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Washington, DC 20463

AGENDA DOCUMENT NO.15-47-A
AGENDA ITEM
For meeting of September 17, 2015

September 10, 2015

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DAP*
Acting General Counsel

Adav Noti *AN*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Sean Wright *SW*
Attorney

Subject: AO 2015-06 (Waters) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on September 16, 2015.

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 <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2015-06
2
3 Hon. Maxine Waters
4 Member of Congress
5 2221 Rayburn House Office Building
6 Washington, D.C. 20515
7

8 Dear Representative Waters,
9

10 We are responding to your advisory opinion request concerning whether the Federal
11 Election Campaign Act, 52 U.S.C. §§ 30101-46 (the “Act”), and Commission regulations permit
12 your authorized committee, your leadership PAC, or yourself personally to make donations to
13 candidates for elected office in a foreign country. The Commission concludes that such
14 donations are permissible under the Act and Commission regulations.

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter received on July 14,
17 2015, and a subsequent email received on July 28, 2015.

18 You are a member of the U.S. House of Representatives representing the 43rd
19 Congressional District of California, and you are a candidate for re-election to that office.¹ You
20 intend to donate to campaigns of candidates for office in Haiti. Advisory Opinion Request
21 (“AOR”) at AOR002. You intend to make these donations using your authorized committee’s
22 funds, your leadership PAC’s funds, or your own individual funds. AOR002.

23 ***Questions Presented***

24 (1) *May your authorized committee use committee funds to make a donation to a candidate*
25 *for office in a foreign country?*

26 (2) *May your leadership PAC use PAC funds to make a donation to a candidate for office in*
27 *a foreign country?*

¹ Maxine Waters, FEC Form 2 at 1 (Mar. 19, 2015),
<http://docquery.fec.gov/pdf/080/15950885080/15950885080.pdf>.

1 (3) *May you use your personal funds to make an individual donation to a candidate for office*
2 *in a foreign country?*

3 ***Legal Analysis and Conclusions***

4 (1) *May your authorized committee use committee funds to make a donation to a candidate*
5 *for office in a foreign country?*

6 Yes, provided that the proposed donation is permissible under Haitian law, your
7 authorized committee may use committee funds to donate to a candidate for office in a foreign
8 country because the donations would constitute a “lawful purpose” within the meaning of the
9 Act.²

10 Under the Act and Commission regulations, an authorized committee may use its funds
11 for several specific purposes — including “donations to state and local candidates” — and for
12 “any other lawful purpose” that does not constitute conversion of campaign funds to “personal
13 use.” 52 U.S.C. § 30114(b); 11 C.F.R. §§ 113.1(g), 113.2(e). The Act provides that campaign
14 funds “shall be considered to be converted to personal use if [the funds are] used to fulfill any
15 commitment, obligation or expense of a person that would exist irrespective of the candidate’s
16 election campaign or individual’s duties as a holder of Federal office.” 52 U.S.C. § 30114(b)(2);
17 *see also* 11 C.F.R. § 113.1(g). The Act and Commission regulations provide a non-exhaustive
18 list of uses of campaign funds that are *per se* personal use. 52 U.S.C. § 30114(b)(2); 11 C.F.R.
19 § 113.1(g)(1)(i). For uses of campaign funds not on this list, the Commission determines, on a
20 case-by-case basis, whether they constitute personal use. 11 C.F.R. § 113.1(g)(1)(ii). *See*
21 *Advisory Opinion 2014-06 (Ryan et al.)* at 4 (purchase of candidate’s book); *see also* *Advisory*

² Regarding other provisions of law that might bear on the permissibility of the proposed activity, *see infra* pp. 4 & 6-7.

1 Opinion 2011-17 (Giffords) (use of campaign funds for home security system). When the
2 Commission engages in a case-by-case determination, it does so in light of its “long-standing
3 opinion that candidates have wide discretion over the use of campaign funds.” Expenditures;
4 Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7867 (Feb. 9,
5 1995).

6 Donating to candidates for office in a foreign country is not one of the *per se* personal
7 uses listed in the Act and Commission regulations. *See* 52 U.S.C. § 30114(b)(2); 11 C.F.R.
8 § 113.1(g)(1)(i). Accordingly, the Commission determines on a case-by-case basis whether such
9 a donation by an authorized committee is permissible.

