

FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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August 27, 2009

AGENDA ITEM

For Meeting of: 08-27-09

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *PCS*
Associate General Counsel

Amy L. Rothstein
Assistant General Counsel

Esther Heiden *EHD*
Attorney

Subject: AO 2009-20 (Visclosky) – Alternative Draft B

SUBMITTED LATE

We have been asked to circulate the attached alternative draft of the subject advisory opinion. Please place this draft on the agenda for August 27, 2009.

Attachment

1 ADVISORY OPINION 2009-20

2

3

4 Dr. Michael C. Malczewski
5 Visclosky for Congress
6 P.O. Box 10003
7 Merrillville, IN 46411-0003
8

DRAFT B

9 Dear Dr. Malczewski:

10 We are responding to your advisory opinion request on behalf of Visclosky for
11 Congress (the “Committee”), concerning the application of the Federal Election
12 Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the use
13 of campaign funds to pay legal fees and expenses incurred by Representative Visclosky’s
14 former Chief of Staff in connection with a Federal investigation of the PMA Group and
15 Representative Visclosky.

16 The Commission concludes that the Committee may not use campaign funds to
17 pay legal fees and expenses incurred by Representative Visclosky’s former Chief of Staff
18 in connection with the Federal investigation of the PMA Group and Representative
19 Visclosky.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 July 9, 2009, and telephone conversations with Commission attorneys.

23 Peter J. Visclosky is the U.S. Representative from the First District of Indiana.
24 He is a member of the House Committee on Appropriations and the Appropriations

1 Subcommittee on Defense, and is Chairman of the Appropriations Subcommittee on
2 Energy and Water Development. The Committee is Representative Visclosky's principal
3 campaign committee.

4 According to media reports provided, the FBI and Federal prosecutors are
5 investigating whether a lobbying firm, PMA Group, made improper political
6 contributions to Representative Visclosky and other members of the U.S. House of
7 Representatives. Media reports state that the FBI executed a search warrant at PMA
8 Group headquarters in November 2008, and that Federal prosecutors "are looking into the
9 possibility that a prominent lobbyist may have funneled bogus campaign contributions to
10 . . . lawmakers."¹

11 Although many of the details of the Federal investigation are not public at this
12 time, media reports indicate that the investigation centers on more than \$500,000 dollars
13 in alleged campaign contributions from PMA Group and its clients to three congressmen,
14 including Representative Visclosky.² The media reports also discuss appropriations
15 earmarks purportedly obtained by Representative Visclosky for PMA Group clients,
16 several of whom also allegedly made contributions to Representative Visclosky's re-
17 election campaign.³ Recently, as part of the ongoing Federal investigation,

¹ David D. Kirkpatrick, *Lobbyist Inquiry Appears to Be Widening*, N.Y. TIMES, Feb. 11, 2009, available at <http://www.nytimes.com/2009/02/11/us/politics/11inquire.html?ref=politics>.

² Kevin Nevers, *Lobbying Firm Facing FBI Probe Has History of Donations to Visclosky*, CHESTERTON TRIBUNE (Ind.), Feb. 13, 2009, available at http://chestertontribune.com/Northwest%20Indiana/21397%20lobbying_firm_facing_fbi_probe_h.htm.

³ *Id.*; see also Henry C. Jackson, *Visclosky's Ties to Troubled PMA Group Run Deep*, CHICAGO TRIBUNE, March 2, 2009, available at <http://archives.chicagotribune.com/2009/mar/02/news/chi-ap-in-viscloskydonation>.

1 Representative Visclosky's former Chief of Staff was served with a grand jury subpoena
2 to produce documents.⁴

3 ***Question Presented***

4 *May the Committee use campaign funds to pay legal expenses incurred by*
5 *Representative Visclosky's former Chief of Staff in connection with a Federal*
6 *investigation of the PMA Group and Representative Visclosky's conduct as a candidate*
7 *for and a member of the House of Representatives?*

8 ***Legal Analysis and Conclusions***

9 No, the Committee may not use campaign funds to pay legal fees and expenses
10 incurred by Representative Visclosky's former Chief of Staff in connection with a
11 Federal investigation into the alleged provision of illegal campaign contributions by the
12 PMA Group and its clients to the Committee, and Representative Visclosky's allegedly
13 improper earmarking of appropriations for clients of PMA Group.

14 The Act identifies six categories of permissible uses of contributions accepted by
15 a Federal candidate. They include: (1) otherwise authorized expenditures in connection
16 with the candidate's campaign for Federal office; (2) ordinary and necessary expenses
17 incurred in connection with the duties of the individual as a holder of Federal office; and
18 (3) any other lawful purpose not prohibited by 2 U.S.C. 439a(b). 2 U.S.C. 439a(a);
19 11 CFR 113.2(a)-(e).

20 Under the Act and Commission regulations, contributions accepted by a candidate
21 may not be converted to "personal use" by any person. 2 U.S.C. 439a(b)(1); 11 CFR
22 113.2(e). The Act specifies that conversion to personal use occurs when a contribution or

⁴ See 155 Cong. Rec. H6017 (daily ed. June 2, 2009) (communication from Chief of Staff of Representative Visclosky).

1 amount is used “to fulfill any commitment, obligation, or expense of a person that would
2 exist irrespective of the candidate’s election campaign or individual’s duties as a holder
3 of Federal office.” 2 U.S.C. 439a(b)(2); *see also* 11 CFR 113.1(g).

4 The Act and Commission regulations provide a non-exhaustive list of items that
5 would constitute personal use *per se*, none of which applies here. For items not on this
6 list, the Commission determines on a case-by-case basis whether an expense would fall
7 within the definition of “personal use.” 11 CFR 113.1(g)(1)(ii). Commission regulations
8 specifically provide that “legal expenses” are subject to a case-by-case determination.
9 11 CFR 113.1(g)(1)(ii)(A).

10 The Commission has long recognized that if a candidate “can reasonably show
11 that the expenses at issue resulted from campaign or officeholder activities, the
12 Commission will not consider the use to be personal use.” Explanation and Justification
13 for Final Rules on Expenditures; Reports by Political Committees; Personal Use of
14 Campaign Funds, 60 FR 7862, 67 (Feb. 9, 1995). Although the Commission has
15 concluded that the use of campaign funds to pay legal fees and expenses does not
16 constitute personal use when the legal proceedings involve allegations directly relating to
17 the candidate’s campaign or duties as a Federal officeholder, *see, e.g.*, Advisory Opinions
18 2009-10 (Visclosky), 2008-07 (Vitter), 2006-35 (Kolbe), 2005-11 (Cunningham), and
19 2003-17 (Treffinger), prior advisory opinions involved legal expenses of the candidate or
20 the Federal officeholder, and the Commission has not previously addressed the legal
21 expenses of campaign or congressional staff members.

22 In situations involving third parties, the relationship of the third party’s legal fees
23 and expenses to any underlying legal proceedings involving a candidate or Federal

1 officeholder often becomes attenuated, particularly under circumstances, as here, where
2 (a) many of the details of the Federal investigation are not public at this time and (b) no
3 information is provided to the Commission regarding the content of the documents
4 sought or the reason why they are being sought. In fact, as discussed below, the
5 irrespective test becomes especially attenuated in this case because it appears very likely
6 that the information is being sought from Representative Visclosky's former Chief of
7 Staff not because of his relationship as a former employee of the officeholder, but rather
8 because of his relationship with the donor under investigation and for whom he was
9 employed after he left the employ of the officeholder and during a period when much of
10 the alleged wrongdoing appears to have occurred.

11 The Commission is thus particularly wary of interpreting 2 U.S.C. 439a as
12 authorizing the use of campaign funds to pay the legal fees and expenses of persons other
13 than candidates and Federal officeholders unless it can be shown that the fees and
14 expenses at issue unambiguously resulted directly from campaign activities or
15 officeholder duties and would not have existed irrespective of those activities or duties.
16 Moreover, permitting the use of campaign funds to benefit third parties absent a specific
17 showing of how the fees and expenses at issue resulted directly from campaign or
18 officeholder activities could open the door to uses of campaign funds that were not
19 contemplated by Congress. Many individuals make contributions to candidates in order
20 to aid their elections, not to subsidize the payment of third parties' legal fees that are not
21 directly related to a candidate's campaign or duties as a Federal officeholder. *See, e.g.,*
22 Comment of Daniel and Susan Martin on Advisory Opinion 2009-10 (Visclosky) ("When

1 citizens give money to a candidate for a specific purpose ([the candidate's] election to
2 Congress), this money should ONLY be used for that reason").

