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August 12, 2020

VIA EMAIL

David Emadi, Executive Secretary
Robert Lane, Deputy Executive Secretary
Government Transparency and Campaign Finance Commission
200 Piedmont Ave. SE
Suite 1402 - West Tower
Atlanta, GA 30334

Re: Comments on Draft Advisory Opinion 2020-03

Dear Messrs. Emadi and Lane:

The following are comments on draft advisory opinion AO 2020-03 (the "Draft AO"), which was prepared in response to the advisory opinion request that we submitted on April 7, 2020. Please note that these comments are mine alone, and do not necessarily reflect the views of any of our clients or other third parties.

It bears noting at the outset that the advisory opinion request specifically requested guidance for a legislator "who lives outside Atlanta and would otherwise use campaign funds to pay for lodging in Atlanta" in connection with campaign or official duties. The Draft AO makes no mention of this important fact. Rather than addressing this scenario, the Draft AO instead addresses this issue in broad terms, concluding that, for all legislators and candidates, they "may not utilize campaign funds . . . to pay for rent or lodging expenses in real property that is owned, in whole or in part, by the legislator, public officer, candidate for public office, spouse of the same, or a corporate entity that is owned in whole or in part by the same" The Draft AO reasons that "such a transfer of campaign funds is tantamount to a conversion of campaign funds into personal assets which is prohibited by the Act pursuant to O.C.G.A. § 21-5-33(c)." For a number of reasons, I respectfully disagree with the Draft AO's reasoning and its conclusion.

(1) The Draft AO Misconstrues the Commission's Previous Advisory Opinion Involving Noncommercial Aircraft. First, the Draft AO misconstrues the Commission's previous advisory opinion on the use of campaign funds to pay for campaign or official travel on noncommercial aircraft owned by a candidate (AO 2012-04 & 2012-06). The Draft AO says this about that older opinion:

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More recently the Commission was presented with two requests which posited similar hypotheticals regarding the use of campaign funds for the use of private aircraft, for campaign purposes, where the public officer /candidate or the public officer's/candidate's spouse owned an interest in said aircraft. In its consolidated advisory opinion, the Commission held that:

(1) In the case of travel on an aircraft that is owned or leased under a shared ownership or other time-share arrangement, where the travel does not exceed the candidate's or immediate family member's proportional share of the ownership interest in the aircraft, the candidate must pay and report the hourly, mileage, or other applicable rate charged the candidate or immediate family member for the costs of the travel; or

(2) In the case of travel on aircraft that is owned or leased under a shared ownership or other time-share arrangement, where the travel exceeds the candidate's or immediate family member's proportional share of the ownership interest in the aircraft, the candidate must pay and report the normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size.

S.E.C. AO 2012-04 I 2012-06 (2012) (emphasis added).

The Commission notes that the guidance previously provided in S.E.C. AO 2012-04 / 2012-06 *supra* authorized the expenditure of campaign funds for rental fees and other "applicable charges " that were outside of the "proportional share of ownership interest" that belonged to the public officer/candidate or the public officer's/candidate's family member. Thus, any funds utilized in conformity with the aforementioned guidance would have no material effect upon the public officer's/candidate's or the public officer's/candidate's family member's financial interest in the owned aircraft as the fees paid would not alter, either in an increase or decrease, the fractional ownership interest or overall net value of the financial interest owned by the same in the aircraft.

Draft AO 2020-03. This is a misreading of the previous advisory opinion.

On this issue, it is important to remember that there are usually two issues at play when addressing questions related to use of campaign funds. The first is whether campaign funds may be used to make a certain type of payment. This is a question of permissibility - whether the payment is an ordinary and necessary expense. The second is how such payments should be valued and reported if permissible. That is a reporting issue - an entirely different question.

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The language that the Draft AO has cited from AO 2012-04 / 2012-06 deals with the latter question (valuation and reporting), not the former (permissibility). The language dealt with the situation where an aircraft is owned under a shared-ownership arrangement (not the situation where an aircraft is entirely owned by the candidate), and it stated that the method of valuation and reporting depends on whether the candidate's use of the aircraft is more or less than his or her proportional share of ownership in the aircraft. If the proportional use is less than the proportional ownership, then the campaign should pay and report one rate ("the hourly, mileage, or other applicable rate charged the candidate or immediate family member for the costs of the travel") and if proportional use is more than proportional ownership, the campaign should pay and report a different rate ("the normal and usual charter fare or rental charge for travel on comparable aircraft of comparable size").

