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Washington, DC 20463

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AGENDA ITEM
For meeting of Sept. 15, 2022

SUBMITTED LATE

September 13, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

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Assistant General Counsel

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Subject: Draft AO 2022-17 (Warren Democrats) - Draft A (Revised)

We have been asked to place this draft on the Agenda by one or more Commissioners.

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 September 15, 2022.

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 <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2022-17

2

3 Kate Sawyer Keane, Esq.

4 Sarah N. Mahmood, Esq.

DRAFT A (Revised)

5 Elias Law Group

6 10 G. Street, N.E. – Suite 600

7 Washington, D.C. 20002

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9 Dear Ms. Keane and Ms. Mahmood:

10 We are responding to your advisory opinion request on behalf of Warren Democrats, Inc.
11 (the “Committee”) concerning the application of the Federal Election Campaign Act, 52 U.S.C.
12 §§ 30101-45 (the “Act”), and Commission regulations to the proposed use of campaign funds to
13 pay for the costs of reasonable cybersecurity measures to protect Senator Elizabeth Warren’s
14 home network, which connects to her electronic devices and to the devices of other members of,
15 and visitors to, her household, from cyber threats Senator Warren faces in her role as an elected
16 official. The Commission concludes that the Committee may use campaign funds to pay for the
17 costs of reasonable cybersecurity measures to protect the Senator’s home network without such
18 payments constituting an impermissible conversion of campaign funds to personal use, under the
19 Act and Commission regulations.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on July 15,
22 2022.

23 The Committee is registered with the Commission as the principal campaign committee
24 of Senator Elizabeth Warren of Massachusetts, who is running for re-election in 2024.¹ While
25 your letter does not report any specific threats against Senator Warren’s personal electronic

¹ See Statement of Organization (FEC Form 1), Warren Democrats, Inc. (March 23, 2020), <https://docquery.fec.gov/pdf/575/202003239215621575/202003239215621575.pdf>; Statement of Candidacy (FEC Form 2) (March 23, 2020) <https://docquery.fec.gov/pdf/485/202003239215620485/202003239215620485.pdf> (last visited Aug. 1, 2022).

1 devices or accounts, you state that as an elected official, the Senator “faces threats greater than
2 those faced by the general public, including heightened vulnerability to cyberattacks against their
3 electronic devices and accounts.”² You cite news accounts from 2018 and 2020 reporting that
4 email accounts of Senators and other senior government officials have been targeted for hacking,
5 and a POLITICO article written this year containing reports of similar incidents worldwide
6 accompanied by predictions that such incidents will occur in the future.³

7 You also cite materials associated with the Commission’s consideration of a previous
8 advisory opinion request submitted by Senator Ron Wyden of Oregon in 2018.⁴ Among these
9 are: (1) a letter from Michael Rogers, then director of the National Security Agency, stating that
10 the personal devices and accounts of senior U.S. government officials “remain prime targets for
11 exploitation;”⁵ (2) testimony of Dan Coats, former Director of National Intelligence, that “[t]he
12 personal accounts and devices of government officials can contain information that is useful for
13 our adversaries to target;”⁶ and (3) the opinion of Professor Thomas Rid, a cybersecurity expert
14 at Johns Hopkins University’s School of Advanced International Studies, that “the personal
15 accounts of Senators and their staff are high-value . . . targets” because they “contain highly
16 sensitive information about officials’ activities, private communications, family life, finances
17 and movements.”⁷

² AOR001.

³ AOR002.

⁴ *Id.*

⁵ Advisory Opinion 2018-15 (Wyden), AOR002.

⁶ *Id.*; AOR008.

⁷ Advisory Opinion 2018-15 (Wyden), at 4.

1 You propose to use campaign funds for professionally managed security services to
2 provide ongoing network monitoring, patch management, backup management, and remote
3 incident remediation services to ensure overall home network security.⁸

4 ***Question Presented***

5 *May a United States Senator’s principal campaign committee use campaign funds to pay*
6 *for the costs of reasonable cybersecurity measures to protect the Senator’s home network, which*
7 *connects to the personal electronic devices of members of, and visitors to, the Senator’s*
8 *household, as well as to those of the Senator herself?*

9 ***Legal Analysis***

10 Yes, the Committee may use campaign funds to pay for the costs of reasonable
11 cybersecurity measures to protect the Senator’s home network. Such expenses fall within the
12 ordinary and necessary expenses incurred in connection with the duties of the Senator as a holder
13 of federal office.

14 The Act and Commission regulations permit a federal officeholder to use campaign funds
15 for a variety of enumerated purposes, including for “ordinary and necessary expenses incurred in
16 connection with duties of the individual as a holder of Federal office,”⁹ and for “any other lawful

⁸ AOR004. You represent that the Senator will continue to pay personally for internet services to her home, AOR002, which, the Commission assumes, subsumes the basic cost of providing and maintaining the home network. Thus, the Commission understands the scope of this request to extend solely to the incremental costs associated with providing the proposed cybersecurity-focused services for the home network. *See* Matter Under Review 7763 (Casper for Colorado), Factual and Legal Analysis, at 4, 11 (Jan. 18, 2022); Conciliation Agreement, at 4 (May 31, 2022) (candidate committee’s use of campaign funds to pay Comcast bills for internet service to personal residence constitutes *per se* personal use under 11 C.F.R. § 113.1(g)(1)(i)(E) as payment for utility).

