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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

Robert M. Knop *RMK*
Assistant General Counsel

Jessica Selinkoff *JS by RMK*
Attorney

Subject: AO 2015-13 (Reid) Draft D

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 D

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 certain administrative costs after his retirement from federal office; and
15 the use of leadership PAC funds to pay the costs of winding down the Senate office after Senator
16 Reid retires. The Commission concludes that, under the Act and Commission regulations,
17 Senator Reid may use campaign funds to pay the administrative costs as discussed below. The
18 Commission further concludes that the leadership PAC may pay the Senate office’s winding
19 down costs.

20 ***Background¹***

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

25 Senator Reid represents that he will have “substantial post-retirement obligations” that
26 would not exist but for his tenure as a federal officeholder, particularly his tenure as Senate

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 Democratic Leader and Senate Majority Leader. AOR at AOR001. Senator Reid intends to hire
2 a full-time assistant to help him meet these obligations. The assistant would review, organize,
3 and arrange for transportation and storage of archival and office materials; arrange Senate-related
4 correspondence; fact-check and draft materials relating to Senator Reid's tenure in office;
5 schedule and organize appearances in which Senator Reid will discuss his tenure in office; and
6 perform related clerical tasks. Senator Reid intends to use campaign funds to pay the assistant
7 for as long as the need to do these tasks exists. AOR006. Senator Reid represents that the
8 assistant will not be a family member and will not assist with any activity described in 11 C.F.R.
9 § 113.1(g)(1)(i), which provides that certain uses of campaign funds are *per se* unlawful personal
10 uses.

11 Senator Reid also seeks to have his leadership PAC pay some or all of the costs of
12 winding down his Senate office. Senator Reid represents that the leadership PAC funds would
13 not be used prior to the expiration of Senator Reid's term in office.

14 ***Questions Presented & Legal Analysis***

15
16 1. *May Senator Reid use campaign funds to pay the salary and related costs of an assistant*
17 *who will exclusively engage in tasks arising from the officeholder's tenure in office?*

18 The question of whether Senator Reid may pay an assistant as proposed raises two issues:
19 first, whether Senator Reid may use campaign funds to pay the staffer who will exclusively
20 engage in tasks arising from Senator Reid's tenure in office and, second, whether Senator Reid
21 may make these payments for the extended period of time presented in the AOR. The
22 Commission concludes that, as discussed below, Senator Reid may use campaign funds to pay
23 the salary and related costs of an assistant who will exclusively engage in tasks arising from
24 Senator Reid's tenure in office and may do so for the extended time period as proposed.

1 The Act and Commission regulations identify five categories of permissible non-
2 campaign uses of campaign funds, including the “ordinary and necessary expenses incurred in
3 connection with duties of the individual as a holder of Federal office.” 52 U.S.C. § 30114(a)(2);
4 11 C.F.R. § 113.2(a). Commission regulations specify, however, that any use of funds that
5 would be personal use “will not be considered . . . an ordinary and necessary expense incurred in
6 connection with the duties of a holder of Federal office.” 11 C.F.R. § 113.1(g)(5). Conversion
7 to personal use occurs when funds in a campaign account are used “to fulfill any commitment,
8 obligation or expense . . . that would exist irrespective of the candidate’s election campaign or . .
9 . duties as a holder of Federal office.” 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g).

10 In 1989, Congress amended the Act to ensure that the personal use prohibition would
11 apply to all current and former members of Congress. *See* Ethics Reform Act of 1989, Public
12 Law 101-194, § 504, 103 Stat. 1716, 1755 (restricting previous grandfather provision that had
13 exempted from personal use rules certain members elected to office prior to 1980). The
14 legislative history of the Ethics Reform Act of 1989 indicates that Congress was particularly
15 interested in prohibiting the conversion of campaign funds to personal use by former
16 officeholders (or their estates) after they have retired, been defeated, or died. *See* 135 Cong.
17 Rec. S15968-69 (daily ed. Nov. 17, 1989) (statement of Sen. Nickels). As explained in the
18 legislative history, the Ethics Reform Act of 1989 therefore amended the personal use provision
19 to clarify that it would be impermissible for a former Senator to use (or, in the case of a deceased
20 officeholder, have the estate use) campaign funds for personal purposes as essentially “an illegal
21 pension fund.” *See* 135 Cong. Rec. S15969-70 (daily ed. Nov. 17, 1989) (statement of Sen.
22 Shelby). Thus, the question presented here is whether the duties for which Senator Reid wishes
23 to hire an assistant using campaign funds would exist irrespective of the Senator’s duties as an

1 officeholder, even after he leaves office. *See* Advisory Opinion 2001-03 (Meeks) (applying
2 section 113.1(g)(5)'s personal use restriction to funds spent to defray officeholder expenses);
3 Advisory Opinion 1996-9 (Exon) (analyzing permissible post-retirement transfer of funds for
4 impermissible conversion to personal use).