That deals purely with valuation and reporting, not permissibility. On permissibility, the advisory opinion specifically stated that "[t]he Commission finds that a candidate is allowed to use campaign funds for expenditures for use of aircraft for campaign purposes under circumstances where the candidate or the candidate's spouse owns an interest in an airplane . . ." (Emphasis added). This quote, which is the one portion of that advisory opinion that is most relevant to the present request, is neither mentioned nor discussed in the Draft AO.

In short, the Draft AO misconstrues and misapplies AO 2012-04 / 2012-06. That older opinion reiterates the longstanding principle that campaign funds may be used to reimburse a candidate or public official when that person provides access to personally-owned assets for campaign or official use. Both that advisory opinion and that principle support the conclusion that campaign funds may be used to reimburse a candidate for campaign or official use of real property that is owned by that candidate. This is particularly true when that candidate lives outside Atlanta and would otherwise need to rent property in Atlanta in order to attend the legislative session and/or political and campaign events in the Atlanta area.

(2) The Draft AO Sets Out a New Principle That is Inconsistent With Years of Commission Precedent Permitting the Use of Campaign Funds to Reimburse Candidates When They Provide Personally-Owned Assets for Campaign or Official Purposes. Second, in stating that a payment of campaign funds to a legislator or candidate for lodging for campaign or official purposes "would have the effect of transferring campaign funds to the public officer/candidate, thereby converting campaign funds into personal assets of the public officer/candidate," the Draft AO sets forth a new principle that would, among other things, make it illegal for the first time for campaigns to reimburse candidates or legislators when they use personal funds to pay for typical campaign or official expenses such as travel, office supplies, computer expenses, etc.

The principle that has long been applied when determining whether such an expenditure is a permissible "ordinary and necessary" expenditure is not simply whether campaign funds have gone to the candidate; it is whether the candidate has provided fair market value to the

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campaign in exchange for the payment. For example, if a candidate provides a personally-owned computer to his or her campaign, the campaign may reimburse the candidate for such value. A failure to make such a payment would result in an in-kind contribution. The Draft AO would make such a payment impermissible, however, on the theory that it “would have the effect of transferring campaign funds to the public officer/candidate, thereby converting campaign funds into personal assets of the public officer/candidate.” That is not now, and has never been, the law.

On this issue, it bears noting that the proposed transaction in the advisory opinion request would have neither a negative effect on the campaign’s finances or a positive effect on the legislator’s finances. It is neutral for both. If a legislator who lives outside Atlanta owns property in Atlanta that is not the legislator’s primary residence, the legislator has the option to rent that property out to a third party and earn rental income. If the legislator were to do that, it would still be legal for the legislator to use campaign funds to rent separate lodging for the legislator to attend the legislative session and campaign events in Atlanta. In either case, the legislator would earn rent from the leasing of the property in Atlanta, and the campaign would pay rent to allow the legislator to attend the legislative session and campaign events in Atlanta. The same financial situation would result if the legislator uses campaign funds to pay for the legislator to use his or her own property during the session, rather than renting that property to a third party. So long as fair market value is used for each transaction, there is no net increase in the legislator’s financial situation, nor any net decrease for the campaign.

(3) Conclusion. For the foregoing reasons, we respectfully submit that it is legal for a legislator who lives outside Atlanta but who owns real property in Atlanta to use campaign funds to rent that property for the legislator to attend legislative sessions or campaign events in Atlanta. Such an expenditure is an ordinary and necessary expenditure, and it does not violate the prohibition on converting campaign funds to personal assets any more than does any other reimbursement to a candidate or legislator who makes personally-owned assets available for campaign or official use.

Thank for your consideration of these comments.

Sincerely,

/s/ Douglas Chalmers, Jr.

Douglas Chalmers, Jr.