FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

FROM: **Office of the Commission Secretary** LC

DATE: **July 19, 2022**

SUBJECT: **AO 2022-15 (Rouda for Congress) NRCC Comment**

The following is a comment from NRCC on AO 2022-15 (Rouda for Congress).

Attachment

RECEIVED
By Office of the Commission Secretary at 10:58 am, Jul 19, 2022

July 18, 2022

Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: Comment on Advisory Opinion Request 2022-15 (Harley Rouda for Congress)

Dear Commissioners,

This comment on Advisory Opinion Request 2022-15 (Harley Rouda for Congress) is submitted by the undersigned counsel on behalf of the NRCC. The NRCC strongly supports Mr. Rouda's request and urges the Commission to affirm that his campaign committee may "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." Advisory Opinion Request at 2. This result is compelled by the Supreme Court's decision in *FEC v. Ted Cruz for Senate*, and we note the Commission has already applied *Cruz* in a recent audit matter.

In fact, the NRCC submitted its own advisory opinion request on behalf of its Members in the hopes of receiving guidance from the Commission on this important question, but that request was rejected by the Office of General Counsel ("OGC") as "incomplete or otherwise not qualified." We noted in our request that the Commission has issued several advisory opinions to representative entities, usually party committees, presenting questions on behalf of their members, and the Commission issued another such advisory opinion just last month.[1] Attorneys with OGC, however, took the position that the NRCC's request did not include enough facts and that somehow made it distinguishable from these past advisory opinions. We are unsure exactly how OGC came to this conclusion, and found their explanation lacking, but with OGC unwilling to advance our request, we withdrew it.[2]

Notwithstanding our disagreement with OGC's assessment, OGC's attorneys remained helpful and suggested we could file a comment in this matter. Accordingly, we submit this comment

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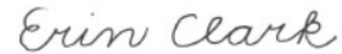
[1] *See*, *e.g.*, Advisory Opinion 2022-08 (NRCC) (issuing advisory opinion to NRCC regarding contribution limits applicable to NRCC's Members running in certain New York primary elections); Advisory Opinion 2021-03 (NRSC and NRCC) (issuing advisory opinion to NRSC and NRCC regarding Members' use of campaign funds to pay for personal security personnel); Advisory Opinion 2017-17 (Sergeant at Arms Irving) (issuing advisory opinion to House Sergeant at Arms regarding Members' use of campaign funds to pay for residential security systems); Advisory Opinion 2006-24 (NRSC, DSCC, Republican State Committee of Pennsylvania) (issuing advisory opinion to party committees regarding federal candidate's recount funds).

[2] 11 C.F.R. § 112.1(d) purports to authorize OGC to exercise the Commission's authority to determine the sufficiency of advisory opinion requests and appears to contravene 52 U.S.C. § 30106(c). In 1980, the Commission's sole stated basis for granting the Commission's authority to OGC was that it "reflect[ed] the Commission's current practice." 45 Fed. Reg. 15,089 (March 7, 1980) ("Subsection (d) reflects the Commission's current practice of reviewing requests for sufficiency.").

which incorporates the NRCC's withdrawn advisory opinion request as we believe it should be before the Commission as it considers Mr. Rouda's request.

Sincerely,



Jessica F. Johnson
Holtzman Vogel Baran
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Washington, DC 20037

Counsel to NRCC

Erin Clark
General Counsel
NRCC

June 8, 2022

VIA EMAIL

Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: Request for Advisory Opinion

Dear Commissioners:

The National Republican Congressional Committee ("NRCC"), through the undersigned counsel, submits this request for an advisory opinion pursuant to 52 U.S.C. § 30108 of the Federal Election Campaign Act of 1971, as amended (the "Act"). The NRCC requests the Commission's confirmation that officeholders and candidates who are similarly situated to Senator Cruz may be repaid by their campaign committees for those portions of candidate personal loans that were previously converted to candidate contributions pursuant to 11 C.F.R. § 116.11(c)(2), along with guidance on proper reporting of such transactions.

The NRCC is classified as a national political party committee under the Act. The NRCC is comprised of sitting Republican Members of the U.S. House of Representatives and includes all incumbent Republican House Members. As part of its primary function to aid the election of candidates affiliated with the Republican Party, the NRCC provides guidance to incumbent federal candidates, as well as to challengers and to candidates for open seats. The NRCC submits this request on behalf of its Members currently serving in federal office.[1]

Legal Background

On May 16, 2022, the U.S. Supreme Court invalidated Section 304 of the Bipartisan Campaign Reform Act of 2002, *see* 52 U.S.C. § 30116(j), which provided that "a candidate who loans money to his campaign may not be repaid more than $250,000 of such loans from contributions made to the campaign after the date of the election." *FEC v. Ted Cruz For Senate*, 596 U.S. ____ (2022), Slip Op. at 2. The Court also invalidated the Commission's implementing regulations at 11 C.F.R. §§ 116.11 and 116.12. *Id*. at 9 ("if Section 304 is invalid and unenforceable … the agency's 20-day rule is as well").

