tenure in office; (4) schedule and organize appearances in
9 which Senator Reid will discuss his tenure in office; and (5) perform related clerical tasks.

10 The Advisory Opinion Request notes that Congress has enacted a law, 2 U.S.C. § 5125-
11 29, that provides former Speakers of the House funds to assist with “post-retirement duties,”
12 AOR at AOR002, but because Congress did not provide similar funding for former Senate
13 leaders, such as the requestor, Senator Reid wishes to use his *campaign* funds to pay his assistant
14 for as long as these tasks exist. *Id.* at AOR006. Senator Reid represents that the assistant will
15 not be a family member and will not assist with any activity described in 11 C.F.R.
16 § 113.1(g)(1)(i), which provides that certain uses of campaign funds are *per se* unlawful personal
17 uses.

18 Senator Reid also seeks to have his leadership PAC pay some or all of the costs of
19 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>.

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 \$60,804.³

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

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

1 In 1989, Congress amended the Act to ensure that the personal use prohibition would
2 apply to all current and former members of Congress. *See* Ethics Reform Act of 1989, Public
3 Law 101-194, § 504, 103 Stat. 1716, 1755 (restricting previous grandfather provision that had
4 exempted from personal use rules certain members elected to office prior to 1980). The
5 legislative history of the Ethics Reform Act of 1989 indicates that Congress was particularly
6 interested in prohibiting the conversion of campaign funds to personal use by former
7 officeholders (or their estates) after they have retired, been defeated, or died. *See* 135 Cong.
8 Rec. S15968-69 (daily ed. Nov. 17, 1989) (statement of Senator Nickels). As explained in the
9 legislative history, the Ethics Reform Act of 1989 therefore amended the personal use provision
10 to clarify that it would be impermissible for a former Senator to use (or, in the case of a deceased
11 officeholder, have the estate use) campaign funds for personal purposes as essentially “an illegal
12 pension fund.” *See* 135 Cong. Rec. S15969-70 (daily ed. Nov. 17, 1989) (statement of Senator
13 Shelby) (underscoring added).

14 Thus, two questions are presented here. The first is whether Senator Reid’s hiring of the
15 assistant after he retires from office is *necessary* to perform obligations imposed upon Senator
16 Reid as an officeholder. And second, if not, would the expense to hire the assistant exist
17 irrespective of the Senator’s duties as a candidate or officeholder and thus impermissibly benefit
18 him personally. *See* Advisory Opinion 2001-03 (Meeks) (applying section 113.1(g)(5)’s
19 personal use restriction to funds spent to defray officeholder expenses); Advisory Opinion 1996-
20 9 (Exon) (analyzing permissible post-retirement transfer of funds for impermissible conversion
21 to personal use).

1 A. Assistant’s Review, Organization, and Arrangement of Office Materials for
2 Storage

3 Commission regulations provide that the “costs of winding down the office of a former
4 Federal officeholder for a period of 6 months after [leaving] office” are included among the
5 “ordinary and necessary expenses incurred in connection with” the duties of the individual as a
6 holder of federal office. 11 C.F.R. § 113.2(a)(2). This six-month winding down period “acts as
7 a safe harbor” and is intended “to ensure that former officeholders have ample time to close
8 down their offices.” *See* Expenditures; Reports by Political Committees; Personal Use of
9 Campaign Funds, 60 Fed. Reg. 7862, 7873 (Feb. 9, 1995). It “does not preclude a former
10 officeholder who can demonstrate that he or she has incurred ordinary and necessary winding
11 down expenses more than six months after leaving office from using campaign funds to pay
12 those expenses.” *Id.*