10 As noted above, the Act and Commission regulations explicitly permit authorized
11 committees to donate funds to state and local candidates. *See* 52 U.S.C. § 30114(a)(5); 11
12 C.F.R. § 113.2(d). But even before Congress amended the Act to include donations to state and
13 local candidates in the enumerated list of permissible uses of campaign funds, the Commission
14 consistently relied on the “any other lawful purpose” provision to determine that such donations
15 were permissible. For example, in Advisory Opinion 1993-10 (Colorado), the Commission
16 permitted a former federal candidate to transfer his excess federal campaign funds to two
17 separate election efforts: his campaign for President of the Popular Democratic Party, and his
18 campaign for Governor of Puerto Rico. In permitting the transfer of funds to the campaign for
19 office in Puerto Rico, a territory of the United States, the Commission relied on the “any other
20 lawful purpose” provision in what is now 52 U.S.C. § 30114(a), stating that permissibility of this
21 transfer “follow[ed]” from the Commission’s precedents allowing transfers to state and local
22 campaigns. *See id.* at 2; *see also* Advisory Opinion 2000-32 (Martinez) (donation of funds to a
23 state candidate); Advisory Opinion 1996-52 (Andrews) (excess campaign funds refunded and

1 resolicited for future state campaign); *see also* Factual and Legal Analysis at 9-10, MUR 6263
2 (Committee to Re-elect Artur Davis to Congress) (Sept. 27, 2010) (concluding that committee’s
3 spending on U.S. Representative’s “exploratory efforts before becoming a [state] candidate” was
4 akin to permissible donation to state and local candidates).

5 Like non-federal candidates within the United States, candidates in other countries are
6 categorically excluded from the Act’s definition of “candidate.” *See* 52 U.S.C. § 30101(2)-(3).
7 Thus, for purposes of the “lawful purpose” analysis under section 30114(a)(6), foreign
8 candidates and nonfederal domestic candidates are similarly situated with regard to receiving
9 donations of federal campaign funds. *Cf.* Advisory Opinion 1993-10 (Colorado) at 2.
10 Accordingly, provided that the proposed donation would be permissible under Haitian law and
11 thus a “lawful” use under section 30114(a)(6) of the Act, the proposed contribution to a
12 candidate for office in a foreign country is permissible pursuant to 52 U.S.C. § 30114(a)(6) and
13 11 CFR § 113.2(e).³ If the proposed donation is not lawful under Haitian law – or under any law
14 of the United States outside the Commission’s jurisdiction – then it would not be permissible
15 under section 30114(a)(6) of the Act. *See, e.g.*, Advisory Opinion 1993-10 (Colorado) at 2-3;
16 Advisory Opinion 1986-05 (Barnes) at 1; Advisory Opinion 1980-113 (Miller) at 2.

17 (2) *May your leadership PAC use PAC funds to make a donation to a candidate for office in*
18 *a foreign country?*

19 Yes, your leadership PAC may use PAC funds to make a contribution to a candidate for
20 office in a foreign country because, provided that the proposed donation is permissible under
21 Haitian law, the donation would constitute a “lawful purpose” within the meaning of the Act.

³ The Commission notes that spending pursuant to section 30114(a)(6) must comply with the proscriptions of section 30114(b). Your proposed donations therefore must not be used by the recipient to relieve you of “any commitment, obligation, or expense . . . that would exist irrespective of [your] election campaign or . . . duties as a holder of federal office.” 52 U.S.C. § 30114(b)(2).

1 A leadership PAC is “a political committee that is directly or indirectly established,
2 financed, maintained or controlled by [a federal candidate or officeholder] but which is not an
3 authorized committee of the candidate or individual and which is not affiliated with an
4 authorized committee of the candidate or individual.” 52 U.S.C. § 30104(i)(8)(B); *see also* 11
5 C.F.R. § 100.5(e)(6).

