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FEDERAL ELECTION COMMISSION  
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ADVISORY OPINION 2022-15

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Dear Counsel:

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

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

***Background***

The facts presented in this advisory opinion are based on your letter received on June 29, 2022 (Advisory Opinion Request (“AOR”)), supplemental material received July 20, 2022 (Advisory Opinion Request Supplement (“AOR Supp.”)), and public disclosure reports filed 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).

48th Congressional District and the Committee was his principal campaign committee.<sup>2</sup> During the 2018 primary election period, the Committee reported that Mr. Rouda made loans from his personal funds to the Committee aggregating \$1,625,000.<sup>3</sup> The Committee repaid Mr. Rouda \$472,127.93 prior to or within 20 days of the primary election and repaid an additional \$250,000 over the remainder of 2018 and 2019; Mr. Rouda forgave the remaining loan amounts, totaling \$902,872.07 on June 30, 2018, and the Committee converted the loans to contributions pursuant to 11 C.F.R. § 116.11(c)(2) and as instructed in a Request for Additional Information (“RFAI”) from the Commission’s Reports Analysis Division.<sup>4</sup> The requestors state that but for the Act, Commission regulations, and the RFAI, Mr. Rouda would not have forgiven the 2018 loans. AOR003, 5.

### ***Question Presented***

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

### ***Legal Analysis***

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

Until *FEC v. Cruz*, Section 304 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) precluded candidates who incurred personal loans made in connection with the candidate’s campaign for election from repaying (directly or indirectly), “to the extent such loans exceed \$250,000, such loans from any contributions made to such candidate or any authorized

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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).

committee of such candidate after the date of such election.”<sup>5</sup> Commission regulations at 11 C.F.R. § 116.11 implemented this provision by specifying that an authorized committee could repay in full a candidate’s personal loans aggregating over \$250,000 using contributions made before or on the date of the election, but only until the 20th day after the election.<sup>6</sup> Under section 116.11, an authorized committee could also use post-election contributions to repay the candidate’s personal loans, but only up to \$250,000.<sup>7</sup> Finally, section 116.11 required authorized committees to “treat the remaining balance of a candidate’s personal loan that exceeds \$250,000 as a contribution from the candidate to the authorized committee, given that this amount could never be repaid, and given that the amount must be accounted for on the authorized committee’s next report.”<sup>8</sup>

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

Neither the Act nor Commission regulations expressly addresses whether or how a committee may reinstate candidate loans that were previously converted to candidate contributions, whether pursuant to 11 C.F.R. § 116.11(c)(2) or otherwise. Nonetheless, in previous advisory opinions, the Commission has considered whether an authorized committee may amend disclosure reports previously reporting contributions from a candidate to instead report that activity as the candidate’s loan of personal funds to the committee, and whether such

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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).

<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.”).

a committee could then repay those loans with existing funds or accept contributions to pay off those loans.

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

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

Here, where the Committee initially reported the activity as loans from Mr. Rouda and then recharacterized those loans' balances as contributions as required by 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11 (c)(2), the nature of those transactions is evident from the reporting. Whereas in the earlier advisory opinions, the Commission determined the nature of the transactions from written statements from the parties, confirmed by oath or affirmation, to explain the reported transactions, the Committee's conversion of Mr. Rouda's loans to contributions solely to comply with the law is apparent from the reports themselves in

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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.

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

conjunction with the RFAI,<sup>15</sup> and that law has now changed. In light of the foregoing, and the invalidation in *FEC v. Cruz* of 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11(c)(2), the Commission concludes that the Committee may reinstate as loans from Mr. Rouda the \$902,872.07 in loans that it converted on June 30, 2018, to candidate contributions pursuant to the now-invalidated provisions at 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11(c)(2).

The Commission further concludes that the Committee may repay Mr. Rouda's reinstated 2018 loans with Committee funds currently on hand. The Commission has previously permitted candidates' authorized committees to use otherwise lawful campaign contributions on hand to repay debts outstanding from previous elections, and stated that — in the context of a candidate who planned to seek re-election — “this use of contributions ‘does not require that they be counted against the limits applicable to the previous election unless there are facts and circumstances indicating that the contributions were actually solicited to pay the debts remaining from the previous election, or that contributors gave to the current campaign with knowledge that the funds would be applied only to debt retirement.’”<sup>16</sup> The Committee may also repay the reinstated loans with contributions raised now to retire the reinstated debt, subject to the following conditions. Contributions received now for 2018 debt retirement must be designated as 2018 primary election contributions and must not exceed the Committee's net debts outstanding for the 2018 primary election.<sup>17</sup> Furthermore, any contribution now received for 2018 primary election debt retirement is subject to the Act's contribution limits for that election and must be aggregated with a contributor's contributions for that election.<sup>18</sup>

The Committee should disclose the reinstated candidate loans in its next scheduled disclosure report, rather than amending its earlier reports. The reinstated loans should be disclosed on Schedule C of the report covering the period when the loans were reinstated. Since

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<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, 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)).

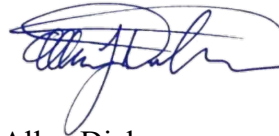
<sup>17</sup> See 11 C.F.R. § 110.1(b)(3)(i). Net debts outstanding are calculated as of the date of the election and defined as “the total amount of unpaid debts and obligations incurred with respect to the election” minus a number of things, including contributions from that election. *Id.* § 110.1(b)(3)(ii)(A).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

the loans were incurred in a prior reporting period, the Committee should not disclose the receipt of the loans on Line 13(a) (Loans Made or Guaranteed by the Candidate) of the Detailed Summary Page of this report. When disclosing the reinstated candidate loans, the Committee should include memo text explaining that the loan forgiveness was revoked pursuant to the *FEC v. Cruz* decision. This memo text will serve as a clarifying note which can be linked to the loan transaction for anyone reviewing the disclosure report. The Committee must continuously disclose the amount of the outstanding debt until it is extinguished.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> 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,



Allen Dickerson  
Chairman

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<sup>19</sup> 52 U.S.C. § 30104(b)(8); 11 C.F.R. § 104.11(a).

<sup>20</sup> *See* 52 U.S.C. § 30108.

<sup>21</sup> *See id.* § 30108(c)(1)(B).