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FEDERAL ELECTION COMMISSION  
Washington, DC

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

February 8, 2024

**MEMORANDUM**

TO: The Commission

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

Neven F. Stipanovic *LJS for NFS*  
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Subject: Draft AO 2024-02 (Waters) Draft B

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 12:00 p.m. (Eastern Time) on February 12, 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 B**

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8 Dear Ms. Beaver:

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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 prohibit Requestors from soliciting or receiving reimbursement of funds from the non-  
17 federal sources as proposed in the request because although the Requestors represent that  
18 the funds will comply with the Act’s source prohibitions and amount limitations, the  
19 Requestors do not represent that the funds will comply with the Act’s reporting  
20 requirements.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on  
23 January 25, 2024, and your emails received on February 1, 2024 and February 7, 2024.

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

27 Requestors intend to design, publish, and mail brochures featuring  
28 Congresswoman Waters’s endorsements of federal and non-federal candidates, together

1 with her positions of support for or opposition to ballot measures to be voted on the  
2 March 5, 2024, California primary ballot. Citizens for Waters will pay for the costs of  
3 designing, publishing, and mailing the brochures. The brochures will use the same  
4 design and layout as those described in Advisory Opinion 2004-37 (Waters). The space  
5 devoted to each candidate and ballot measure and its prominence on the brochure will be  
6 determined by the candidate's or ballot measure's prominence on the primary election  
7 ballot. As in Advisory Opinion 2004-37 (Waters), Requestors anticipate distributing at  
8 least 500 pieces of each version of their proposed brochure by U.S. Mail.

9 Requestors state that they will use only federally permissible funds to pay for the  
10 design, publishing, and mailing of the brochures.<sup>1</sup> Requestors propose to solicit and  
11 receive reimbursement from several types of non-federal sources: (1) the featured non-  
12 federal candidates' personal funds, (2) the non-federal candidates' committees; (3) state  
13 independent expenditure-only political committees supporting or opposing the non-  
14 federal candidates; and (4) ballot measure committees supporting or opposing the  
15 featured ballot measures (collectively, "non-federal sources"). Requestors will seek  
16 reimbursement from non-federal sources for the portion of the brochures devoted to each

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<sup>1</sup> 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 AOR002 n. 3. The Commission understands that with respect to the funds used by Citizens for Waters to pay for the brochures, these funds will also have been reported subject to the Act's reporting requirements.

1 non-federal candidate and ballot measure, as determined by the candidate’s or ballot  
2 measure’s pro rata share of the costs to design, publish, and mail the brochure.<sup>2</sup>

3 Citizens for Waters will invoice the non-federal sources for their pro rata share of  
4 the brochures’ costs. Each invoice will state that Requestors are soliciting and will  
5 accept only “federally permissible funds.” The non-federal sources that reimburse  
6 Citizens for Waters will be required to submit signed invoices attesting that their  
7 payments are from “funds that do not exceed the applicable contribution limits of the Act  
8 and from sources that would not be prohibited under the Act from contributing directly to  
9 Congresswoman Waters.”<sup>3</sup> Citizens for Waters further states that it will not ask the non-  
10 federal sources about reporting under the Act.<sup>4</sup> Citizens for Waters will not accept any  
11 reimbursements that exceed the non-federal candidate’s or committee’s pro rata share of  
12 the costs. Congresswoman Waters will not establish, finance, maintain, or control any of  
13 the non-federal sources reimbursing Citizens for Waters.

14 ***Question Presented***

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

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<sup>2</sup> Pro rata shares will be determined according to the “space or time” method described in 11 C.F.R. § 106.1(a).

<sup>3</sup> AOR002 n.3.

<sup>4</sup> Advisory Opinion Request Supplement (February 7, 2024) (“AOR Supp.”) at 1.

1 ***Legal Analysis***

2 Citizens for Waters may not solicit and receive reimbursements from non-federal  
3 candidates, non-federal candidate committees, state independent expenditure-only  
4 political committees, and ballot measure committees to appear in the proposed brochures  
5 because, although the Requestors represent that the funds will comply with the Act’s  
6 source prohibitions and amount limitations, the Requestors do not represent that the funds  
7 will comply with the Act’s reporting requirements.

8 Under the Act, federal candidates and their committees may not “solicit, receive,  
9 direct, transfer, or spend funds in connection with an election for Federal office,  
10 *including funds for any Federal election activity*, unless the funds are subject to the  
11 [amount] limitations, [source] prohibitions, and reporting requirements of [the] Act.”<sup>5</sup>  
12 The term “federal election activity” includes “a public communication that refers to a  
13 clearly identified candidate for Federal office (regardless of whether a candidate for State  
14 or local office is also mentioned or identified) and that promotes or supports a candidate  
15 for that office, or attacks or opposes a candidate for that office (regardless of whether the  
16 communication expressly advocates a vote for or against a candidate).”<sup>6</sup> The term  
17 “public communication” includes a “communication by means of any . . . mass mailing,  
18 . . . or any other form of general public political advertising.”<sup>7</sup> A “mass mailing” is “a

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<sup>5</sup> 52 U.S.C. § 30125(e)(1)(A) (emphasis added).