⁹ 52 U.S.C. § 30114(a)(2); 11 C.F.R. § 113.2(a).

1 purpose” that does not constitute conversion of campaign funds to “personal use.”¹⁰ Conversion
2 to personal use occurs when a contribution or amount is used “to fulfill any commitment,
3 obligation, or expense” of a federal officeholder “that would exist irrespective” of the
4 officeholder’s duties.¹¹

5 The Act and Commission regulations provide a non-exhaustive list of items that would
6 constitute a prohibited personal use *per se*, none of which applies here.¹² For items not on this
7 list, such as, in this case, payments for cybersecurity measures to protect a home network
8 connecting to personal electronic devices, the Commission determines on a case-by-case basis
9 whether such expenses would fall within the definition of “personal use.”¹³ The Commission
10 has long recognized that if a candidate or federal officeholder “can reasonably show that the
11 expenses at issue resulted from campaign or officeholder activities, the Commission will not
12 consider the use to be personal use.”¹⁴

13 The Commission has issued several advisory opinions authorizing the use of campaign
14 funds for various residential home security upgrades in order to protect against threats to
15 officeholders’ physical safety, on the grounds that the need of for such security expenses would
16 not exist if not for the officeholders’ activities or duties. In Advisory Opinion 2022-02 (Steube)
17 Advisory Opinion 2020-06 (Escobar), Advisory Opinion 2011-17 (Giffords), Advisory Opinion

¹⁰ 52 U.S.C. § 30114(a)(6), (b)(1); 11 C.F.R. § 113.2(e).

¹¹ 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g).

¹² *See* 52 U.S.C. § 30114(b)(2)(A)-(I); 11 C.F.R. § 113.1(g)(1)(i)(A)-(J).

¹³ 11 C.F.R. § 113.1(g)(1)(ii). *See also* Advisory Opinion 2018-15 (Wyden), at 3.

¹⁴ Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995).

1 2011-05 (Terry), and Advisory Opinion 2009-08 (Gallegly), members of Congress faced specific
2 and ongoing threats to the safety of themselves and their families. The facts presented in those
3 advisory opinions suggested that the threats were motivated by the requestors' public roles as
4 federal officeholders, candidates, or both. The Commission concluded in each instance that the
5 expenses for the proposed security upgrades would not have existed irrespective of the
6 requestors' duties as federal officeholders or candidates. Therefore, the Commission concluded
7 that the use of campaign funds to pay for the security upgrades was permissible under the Act or
8 Commission regulations.¹⁵

9 The Commission has also previously concluded that the heightened threat environment
10 faced by members of Congress necessitated increased residential security measures even if an
11 individual member has not received direct threats. In Advisory Opinion 2017-07 (Sergeant at
12 Arms), the Commission considered information from the House Sergeant at Arms about the
13 threats faced by members of Congress due to their status as federal officeholders, and the
14 recommendation of the Capitol Police that members of Congress install or upgrade residential
15 security systems to protect themselves and their families. In light of that information, the
16 Commission concluded that certain costs of installing or upgrading home security systems would
17 constitute ordinary and necessary expenses incurred in connection with members' duties as
18 federal officeholders, and that therefore members of Congress may use campaign funds to pay

¹⁵ See Advisory Opinion 2022-02 (Steube) at 5 (approving use of campaign funds for the cost of a locking steel security gate at the officeholder's residence); Advisory Opinion 2020-06 (Escobar) at 3 (approving use of campaign funds for wiring and lighting costs necessary for the operation of the residential security system); Advisory Opinion 2011-17 (Giffords) at 3 (approving use of campaign funds for installing improved exterior lighting, improved locks, and a duress alarm button); Advisory Opinion 2011-05 (Terry) at 4 (approving use of campaign funds for installation of an exterior closed circuit television monitor); Advisory Opinion 2009-08 (Gallegly) at 4 (approving use of campaign funds for non-structural upgrades to home security system).

1 for reasonable costs associated with home security systems.¹⁶

2 In Advisory Opinion 2018-15 (Wyden), the Commission concluded that a United States
3 Senator’s use of campaign funds to pay for cybersecurity measures for that Senator’s personal
4 electronic devices and accounts would constitute ordinary and necessary expenses incurred in
5 connection with his duties as a federal officeholder because the Senator faced a heightened threat
6 of cyberattacks “with respect to [his] personal electronic devices and accounts by virtue of [his]
7 role as a federal officeholder.”¹⁷

8 As in Advisory Opinion 2018-15 (Wyden), Senator Warren is currently subject to
9 heightened cybersecurity threats due to her role as a federal officeholder. Specifically, “both the
10 heightened risk to Senators’ personal electronic devices and accounts and the magnitude of the
11 potential harm would not exist if not for their roles as federal officeholders.”¹⁸ In order to
12 protect her personal devices and accounts from heightened cybersecurity threats, Senator Warren
13 wishes to purchase enhanced cybersecurity measures for her home network to which those
14 devices and accounts are connected. Although family members and visitors to Senator Warren’s
15 home may also connect their personal devices to Senator Warren’s home network and thus
16 derive the benefit from the enhanced network security protections, any such benefit to others
17 would be merely incidental to the expense of securing Senator Warren’s own electronic devices

¹⁶ Advisory Opinion 2017-07 (Sergeant at Arms) at 3; *see also* Advisory Opinion 2022-02 (Steube) at 5; Advisory Opinion 2020-06 (Escobar) at 3.

