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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA DOCUMENT NO. 22-39-A**  
**AGENDA ITEM**  
**For meeting of August 31, 2022**

August 23, 2022

## MEMORANDUM

TO: The Commission

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

Neven F. Stipanovic *NFS*  
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Attorney

Subject: AO 2022-15 (Harley Rouda for Congress) - 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 9:00am (Eastern Time) on August 31, 2022.

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 2022-15  
2

3 Joseph M. Birkenstock, Esq.  
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6 Sandler Reiff Lamb  
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**DRAFT A**

10  
11 Dear Counsel:

12 We are responding to your advisory opinion request on behalf of Harley Rouda for  
13 Congress (the “Committee”) and Harley Rouda, concerning the application of the Federal  
14 Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to your  
15 proposal to reinstate loans that Mr. Rouda forgave and repay those loans with Committee funds,  
16 either cash on hand or raised to retire the debt, in light of the U.S. Supreme Court’s decision in  
17 *Federal Election Commission v. Ted Cruz for Senate* (“*FEC v. Cruz*”).<sup>1</sup>

18 The Commission concludes the Committee may reinstate Mr. Rouda’s loans that it  
19 previously converted to candidate contributions pursuant to 11 C.F.R. § 116.11(c)(2). The  
20 Committee may repay those loans with Committee funds currently on hand or funds raised to  
21 retire the loans provided there are net debts outstanding.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter received on June 29,  
24 2022 (Advisory Opinion Request (“AOR”)), supplemental material received July 20, 2022  
25 (Advisory Opinion Request Supplement (“AOR Supp.”)), and public disclosure reports filed  
26 with the Commission. Mr. Rouda was a candidate in the 2018 primary election for California’s

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<sup>1</sup> *FEC v. Cruz et al.*, 142 S. Ct. 1638 (2022).

1      48<sup>th</sup> Congressional District and the Committee was his principal campaign committee.<sup>2</sup> During  
2      the 2018 primary election period, the Committee reported that Mr. Rouda made loans from his  
3      personal funds to the Committee aggregating \$1,625,000.<sup>3</sup> The Committee repaid Mr. Rouda  
4      \$472,127.93 prior to or within twenty days of the primary election and repaid an additional  
5      \$250,000 over the remainder of 2018 and 2019; Mr. Rouda forgave the remaining loan amounts,  
6      totaling \$902,872.07 on June 30, 2018, and the Committee converted the loans to contributions  
7      pursuant to 11 C.F.R. § 116.11(c)(2) and as instructed in a Request for Additional Information  
8      (“RFAI”) from the Commission’s Reports Analysis Division.<sup>4</sup> The requestors state that but for  
9      the Act, Commission regulations, and the RFAI, Mr. Rouda would not have forgiven the 2018  
10     loans. AOR003, 005.

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<sup>2</sup>      AOR001; Harley Rouda for Congress, Statement of Organization at 2 (Feb. 24, 2017),  
<https://docquery.fec.gov/pdf/690/201702270300142690/201702270300142690.pdf>.

<sup>3</sup>      AOR001. Mr. Rouda made personal loans to the Committee on seven occasions: \$150,000 on August 20, 2017, \$25,000 on September 29, 2017, \$500,000 on December 31, 2017, \$237,000 on February 23, 2018, \$163,000 on March 31, 2018, \$250,000 on May 10, 2018, and \$300,000 on May 31, 2018. See FEC Receipts: Filtered Results,  
[https://www.fec.gov/data/receipts/?data\\_type=processed&committee\\_id=C00633982&two\\_year\\_transaction\\_period=2018&line\\_number=F3-13A](https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00633982&two_year_transaction_period=2018&line_number=F3-13A) (last visited July 18, 2022) (reflecting receipts by Harley Rouda for Congress of loans from the candidate, 2017-2018); see also FEC, 2018 Congressional Pre-Election Reporting Dates, [https://transition.fec.gov/info/charts\\_primary\\_dates\\_2018.shtml](https://transition.fec.gov/info/charts_primary_dates_2018.shtml) (showing California primary election on June 5, 2018).

