

1 Advisory Opinion No. 2012-06

2 Questions Presented

- 3 1. What guidelines (if any) exist for a state campaign committee seeking to utilize its
4 contribution funds to pay the costs associated with private air travel when such services
5 are purchased in accordance with the terms of a fair-market, commercially-reasonable
6 transaction? In other words, what guidelines (if any) exist for a state campaign
7 committee seeking to purchase such services on the open market in accordance with the
8 terms of a commercially-reasonable contract, lease, or other similar agreement? In light
9 of the current regulatory framework for the purchase of non-commercial air
10 transportation services, does the above analysis at all change if the private air travel is
11 being purchased from an entity for which the candidate, candidate’s spouse, or
12 candidate’s relative has an ownership interest (fractional or otherwise)? In such an
13 ownership scenario, please assume that the state campaign committee is paying the entity
14 at issue fair market rates for the non-commercial air transportation services provided.
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- 16 2. When a state campaign committee utilizes its campaign funds to pay the costs associated
17 with non-commercial air transportation services that are purchased in accordance with the
18 terms of a fair-market, commercially-reasonable transaction rather than in settings
19 involving either an in-kind contribution of such services or the reimbursement of a party
20 who provides such services free of charge, what is the appropriate disclosure
21 methodology for such expenditures on the committee’s periodic CCDRs filed with the
22 Commission? In other words, how should a campaign committee that purchases such
23 services on the open market through a commercially-reasonable contract, lease, or other
24 similar agreement report its private aircraft expenditures for the purposes of its CCDRs
25 filed with the Commission?

26 Advisory Opinion

27 The Georgia Government Transparency and Campaign Finance Commission (the
28 “Commission”) has received this request for advisory opinion from McKenna Long & Aldridge
29 (“McKenna”).

30 The Georgia Government Transparency and Campaign Finance Act (the “Act”) provides that

31 Contributions to a candidate...shall be utilized only to defray ordinary and
32 necessary expenses...incurred in connection with such candidate’s campaign for
33 elective office....

34 See O.C.G.A. § 21-5-33(a). The Act defines “ordinary and necessary expenses” as including, but
35 not limited to “Expenditures made during the reporting period for ... travel...” See O.C.G.A. §
36 21-5-3(18).

37 A candidate or public officer may expend campaign funds for flights on noncommercial aircraft
38 if the flight is an ordinary and necessary expense incurred in connection with a campaign for
39 elective office. See Commission Rule 189-3-.06; Advisory Opinion 2007-07. Upon use of
40 noncommercial aircraft, a candidate is required to “reimburse the service provider of the aircraft
41 the pro rata share [if any] of the fair market value of a noncommercial flight as set by the
42 Commission, not including the receipt of an in-kind contribution in the form of unreimbursed
43 value, if applicable.” Comm’n Rule 189-3-.06(4)(b). “Unreimbursed value” is defined as “the
44 difference between the value of noncommercial flight as set by the Commission and the payment
45 made for such flight by a candidate or public officer for campaign purposes.” Comm’n Rule
46 189-3-.06(1)(e). “Any such unreimbursed value is an in-kind contribution.” *Id.*

47 Pursuant to these Commission Rules, it is clear that when a candidate expends campaign funds
48 for noncommercial aircraft, the candidate is required to pay the service provider the fair market
49 value as set by the Commission and, if the cost is less than the fair market value, then the
50 difference between the two must be reported as an in-kind contribution from the service
51 provider.

52 The Commission further finds that where a fair-market, commercially reasonable transaction
53 results in a cost of the noncommercial aircraft that is greater than the fair market value as set by
54 the Commission, a campaign may pay the higher cost and shall report the expenditure at the cost
55 of the transaction. However, if the private air travel is being purchased from an entity in which
56 the candidate, candidate’s spouse, or candidate’s relative has an ownership interest, the
57 Commission’s rules for expending campaign funds and reporting the expenditure is found in
58 Advisory Opinion 2012-04.

59
60 Prepared by Jonathan Hawkins.
61 June 29, 2012

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June 14, 2012

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Re: Advisory Opinion Request—Aircraft

Dear Ms. LaBerge and Ms. Murray-Obertein:

This correspondence represents a formal request to the Georgia Government Transparency and Campaign Finance Commission (the “Commission”) for the issuance of an advisory opinion in accordance with O.C.G.A. § 21-5-6(b)(13). This request seeks clarification regarding the proper application of the Georgia Government Transparency and Campaign Finance Act (the “Act”) and existing Commission Rules to factual situations involving campaign committee expenditures on non-commercial air transportation services. In general, given the lack of controlling precedent, we seek additional guidance from the Commission with regard to the following topics: (1) the treatment of campaign fund expenditures for the purchase of private air transportation services through arrangements (contractual or otherwise) that are not specifically contemplated in the provisions of the Act or the Commission Rules; and (2) the proper disclosure methodology for campaign expenditures associated with the purchase of private air transportation services through such presently non-contemplated arrangements. Specifically, we ask the Commission to consider the formal requests set forth herein and provide advice regarding the relevant subjects discussed.

Discussion

As set forth in O.C.G.A. § 21-5-33, a candidate for elective office in the State of Georgia is permitted to utilize contributions made to his or her campaign committee, and any proceeds from investing such contributions, to defray ordinary and necessary expenses which are incurred in connection with the candidate’s campaign. For the purposes of the Act, the term “ordinary and necessary expenses” is explicitly defined to include expenditures made for travel. *See* O.C.G.A. § 21-5-3(18). As such, the Commission has traditionally considered non-commercial

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air transportation service costs associated with state campaign travel as both ordinary and necessary, and thus permissible under Georgia law.

