



March 10, 2021

Commission Secretary  
Federal Election Commission  
1050 First Street, NW  
Washington, DC 20463

VIA EMAIL ([personalsecurityrule@fec.gov](mailto:personalsecurityrule@fec.gov))

**Re: Comments on Draft Interpretive Rule on Use of Campaign Funds by  
Members of Congress for Personal and Residential Security**

Dear Commission Secretary:

These comments are submitted by the National Republican Senatorial Committee (NRSC) and the National Republican Congressional Committee (NRCC), through the undersigned counsel, in connection with Agenda Document No. 21-14-A, Draft Interpretive Rule on Use of Campaign Funds by Members of Congress for Personal and Residential Security dated March 5, 2021 (the “Draft”). We write to express serious concerns with the Draft.

*First*, we note that Interpretive Rules have generally been issued for the purpose of clarifying narrow or technical questions arising from ambiguities in the Commission’s *own regulations*.<sup>1</sup> The Draft, however, purports to serve as the Commission’s “interpretation” of a statutory provision (52 U.S.C. § 30114(a)(2)). In other words, The Draft proposes a new *substantive rule*, applicable to all Members of Congress, that would effectively be a regulation implementing Section 30114(a)(2) without having been promulgated by the process set forth in the Administrative Procedure Act. A rule like the one proposed in the Draft should be addressed through the notice and comment rulemaking process.

*Second*, language on pages 5-6 of the Draft troublingly suggests that one or more Commissioners may be contemplating side-stepping the Commission’s obligation to answer a valid, pending advisory opinion request by selectively invoking the rule regarding hypothetical situations or activities of third parties (11 C.F.R. § 112.1(b)). The procedural posture of the

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<sup>1</sup> See, e.g., Interpretive Rule on Reporting Ultimate Payees of Political Committee Disbursements, 78 Fed. Reg. 40,625 (July 8, 2013); Interpretive Rule on When Certain Independent Expenditures Are “Publicly Disseminated” for Reporting Purposes, 76 Fed. Reg. 61,254 (Oct. 4, 2011); Interpretive Rule Regarding Electronic Contributor Redesignations, 76 Fed. Reg. 16,233 (Mar. 23, 2011).

pending advisory opinion request is materially indistinguishable from Advisory Opinion 2017-07, which the Commission issued unanimously less than four years ago. In both instances, the request was submitted by a person (or persons) acting in a representative capacity on behalf of Members of Congress.<sup>2</sup> In 2017, House Sergeant at Arms Paul Irving wrote to the Commission, “I write to request guidance and clarification from the Federal Election Commission (FEC) regarding the use of campaign funds by Members of the U.S. House of Representatives for residential security systems.”<sup>3</sup> The Commission responded to the request without expressing any concern that it presented hypothetical situations or related to the activities of third parties. We request the same treatment and see no valid basis for refusing to respond to the pending request.

*Third*, we believe the Draft proposes a new rule for Members’ home security systems that is more burdensome than the rule adopted in Advisory Opinion 2017-07, and which, in the current threat environment, will make Members less safe by prohibiting them from using campaign funds to take proactive measures to protect themselves and their families. The Draft proposes the same inadequate rule for personal security personnel, which is objectionable for the same reasons.

### **The Draft Interpretive Rule Departs from Advisory Opinion 2017-07 and Leaves Members with Fewer Home Security Options to Protect Themselves and Their Families**

The most significant aspect of Advisory Opinion 2017-07 is that it allowed *all* Members of Congress to use campaign funds to install residential security systems *before* they or their families were subjected to threats of physical harm. Prior to 2017, the Commission issued case-by-case decisions granting requestors permission to use campaign funds to install security systems *after* they had received threats and *after* the Capitol Police recommended they upgrade their home security. Advisory Opinion 2017-07 recognized the inherent flaw in this approach – the harm may already have been inflicted before a Member receives a response regarding a specific threat. As Representative Harper commented at the time, **“These types of threats necessitate a proactive rather than reactive response. Members are unfortunately no longer able to wait until confirmation of a threatening communication before taking prudent steps to protect themselves and their family.”**<sup>4</sup> The Draft purports to recognize this concern, but the standards proposed for both residential and personal security personnel would prohibit any proactive action.

With respect to home security systems, if the Draft’s intent is to restate and “codify” Advisory Opinion 2017-07, it does not do that. Instead, the Draft imposes new requirements that prohibit a Member from proactively using campaign funds to install a home security system *before* a specific threat emerges. Whether intended or not, the Draft undoes what was most valuable about Advisory Opinion 2017-07 and reinstates the less effective (and, frankly, more dangerous) approach of earlier advisory opinions. The same critique applies to the Draft’s proposed treatment of personal security personnel.

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<sup>2</sup> See also Advisory Opinion 2006-04, issued to the NRSC, DSCC, and Republican State Committee of Pennsylvania, and addressing questions pertaining to federal candidate recount funds.

<sup>3</sup> Advisory Opinion Request 2017-07 at 1.

<sup>4</sup> Advisory Opinion 2017-07 at 2 (citing comment of Rep. Harper).

