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FEDERAL ELECTION COMMISSION
Washington, DC

AGENDA DOCUMENT NO. 24-06-A
AGENDA ITEM
For meeting of February 8, 2024
SUBMITTED LATE

February 5, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by ALR*
Acting General Counsel

Neven F. Stipanovic *NFS by ALR*
Associate General Counsel

Amy Rothstein *ALR*
Assistant General Counsel

Joanna Waldstreicher *JW by ALR*
Attorney

Subject: Draft AO 2024-02 (Waters) Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 a.m. (Eastern Time) on February 8, 2024.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2024-02

2

3 Leilani Beaver, Esq.
4 Beaver Legal Corporation
5 220 S. Pine St, Suite 109
6 Sisters, OR 97759

DRAFT A

7

8 Dear Ms. Beaver:

9

10 We are responding to your advisory opinion request on behalf of Congresswoman
11 Maxine Waters and Citizens for Waters (collectively, “Requestors”), concerning the
12 application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”),
13 and Commission regulations to Requestors’ proposal to solicit and receive reimbursement
14 from non-federal sources of Requestors’ costs to design, print, and mail certain
15 brochures. The Commission concludes that the Act and Commission regulations would
16 not prohibit Requestors from soliciting or receiving reimbursement of funds from the
17 non-federal sources because the reimbursement of funds as proposed would comply with
18 the source prohibitions, amount limitations, and reporting requirements of the Act.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 January 25, 2024, and your email received on February 1, 2024.

22 Congresswoman Maxine Waters represents California’s 43rd District in the
23 United States House of Representatives. Citizens for Waters is her principal campaign
24 committee.

25 Requestors intend to design, publish, and mail brochures featuring
26 Congresswoman Waters’s endorsements of federal and non-federal candidates, together
27 with her positions of support for or opposition to ballot measures to be voted on the
28 March 5, 2024, California primary ballot. Citizens for Waters will pay for the costs of

1 designing, publishing, and mailing the brochures. The brochures will use the same
2 design and layout as those described in Advisory Opinion 2004-37 (Waters). The space
3 devoted to each candidate and ballot measure and its prominence on the brochure will be
4 determined by the candidate's or ballot measure's prominence on the primary election
5 ballot. As in Advisory Opinion 2004-37 (Waters), Requestors anticipate distributing at
6 least 500 pieces of each version of their proposed brochure by U.S. Mail.

7 Requestors state that they will use only federally permissible funds to pay for the
8 design, publishing, and mailing of the brochures.¹ Requestors propose to solicit and
9 receive reimbursement from non-federal sources, however, for the portion of the
10 brochures devoted to each non-federal candidate and ballot measure, as determined by
11 the candidate's or ballot measure's pro rata share of the costs to design, publish, and mail
12 the brochure.² The non-federal sources from which Requestors propose to solicit and
13 receive funds are (1) the featured non-federal candidates' personal funds, (2) the non-
14 federal candidates' committees; (3) state independent expenditure-only political
15 committees supporting or opposing the non-federal candidates; and (4) ballot measure
16 committees supporting or opposing the featured ballot measures.

17 Citizens for Waters will invoice the non-federal candidates and committees for
18 their pro rata share of the brochures' costs. Each invoice will state that Requestors are

¹ Requestors state that the term "federally permissible funds" as used in their request means "funds that do not exceed the applicable contribution limitations of the Act and from sources that would not be prohibited under the Act from contributing directly to Congresswoman Waters." Advisory Opinion Request ("AOR") at note 3.

² Pro rata shares will be determined according to the "time and space" method described in 11 C.F.R. § 106.1.

1 soliciting and will accept only federally permissible funds. The non-federal candidates
2 and committees that reimburse Citizens for Waters will be required to submit signed
3 invoices attesting that their payments are from federally permissible funds. Citizens for
4 Waters will not accept any reimbursements that exceed the non-federal candidate's or
5 committee's pro rata share of the costs. Congresswoman Waters will not establish,
6 finance, maintain, or control any of the non-federal committees reimbursing Citizens for
7 Waters.