<sup>6</sup> 52 U.S.C. § 30101(20)(A)(iii); *see also* 11 C.F.R. § 100.24 (b)(3).

<sup>7</sup> 11 C.F.R. § 100.26.

1 mailing by United States mail or facsimile of more than 500 pieces of mail matter of an  
2 identical or substantially similar nature within any 30-day period.”<sup>8</sup>

3 Here, Requestors state that they anticipate distributing at least 500 pieces of each  
4 version of their proposed brochure by U.S. Mail. Such a distribution would be a “mass  
5 mailing” and, therefore, a public communication.<sup>9</sup> Moreover, the brochures for which  
6 Requestors propose to obtain reimbursement would refer to and contain Congresswoman  
7 Waters’s endorsements of certain clearly identified candidates, including federal  
8 candidates.<sup>10</sup> As such, the brochures would be public communications that refer to and  
9 promote or support clearly identified federal candidates. Accordingly, the brochures  
10 would be “federal election activity” under the Act and Commission regulations.<sup>11</sup>

11 As noted above, the only funds that federal candidates and officeholders and their  
12 committees may spend and receive for federal election activity are those “subject to” the  
13 Act’s contribution limitations, source prohibitions, and reporting requirements.<sup>12</sup> The

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<sup>8</sup> *Id.* § 100.27.

<sup>9</sup> *See* Advisory Opinion 2004-37 (Waters) at 6.

<sup>10</sup> AOR001-2.

<sup>11</sup> *Compare* Advisory Opinion 2003-25 (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.

<sup>12</sup> *See* 11 C.F.R. § 300.61 (“No person described in 11 CFR 300.60 shall solicit, receive, direct, transfer, spend, or disburse funds in connection with an election for Federal office, including funds for any Federal election activity as defined in 11 CFR 100.24, unless the amounts consist of Federal funds that are subject to the limitations, prohibitions, and reporting requirements of the Act.”); *see also* 11 C.F.R. § 300.2(g) (defining “Federal funds”).

1 Act thus requires that any funds, before they are tendered to Citizens for Waters, “must  
2 not have been received by the [non-federal sources] in amounts in excess of those  
3 permitted with respect to contributions to Federal candidates” or from sources prohibited  
4 by the Act, and they must have been federally reported.<sup>13</sup>

5 Moreover, a federal candidate’s solicitation or receipt of funds in connection with  
6 an election for Federal office that fail to comply with any one of the Act’s amount  
7 limitations, source prohibitions, or reporting requirements, on the other, “is sufficient to  
8 comprise a violation.”<sup>14</sup> The Commission has repeatedly found reason to believe the Act  
9 was violated where the funds in question were subject to the Act’s amount limitations and  
10 source prohibitions but “[n]evertheless, none of the funds were subject to the Act’s  
11 reporting provisions as required by Section [30125](e)(1)(A)[.]”<sup>15</sup>

12 Here, Requestors state that Citizens for Waters will invoice the non-federal  
13 sources featured in the brochures for their pro rata shares of the costs to design, publish,  
14 and mail the brochures, and that these invoices will state that Congresswoman Waters  
15 and Citizens for Waters will accept only “federally permissible funds.” In addition,  
16 Requestors propose to require the non-federal sources reimbursing Citizens for Waters to

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<sup>13</sup> Advisory Opinion 2007-26 (Schock) at 4. In that request, the provision at issue was 52 U.S.C. § 30125(e)(1)(B). Nonetheless, the Commission’s application of the language in that provision informs its application of the nearly identical language in § 30125(e)(1)(A) in this instance.

<sup>14</sup> Factual & Legal Analysis at 5-6, MUR 7337 (Lesko) (Aug. 13, 2019) (stating “the nature of the funds and the funds being subject to the Act’s reporting requirements are separate requirements, and the failure to comply with any one aspect is sufficient to comprise a violation.”).

<sup>15</sup> Factual & Legal Analysis at 14-15, MUR 5646 (Cohen for New Hampshire) (Mar. 3, 2005). *See also* Factual & Legal Analysis at 4, MUR 5426 (Dale Schultz for Congress, et al.) (Feb. 17, 2005); Factual & Legal Analysis at 4, MUR 6253 (Trey Gowdy for Congress, et al.) (Oct. 1, 2010); Factual & Legal Analysis at 3, MUR 6219 (Kuhl for Congress, et al.) (Oct. 21, 2009).

1 submit signed invoices attesting that their payments are made with “federally permissible  
2 funds.” Requestors explain that the term “federally permissible funds” as used in their  
3 request means “funds that do not exceed the applicable contribution limitations of the Act  
4 and from sources that would not be prohibited under the Act from contributing directly to  
5 Congresswoman Waters.”<sup>16</sup> Based on these representations, the Commission assumes for  
6 purposes of this advisory opinion that the non-federal sources’ reimbursement funds will  
7 comply with the Act’s source prohibitions and amount limitations.