In our Advisory Opinion Request, we asked the Commission to affirm that Members of Congress may use campaign funds to pay for personal security personnel to protect both the Member and the Member’s immediate family. We urged the Commission to apply the same analysis employed in Advisory Opinion 2017-07 to conclude that these expenses “fall within the uses defined as permissible under the Act: ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of federal office.”<sup>5</sup> In Advisory Opinion 2017-07, the Commission made clear that its conclusion applied “regardless of whether those Members have received specific or ongoing threats.”<sup>6</sup> Thus, the Commission adopted a new and different legal analysis for home security systems. Whereas prior advisory opinions analyzed the question under the regulatory “irrespective” test (11 C.F.R. § 113.1(g)1(ii)), which is a facts-and-circumstances standard, in Advisory Opinion 2017-07, the Commission declared spending for home security systems to be an ordinary and necessary officeholder expense under the Act (52 U.S.C. § 30114(a)(2)). This shift in legal rationale allowed the Commission to make a blanket determination that applied to *all* Members without regard to their specific facts and circumstances. The statutory permitted uses listed at 52 U.S.C. § 30114(a) are categorical; they do not depend on facts-and-circumstances determinations. The Draft appears to conflate the two different legal rationales and, in the process, applies a new facts-and-circumstances test to the statutory ordinary and necessary officeholder expenses category.

The Draft undoes the approach the Commission took in Advisory Opinion 2017-07 by imposing a newly minted three-part test that does not appear in Advisory Opinion 2017-07. The effect of this three-part test is to take away what made Advisory Opinion 2017-07 valuable to Members in the first place, which was dispensing with the requirements that a specific threat be shown and that Capitol Police issue a specific recommendation to the Member, and instead declaring that home security systems were an ordinary and necessary officeholder expense in the then-current threat environment.

The Draft would effectively repeal Advisory Opinion 2017-07 by replacing the straightforward and valuable conclusion that home security systems are ordinary and necessary officeholder expenses for all Members, as a categorical matter, with a three-part test derived from the earlier advisory opinions that made case-by-case determinations using the “irrespective” standard.

- The first part of the proposed test re-imposes the pre-2017 requirement that a Member first be subjected to “reasonably specific and ongoing threats of physical harm” before spending campaign funds on a home security system.<sup>7</sup> In other words, the “proactive rather than reactive response” that was approved in Advisory Opinion 2017-07 would no

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<sup>5</sup> Advisory Opinion 2017-07 at 2.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> “The Commission interprets ‘ordinary and necessary expenses incurred in connection with duties of [an] individual as a holder of Federal office,’ 52 U.S.C. 30114(a)(2), to include an expense for the installation (or upgrade) and monitoring costs of cameras, sensors, distress services, and similar non-structural security devices (including any wiring and lighting necessary for the function of such security devices), as well as locks, in and around a member’s residence if: (1) reasonably specific and ongoing threats of physical harm exist as to members of Congress due to their status as federal officeholders . . . .” Draft at 6-7.

longer be permissible, notwithstanding the fact that the Draft quotes that exact language approvingly. This requirement is a step in the wrong direction that places Members and their families in danger. We find it exceedingly difficult to believe that the Commission would even consider making it *more* difficult for Members to protect themselves and their families in the current environment.

- The second part of the test requires the U.S. Capitol Law Enforcement Offices to recommend that Members use residential security systems, but the Draft renders this requirement a non-issue by deeming it satisfied as long as the current “recommendation remains active.”<sup>8</sup> If this requirement is automatically satisfied, why is it part of the test at all?
- The third part of the test restates existing requirements regarding structural improvements and is not objectionable.

The approach proposed in the Draft needlessly complicates a decision the Commission has already made, and in the process, forbids the spending of campaign funds on home security systems proactively. If adopted, the Draft would require a Member to be threatened *before* he or she may use campaign funds to install a home security system. If the Draft is adopted, the Commission should address whether home security systems that were installed proactively on the basis of Advisory Opinion 2017-07 are deemed “grandfathered,” or whether Members should be prepared to demonstrate “reasonably specific and ongoing threats of physical harm” in order to keep their campaign-funded residential security systems. In addition, the Commission should clearly state that, as of the date the Draft is adopted, Advisory Opinion 2017-07 is superseded, and Members may no longer rely on its guidance.

**The Draft Interpretive Rule Proposes A Standard for Personal Security Personnel That Delegates the Commission’s Decision-making Authority to U.S. Capitol Police and Prevents Members From Acting Proactively to Protect Themselves and Their Families**

The Draft’s proposed standard for personal security personnel similarly rejects the approach taken in Advisory Opinion 2017-07 in favor of the convoluted three-step approach described above. Instead of allowing a Member to act proactively, before the Member or his or her family is threatened, the Draft requires the Member to identify a “specific and ongoing threat,” report that threat to “one or more U.S. Capitol Law Enforcement Offices,” and wait for the U.S. Capitol Law Enforcement Offices to issue a recommendation that the Member should retain personal security personnel. The Member may then use that recommendation as the basis for using campaign funds for personal security personnel. This multi-step, inherently reactive process is completely at odds with the Commission’s alleged cognizance that “these types of threats necessitate a proactive rather than reactive response” and that “Members are unfortunately no longer able to wait until confirmation of a threatening communication before taking prudent steps to protect themselves and their family.”<sup>9</sup>

The threat environment assessment that served as one of the bases for the Commission’s conclusions in Advisory Opinion 2017-07 has, by nearly all accounts, significantly worsened.