8 ***Question Presented***

9 *May Citizens for Waters receive reimbursements from individuals, non-federal*
10 *candidate committees, state independent expenditure-only political committees, and*
11 *ballot measure committees to appear in the brochure using funds that do not exceed the*
12 *applicable contribution limitations of the Act and from sources that would not be*
13 *prohibited under the Act from contributing directly to Congresswoman Waters?*

14 ***Legal Analysis***

15 Citizens for Waters may solicit and receive reimbursements from non-federal
16 candidates, non-federal candidate committees, state independent expenditure-only
17 political committees, and ballot measure committees to appear in the proposed brochure
18 only if the non-federal sources' funds comply with the source prohibitions, amount
19 limitations, and reporting requirements of the Act.

20 Under the Act, federal candidates and their committees may not "solicit, receive,
21 direct, transfer, or spend funds in connection with an election for Federal office,

1 *including funds for any Federal election activity*, unless the funds are subject to the
2 [amount] limitations, [source] prohibitions, and reporting requirements of [the] Act.”³
3 The term “federal election activity” includes “a public communication that refers to a
4 clearly identified candidate for Federal office (regardless of whether a candidate for State
5 or local office is also mentioned or identified) and that promotes or supports a candidate
6 for that office, or attacks or opposes a candidate for that office (regardless of whether the
7 communication expressly advocates a vote for or against a candidate).”⁴ The term
8 “public communication” includes a “communication by means of any . . . mass mailing,
9 . . . or any other form of general public political advertising.”⁵ A “mass mailing” is “a
10 mailing by United States mail or facsimile of more than 500 pieces of mail matter of an
11 identical or substantially similar nature within any 30-day period.”⁶

12 Here, Requestors state that they anticipate distributing at least 500 pieces of each
13 version of their proposed brochure by U.S. Mail. Such a distribution would be a “mass
14 mailing” and, therefore, a public communication.⁷ Moreover, the brochures for which
15 Requestors propose to obtain reimbursement would refer to and contain Congresswoman
16 Waters’s endorsements of certain clearly identified candidates, including federal
17 candidates.⁸ As such, the brochures would be public communications that refer to and

³ 52 U.S.C. § 30125(e)(1)(A) (emphasis added).

⁴ 52 U.S.C. § 30101(20)(A)(iii); *see also* 11 C.F.R. 100.24 (b)(3).

⁵ 11 C.F.R. § 100.26.

⁶ 11 C.F.R. § 100.27.

⁷ *See* Advisory Opinion 2004-37 at 6.

⁸ AOR002.

1 promote or support clearly identified federal candidates. Accordingly, the brochures
2 would be “federal election activity” under the Act and Commission regulations.⁹

3 As noted above, federal candidates may receive or spend funds for federal
4 election activity only if the funds comply with the Act’s contribution limitations, source
5 prohibitions, and reporting requirements. Requestors state that Citizens for Waters will
6 invoice the non-federal candidates and committees featured in the brochures for their pro
7 rata shares of the costs to design, publish, and mail the brochures, and that these invoices
8 will state that Congresswoman Waters and Citizens for Waters will accept only “federally
9 permissible funds.” In addition, Requestors propose to require the non-federal candidates
10 and committees reimbursing Citizens for Waters to submit signed invoices attesting that
11 their payments are made with “federally permissible funds.” Requestors explain that the
12 term “federally permissible funds” as used in their request means “funds that do not
13 exceed the applicable contribution limitations of the Act and from sources that would not
14 be prohibited under the Act from contributing directly to Congresswoman Waters.”¹⁰

15 As noted above, the Act and Commission regulations prohibit federal candidates
16 and their committees from soliciting or receiving funds for federal election activity unless
17 those funds comply with the reporting requirements of the Act, in addition to applicable

⁹ Compare Advisory Opinion 2003-14 (Weinzapfel). There, the Commission considered a public communication that referred to both a federal candidate and a non-federal candidate, but only endorsed the non-federal candidate. The Commission concluded that the communication was not federal election activity because it did not promote, support, attack, or oppose the federal candidate. In contrast, here the proposed brochures would both refer to and endorse one or more federal candidates in addition to the non-federal candidates.

