



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

## INTERPRETIVE STATEMENT OF COMMISSIONER SEAN J. COOKSEY

No funds held “in a campaign account” may be converted “to personal use.” That is the law under the Federal Election Campaign Act of 1971, as amended (the “Act”), and the Commission’s longstanding regulations. Yet over recent years, confusion has increased about the scope and application of the personal-use restriction, especially as it relates to non-campaign committees like leadership PACs. Accordingly, I write to state plainly the law as it stands today: the Act’s personal-use restriction is limited to authorized candidate committees, does not apply to funds lawfully transferred by an authorized candidate committee after the funds have left the campaign account, and does not apply to other types of non-candidate political committees, including leadership PACs. Only a formal rulemaking—or better, an act of Congress—can change that.

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The Act prohibits “[a] contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office” from being “converted by any person to personal use.”<sup>1</sup> Personal use occurs when “the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate’s election campaign or individual’s duties as a holder of Federal office.”<sup>2</sup> FEC regulations further clarify this definition: “Personal use means any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate’s campaign or duties as a Federal officeholder.”<sup>3</sup>

Commission regulations define a leadership PAC, in relevant part, as “a political committee that is directly or indirectly established, financed, maintained or controlled by a candidate for Federal office or an individual holding Federal office but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual.”<sup>4</sup> In this way, leadership PACs are like other committees that are

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<sup>1</sup> 52 U.S.C. § 30114(a), (b)(1).

<sup>2</sup> 52 U.S.C. § 30114(b)(2).

<sup>3</sup> 11 C.F.R. § 113.1(g).

<sup>4</sup> 11 C.F.R. § 100.5(e)(6).

not authorized candidate committees, such as independent expenditure-only committees, separate segregated funds, or party committees.

The Commission's established legal rule is that leadership PACs are not subject to the Act's personal-use restriction because they are neither authorized candidate committees nor affiliated with them. As the Commission reasoned in Advisory Opinion 2008-17 (KITPAC), because "a leadership PAC cannot be affiliated with an authorized committee[,] [a leadership PAC] is a 'third party' for purposes of 11 CFR [§] 113.1(g)(6)."<sup>5</sup> This legal interpretation was subsequently affirmed in four unanimously adopted sets of legislative recommendations by the Commission. Those Commission recommendations stated: "[The Act] makes it illegal for an individual to use contributions accepted by a candidate or a candidate's committee for his or her own personal use. . . . However, no corresponding provision covers individuals who convert contributions received by party committees, separate segregated funds, leadership PACs, and other political committees to their own personal use."<sup>6</sup> In the 2013 legislative recommendations, the Commission went so far as to recognize that "[l]eadership PACs present a particularly compelling case" for a legislative amendment subjecting them to the personal-use restriction, but "Congress might not have considered the application of the personal use prohibition to this particular type of political committee."<sup>7</sup> Two Commissioners who voted in favor of this language are still serving today.

This distinction does not change when a leadership PAC (or any other committee that is not an authorized candidate committee) receives an otherwise-permissible contribution from an authorized candidate committee. The Commission's regulations provide that the personal-use restriction applies only to the "use of funds *in a campaign account*"—that is, an account of a campaign committee for a federal candidate.<sup>8</sup> Once an authorized candidate committee dispenses funds for a lawful purpose, including making permissible contributions or donations to other organizations, the funds are, by definition, no longer *in* the campaign account. They become the property of the recipient organization and may be used just like any other funds the recipient raises. The personal-use restriction is not tied to the funds, and there is no obligation under the Act or Commission regulations to trace, segregate, or restrict the use of funds that originate from a campaign account once those funds have been transferred.

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<sup>5</sup> Advisory Opinion 2008-17 (KITPAC) at 4 n.4.