13 As the Commission has previously concluded, costs incurred to review, transport, and
14 store office materials are costs incurred in connection with the duties of the individual as a holder
15 of federal office as a “cost of winding down the office” and are not personal use. *See* Advisory
16 Opinion 2013-05 (Gallegly) at 2-3 (citing 11 C.F.R. §§ 113.2(a)(2), 116.1(a)). In Advisory
17 Opinion 2013-05 (Gallegly), the Commission concluded that a United States Representative who
18 was retiring after 26 years in office could permissibly spend campaign funds for up to a year to
19 archive and store his congressional materials as an expense *necessary* to wind down his office
20 after his “extensive tenure.” *See* Advisory Opinion 2013-05 (Gallegly) (*italics added*). The
21 duration of Senator Reid’s time in Congress, including his service as Senate Democratic Leader
22 for more than 11 years, support the request’s statement that Senator Reid may need more than six
23 months after leaving office to pay for staff assistance in arranging for review, transportation, and

1 storage of voluminous archival and office materials as part of the ordinary and necessary
2 expenses incurred in connection with winding down his Senate office. Accordingly, the
3 Commission concludes that Senator Reid may permissibly use campaign funds to pay an
4 assistant to help review, transport, and store office materials for longer than the six-month period
5 specified in 11 C.F.R. § 113.2(a)(2)⁴ so long as such services remain necessary.

6 B. Assistant’s Arrangement of Correspondence, Drafting of Materials, Scheduling
7 and Organizing Reid’s Appearances

8 The Commission notes, however, that the assistant’s other proposed tasks—managing
9 “officially-related” correspondence; fact-checking and drafting materials; and scheduling and
10 organizing appearances—would relate to materials generated and activities initiated only after
11 Senator Reid leaves office and enters private life. Accordingly, these are not winding down
12 costs of his Senate office within the meaning of 11 C.F.R. § 113.2(a)(2). As noted above, the
13 Commission must therefore determine whether these costs would be “ordinary and *necessary*
14 expenses incurred in connection with” Reid’s campaign or duties as an officeholder or, if not,
15 constitute the conversion of campaign funds to personal use because campaign funds will be
16 used “to fulfill [a] commitment, obligation or expense . . . that would exist irrespective of
17 [Senator Reid’s] election campaign or . . . duties as a holder of Federal office.” *See* 52 U.S.C.
18 § 30114(b)(2); 11 C.F.R. § 113.1(g).

19 The Commission explained the meaning of the “irrespective test” in its Explanation and
20 Justification of the regulations on personal use, which it promulgated in early 1995. *See*

⁴ 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 Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of*
2 *Campaign Funds*, 60 Fed. Reg. 7862 (February 9, 1995). The Commission stated:

3 If campaign funds are used for a financial obligation that is *caused by* campaign activity
4 or the activities of an officeholder, that use is not personal use. However, if the
5 obligation would exist even in the absence of the candidacy or even if the officeholder
6 were not in office, then the use of funds for that obligation generally would be personal
7 use.

8 60 Fed. Reg. at 7863-4 (italics added). Moreover, in explaining its case-by-case approach, the
9 Commission stated that “[i]f the candidate can reasonably show that the expenses at issue
10 *resulted from* campaign or officeholder activities, the Commission will not consider the use to be
11 personal use.” *Id.* at 7867 (italics added).

12 Once Senator Reid leaves office, he will no longer have ongoing duties as an officeholder
13 and the decision to engage in public activities during retirement will be a wholly personal choice.
14 Whether any former officeholder wishes to hire one or more assistants to help with the activities
15 described in the request is a personal choice within the discretion of the former officeholder.
16 The correspondence former officeholders receive, the material they write, and the speeches they
17 give will be in their capacities as private citizens and a matter of choice. A private individual is
18 of course free to employ a personal assistant to help with such tasks, but the tasks themselves are
19 the product of the individual’s choice to engage in these writing and speaking activities, and are
20 not necessitated by their status or duties as former officeholders.

21 Moreover, the proposed use of campaign funds to pursue these activities in order to assist
22 Senator Reid’s discretionary choice to remain engaged in public speaking about his past tenure
23 would convert Senator Reid’s leftover campaign funds to his personal use. As choices purely
24 within his discretion and not necessitated by his campaign or former duties as an officeholder,
25 they are expenses “that would exist irrespective of the candidate’s campaign or duties as a

1 Federal officeholder.” The Commission has never gone so far as to permit such use of campaign
2 funds because it would effectively transform leftover campaign funds into an officeholder’s
3 administrative pension fund, exactly what Congress feared, and as a result incentivize
4 contributions while in office for that purpose.