[1] The Commission has previously issued advisory opinions to requestors submitting on behalf of Members of Congress and/or federal candidates. See, *e.g.*, Advisory Opinion 2021-03 (NRSC and NRCC) (issuing advisory opinion applicable to Members' use of campaign funds to pay for personal security personnel); Advisory Opinion 2017-17 (Sergeant at Arms Irving) (issuing advisory opinion applicable to Members' use of campaign funds to pay for residential security systems); Advisory Opinion 2006-24 (NRSC, DSCC, Republican State Committee of Pennsylvania) (issuing advisory opinion applicable to federal candidate recount funds).

The Court's decision explains that "[b]efore election day, Cruz loaned $260,000 to … Ted Cruz for Senate (Committee). At the end of election day, however, the Committee was in the red by approximately $340,000. It eventually began repaying Cruz's loans, but by that time the 20-day post-election window for repaying amounts over $250,000 had closed. See 11 CFR §§ 116.11(c)(1), (2). The Committee accordingly repaid Cruz only $250,000, leaving $10,000 of his personal loans unpaid." *Id*. at 3. The three-judge panel decision indicated that "[t]he $10,000 balance of those loans was subsequently deemed a campaign contribution from Senator Cruz." *Ted Cruz for Senate v. FEC*, 542 F. Supp. 3d 1, 6 (D.D.C. 2021).

Question Presented

As a result of the Supreme Court's decision, Senator Cruz's principal campaign committee, Ted Cruz For Senate, may now repay Senator Cruz the $10,000 portion of the candidate personal loan that was converted to a candidate contribution pursuant to Commission regulations. The question presented now is:

Member A is an incumbent Member of the U.S. House of Representatives and a candidate for re-election to the U.S. House in 2022. In a past election, Member A made a personal loan to his principal campaign committee in an amount greater than $250,000. At the close of the 20-day repayment period specified in 11 C.F.R. § 116.11(c)(2), Member A's personal loan to his campaign had not been fully repaid and Member's campaign lacked sufficient pre-election funds to fully repay Member A's loan. Member A's campaign was forced to "treat the portion of the aggregate outstanding balance of the personal loans that exceed[ed] $250,000 minus the amount of cash on hand as of the day after the election used to repay the loan as a contribution by the candidate." Member A's next-filed disclosure report reflected that the committee carried forward a permissible portion of the candidate's personal loan, but the "excess loan amount" was converted to a personal contribution from the candidate.

May Member A's campaign committee reclassify the "excess loan amount" that was previously converted to a personal contribution from the candidate as a candidate personal loan and repay Member A for that loan from campaign funds either existing as cash on hand now or raised in the future?

Analysis and Reporting Proposal

The Commission should confirm that the campaign committees of candidates who are similarly situated to Senator Cruz may also repay candidate personal loans that were previously converted to candidate contributions pursuant to 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11(c)(2).[2] There is no basis for the Commission to prevent such repayments, and to the greatest extent possible, the Commission should endeavor to provide relief to persons who were subjected to unconstitutional restrictions that have been invalidated. *See generally Harper v. Va. Dep't of*

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[2] Requestor notes that the issue of the application of the Supreme Court's decision to an officeholder/candidate other than Senator Cruz arose during the Commission's consideration of the Proposed Final Audit Report on Mike Braun for Indiana (A19-02) on June 8, 2022. Both the Commission's discussion and the agenda documents indicated there was no dispute that the Court's decision applies beyond Senator Cruz, and the approved Proposed Final Audit Report in fact applied the *Cruz* decision to the audited committee.

Taxation, 509 U.S. 86, 94-102 (1993) (discussing "general rule of retrospective effect for the constitutional decisions of this Court").

The Requestor proposes that campaign committees that make the determination to repay candidate personal loans that were converted to candidate contributions pursuant to 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11(c)(2) may reclassify those transactions as loans and include a new entry (or entries) on Schedule C (Loans) along with an explanatory note or Form 99 filing explaining that a certain candidate loan that was converted to a contribution has been reclassified as a loan. This explanatory note or Form 99 filing would include the following details: (1) date of original candidate loan; (2) date and amount of "excess loan" conversion to candidate contribution; (3) reference to new entry (or entries) on Schedule C (Loans); and (4) statement that previously converted loan has been reclassified pursuant to *FEC v. Ted Cruz For Senate*.

The Commission has previously allowed campaign committees to reclassify candidate personal contributions as candidate loans in situations where those loans were mis-reported as contributions. *See*, *e.g.*, Advisory Opinions 2007-07 (Craig for U.S. Congress), 2006-37 (Kissin For Congress), Advisory Opinion 1997-21 (Firebaugh). In those matters, the Commission required the committees to amend the initial report disclosing the misreported contribution at issue as well as "all subsequent reports to reflect the debts owed by the Committee to the candidate," on the grounds that a reporting error had occurred. Advisory Opinion 2007-07 at 3. In the present circumstances, however, no reporting errors occurred, and committees should not be required to amend reports that were properly filed. To require extensive reporting amendments would simply compound the error that the Court's decision corrects.

