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FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 25, 2022

ADVISORY OPINION 2022-07

Rebecca J. Olson, Esq.
Miller & Olson, LLP
400 Capitol Mall, Suite 1545
Sacramento, CA 95814-4434

Dear Ms. Olson:

We are responding to your advisory opinion request on behalf of Congressman Eric Swalwell and Swalwell for Congress (the “Committee”) concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to the proposed use of campaign funds to pay certain of Congressman Swalwell’s childcare expenses. The Commission concludes that Congressman Swalwell may use campaign funds to pay overnight childcare expenses that he will incur when he travels for his own campaign and his spouse is not available to care for their children. The Commission did not approve a response by the required affirmative vote of at least four Commissioners as to whether Congressman Swalwell may use campaign funds to pay childcare expenses incurred when he travels for other campaigns or at the request of foreign governments or other entities.

Background

The facts presented in this advisory opinion are based on your letter received on May 26, 2022.

Congressman Swalwell currently represents California Congressional District 15. He also serves as Co-Chair of the House Democratic Steering and Policy Committee, which is a party leadership position that can be held only by a Member of Congress. His duties as Co-Chair “include getting more Democrats elected to Congress.”¹ In addition, Congressman Swalwell is a candidate for California Congressional District 14 in the 2022 elections. The Committee is his principal campaign committee.²

¹ Advisory Opinion Request (“AOR”) at AOR001.

² See Swalwell for Congress, Statement of Candidacy, FEC Form 2 (Jan. 15, 2022), <https://docquery.fec.gov/pdf/513/202201159474990513/202201159474990513.pdf> (last viewed June 21, 2022)

Congressman Swalwell and his wife work full-time and have three young children at home. Congressman Swalwell often pays for childcare when conducting campaign activities locally. In addition, Congressman Swalwell “is often expected to travel and be away from home, including overnight,” “[a]s part of his duties as” an officeholder, candidate, and fundraiser for other Democratic candidates.³ Further, “because of his status as a well-known member of Congress,” Congressman Swalwell also receives invitations, including invitations from foreign governments for information gathering visits, “that may require him and sometimes his spouse to be away for multiple days.”⁴

Questions Presented

1. *May Congressman Swalwell use campaign funds to pay for overnight childcare if he travels for campaign events for his campaign or other campaigns, if his spouse is not available to care for the children?*
2. *May Swalwell for Congress pay for childcare expenses for Congressman Swalwell’s children if he travels at the request of foreign governments or other entities because of his status as a Member of Congress? If yes, would that include the expenses for overnight childcare as well?*

Legal Analysis and Conclusions

1. *May Congressman Swalwell use campaign funds to pay for overnight childcare if he travels for campaign events for his campaign or other campaigns, if his spouse is not available to care for the children?*

Congressman Swalwell may use campaign funds to pay for overnight childcare if he travels for campaign events for his campaign and his spouse is not available to care for their children, because the expenses would not exist irrespective of Congressman Swalwell’s campaign. The Commission did not approve a response by the required affirmative vote of at least four Commissioners on whether Congressman Swalwell may use campaign funds to pay childcare expenses that he will incur when he travels for campaigns other than his own.

Under the Act and Commission regulations, a candidate’s authorized committee may use campaign funds for several specific purposes, including “for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual,” “for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office,” and “for any other lawful purpose” that does not constitute conversion of campaign funds to “personal use.”⁵ The

³ AOR001.

⁴ *Id.*

⁵ See 52 U.S.C. § 30114(a)(1)-(2), (a)(6); 11 C.F.R. § 113.2(a), (e).

Act and Commission regulations define “personal use” as the use of campaign funds “to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate’s election campaign” or duties as a federal officeholder.⁶

The Act and Commission regulations provide a non-exhaustive list of expenses that, when paid using campaign funds, constitute *per se* personal use.⁷ For expenses not included on this list, the Commission determines, on a case-by-case basis, whether the use is a prohibited “personal use” — that is, whether the expense would exist irrespective of the candidate’s campaign or federal officeholder duties.⁸

The Act and Commission regulations do not expressly address childcare expenses. The Commission, accordingly, determines whether the proposed use of campaign funds for childcare expenses would exist irrespective of the candidate’s campaign for federal office or federal officeholder duties.