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<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.*

On March 3, 2021, Acting Capitol Police Chief Yogananda Pittman testified that “there has been a 93.5% increase in threats to members in the first two months of 2021 compared to the same period last year.”<sup>10</sup> Furthermore, “[s]he also said that threats have more than doubled overall — by about 119 percent — from 2017 to 2020, with most suspects living outside the Washington region.”<sup>11</sup> Thus, according to the Acting Capitol Hill Police Chief, in the time period since the Commission approved Advisory Opinion 2017-07, “threats have more than doubled overall.” Yet, the Draft proposes a different, far more burdensome standard for personal security personnel than has been afforded to residential security for the past four years.

In addition to forcing Members to react to specific threats, rather than take proactive steps to secure themselves and their families, the Draft also requires a security recommendation from the U.S. Capitol Law Enforcement Offices *before* a Member spends campaign funds on personal security personnel. Unlike the proposed test for residential security expenses, this element of the standard would not be automatically satisfied by a threat assessment issued by a U.S. Capitol Law Enforcement Office. Thus, the ability of the U.S. Capitol Law Enforcement Offices to quickly assess a threat and issue a recommendation is an issue. Speaker Pelosi’s Task Force 1-6 issued its “Capitol Security Review” on March 5, 2021, and found that “[t]he USCP is not postured to track, assess, plan against, or respond to this plethora of threats due to significant capacity shortfalls, inadequate training, immature processes, and an operating culture that is not intelligence-driven.”<sup>12</sup> The conclusions reached in the Capitol Security Review suggest the U.S. Capitol Law Enforcement Offices cannot, at this time, reliably perform the task assigned them in the Draft. However, even if this conclusion is unduly harsh, and threats can be quickly assessed and recommendations made, the proposed process is still *reactive*. For Members and their families, being forced to address their security needs *reactively* means not protecting themselves from threats until after they have already occurred. If Members can only protect themselves *reactively*, then at some point, somewhere, an incident will occur that could have been stopped if the Member had been permitted to act *proactively*.

The “Capitol Security Review” specifically recognizes the inadequacy of Member security away from the Capitol Complex. “Although the USCP’s Dignitary Protection Division (DPD) provides adequate security to House leadership, other Members, faced with varying threat levels, have limited or inconsistent protection at their homes, in their districts, and while in transit.”<sup>13</sup> The Task Force recommended that “[t]he DPD should develop a threat-based protection model that can be consistently applied to non-leadership, allocating protection resources based on an evaluation of risk to Members and their families.”<sup>14</sup> In addition, the Task Force recommends increasing the size of the DPD “to viably handle growing demand for Member security.”<sup>15</sup>

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<sup>10</sup> Cristina Marcos, *Threats to lawmakers up 93.5 percent in last two months*, The Hill (Mar. 3, 2021), <https://thehill.com/homenews/house/541382-capitol-police-chief-says-threats-to-members-of-congress-have-nearly-doubled>.

<sup>11</sup> *Id.*

<sup>12</sup> Task Force 1-6, Capitol Security Review at 2, (Mar. 5, 2021), <https://www.washingtonpost.com/context/read-the-report-task-force-1-6-capitol-security-review/91993776-3301-4d92-bb97-658d65c864dc/>.

<sup>13</sup> *Id.* at 11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

The Task Force's recommendations may or may not be implemented. If they are, taxpayers may ultimately fund some of the expenses contemplated here. In the meantime, however, Members of Congress *should* have the ability to use their campaign funds to protect themselves and their families in the face of a broadly acknowledged increase in threats. As demonstrated in Advisory Opinion 2017-07, it is within the Commission's authority to tell Members of Congress that they may permissibly use campaign funds to protect themselves and their families with personal security personnel, *without having to wait until it may be too late*.

Finally, the Draft's proposed requirement that campaign spending be judged permissible only after a U.S. Capitol Law Enforcement Office assesses a threat and issues a recommendation effectively outsources the agency's administration of 52 U.S.C. § 30114(a)(2). Respectfully, Congress delegated that task to the Commission.

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We appreciate the opportunity to comment on the proposed Draft Interpretive Rule.

Sincerely,



Erin Clark  
General Counsel  
NRCC



Ryan G. Dollar  
General Counsel  
NRSC



Jessica Johnson  
Holtzman Vogel Josefiak Torchinsky PLLC  
Counsel to NRSC and NRCC



Chris Winkelman  
Holtzman Vogel Josefiak Torchinsky PLLC  
Counsel to NRSC and NRCC

cc: Chair Broussard  
Vice Chair Dickerson  
Commissioner Cooksey  
Commissioner Trainor  
Commissioner Walther  
Commissioner Weintraub