5 The use proposed here is distinguishable from Advisory Opinion 2001-09 (Kerrey for
6 U.S. Senate), which represents the Commission’s most permissive opinion on the use of
7 campaign funds by a former member of Congress. There, a former candidate and officeholder
8 desired to use remaining campaign funds to respond to media coverage focusing on his conduct
9 and particular statements he had made as a candidate and officeholder. The media inquiry faced
10 by Senator Kerrey in retirement commenced while – and demonstrably because – Senator Kerrey
11 was a candidate and officeholder. The inquiry unavoidably continued after Senator Kerrey
12 retired from public office and followed him into private life. The Commission concluded that
13 there was “a direct resultant relationship” between the media inquiry and Senator Kerrey’s
14 “campaigns and officeholder activities.” Senator Kerrey’s expenses to address the media inquiry
15 thus resulted from – *i.e.*, were caused by – Senator Kerrey’s former campaign and officeholder
16 duties, the Commission concluded the expenses were sufficiently necessary and therefore were
17 not incurred irrespective of his status or duties as a candidate or officeholder. Additionally, the
18 media inquiry at issue was a specific, discrete and cabined retirement obligation that was
19 “directly related to Mr. Kerrey’s Federal campaign and officeholder duties.” Indeed, the
20 Commission warned against an overbroad reliance upon the opinion observing that Senator
21 Kerrey’s request presented “a unique situation,” that the “opinion’s conclusion is based on the
22 case-by-case determination provisions of 11 CFR 113.1(g)(1)(ii),” and that the “opinion does not

1 establish any general rule regarding the use of campaign funds by former candidates or Federal
2 officeholders for public relations expenses.” Advisory Op. 2001-09 (Kerrey for U.S. Senate).

3 The Commission applied the same reasoning as recently as Advisory Opinion 2013-11
4 (Joe Miller for Senate). There the Commission observed: “The Commission has long provided
5 that if a candidate ‘can reasonably show that the expenses at issue *resulted from* campaign or
6 officeholder activities, the Commission will not consider the use to be personal use.” Advisory
7 Op. 2013-11 at 3 (citing Expenditures; Reports by Political Committees; Personal Use of
8 Campaign Funds, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995)) (emphasis added). Because Mr.
9 Miller’s litigation was directly traceable to, and caused by, his unsuccessful campaign for Senate,
10 the Commission opined that he could continue to spend campaign funds on the specific legacy
11 litigation.

12 There is little basis to analogize those opinions to Senator Reid’s requested use. In
13 contrast to the *Kerrey* and *Miller* opinions, Senator Reid desires to use his remaining campaign
14 funds to maintain his engagement in public appearances, public speaking and writing—for as
15 long as he desires—with little boundaries other than the fact that the proposed correspondence
16 and materials to be drafted will “regard[] his tenure in office” and he will “discuss his tenure in
17 office” at the proposed speaking engagements. AOR at AOR003. The request does not present
18 the need to respond to a specific legacy matter that began during his past service or campaigns,
19 was caused by his past service or campaigns, or even was visited upon him by others. Moreover,
20 the Commission’s opinions in *Kerrey* and *Miller* did not raise any risk that the requestors, or
21 those relying on the opinions, could have sought or amassed campaign funds before retirement
22 with the intention of using them for wholly voluntary, or discretionary, post-retirement uses, as
23 Congress feared.

1 The Commission therefore concludes that the expenses incurred by Senator Reid for a
2 personal assistant to perform the proposed tasks (other than those to wind down the office under
3 11 C.F.R. § 113.2(a)(2)) are not “ordinary and necessary expenses incurred in connection with”
4 Reid’s duties as an officeholder, 11 C.F.R. § 113.2(a), (e), and would exist irrespective of
5 Senator Reid’s campaign activities or “duties as a Federal officeholder.” 11 C.F.R. § 113.1(g).
6 Thus, the use of campaign funds to pay Senator Reid’s personal assistant for the enumerated
7 tasks after Senator Reid leaves office would constitute personal use. *See* 11 C.F.R. § 113.2(a).
8 As such, Senator Reid may not use campaign funds to pay these expenses as proposed.