<sup>4</sup>      AOR001 (citing Harley Rouda for Congress, Request for Additional Information: July Quarterly Report (Sept. 27, 2018), <https://docquery.fec.gov/pdf/782/201809270300020782/201809270300020782.pdf>); AOR Supp.; see also FEC Disbursements: Filtered Results,  
[https://www.fec.gov/data/disbursements/?data\\_type=processed&committee\\_id=C00633982&line\\_number=F3-19A](https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00633982&line_number=F3-19A) (last visited July 18, 2022) (reflecting candidate loan repayments by Harley Rouda for Congress).

1     ***Question Presented***

2                 *In light of FEC v. Cruz, may the Committee reinstate the loans that Mr. Rouda previously  
3                 made to the Committee and repay those loans with Committee funds either currently on hand or  
4                 raised to retire the reinstated debt?*

5     ***Legal Analysis***

6                 Yes, the Committee may reinstate Mr. Rouda’s loans that it previously converted to  
7                 candidate contributions pursuant to 11 C.F.R. § 116.11(c)(2) and may repay those loans with  
8                 Committee funds currently on hand or, as explained below, with contributions raised now to  
9                 retire the reinstated debt.

10                 Until *FEC v. Cruz*, Section 304 of the Bipartisan Campaign Reform Act of 2002  
11                 (“BCRA”) precluded candidates who incurred personal loans made in connection with the  
12                 candidate’s campaign for election from repaying (directly or indirectly), “to the extent such loans  
13                 exceed \$250,000, such loans from any contributions made to such candidate or any authorized  
14                 committee of such candidate after the date of such election.”<sup>5</sup> Commission regulations at 11  
15                 C.F.R. § 116.11 implemented this provision by specifying that an authorized committee could  
16                 repay in full a candidate’s personal loans aggregating over \$250,000 using contributions made  
17                 before or on the date of the election, but only until the 20th day after the election.<sup>6</sup> Under  
18                 section 116.11, an authorized committee could also use post-election contributions to repay the

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<sup>5</sup>                 Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81, 99 (2002) (codified at 52 U.S.C. § 30116(j)).

<sup>6</sup>                 11 C.F.R. § 116.11(b)(1), (c)(1).

1 candidate's personal loans, but only up to \$250,000.<sup>7</sup> Finally, section 116.11 required authorized  
2 committees to "treat the remaining balance of a candidate's personal loan that exceeds \$250,000  
3 as a contribution from the candidate to the authorized committee, given that this amount could  
4 never be repaid, and given that the amount must be accounted for on the authorized committee's  
5 next report."<sup>8</sup>

6 On May 16, 2022, the Supreme Court concluded in *FEC v. Cruz* that Section 304 of  
7 BCRA "burdens core political speech without proper justification" in violation of the First  
8 Amendment of the United States Constitution and affirmed the judgment of the U.S. District  
9 Court for the District of Columbia that invalidated and enjoined enforcement of Section 304 and  
10 the implementing regulation.<sup>9</sup> The Commission now examines how to give retroactive effect to  
11 the decision in *FEC v. Cruz* as applied to Mr. Rouda's loans that the Committee previously  
12 converted to candidate contributions pursuant to 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11.<sup>10</sup>

13 Neither the Act nor Commission regulations expressly addresses whether or how a  
14 committee may reinstate candidate loans that were previously converted to candidate  
15 contributions, whether pursuant to 11 C.F.R. § 116.11(c)(2) or otherwise. Nonetheless, in

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<sup>7</sup> *Id.* § 116.11(b)(2).

<sup>8</sup> Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 68 Fed. Reg. 3970, 3974 (Jan. 27, 2003); *see* 11 C.F.R. § 116.11(c)(2).

<sup>9</sup> 142 S. Ct. at 1656-57; *see Ted Cruz for Senate v. FEC*, 542 F. Supp. 3d 1 (D.D.C. 2021).

<sup>10</sup> *See Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 90 (1993) (holding that "this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision"); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) (holding that "when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases whether or not those cases involve predecision events"); *see also Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289 (D.C. Cir. 1995) ("[T]he decision of a federal court must be given retroactive effect regardless whether it is being applied by a court or an agency.").

1 previous advisory opinions, the Commission has considered whether an authorized committee  
2 may amend disclosure reports previously reporting contributions from a candidate to instead  
3 report that activity as the candidate's loan of personal funds to the committee, and whether such  
4 a committee could then repay those loans with existing funds or accept contributions to pay off  
5 those loans.