Accordingly, Requestor asks the Commission to confirm: (i) that campaign committees may repay candidate personal loans that were previously converted to candidate contributions, in accordance with *FEC v. Ted Cruz For Senate*; and (ii) the permissibility of the reporting proposal above. If the Commission deems the Requestor's reporting proposal inadequate, Requestor seeks Commission guidance on a proper and acceptable reporting method.

Sincerely,

Jessica F. Johnson
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Torchinsky & Josefiak PLLC
2300 N Street NW, Suite 643
Washington, DC 20037

Counsel to NRCC

Erin Clark
General Counsel
NRCC

From: Jessica Furst Johnson <>
Date: Friday, June 24, 2022 at 10:35 AM
To: Danita Alberico <>, Jessica Selinkoff <>
Cc: Erin Clark <>
Subject: Re: Contact info re: NRCC Advisory Opinion Request

Ms. Alberico and Ms. Selinkoff:

Thank you for reaching out on Tuesday morning regarding the NRCC's recently submitted AOR. After giving our conversation more thought and discussing the matter with Erin Clark, NRCC General Counsel, we believe the request submitted by the NRCC is consistent with the Commission's approach in past requests, and would respectfully request that the Commission consider it as it currently stands. As the request notes, "The NRCC submits this request on behalf of its Members currently serving in federal office." Just yesterday, the Commissioners unanimously approved AO 2022-08, Draft A, which also was submitted by the NRCC on behalf of its members. The requestor asked whether its members who were candidates in certain elections could raise funds under a separate contribution limit. The Commission answered the question, and there was no discussion at the table suggesting that any Commissioner was concerned that the request was improper. As footnote 1 in AO 2022-08 indicates, this approach is consistent with AO 2021-03, which in turn was consistent with 2017-17 and 2006-24.

The Commission responded to the request in 2022-08 without being specifically informed which members would potentially be engaging in the proposed activity. Rather, it was enough for the Commission to know that its response would apply to any NRCC member running in the specific elections noted in the request. And as Commissioner Weintraub mentioned yesterday morning, the response also applies to any other candidate running in those same elections.

Regarding the concern you expressed with respect to providing advice on how to report the loan/contribution transactions, we note that AO 2022-08 includes reporting advice for the NRCC's members at footnote 37: "Contributions received for the June election do not have to be aggregated with contributions received for the August election, but remain subject to the limits of 52 U.S.C. § 30116. In addition, any unused contributions lawfully made for the June election do not have to be redesignated by the contributors for the August election. See Advisory Opinion 2006-26 (Texans for Henry Bonilla) at 4; Advisory Opinion 1997-37 (Brady for Congress Committee) at 3; Advisory Opinion 1996-36 (Frost et al.) at 5." Thus, we don't believe that details of a specific loan are required in order to answer the reporting aspect of the question at hand, and we're hopeful the facts as provided are sufficient to provide the basis for such guidance.

Again, the Commission provided this advice without knowing anything about any members' past activities or whether aggregation or redesignation was even an issue for any of the members in these elections. The same approach should apply here. Just as specific details about past fundraising activities by specific members was not necessary to 2022-08, specific details about past loans converted to personal contributions should not be needed for this request. For purposes of providing a response to the NRCC's members, all that matters is that members converted 'excess loan amounts' to personal contributions pursuant to the now -invalidated regulation, and now we seek guidance on how to proceed in light the Cruz decision.

We hope this information is helpful in moving the AOR to the next phase of consideration by the Commission. Thank you again for your time.

Jessica Furst Johnson
Holtzman Vogel Baran Torchinsky & Josefiak PLLC
Mobile:
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Any accounting, business or tax advice contained in this communication, including attachments and enclosures, is not intended as a thorough, in-depth analysis of specific issues, nor a substitute for a formal opinion, nor is it sufficient to avoid tax-related penalties. If desired, Holtzman Vogel, PLLC would be pleased to perform the requisite research and provide you with a detailed written analysis. Such an engagement may be the subject of a separate engagement letter that would define the scope and limits of the desired consultation services.

From: Danita Alberico < >
Date: Tuesday, June 21, 2022 at 10:26 AM
To: Jessica Furst Johnson < >
Cc: Jessica Selinkoff < >
Subject: Contact info re: NRCC Advisory Opinion Request

Ms. Johnson,

Thank you for speaking with us this morning concerning our request for additional information regarding your advisory opinion request of June 8, 2022, on behalf of the NRCC. The following is our contact information, as requested.

Danita Alberico
Attorney, Compliance Advice
Policy Division, