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By Electronic Mail

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
999 E Street NW
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Re: Comments on Advisory Opinion 2017-07, Draft A

Dear Ms. Stevenson,

The Campaign Legal Center respectfully submits these comments on Draft A of Advisory Opinion 2017-07 (Sergeant at Arms).

The advisory opinion request asks whether "a Member of Congress may use campaign funds to purchase a home security system which does not make structural improvements to the home and to pay for the monitoring thereof." We noted in our comments on the request[1] that the terms "security system" and "structural" are ambiguous in this context, and we suggested some clarifications that might provide Members with all necessary legal reassurance while also curing that ambiguity.

Rather than cure the ambiguity, Draft A vastly expands it. First, Draft A re-writes the request to ask:

> *May Members of Congress use campaign contributions to install or upgrade residential security systems not **primarily intended** to increase the value of the Members' homes?*

Draft A at 2 (emphasis added). Draft A then goes on to answer its self-created question in the affirmative: "Members of Congress may use campaign funds to pay for the reasonable costs associated with installing or upgrading a security system at the Members' residences, not *primarily intended* to increase the value of the Members' homes . . . ." *Id.* at 4 (emphasis added).

According to Draft A, therefore, the permissibility of the proposed spending turns on the subjective intent of each Member of Congress — his or her individual desires or plans regarding the effect that the spending would have on his or her home value. And this subjectivity is enhanced by the qualifier "primarily," which provides that spending subjectively intended to increase the value of a Member's home would be permissible as long as it is not subjectively *primarily* intended to do so. Thus, a Member who faces the safety risks described in the advisory opinion request and installs a security system without regard to its home-improvement

[1] Advisory Opinion Request 2017-07 was made public on June 30. Although the Act prohibits the Commission from issuing an advisory opinion until the 10-day comment period on the request has closed, 52 U.S.C. § 30108(d), Draft A was released and placed on a Commission meeting agenda on July 6.

value would be legally compliant, but a Member who faces the exact same safety situation and installs the exact same security system will be in violation of the law if he picks that system "primarily" because he subjectively hopes it will enhance the value of his home. This distinction is neither sensible nor administrable.

We also note that Draft A's re-writing of the question presented to focus on subjective intent has no basis in the request itself. Indeed, the "primary intent" question as stated in Draft A cannot possibly be the question presented by the requestor, as the request provides no facts regarding the "intent" (much less the "primary intent") of Members regarding their home values.[2]

Finally, and most importantly, the subjective "primary intent" test of Draft A has no basis in the Act. The Act's personal use restrictions are objective and clear: They turn on the nature of the goods and services purchased, such as housing, clothes, non-campaign travel, and other expenses that would exist irrespective of the spender's officeholder duties. *See* 52 U.S.C. § 30114. Draft A, in contrast, would provide that the key question is not what the spender buys, but rather what he or she "intend[s]" to accomplish through his or her spending. That subjective inquiry cannot be reconciled with the text of section 30114.[3]

As we noted in our comment on the request, spending that increases the value of an official's residence has been involved in many corrupt *quid pro quo* arrangements. *See* Comment of Campaign Legal Center at 1 n.1. In recognizing Members' legitimate and lawful need to secure their homes, the Commission should not throw open a door to such corruption. Thus, while we continue to believe that the request should be approved, we recommend that the Commission do so with a clear opinion that is grounded in the statute, rather than through the subjective "primary intent" test invented by Draft A.

Sincerely,

/s/ Adav Noti

Adav Noti
Senior Director, Trial Litigation and Strategy

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[2] To be clear, we are not objecting to the Commission's general practice of re-writing questions presented in advisory opinion requests. We are concerned only by the way in which Draft A has re-written this particular question to focus on a fact that the request does not contain or ask about.

[3] Draft A misleadingly asserts that in the three prior advisory opinions on this subject "the proposed [security] upgrades were not primarily intended to increase the value of the officeholders' property." In Advisory Opinion 2011-17 (Giffords) and Advisory Opinion 2009-08 (Gallegly), the requestors stated that their security spending was "not intended to increase the value" of the officeholders' homes, but the Commission did not cite, note, or even mention the requestors' intentions in its analysis or approval of either request. Only in Advisory Opinion 2011-05 (Terry) did the Commission note the requestor's intention not to increase his home value as a material fact, but even there, the requestor's intention was not central to the response as it is in Draft A. And none of these opinions refers to the "primary" intention of the requestor, versus some other intention.