MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas
Acting General Counsel
Adav Noti
Acting Associate General Counsel
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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
Dear Representative Waters,

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

Background

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

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

Questions Presented

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

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

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

Legal Analysis and Conclusions

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

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

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

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2 Regarding other provisions of law that might bear on the permissibility of the proposed activity, see infra pp. 4 & 6-7.
Opinion 2011-17 (Giffords) (use of campaign funds for home security system). When the
Commission engages in a case-by-case determination, it does so in light of its “long-standing
opinion that candidates have wide discretion over the use of campaign funds.” Expenditures;
Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7867 (Feb. 9,
1995).

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

As noted above, the Act and Commission regulations explicitly permit authorized
committees to donate funds to state and local candidates. \emph{See} 52 U.S.C. § 30114(a)(5); 11
C.F.R. § 113.2(d). But even before Congress amended the Act to include donations to state and
local candidates in the enumerated list of permissible uses of campaign funds, the Commission
consistently relied on the “any other lawful purpose” provision to determine that such donations
were permissible. For example, in Advisory Opinion 1993-10 (Colorado), the Commission
permitted a former federal candidate to transfer his excess federal campaign funds to two
separate election efforts: his campaign for President of the Popular Democratic Party, and his
campaign for Governor of Puerto Rico. In permitting the transfer of funds to the campaign for
office in Puerto Rico, a territory of the United States, the Commission relied on the “any other
lawful purpose” provision in what is now 52 U.S.C. § 30114(a), stating that permissibility of this
transfer “follow[ed]” from the Commission’s precedents allowing transfers to state and local
campaigns. \emph{See id.} at 2; \emph{see also} Advisory Opinion 2000-32 (Martinez) (donation of funds to a
state candidate); Advisory Opinion 1996-52 (Andrews) (excess campaign funds refunded and
Like non-federal candidates within the United States, candidates in other countries are categorically excluded from the Act’s definition of “candidate.” See 52 U.S.C. § 30101(2)-(3). Thus, for purposes of the “lawful purpose” analysis under section 30114(a)(6), foreign candidates and nonfederal domestic candidates are similarly situated with regard to receiving donations of federal campaign funds. Cf. Advisory Opinion 1993-10 (Colorado) at 2.

Accordingly, provided that the proposed donation would be permissible under Haitian law and thus a “lawful” use under section 30114(a)(6) of the Act, the proposed contribution to a candidate for office in a foreign country is permissible pursuant to 52 U.S.C. § 30114(a)(6) and 11 CFR § 113.2(e). If the proposed donation is not lawful under Haitian law – or under any law of the United States outside the Commission’s jurisdiction – then it would not be permissible under section 30114(a)(6) of the Act. See, e.g., Advisory Opinion 1993-10 (Colorado) at 2-3; Advisory Opinion 1986-05 (Barnes) at 1; Advisory Opinion 1980-113 (Miller) at 2.

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

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

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

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

Indeed, the primary purpose of a leadership PAC is to support the activities of the federal officeholder sponsoring the leadership PAC. Thus, the Act’s personal use prohibition applies to leadership PACs such as yours. 4

While the personal use prohibition applies to your leadership PAC, the proposed contribution to a candidate for office in a foreign country is permissible pursuant to 52 U.S.C. § 30114(a), (b).

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

contribution.5

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

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

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

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

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

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

On behalf of the Commission,

Ann M. Ravel
Chair