Like all other permissible expenditures under the Act, payments made to defray the costs of private air transportation services are required to be disclosed on a campaign committee's periodic campaign contribution disclosure reports ("CCDRs") filed with the Commission. See O.C.G.A. §§ 21-5-34 and 21-5-34.1. Specifically, Commission Advisory Opinion 2007-07 and Commission Rule 189-3-.06 require state candidates for public office to disclose the fair market value of flights they or members of their staff take on private, non-commercial aircraft if the purpose of such use is related to a campaign for state office. Upon initial consideration, this mandate would appear to be fairly straightforward, but unfortunately the specific disclosure framework set forth in Commission Advisory Opinion 2007-07 and Commission Rule 189-3-.06 is quite ambiguous in a variety of circumstances – particularly in situations where non-commercial air transportation services are purchased through a true market transaction.

As is clear from the language and structure of Commission Advisory Opinion 2007-07 and Commission Rule 189-3-.06, the logical and apparent purpose of the Commission's disclosure framework and rate structure for valuing non-commercial aircraft usage is to provide a means of standard valuation for private air travel given as an in-kind contribution to a candidate or given to a candidate at no charge with the idea that the cost of the flight will eventually be reimbursed. In such situations, there is no standard means by which a candidate can measure the appropriate value of his or her aircraft usage when no actual market transaction has taken place. Appropriately, under such circumstances, the Commission's regulatory framework sets forth a helpful rubric through which to price and disclose non-commercial flight in-kind contributions or reimbursement in a consistent manner.

In scenarios where an actual market transaction has taken place, however, the application of the valuation and disclosure structure set forth in Commission Advisory Opinion 2007-07 and Commission Rule 189-3-.06 is an ambiguous and unsettled point of law. Simply put, the language, constructs, valuation rates and disclosure requirements of the Commission's regulatory framework do not square with situations where a candidate committee has chosen to purchase non-commercial air transportation services via any form of market transaction. This is because the general purpose of the Commission valuation structure is to provide a standard estimate of value for non-commercial aircraft usage in scenarios where no actual market value exists. To apply the existing regulatory structure in settings not involving in-kind contributions or reimbursements illogically requires a campaign to disrupt otherwise natural market transactions and replace the precise, actual value of its private aircraft expenditures (as established by a fair-market, commercially-reasonable transaction) with an imprecise estimated value. Such an application of the provisions of Commission Advisory Opinion 2007-07 or Commission Rule 189-3-.06 would be one that leads to Commission interference in the commercial marketplace, the substitution of actual market values for estimated valuation rates, and the improper obligation for candidates to negotiate with private vendors for flight prices tied to outdated valuation tables

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for imprecise aircraft classifications. This is neither a feasible nor logical application of the Commission's regulatory structure. As such, we seek additional guidance from the Commission.

Formal Requests

Given the ambiguous and unsettled nature of the current valuation and disclosure structure for non-commercial air transportation services contained within the Act, Commission Advisory Opinion 2007-07 and Commission Rule 189-3-06, it is our desire to clarify how expenditures on private air travel should be assessed, valued and disclosed when made outside of an in-kind contribution or reimbursement scenario. Thus, in order to provide proper legal counsel to our clients and to promote optimal compliance with the Act and Commission Rules among present and future state campaign committees, we hereby submit the following formal requests for Commission consideration.

Request #1: Given the ambiguous and unsettled nature of the regulatory framework set forth by the Act, Commission Rule 189-3-06 and Commission Advisory Opinion 2007-07 with regard to the purchase of non-commercial air transportation services, what guidelines (if any) exist for a state campaign committee seeking to utilize its contribution funds to pay the costs associated with private air travel when such services are purchased in accordance with the terms of a fair-market, commercially-reasonable transaction? In other words, due to the fact that the Commission's regulatory structure appears to address the payment of non-commercial air transportation service costs only in settings involving either an in-kind contribution of such services or the reimbursement of a party who provides such services free of charge, what guidelines (if any) exist for a state campaign committee seeking to purchase such services on the open market in accordance with the terms of a commercially-reasonable contract, lease, or other similar agreement? Also, in light of the current regulatory framework for the purchase of non-commercial air transportation services, does the above analysis at all change if the private air travel is being purchased from an entity for which the candidate, candidate's spouse, or candidate's relative has an ownership interest (fractional or otherwise)? In such an ownership interest scenario, please assume that the state campaign committee is paying the entity at issue fair market rates for the non-commercial air transportation services provided.

Request #2: When a state campaign committee utilizes its campaign funds to pay the costs associated with non-commercial air transportation services that are purchased in accordance with the terms of a fair-market, commercially-reasonable transaction rather than in settings involving either an in-kind contribution of such services or the reimbursement of a party who provides such services free of charge, what is the appropriate disclosure methodology for such expenditures on the committee's periodic CCDRs filed with the Commission? In other words, given that the Act, Commission Rule 189-3-06 and Commission Advisory Opinion 2007-07 only appear to provide a standard means of valuation and disclosure for non-commercial air transportation service expenditures made in situations where no actual market transaction took place and no true market value was set, how should a campaign committee that purchases such services on the open market through a commercially-reasonable contract, lease or

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other similar agreement report its private aircraft expenditures for the purposes of its CCDRs filed with the Commission?

We appreciate your thoughtful consideration of the above inquiries and this advisory opinion request as a whole. Should you have any questions, please do not hesitate to contact me.

Sincerely,



J. Randolph Evans
Benjamin J. Vinson

JRE