6 In Advisory Opinion 2007-07 (Craig for U.S. Congress), for example, a federal candidate  
7 provided personal funds to his committee to retire campaign debt, which the committee reported  
8 as contributions from the candidate. In seeking the advisory opinion, the committee submitted  
9 an affidavit from the candidate and a statement from the committee's outside compliance  
10 consultant indicating that the candidate intended the funds to be treated as loans to the  
11 committee.<sup>11</sup> Similarly, in Advisory Opinion 2006-37 (Kissin for Congress), a candidate and his  
12 authorized committee submitted affidavits with an advisory opinion request indicating that,  
13 although the candidate deposited personal funds into the committee's campaign depository,  
14 which the committee reported as contributions from the candidate, the candidate intended to be  
15 reimbursed.<sup>12</sup> In both advisory opinions, the Commission considered the "nature of the  
16 transaction" by looking both to how the transactions were reported and affidavits evidencing the  
17 intent of the respective parties.<sup>13</sup> The Commission concluded in both advisory opinions that the  
18 affidavits supported the contentions that the personal funds were loans from the candidates that

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<sup>11</sup> Advisory Opinion 2007-07 (Craig for Congress) at 2-3.

<sup>12</sup> Advisory Opinion 2006-37 (Kissin for Congress) at 2-3.

<sup>13</sup> Advisory Opinion 2007-07 (Craig for Congress) at 3; Advisory Opinion 2006-37 (Kissin for Congress) at 3.

1        were mistakenly reported as contributions, and permitted the respective committees to use  
2        existing funds or accept contributions to repay the loans.

3                  Another advisory opinion is instructive on the retroactive effect of external circumstances  
4        on a candidate's earlier transactions with her authorized committee. In Advisory Opinion 1997-  
5        21 (Firebaugh), a candidate had forgiven advances of personal funds to her committee so that it  
6        could terminate, and the committee had reported the forgiveness as a contribution from the  
7        candidate; the committee subsequently received an unanticipated vendor refund, and the  
8        committee and candidate then sought permission to recharacterize the contribution as an advance  
9        and repay the candidate from the unanticipated refund. The Commission concluded, on the basis  
10      of the committee's reporting as well as affidavits as to intent, that the transactions were of the  
11      nature of advances and allowed the committee to use the vendor refund to repay the candidate.<sup>14</sup>

12                  Here, where the Committee initially reported the activity as loans from Mr. Rouda and  
13        then recharacterized those loans' balances as contributions as required by 52 U.S.C. § 30116(j)  
14        and 11 C.F.R. § 116.11 (c)(2), the nature of those transactions is evident from the reporting.

15                  Whereas in the earlier advisory opinions, the Commission determined the nature of the  
16        transactions from written statements from the parties, confirmed by oath or affirmation, to  
17        explain the reported transactions, the Committee's conversion of Mr. Rouda's loans to  
18        contributions solely to comply with the law is apparent from the reports themselves in  
19        conjunction with the RFAI,<sup>15</sup> and that law has now changed. In light of the foregoing, and the

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<sup>14</sup>        Advisory Opinion 1997-21 (Firebaugh) at 3-4.

<sup>15</sup>        See *supra*, note 4; compare Harley Rouda for Congress, July 2018 Report at 470, 478-84 (July 15, 2018), <https://docquery.fec.gov/pdf/592/201807159115652592/201807159115652592.pdf> (pre-RFAI report showing two loan payments and no loan forgiveness), with Harley Rouda for Congress, Amended July 2018 Report at 482-84,

1 invalidation in *FEC v. Cruz* of 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11(c)(2), the  
2 Commission concludes that the Committee may reinstate as loans from Mr. Rouda the  
3 \$902,872.07 in loans that it converted on June 30, 2018, to candidate contributions pursuant to  
4 the now-invalidated provisions at 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11(c)(2).

