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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 15-47-D
AGENDA ITEM

For meeting of September 17, 2015

SUBMITTED LATE

September 17, 2015

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DAP*
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Subject: AO 2015-06 (Waters) Draft D

Attached is a proposed draft of the subject advisory opinion.

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. §§ 30101-30146 (the “Act”), and Commission regulations
12 permit your authorized committee, your leadership PAC, or yourself personally to make
13 donations to candidates for elected office in a foreign country. The Commission concludes that
14 such 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, your authorized committee may use committee funds to make a donation to a
7 candidate in a foreign country.

8 Under the Act and Commission regulations, an authorized committee may use its funds
9 for several specific purposes — including “donations to state and local candidates” — as well as
10 for “any other lawful purpose”² that does not otherwise constitute conversion of campaign funds
11 to “personal use.” 52 U.S.C. § 30114(b); 11 C.F.R. §§ 113.1(g), 113.2(e).

12 Campaign funds “shall be considered to be converted to personal use if [the funds are]
13 used to fulfill any commitment, obligation or expense of a person that would exist irrespective of
14 the candidate’s election campaign or individual’s duties as a holder of Federal office.” 52 U.S.C.
15 § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g). The Act and Commission regulations provide a
16 non-exhaustive list of uses of campaign funds that are *per se* personal use. 52 U.S.C.
17 § 30114(b)(2); 11 C.F.R. § 113.1(g)(1)(i). For uses of campaign funds not on this list, the
18 Commission determines, on a case-by-case basis, whether they constitute personal use. 11
19 C.F.R. § 113.1(g)(1)(ii). *See* Advisory Opinion 2014-06 (Ryan *et al.*) at 4 (purchase of
20 candidate’s book); *see also* Advisory Opinion 2011-17 (Giffords) (use of campaign funds for

² For purposes of its analysis in this advisory opinion, the Commission assumes, but expresses no opinion as to, the legality of the proposed activity under any other potentially relevant federal or foreign laws or regulations, as any such laws would lie beyond the Commission’s jurisdiction. For the same reason, the Commission expresses no opinion concerning any aspects of your proposal that fall within the jurisdiction of the House Ethics Committee, the General Counsel of the House of Representatives, or the Department of State. *See* AOR001.

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

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

9 As noted above, the Act and Commission regulations explicitly permit authorized
10 committees to donate funds to state and local candidates. *See* 52 U.S.C. § 30114(a)(5); 11
11 C.F.R. § 113.2(d). But even before Congress amended the Act to include donations to state and
12 local candidates in the enumerated list of permissible uses of campaign funds, the Commission
13 consistently determined that such donations were permissible. *See* Advisory Opinion 2000-32
14 (Martinez) (donation of funds to a state candidate); *see also* Factual and Legal Analysis at 9-10,
15 MUR 6263 (Committee to Re-elect Artur Davis to Congress) (Sept. 27, 2010) (concluding that
16 committee’s spending on U.S. Representative’s “exploratory efforts before becoming a [state]
17 candidate” was akin to permissible donation to state and local candidates).

18 For example, in Advisory Opinion 1993-10 (Colorado), the Commission permitted a
19 former federal candidate to transfer his excess federal campaign funds to two separate election
20 efforts: his campaign for President of the Popular Democratic Party, and his campaign for
21 Governor of Puerto Rico. In permitting the transfer of funds to the campaign for office in Puerto
22 Rico, a territory of the United States, the Commission relied on the provision that is now 52

1 U.S.C. § 30114(a)(6), stating that permissibility of this transfer “follow[ed]” from the
2 Commission’s precedents allowing transfers to state and local campaigns. *See id.* at 2.

3 For purposes of the analysis under § 30114(a)(6), foreign candidates and nonfederal
4 domestic candidates — both of which are excluded from the Act’s definition of candidate, 52
5 U.S.C. § 30101(2)-(3) — are similarly situated with regard to receiving donations of federal
6 campaign funds. *Cf.* Advisory Opinion 1993-10 (Colorado) at 2. Accordingly, the proposed
7 contribution to a candidate for office in a foreign country is permissible under 52 U.S.C.
8 §§ 30114(a)(6), (b) and 11 CFR §§ 113.2(e).³

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

11 Yes, the Commission concludes that your leadership PAC may use PAC funds to make a
12 contribution to a candidate for office in a foreign country. The Commission could not agree as to
13 the legal basis for its conclusion by the required four affirmative votes. 52 U.S.C. § 30106(c); 11
14 C.F.R. § 112.4(a).

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

17 Yes, you may use your personal funds to make an individual contribution to a candidate
18 for office in a foreign country. The Commission notes also that the proposed contributions from
19 you to a foreign candidate would not implicate the Act’s prohibition on contributions *from*
20 foreign nationals in connection with Federal, State, and local elections. *See* 52 U.S.C.
21 § 30121(a)(1)(A); 11 C.F.R. § 110.20(b); *see also* Advisory Opinion 2015-02 (Grand Trunk

³ The Commission notes that spending under § 30114(a)(6) must comply with the proscriptions of § 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 Western Railroad – Illinois Central Railroad PAC) at 3 n.2 (noting that foreign entity’s
2 “receiving of donations does not implicate the Act’s prohibition on foreign nationals *making* any
3 contribution or donation in connection with an election” (emphasis in original)).

4 This response constitutes an advisory opinion concerning the application of the Act and
5 Commission regulations to the specific transaction or activity set forth in your request. *See*
6 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
7 assumptions presented, and such facts or assumptions are material to a conclusion presented in
8 this advisory opinion, then the requestor may not rely on that conclusion as support for its
9 proposed activity. Any person involved in any specific transaction or activity which is
10 indistinguishable in all its material aspects from the transaction or activity with respect to which
11 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
12 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
13 affected by subsequent developments in the law including, but not limited to, statutes,
14 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
15 on the Commission’s website.

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19 On behalf of the Commission,
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Ann M. Ravel
Chair