3 Here, Representative Visclosky's former Chief of Staff has been served with a
4 grand jury subpoena to produce documents that are in his custody. In an ordinary case, it
5 is not usually necessary for the subject of a Federal investigation to hire separate counsel
6 for a custodian of records because the records are in the possession of the party being
7 investigated. To respond to a subpoena issued to the custodian of records in such as case
8 would not require counsel, and if the subpoena was objected to, certainly the legal
9 counsel for the officeholder could represent that interest, absent a conflict of interest,
10 which is not argued here. The Committee has made no showing whatsoever as to
11 whether Representative Visclosky's former Chief of Staff will incur legal expenses
12 relating to the production of documents that resulted directly from campaign activities or
13 officeholder duties. Additionally, even if the Committee can show that Representative
14 Visclosky's former Chief of Staff will incur legal expenses relating to the production of
15 documents that resulted directly from campaign or officeholder activities, the Committee
16 has not made any showing as to why any such documents would be in the possession of
17 Representative Visclosky's former Chief of Staff but would not also be available directly
18 from the Committee itself. Accordingly, the Committee has not made the requisite
19 showing under 2 U.S.C. 439a that the legal expenses incurred by Representative
20 Visclosky's former Chief of Staff unambiguously resulted directly from campaign
21 activities or officeholder duties and would not have existed irrespective of those activities
22 or duties.

1 Here, the Commission is asked to approve the use of campaign funds to pay for
2 the legal expenses of a former employee, who is not the custodian of record of currently
3 held documents of the officeholder, and not likely the proper custodian for documents
4 belonging to the Federal officeholder. Nor is it suggested that the former Chief of Staff
5 was at any time the custodian of any records belonging to the officeholder. Likewise, as
6 many of the details of the Federal investigation are not public at this time, the
7 Commission is provided with no information regarding what documents are being
8 requested, or any information as to whether the documents in question were documents
9 generated in the office of the officeholder, or obtained by the former Chief of Staff in his
10 capacity as Chief of Staff of the officeholder. Similarly, no copy of the subpoena, nor
11 any information about its contents, is provided to the Commission. Yet the Commission
12 is being asked to speculate: (a) that the documents were ones belonging to the
13 officeholder, or are directly related to the duties of the officeholder, and (b) that the
14 documents are not related to possible independent wrongdoing of the former Chief of
15 Staff or others associated with PMA Group. Indeed, it appears that the bulk of
16 contributions made by donors tied to PMA Group were received by the Committee
17 during the former Chief of Staff's tenure as a lobbyist for PMA Group, where he worked
18 subsequent to his service as Representative Visclosky's Chief of Staff. Accordingly,
19 based on the information available to the Commission, it appears likely, if not more
20 likely, that Representative Visclosky's former Chief of Staff's legal fees and expenses
21 related to the grand jury subpoena for document production are for documents related to
22 his tenure at PMA Group, which postdates his employment with Representative
23 Visclosky.

1 As stated above, the Act identifies six categories of permissible uses of
2 contributions accepted by a Federal candidate, including: (1) otherwise authorized
3 expenditures in connection with the candidate's campaign for Federal office; (2) ordinary
4 and necessary expenses incurred in connection with the duties of the individual as a
5 holder of Federal office; and (3) any other lawful purpose other than personal use. 2
6 U.S.C. 439a(a); 11 CFR 113.2(a)-(e). The Act specifies that conversion to personal use
7 occurs when a contribution or amount is used "to fulfill any commitment, obligation, or
8 expense of a person that would exist irrespective of the candidate's election campaign or
9 individual's duties as a holder of Federal office." 2 U.S.C. 439a(b)(2); *see also* 11 CFR
10 113.1(g). Thus, the Act makes clear that our analysis must be confined to either (a)
11 campaign activity (not applicable here); or (b) the duties, rather than status, of the Federal
12 officeholder, and it must be an obligation that would exist irrespective of either
13 circumstance. With the exception of Advisory Opinion 1996-24 (Cooley) (permitting the
14 use of campaign funds to pay legal expenses to respond to media inquiries and allegations
15 concerning both a candidate and the candidate's wife), the Commission has never
16 authorized the use of campaign funds for when a person incurs an obligation that is not an
17 obligation of the officeholder, arising out of the duties of the officeholder, for which the
18 officeholder is not legally responsible.⁵ In view of the fact the irrespective test is not met