6 The Act’s personal use provision applies to “[a] contribution accepted by a candidate, and
7 any other donation received by an individual as support for activities of the individual as a holder
8 of Federal office.” 52 U.S.C. § 30114(a). Such contributions “shall not be converted by any
9 person to personal use.” 52 U.S.C. § 30114(b)(1). Because a leadership PAC, by definition, is
10 “directly or indirectly established, financed, maintained or controlled” by a federal candidate or
11 officeholder, contributions to a candidate’s or officeholder’s leadership PAC are contributions
12 “accepted by” the candidate or officeholder. 52 U.S.C. § 30104(i)(8)(B); *see also* 11 C.F.R. §
13 100.5(e)(6). Contributions to leadership PACs are received by candidates or members of
14 Congress “as support for [their] activities” as candidates or officeholders. 52 U.S.C. § 30114(a).
15 Indeed, the primary purpose of a leadership PAC is to support the activities of the federal
16 officeholder sponsoring the leadership PAC. Thus, the Act’s personal use prohibition applies to
17 leadership PACs such as yours.⁴

18 While the personal use prohibition applies to your leadership PAC, the proposed
19 contribution to a candidate for office in a foreign country is permissible pursuant to 52 U.S.C.

⁴ Commission regulations currently only address the personal use of “funds in a campaign account.” *See* 11 C.F.R. part 113 “Permitted and Prohibited Uses of Campaign Funds”; 11 C.F.R. § 113.1(g). Commission regulations are silent as to the personal use of leadership PAC funds. Presumably relying on that silence, the Commission failed in a prior advisory opinion to apply the personal use prohibition to a leadership PAC. *See* Advisory Opinion 2008-17 (KITPAC). That opinion, however, is contrary to the Act’s clear and broad prohibition on personal use of funds by candidates and Federal officeholders, and therefore is hereby superseded. *See* 52 U.S.C. § 30114(a),(b).

1 § 30114(a)(6), for the same reasons that your authorized committee may make such a
2 contribution.⁵

3 (3) *May you use your personal funds to make an individual contribution to a candidate for*
4 *office in a foreign country?*

5 Yes, you may use your personal funds to make an individual contribution to a candidate
6 for office in a foreign country. As discussed above, the Act’s personal use prohibition applies
7 only to “[a] contribution accepted by a candidate, and any other donation received by an
8 individual as support for activities of the individual as a holder of Federal office.” 52 U.S.C. §
9 30114(a). So long as the personal funds used are derived neither from campaign contributions
10 nor donations to you as support for your activities as a holder of federal office, you may use
11 personal funds to contribute to a candidate for office in a foreign country.

12 Moreover, the proposed contribution would not implicate the Act’s prohibition on
13 contributions *from* foreign nationals. Commission regulations provide that foreign nationals
14 shall not, directly or indirectly, make “a contribution or donation of money or other thing of
15 value, or to make an express or implied promise to make a contribution or donation, in
16 connection with a Federal, State, or local election,” 52 U.S.C. § 30121(a)(1)(A); 11 C.F.R.
17 § 110.20(b), but the request presents no facts that suggest such contribution or donation will be
18 made. *See* Advisory Opinion 2015-02 (Grand Trunk Western Railroad – Illinois Central
19 Railroad PAC) at 3 n.2 (noting that foreign entity’s “*receiving* of donations does not implicate
20 the Act’s prohibition on foreign nationals *making* any contribution or donation in connection
21 with an election” (emphasis in original)).

22 The Commission expresses no opinion as to any other relevant federal or foreign laws or

⁵ *See supra* pp. 2-4.

1 regulations — including the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, *et seq.*, or the
2 laws of the Republic of Haiti — or as to any potential tax ramifications of the described activity
3 because such matters are not within the Commission’s jurisdiction. For the same reason, the
4 Commission expresses no opinion regarding any aspects of your proposal that are within the
5 jurisdiction of the House Ethics Committee, the General Counsel of the House of
6 Representatives, or the Department of State. *See* AOR001.

7 This response constitutes an advisory opinion concerning the application of the Act and
8 Commission regulations to the specific transaction or activity set forth in your request. *See*
9 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
10 assumptions presented, and such facts or assumptions are material to a conclusion presented in
11 this advisory opinion, then the requestor may not rely on that conclusion as support for its
12 proposed activity. Any person involved in any specific transaction or activity which is
13 indistinguishable in all its material aspects from the transaction or activity with respect to which
14 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
15 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
16 affected by subsequent developments in the law including, but not limited to, statutes,
17 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
18 on the Commission’s website.

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On behalf of the Commission,

Ann M. Ravel
Chair