



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: February 15, 2024

SUBJECT: AOR 2024-02 (Waters) Draft C Comment from CLC

**Attached is AOR 2024-02 (Waters) Draft C Comment
from Campaign Legal Center.**

Attachment

RECEIVED

By Office of the Commission Secretary at 11:35 am, Feb 15, 2024



February 15, 2024

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First St. NE
Washington, DC 20463
ao@fec.gov

Re: Advisory Opinion Request 2024-02 (Waters) – Draft C

Dear Ms. Stevenson:

Campaign Legal Center (“CLC”) respectfully submits this comment on Draft C in response to advisory opinion request (“AOR”) 2024-02, which was submitted to the Federal Election Commission (the “FEC” or “Commission”) by Rep. Maxine Waters and Citizens for Waters (“CFW”), her principal campaign committee (collectively, “Requestors”).¹

Requestors propose to create and disseminate brochures that feature Rep. Waters endorsing federal and non-federal candidates, and state that CFW will pay for these brochures using funds that comply with the prohibitions, limitations, and reporting requirements of the Federal Election Campaign Act (“FECA”).² Requestors state that the federal and non-federal candidates featured in the brochures will, in turn, reimburse CFW for their allocated, “pro-rata share of the costs” for the brochures, and such reimbursements will be made from “federally permissible funds,”³ which Requestors define as “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.”⁴

The activity proposed in the AOR meets FECA’s definition of “federal election activity” (FEA), which, among other things, includes:

¹ See AOR 2024-02 (Waters) (Jan. 26, 2024), https://www.fec.gov/files/legal/aos/2024-02/202402R_1.pdf (“AOR”).

² *Id.* at 1-2.

³ *Id.* at 2.

⁴ *Id.* at 2 n.3.

[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 a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).⁵

FECA provides that a federal candidate or officeholder, like Rep. Waters, or their campaign committees, like CFW, cannot “solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of [FECA].”⁶

Drafts A, B, and D responding to this AOR explicitly recognize this foundational premise, namely that the activity proposed in the AOR is FEA, and that because funds used to pay for FEA must comply with FECA’s requirements, only FECA-compliant funds may be used by federal and nonfederal candidates to reimburse CFW for their allocated share of the brochure costs.⁷ Draft C, however, implicitly rejects that premise—it makes no mention of FEA at all, and erroneously compares the reimbursement of allocated costs for the brochures to “receipts from certain transactions [that] are not ‘contributions’ or ‘donations’ and may be deposited in a committee’s federal account” as “other receipts,” such as “income from the rental of a committee’s mailing list” and “income from the sale of office furniture.”⁸

Draft C’s errant approach appears to align with a comment by Neil P. Reiff received by the Commission on February 12, 2024, which asserts what Mr. Reiff characterizes as a “plausible argument” that the FEC rule governing FEA was not intended to apply to the activity proposed in the AOR, and that such activity should therefore be evaluated solely on whether it results in a “contribution” under FECA.⁹ Mr. Reiff cites zero supporting authority for this “alternative legal approach,” relying instead on his personal “belief that the concept of ‘federal election activity’ was not intended to be applicable to communications disseminated directly by and paid for by an authorized committee of a federal candidate.”¹⁰ Mr. Reiff infers, again without any authority, that Congress added FEA to the statute “solely to define

⁵ 52 U.S.C. § 30101(20)(A)(iii).

⁶ *Id.* § 30125(e)(1)(A).

⁷ *See, e.g.*, Draft D at 5, https://www.fec.gov/files/legal/aos/2024-02/202402_3.pdf (“[T]he brochures would be public communications that refer to and promote or support clearly identified federal candidates. Accordingly, the brochures would be ‘federal election activity’ under the Act and Commission regulations[, and] federal candidates may solicit, receive or spend funds for [FEA] only if the funds comply with the Act’s contribution limitations, source prohibitions, and reporting requirements.”).

⁸ Draft C at 4 (citing Advisory Op. 2002-14 (Libertarian Nat’l Comm.) and Advisory Op. 2003-19 (DCCC)), https://www.fec.gov/files/legal/aos/2024-02/202402_2.pdf.

⁹ Comment on AOR 2024-02 (Waters) from Neil P. Reiff (Feb. 12, 2024), https://www.fec.gov/files/legal/aos/2024-02/202402C_1.pdf (“Reiff Comment”).

¹⁰ *Id.* at 1.

activities undertaken by a specific universe of groups,” namely “state or local political party committees and, in certain circumstances, activities undertaken by other outside non-party, nonfederal groups and candidates.”¹¹

In fact, FECA’s definition of FEA contains no such condition or limit, and the activity proposed in the AOR squarely meets the statutory definition of FEA. Mr. Reiff’s comment purports to read into the law a limiting condition that is simply not there, and the Commission has no authority to narrow or otherwise revise FECA’s definition of FEA, whether through the advisory opinion process or any other administrative action.

As such, the Commission should reject Draft C’s analytic approach, which depends on the flawed premise that the activity proposed in the AOR is not FEA, and results in a legally erroneous and problematic conclusion that the reimbursement of allocated expenses is not a contribution or donation.¹² That conclusion not only is wrong, but it carries with it the concerning implication that reimbursements for the type of activity proposed in this AOR may be paid with funds that do not comply with FECA’s requirements; indeed, Mr. Reiff suggests that very argument.¹³

Finally, to the extent that Requestors have attempted to moot this problem by stipulating that CFW will only solicit and accept reimbursements made with federally permissible funds,¹⁴ Draft C’s approach is nevertheless problematic, because other similarly situated committees may seek to rely on it as permission to reimburse their allocated costs for similar public communications with funds that do *not* comply with FECA’s requirements. In other words, Draft C’s analysis may be relied on as support for misusing “soft money”—*e.g.*, funds which come from FECA-prohibited sources or which exceed FECA’s contribution limits—to pay for activity that meets the definition of FEA. That outcome would fundamentally undermine the statutory framework established by the Bipartisan Campaign Reform Act (“BCRA”) to foreclose the use of soft money in connection with federal elections.

¹¹ *Id.* at 1-2.

¹² Draft C at 4; *see* Reiff Comment at 3 (“Applying the same analysis to the facts in this request, each non-federal committee who provided funds for their pro-rata share of a mailing would not make a ‘contribution’ to the Waters committee.”).

¹³ Reiff Comment at 4 (“Commissioner Weintraub posed the question as to whether reimbursements to the Waters Committee would be subject to the prohibitions and limitations of the Act. . . . an argument can be made that the reimbursements would not be subject to the prohibitions and limitations of the Act.”).

¹⁴ AOR at 2.

Accordingly, we respectfully urge the Commission to reject the flawed analysis in Draft C, and reaffirm that the proposed activity in this AOR is FEA that must be paid for with funds that comply with FECA's requirements.

Respectfully submitted,

/s/ Saurav Ghosh

Saurav Ghosh
Shanna (Reulbach) Ports
Campaign Legal Center
1101 14th St. NW, Suite 400
Washington, DC 20005