8         The only remaining question, then, is whether any funds solicited and accepted by  
9 Citizens for Waters from the non-federal sources for reimbursement, as proposed, must  
10 comply with the Act’s reporting requirements. The Commission concludes that they  
11 must. As explained above, satisfying the Act’s reporting requirements under 52 U.S.C.  
12 § 30125(e)(1)(A) is a separate requirement that must be met when the federal candidate  
13 solicits or receives funds in connection with an election for Federal office, even if the  
14 funds are otherwise from permissible sources and within the federal contribution limits.  
15 Requestors propose soliciting and accepting funds from several types of non-federal  
16 sources. The first two, non-federal candidates and their committees, are separately  
17 subject to reporting under the Act if they pay for communications, such as those  
18 described in the request, that promote, support, attack, or oppose a federal candidate,  
19 even if the communication also mentions a state or local candidate.<sup>17</sup>

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<sup>16</sup> AOR002 n.3.

<sup>17</sup> 52 U.S.C. § 30125(f)(1) (prohibiting a candidate for state or local office, or an agent of such a candidate or individual, from spending “any funds for a communication described in [52 U.S.C. § 30101(20)(A)(iii)] unless the funds are subject to the limitations, prohibitions, and reporting requirements



1           The Act does not impose any reporting requirements on the other types of non-  
2 federal sources from which the Requestors plan to solicit reimbursement, state  
3 independent expenditure-only political committees supporting or opposing the non-  
4 federal candidates and ballot measure committees supporting or opposing the featured  
5 ballot measures. Nevertheless, the Requestors propose to use the solicited funds to pay  
6 for federal election activity, and thus, any funds solicited or accepted must comply with  
7 the Act’s reporting requirements.<sup>18</sup> Funds raised, reported, and maintained by a non-  
8 federal entity in a federal account pursuant to the requirements of the Act and  
9 Commission regulations, for example, would satisfy this requirement.<sup>19</sup>

10           The funds that Requestors propose to solicit and receive from non-federal sources  
11 are intended to reimburse Requestors’ costs to produce and distribute their brochures,  
12 which will promote, support, attack, or oppose federal candidates.<sup>20</sup> Accordingly, the

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of this Act”); 11 C.F.R. § 300.71; *see also* 52 U.S.C. § 30101(20)(A)(iii) (defining “federal election activity” to include “a public communication that refers to a clearly identified candidate for Federal office (*regardless of whether a candidate for State or local office is also mentioned or identified*) and that promotes or supports...or attacks or opposes a candidate for that office.”) (emphasis added).

<sup>18</sup> By contrast, if the brochure did not promote, support, attack, or oppose any federal candidates, then the brochure would not be federal election activity under 52 U.S.C. § 30101(20)(A)(iii). Accordingly, a federal candidate’s solicitation or receipt of funds as reimbursement for such brochures would be governed under 52 U.S.C. § 31025(e)(1)(B), which does not include a requirement that the funds be subject to the Act’s reporting requirements. *See also* 52 U.S.C. § 30125(f)(2) (providing an exception for communications solely in connection with a state or local election from the requirement that a state or local candidate use funds subject to the amount limitations, source prohibitions, and reporting requirements of the Act); 11 C.F.R. § 300.72.

<sup>19</sup> *See, e.g.*, 11 C.F.R. §§ 102.5, 300.36.

<sup>20</sup> 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.

1 Commission concludes that Citizens for Waters may not solicit or receive funds for the  
2 brochures described in the request because the Requestors do not represent that the funds  
3 solicited and received from non-federal sources will have been reported to the  
4 Commission, as required by the Act and Commission regulations.

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

8 This response constitutes an advisory opinion concerning the application of the  
9 Act and Commission regulations to the specific transaction or activity set forth in your  
10 request.<sup>21</sup> The Commission emphasizes that, if there is a change in any of the facts or  
11 assumptions presented, and such facts or assumptions are material to a conclusion  
12 presented in this advisory opinion, then the requestor may not rely on that conclusion as  
13 support for its proposed activity. Any person involved in any specific transaction or  
14 activity which is indistinguishable in all its material aspects from the transaction or  
15 activity with respect to which this advisory opinion is rendered may rely on this advisory  
16 opinion.<sup>22</sup> Please note that the analysis or conclusions in this advisory opinion may be  
17 affected by subsequent developments in the law including, but not limited to, statutes,  
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<sup>21</sup> See 52 U.S.C. § 30108.

<sup>22</sup> See *id.* § 30108(c)(1)(B).

1 regulations, advisory opinions, and case law. Any advisory opinions cited herein are  
2 available on the Commission's website.

3 On behalf of the Commission,

4

5 Sean J. Cooksey,

6 Chairman