¹⁰ AOR002.

1 amount limitations and source prohibitions. Thus, Citizens for Waters may solicit or
2 receive funds to produce and distribute brochures that constitute federal election activity
3 so long as the funds comply with the Act’s reporting requirements, source prohibitions,
4 and amount limitations. The funds that Requestors propose to solicit and receive from
5 non-federal candidates and committees are intended to reimburse Requestors’ costs to
6 produce and distribute their brochures.¹¹ Thus, Requestors may solicit or receive such
7 reimbursement if the funds used for reimbursement come from sources that comply with
8 the Act’s reporting requirements, in addition to its source prohibitions and amount
9 limitations.

10 As part of their proposal for obtaining reimbursement from the non-federal
11 candidates and committees, the Requestors have stated that they will “only solicit[] and
12 accept[] funds from federally permissible funds,” and that they will require non-federal
13 candidates and committees to “submit signed invoices attesting that their payment is from
14 federally permissible funds when payment is received.”¹² Accordingly, the funds used to
15 reimburse the Requestors will comply with the Act’s source prohibitions and amount
16 limitations. The only remaining question, then, is whether such reimbursement is also
17 consistent with the Act’s reporting requirements. The condition in 52 U.S.C.

¹¹ Although the Commission concluded in Advisory Opinion 2004-37 (Waters) that reimbursements to Congresswoman Waters’s authorized committee for costs relating to similar brochures were not contributions to the committee, the restrictions of section 30125(e) extend beyond contributions to a federal candidate’s committee, covering all funds that the candidate solicits, receives, directs, transfers, or spends in connection with an election for Federal office, including funds for any Federal election activity.

¹² AOR002. The Requestors further clarify that “[f]ederally permissible funds means funds that do not exceed the applicable contribution limitations of the Act and from sources that would not be prohibited under the Act from contributing directly to Congresswoman Waters.” *Id.* n.3.

1 § 30125(e)(1)(A) that any funds solicited or received in connection with a federal
2 election must be subject to federal reporting requirements does not itself impose any
3 standalone duty to report that would not otherwise exist under the Act.¹³ Therefore,
4 because the Act does not require non-federal candidates and committees to separately
5 report their reimbursement of a federal candidate for their pro-rata share of federal
6 election activity, and provided that Citizens for Waters properly reports its receipts and
7 disbursements for the brochures as required by the Act and Commission regulations, the
8 Requestors' proposal will also comply with the reporting requirements of the Act.

9 The Commission does not address the potential application of any state or local
10 laws to Requestors' proposed activities because such matters do not fall within the
11 Commission's jurisdiction.

12 This response constitutes an advisory opinion concerning the application of the
13 Act and Commission regulations to the specific transaction or activity set forth in your
14 request.¹⁴ The Commission emphasizes that, if there is a change in any of the facts or
15 assumptions presented, and such facts or assumptions are material to a conclusion
16 presented in this advisory opinion, then the requestor may not rely on that conclusion as
17 support for its proposed activity. Any person involved in any specific transaction or
18 activity which is indistinguishable in all its material aspects from the transaction or
19 activity with respect to which this advisory opinion is rendered may rely on this advisory

¹³ *See* 52 U.S.C. § 30125(e)(1).

¹⁴ *See* 52 U.S.C. § 30108.

1 opinion.¹⁵ Please note that the analysis or conclusions in this advisory opinion may be
2 affected by subsequent developments in the law including, but not limited to, statutes,
3 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
4 available on the Commission's website.

5 On behalf of the Commission,

6

7 Sean J. Cooksey,

8 Chairman

¹⁵ See *id.* § 30108(c)(1)(B).