¹⁷ Advisory Opinion 2018-15 (Wyden), at 4; *see also* Advisory Opinion 2021-03 (NRSC and NRCC) (concluding that Members of Congress may use campaign funds to pay for bona fide, legitimate, professional personal security personnel to protect themselves and their immediate families due to threats arising from their status as officeholders).

¹⁸ Advisory Opinion 2018-15 (Wyden) at 4.

1 and accounts from cybersecurity threats.¹⁹ As you observe in your request, once security devices
2 or improvements are installed in or around the home, the benefits of such devices necessarily
3 extend to other members of the household and visitors to the home. The fact that others will
4 inevitably benefit from such measures, however, has not precluded the Commission from
5 concluding that the use of campaign funds to install such residential security measures is not
6 personal use. For instance, the installation or enhancement of a residential home security system
7 as in Advisory Opinions 2009-08 (Gallegly), 2011-05 (Terry), 2011-17 (Giffords), and 2020-06
8 (Escobar), or a locking steel gate securing an officeholder’s residence, as in Advisory Opinion
9 2022-02 (Steube), likewise provide incidental security protections to other members of the
10 household and visitors and yet the Commission found them to be necessary expenses incurred in
11 connection with the federal officeholders’ duties. Similarly, here, the fact that others may
12 incidentally benefit from the home network cybersecurity measures does not alter the conclusion
13 that protecting Senator Warren’s home network is necessary to protect her own personal devices
14 and accounts, which the Commission previously recognized is an expense that does not
15 constitute personal use.²⁰ Thus, so long as the benefits accruing to household members and

¹⁹ In Advisory Opinion 2018-15 (Wyden), the Commission stated that the permissible use of campaign funds “is limited to [the Senator’s] own personal devices and accounts and not available for devices and accounts of family members, staff, or other persons.” *Id.* at 4. Here, although family members and other persons may derive a temporary and incidental security benefit while those devices are connected to Senator Warren’s home network, no campaign funds would be used to secure the actual devices and accounts of family members or other persons.

²⁰ As in prior advisory opinions regarding the installation or upgrading of residential security measures, the Commission assumes for the purpose of this advisory opinion that to the extent that the proposed cybersecurity measures involve physical enhancements to Senator Warren’s home, they would not be “structural” and would not be intended to improve the value of the home. *See, e.g.*, Advisory Opinions 2020-06 (Escobar), at 3; 2017-17 (Sergeant at Arms), at 3; 2011-17 (Giffords), at 2.²¹ For example, the Commission assumes that the protection afforded to the devices of persons other than the Senator would be limited to the perimeter of the Senator’s home and for the time within which such other persons are within the home.

1 visitors required by the protection of the home network are incidental,²¹ the Commission
2 concludes that the Committee’s proposal to make reasonable cybersecurity improvements to the
3 home network will not result in impermissible personal use because the such expenses would be
4 ordinary and necessary expenses incurred in connection with the Senator’s duties as a federal
5 officeholder.²²

6 Accordingly, the Commission concludes that the Committee may use campaign funds to
7 pay for the costs of reasonable cybersecurity measures to protect the Senator’s home network.

8 This response constitutes an advisory opinion concerning the application of the Act and
9 Commission regulations to the specific transaction or activity set forth in your request.²³ The
10 Commission emphasizes that, if there is a change in any of the facts or assumptions presented,
11 and such facts or assumptions are material to a conclusion presented in this advisory opinion,
12 then the requestor may not rely on that conclusion as support for its proposed activity. Any
13 person involved in any specific transaction or activity which is indistinguishable in all its
14 material aspects from the transaction or activity with respect to which this advisory opinion is
15 rendered may rely on this advisory opinion.²⁴ Please note that the analysis or conclusions in this
16 advisory opinion may be affected by subsequent developments in the law including, but not

²¹ For example, the Commission assumes that the protection afforded to the devices of persons other than the Senator would be limited to the perimeter of the Senator’s home and for the time within which such other persons are within the home.

²² 52 U.S.C. § 30114(a)(2). As in Advisory Opinion 2017-07 (Sergeant at Arms), at 3 n.4, the Commission assumes that in paying for the costs of reasonable cybersecurity measures for the Senator’s home network, the Committee will pay the fair market value of such measures to avoid receiving potentially impermissible in-kind contributions from vendors.

²³ See 52 U.S.C. § 30108.

²⁴ See 52 U.S.C. § 30108(c)(1)(B).

1 limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited
2 herein are available on the Commission's website.

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On behalf of the Commission,

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Allen J. Dickerson,
Chairman

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