A. Use of campaign funds to pay Congressman Swalwell’s overnight childcare expenses when he travels for campaign events for his own campaign

In previous advisory opinions, the Commission has considered whether federal candidates may use campaign funds to pay childcare costs incurred as a result of their own campaigns. In Advisory Opinion 2018-06 (Liuba for Congress), for example, a federal candidate who had given up her in-home consulting work in order to campaign and hired a caregiver for her children proposed to use campaign funds to pay childcare expenses when her campaign responsibilities prevented her from caring for the children herself.⁹ Similarly, in Advisory Opinion 2019-13 (MJ for Texas), a federal candidate who had left her job to work full-time on her campaign proposed to use campaign funds to pay for full-time daycare for her children when her campaign activities prevented her from providing the care herself.¹⁰ In both advisory opinions, the Commission concluded that the candidates could use campaign funds to pay childcare expenses to the extent the expenses were a “direct result of campaign activity,” because such expenses would not have existed irrespective of the candidates’ campaigns.¹¹

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

⁷ See 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1 (g)(1)(i).

⁸ See 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g)(1)(ii).

⁹ Advisory Opinion 2018-06 (Liuba for Congress) at 1-2.

¹⁰ Advisory Opinion 2019-13 (MJ for Texas) at 1-2.

¹¹ Advisory Opinion 2018-06 (Liuba for Congress) at 3, Advisory Opinion 2019-13 (MJ for Texas) at 3; see also Advisory Opinion 1995-42 (McCrery) at 2 (approving proposed use of campaign funds to pay Congressman’s childcare expenses when he and his wife attend campaign events, where childcare expenses result only from campaign activity and otherwise would not exist).

The Commission's analysis and conclusions in the previous advisory opinions apply equally here. The requestors state that Congressman Swalwell's campaign activities will occasionally require him to be away from home overnight, and that he will incur expenses for overnight childcare during those times when his wife is unavailable to care for their children. To the extent that Congressman Swalwell's overnight childcare expenses will be a direct result of Congressman Swalwell's travel for his own campaign activities, the Commission concludes that those expenses would not exist irrespective of his campaign and, therefore, may be paid with campaign funds.¹² This conclusion is consistent with the Commission's conclusions in Advisory Opinion 2018-06 (Liuba for Congress) and Advisory Opinion 2019-13 (MJ for Texas).

B. Use of campaign funds to pay Congressman Swalwell's overnight childcare expenses when he travels for campaign events for other campaigns

The Commission did not approve a response to this question by the required affirmative vote of at least four Commissioners. *See* 52 U.S.C §§ 30106(c), 30107(a)(7); *see also* 11 C.F.R. § 112.4(a).

2. *May Swalwell for Congress pay for childcare expenses for Congressman Swalwell's children if he travels at the request of foreign governments or other entities because of his status as a Member of Congress? If yes, would that include the expenses for overnight childcare as well?*

The Commission did not approve a response to this question by the required affirmative vote of at least four Commissioners. *See* 52 U.S.C §§ 30106(c), 30107(a)(7); *see also* 11 C.F.R. § 112.4(a).

The Commission expresses no opinion regarding the application of the rules of the U.S. House of Representatives to the proposed activities, because those rules are not within the Commission's jurisdiction.

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

¹² *See* 52 U.S.C. § 30114(a)(1), (b); 11 C.F.R. § 113.1(g).

¹³ *See* 52 U.S.C. § 30108.

¹⁴ *See id.* § 30108(c)(1)(B).

regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website. Advisory opinions do not address questions of general law, hypothetical situations, the activities of third parties, or past activity.¹⁵

On behalf of the Commission,

A handwritten signature in blue ink, appearing to read "Allen J. Dickerson", written over a horizontal line.

Allen J. Dickerson
Chairman

¹⁵

See 11 C.F.R. § 112.1(b).