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

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

12 A leadership PAC is a political committee that is established, financed, maintained or
13 controlled by a federal candidate or individual holding federal office but is not an authorized
14 committee of the candidate or individual and is not affiliated with an authorized committee of the
15 candidate or individual. *See* 11 C.F.R. § 100.5(e)(6); *see also* Leadership PACs, 68 Fed. Reg.
16 67,013, 67,014 (Dec. 1, 2003) (explaining that “monies [leadership PACs] receive are given to
17 other Federal candidates to gain support when the officeholder seeks a leadership position in
18 Congress, . . . used to make contributions to party committees, . . . or donated to candidates for
19 State and local office”). To the extent that “leadership PACs are used to pay for costs that could
20 and should otherwise be paid for by a candidate’s authorized committee, such payments are in-
21 kind contributions” from the leadership PAC to the authorized committee and are subject to
22 contribution limitations. Leadership PACs, 68 Fed. Reg. at 67,017; *see also* 11 C.F.R.
23 § 100.52(d) (including in-kind contributions in definition of “contribution”); 11 C.F.R.

1 § 113.1(g)(6) (providing that third-party defrayals of candidate’s expenses that would otherwise
2 constitute personal use are contributions to that candidate).

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

9 The Commission addressed an example of a payment that could and should be paid with
10 campaign funds in Advisory Opinion 2002-05 (Hutchinson). In that opinion, a federal candidate
11 who was also a mayor traveled with a delegation from her city to Washington, D.C. She
12 combined mayoral, campaign, and personal (sightseeing) activities during the trip and sought an
13 opinion regarding the appropriate spending of municipal corporation, campaign, and personal
14 funds for the trip’s mixed uses. The Commission concluded that campaign funds “would have to
15 be used” for the campaign-related incremental travel costs of the trip. Advisory Op. 2002-05
16 (Hutchinson) at 4-5 and n.8.

17 Unlike the campaign-related expenses in that advisory opinion, however, the costs at
18 issue here concern ordinary and necessary expenses in connection with officeholding duties.⁵

⁵ 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.

1 The Commission concludes that the costs of winding down the Senate office are not costs that
2 *should* be paid with campaign funds by Senator Reid’s campaign committee, for two reasons.

3 First, the costs of winding down the Senate office are in connection with the official
4 duties of the officeholder and not in connection with the campaign.⁶ Second, the Commission
5 has previously allowed persons other than a federal officeholder’s campaign committee to make
6 payments to cover the costs of ordinary and necessary expenses incurred in connection with the
7 duties of that federal officeholder. *See* Advisory Op. 2007-18 (Rangel) (concluding that
8 leadership PAC’s payment for portrait of officeholder to be donated to House of Representatives
9 would not be an in-kind contribution to the officeholder’s campaign committee).

10 Consistent with that advisory opinion, the Commission concludes that payments to wind
11 down Senator Reid’s Senate office as an ordinary and necessary expense incurred in connection
12 with the duties of a federal officeholder are not payments that could and should be paid by
13 Senator Reid’s campaign committee. Accordingly, the leadership PAC’s payments to wind
14 down Senator Reid’s Senate office would not be contributions to Senator Reid’s authorized
15 committee, and the Act and Commission regulations allow the leadership PAC to pay the
16 winding down costs of Senator Reid’s Senate office as proposed.

17 This response constitutes an advisory opinion concerning the application of the Act and
18 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
19 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
20 assumptions presented, and such facts or assumptions are material to a conclusion presented in

⁶ 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 this advisory opinion, then the requestor may not rely on that conclusion as support for his
2 proposed activity. Any person involved in any specific transaction or activity which is
3 indistinguishable in all its material aspects from the transaction or activity with respect to which
4 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
5 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
6 affected by subsequent developments in the law including, but not limited to, statutes,
7 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
8 on the Commission's website.

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On behalf of the Commission,

Matthew S. Petersen
Chair