<sup>6</sup> *Legislative Recommendations of the Federal Election Commission 2013* at 12 (Dec. 17, 2013), available at <https://www.fec.gov/resources/cms-content/documents/legrec2013.pdf>; Draft Legislative Recommendations 2013, Certification (Dec. 17, 2013); *Legislative Recommendations of the Federal Election Commission 2012* at 7 (May 10, 2012), available at <https://www.fec.gov/resources/cms-content/documents/legrec2012.pdf>; Draft Legislative Recommendations 2012, Certification (May 10, 2012); *Legislative Recommendations of the Federal Election Commission 2011* at 4 (Mar. 16, 2011), available at <https://www.fec.gov/resources/cms-content/documents/legrec2011.pdf>; Draft Legislative Recommendations 2011, Certification (Mar. 16, 2011); *Legislative Recommendations of the Federal Election Commission 2009* at 4 (Mar. 19, 2009), available at <https://www.fec.gov/resources/cms-content/documents/legrec2009.pdf>; Draft Legislative Recommendations, Certification (Mar. 19, 2009).

<sup>7</sup> *Legislative Recommendations of the Federal Election Commission 2013* at 12 (Dec. 17, 2013), available at <https://www.fec.gov/resources/cms-content/documents/legrec2013.pdf>.

<sup>8</sup> 11 C.F.R. § 113.1(g) (emphasis added).

Despite this, over the past few years, several Commissioners and the Office of the General Counsel (“OGC”) have attempted to erode this consensus legal interpretation. In Advisory Opinion 2014-06 (Ryan for Congress), the Commission was unable to muster four votes to approve a draft advisory opinion plainly stating that the personal-use restriction does not apply to leadership PACs.<sup>9</sup> In MUR 7477 (Steve Chabot, *et al.*), the Commission divided 2-2 on OGC’s recommendation to dismiss allegations that a leadership PAC violated the personal-use restriction, although the Commission in that matter agreed at least to close the file.<sup>10</sup> Significantly, OGC based its dismissal recommendation in that matter on a lack of evidence that the leadership PAC did not pay fair-market value for *bona fide* services, rather than a legal conclusion that leadership PACs are not subject to the personal-use restriction.<sup>11</sup> This suggests that OGC’s recommendation would have been different if there had been more factual evidence.

These subtle shifts have significant consequences for due process and the rule of law. As the Supreme Court has written, “To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”<sup>12</sup> Yet too often, some Commissioners and agency staff attempt to engage in just this kind of unannounced policy change through interpretation-by-enforcement, ignoring or recasting past precedents in order to bring novel enforcement theories and retroactively expand the breadth of prohibited conduct.

Nevertheless, this is the status quo: The Act’s personal-use restriction does not apply to funds spent by leadership PACs. Congress has not amended the relevant statute, and to the extent it is unclear what Congress meant to include in the scope of funds “accepted by a candidate,” the Commission has exercised its rulemaking authority to interpret that language.<sup>13</sup> The Commission has never publicly altered or withdrawn its interpretation of the personal-use restriction, nor has it ever provided a reasoned explanation for such a change. Advisory Opinion 2008-17 (KITPAC) remains binding advice from the Commission. Individuals who engage in materially indistinguishable activity are entitled to rely upon our regulations and this past guidance, and may not be civilly or criminally sanctioned under the Act.<sup>14</sup> To change that requires more than a single enforcement matter—it requires formal regulatory action or legislative amendment.

May 6, 2021

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<sup>9</sup> See Concurring Statement of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 5, Advisory Opinion 2014-06 (Ryan for Congress) (“There were not four votes to conclude that personal use restrictions do not apply to leadership PACs and allow Prosperity Action to do more.”).

<sup>10</sup> Certification (April 23, 2019), MUR 7477 (Steve Chabot, *et al.*).

<sup>11</sup> First General Counsel’s Report at 10–12 (Mar. 29, 2019), MUR 7477 (Steve Chabot, *et al.*).

<sup>12</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>13</sup> See *Am. Fed’n of Labor-Congress of Indus. Orgs. v. FEC*, 333 F.3d 168, 172 (D.C. Cir. 2003) (“Because the Commission is charged with administering FECA, we analyze its regulations under the *Chevron* framework.”).

<sup>14</sup> 52 U.S.C. § 30108(c).