5 The request states that Senator Reid would use campaign funds to pay an assistant to (1)
6 review, organize, and arrange for transportation and storage of archival and office materials; (2)
7 manage "officially-related" correspondence; (3) fact-check and draft materials relating to Senator
8 Reid's tenure in office; and (4) schedule and organize appearances in which Senator Reid would
9 discuss his tenure in office. AOR001-002. The Commission has previously concluded that the
10 first of these categories, expenses incurred to store officeholder and campaign materials, is an
11 "ordinary and necessary expense" incurred in connection with duties of the individual as a holder
12 of federal office as a "cost of winding down the office." *See* Advisory Opinion 1996-14 (de la
13 Garza) (authorizing use of campaign funds to pay costs of winding down federal office,
14 including costs to ship items from congressional office to home state). The Commission
15 concludes that the remaining categories are "incurred in connection with duties of the individual
16 as a holder of Federal office" because the AOR states that the assistant will engage exclusively in
17 "tasks arising from [Senator Reid's] tenure in federal office." *See* 11 C.F.R. § 113.2(a); AOR at
18 3.

19 However, to the extent that the assistant's duties would *also* exist irrespective of the
20 Senator's former duties as an officeholder, the use of campaign funds to pay for such duties
21 would constitute impermissible conversion of campaign funds to personal use. For example, the
22 Commission has noted that campaign funds may not be used to purchase or promote a book from
23 which the officeholder will derive royalty income. *See, e.g.,* Advisory Opinion 2014-06 (Ryan)

1 (discussing advisory opinions addressing personal use implications of use of campaign funds to
2 defray expense that may result in royalty payments to candidate); Advisory Opinion 2008-17
3 (KITPAC) (concluding that principal campaign committee’s payments to Senator’s book co-
4 author would be prohibited personal use). Thus, Senator Reid would not be permitted to use
5 campaign funds to pay an assistant to “draft materials” relating to Senator Reid’s tenure in office
6 if those materials are to be sold or otherwise used to benefit Senator Reid financially. Similarly,
7 Senator Reid may not use campaign funds to pay an assistant to “schedule and organize
8 appearances in which Senator Reid will discuss his tenure in office” if Senator Reid would be
9 paid for such appearances (or if they would be to promote a book for which he would receive
10 payment). *See, e.g.*, Advisory Opinion 2006-07 (Hayworth) (noting that “expenses associated
11 with marketing a book that a commercial publisher has published and for which it pays royalties
12 to the author are expenses that exist irrespective of . . . duties as a holder of Federal office”).
13 Construing the request not to include such activities, the Commission concludes that payments
14 for the salary and related costs of an assistant for the proposed tasks would be ordinary and
15 necessary expenses incurred in connection with duties of the individual as a holder of federal
16 office and would not constitute personal use.

17 As for the period of time during which Senator Reid may use campaign funds to pay an
18 assistant, Commission regulations do not provide time frames within which all payments for the
19 ordinary and necessary expenses incurred in connection with the duties as a federal office holder
20 may occur. Commission regulations on winding down costs, however, offer guidance as to the
21 length of time which would be reasonable for Senator Reid’s assistant to perform similarly
22 administrative duties. Under Commission regulations, the ordinary and necessary expenses of
23 holding office include the costs of winding down the office of a former federal officeholder “for

1 a period of 6 months after [the officeholder] leaves office.” 11 C.F.R. § 113.2(a)(2). This six-
2 month winding down period “acts as a safe harbor” and is intended “to ensure that former
3 officeholders have ample time to close down their offices.” *See* Expenditures; Reports by
4 Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7873 (Feb. 9, 1995).
5 It “does not preclude a former officeholder who can demonstrate that he or she has incurred
6 ordinary and necessary winding down expenses more than six months after leaving office from
7 using campaign funds to pay those expenses.” *Id*; *see also* Advisory Opinion 2013-05 (Gallegly)
8 (concluding that United States Representative who was retiring after 26 years in office could
9 permissibly spend campaign funds for up to a year to archive and store his congressional
10 materials as an expense necessary to wind down his office after his “extensive tenure.”)

11 Similarly, Senator Reid’s extensive tenure in Congress supports the request’s statement
12 that Senator Reid will need an assistant for more than six months after leaving office to review,
13 organize, and manage archival materials and perform the above-mentioned tasks as part of the
14 ordinary and necessary expenses incurred in connection with Senator Reid’s duties as a former
15 federal officeholder. Therefore, the Commission concludes that he may use campaign funds for
16 the assistant’s tasks discussed above for a period longer than six months so long as they continue
17 to be ordinary and necessary expenses incurred in connection with his duties as a federal
18 officeholder.²

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

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

² 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 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.³
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.

9 The costs of winding down the Senate office are in connection with the official duties of
10 the officeholder and not in connection with the campaign. *See* Advisory Opinion 2007-18
11 (Rangel) (concluding that leadership PAC's payment for portrait of officeholder to be donated to
12 House of Representatives would not be in-kind contribution to the officeholder's campaign
13 committee).

14 Consistent with that advisory opinion, the Commission concludes that payments to wind
15 down Senator Reid's Senate office as an ordinary and necessary expense incurred in connection
16 with the duties of a federal officeholder are not payments that could and should be paid by
17 Senator Reid's campaign committee. Accordingly, the leadership PAC's payments to wind
18 down Senator Reid's Senate office would not be contributions to Senator Reid's authorized

³ 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 committee, and the Act and Commission regulations allow the leadership PAC to pay the
2 winding down costs of Senator Reid's Senate office as proposed.

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

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

21 On behalf of the Commission,
22

23
24 Matthew S. Petersen
25 Chair