5 The Commission further concludes that the Committee may repay Mr. Rouda's reinstated  
6 2018 loans with Committee funds currently on hand. The Commission has previously permitted  
7 candidates' authorized committees to use otherwise lawful campaign contributions on hand to  
8 repay debts outstanding from previous elections, and stated that — in the context of a candidate  
9 who planned to seek re-election — “this use of contributions ‘does not require that they be  
10 counted against the limits applicable to the previous election unless there are facts and  
11 circumstances indicating that the contributions were actually solicited to pay the debts remaining  
12 from the previous election, or that contributors gave to the current campaign with knowledge that  
13 the funds would be applied only to debt retirement.’”<sup>16</sup> The Committee may also repay the  
14 reinstated loans with contributions raised now to retire the reinstated debt, subject to the  
15 following conditions. Contributions received now for 2018 debt retirement must be designated  
16 as 2018 primary election contributions and must not exceed the Committee’s net debts  
17 outstanding for the 2018 primary election.<sup>17</sup> Furthermore, any contribution now received for

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492-98 (July 15, 2019), <https://docquery.fec.gov/pdf/263/201907159150932263/201907159150932263.pdf> (post-RFAI amended report showing two loan payments and six candidate loan forgiveness entries).

<sup>16</sup> See Advisory Opinion 2008-22 (Lautenberg) at 3-4 (concluding that committee could repay 2002 obligations, including loans from the candidate, with contributions made in connection with candidate’s 2008 and 2014 elections) (quoting Advisory Opinion 1989-22 (Nagle)).

<sup>17</sup> See 11 C.F.R. § 110.1(b)(3)(i). Net debts outstanding are calculated as of the date of the election and defined as “the total amount of unpaid debts and obligations incurred with respect to the election” minus a number of things, including contributions from that election. *Id.* § 110.1(b)(3)(ii)(A). The Committee’s reports disclose that, at the time it submitted this advisory opinion request, it had net debts outstanding from the 2018 primary

1      2018 primary election debt retirement is subject to the Act's contribution limits for that election  
2      and must be aggregated with a contributor's contributions for that election.<sup>18</sup>

3            The Committee should disclose the reinstated candidate loans in its next scheduled  
4      disclosure report, rather than amending its earlier reports. The reinstated loans should be  
5      disclosed on Schedule C of the report covering the period when the loans were reinstated. Since  
6      the loans were incurred in a prior reporting period, the Committee should not disclose the receipt  
7      of the loans on Line 13(a) (Loans Made or Guaranteed by the Candidate) of the Detailed  
8      Summary Page of this report. When disclosing the reinstated candidate loans, the Committee  
9      should include memo text explaining that the loan forgiveness was revoked pursuant to the *FEC*  
10     *v. Cruz* decision. This memo text will serve as a clarifying note which can be linked to the loan  
11     transaction for anyone reviewing the disclosure report. The Committee must continuously  
12     disclose the amount of the outstanding debt until it is extinguished. 52 U.S.C. §30104(b)(8); 11  
13     C.F.R. § 104.11(a).

14            This response constitutes an advisory opinion concerning the application of the Act and  
15     Commission regulations to the specific transaction or activity set forth in your request.<sup>19</sup> The  
16     Commission emphasizes that, if there is a change in any of the facts or assumptions presented,  
17     and such facts or assumptions are material to a conclusion presented in this advisory opinion,

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election. For the purpose of calculating net debts outstanding from the 2018 primary election after this advisory opinion, the Committee may include any unpaid reinstated candidate personal loans.

<sup>18</sup>        See 11 C.F.R. § 110.1(b)(3)(i), (iii)(B); Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 761 (Jan. 9, 1987) ("The Commission believes that funds given to a candidate after an election is over cannot meet the Act's requirements that contributions be made with respect to and for the purpose of influencing that election unless they could be used to retire outstanding debts from that election.").

<sup>19</sup>        See 52 U.S.C. § 30108.

1 then the requestor may not rely on that conclusion as support for its proposed activity. Any  
2 person involved in any specific transaction or activity which is indistinguishable in all its  
3 material aspects from the transaction or activity with respect to which this advisory opinion is  
4 rendered may rely on this advisory opinion.<sup>20</sup> Please note that the analysis or conclusions in this  
5 advisory opinion may be affected by subsequent developments in the law including, but not  
6 limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited  
7 herein are available on the Commission’s website.

On behalf of the Commission,

Allen Dickerson  
Chairman

<sup>20</sup> See *id.* § 30108(c)(1)(B).