⁵ In Advisory Opinion 1996-24, the Commission stated that "if allegations of improper or wrongful conduct are made about a candidate in a campaign context, the candidate is entitled to use campaign funds for the purpose of *publicly responding to those allegations*, even if the underlying activities that are the subject of the allegations were not campaign or officeholder related" (emphasis added). *See* Advisory Opinion 1996-24 (Cooley). In that opinion, the underlying activities at issue included improprieties of the candidate's wife, which appeared to have become an issue in the candidate's campaign. Thus, the Commission permitted the use of campaign funds to pay for the legal expenses for conferences between the candidate, the candidate's spouse and the candidate's attorneys, to the extent that the conferences involved discussion of the press allegations made during the candidate's campaign. *Id.*

1 in this case, based upon facts available to the Commission at this time, as discussed
2 below, the request for authorization to use those funds must be denied.

3 In this case, the Commission is being asked to engage in unjustified speculation
4 regarding the irrespective test in view of the independent relationship of the former Chief
5 of Staff to the donor whose conduct is under scrutiny, namely the PMA Group, since the
6 former Chief of Staff was an employee of that organization for several years subsequent
7 to his tenure with Representative Visclosky. No facts are presented that reduce the
8 apparent lack of causal connection between the legal fees and expenses related to the
9 grand jury subpoena for document production by Representative Visclosky's former
10 Chief of Staff and Representative Visclosky's duties as an officeholder. In fact, the
11 information supplied to the Commission, with the request, consisting of news articles,
12 may lead to a contrary conclusion. Some of the contents of those articles are as follows:

13 But few lawmakers have stronger ties to the firm than Visclosky. His
14 former congressional chief of staff worked as a lobbyist for the firm, and
15 he received at least \$100,000 in contributions from donors tied to PMA
16 Group between 2006 and 2008, according to Federal Election Commission
17 reports. PMA Group was the top donor to Visclosky's 2008 re-
18 election campaign.

19
20 From his seat on the House Appropriations Committee and its defense
21 funding subcommittee, Visclosky has also reciprocated – helping to secure
22 more than \$23 million in earmarks in 2008 for clients of PMA Group.

23
24 “It’s pretty clear that Visclosky has deep ties to PMA Group,” said Sheila
25 Krumholz, executive president of the Center for Responsive Politics.

26
27 “It’s also clear that (campaign funds) are being delivered to him on a
28 targeted basis, based on his committee assignments. He’s been in a
29 position to help them from his perch,” she said.

30
31 PMA Group spokesman Patrick Dorton declined to comment on
32 Visclosky's ties to the firm (emphasis added).
33

1 See Henry C. Jackson, *Visclosky's Ties to Troubled PMA Group Run Deep*,
2 CHICAGO TRIBUNE, March 2, 2009, *available at*
3 <http://archives.chicagotribune.com/2009/mar/02/news/chi-ap-in-viscloskydonation>.

4 For the forgoing reasons, and because many of the details of the Federal
5 investigation are not public at this time, including whether, or the extent to which, the
6 former Chief of Staff is involved based on his employment relationship with
7 Representative Visclosky, or based on the independent relationship of the former Chief of
8 Staff to PMA Group, the Committee may not use campaign funds to pay legal fees and
9 expenses incurred by Representative Visclosky's former Chief of Staff as proposed.

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

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1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

2 All cited advisory opinions are available on the Commission's website at

3 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Steven T. Walther

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Chairman

10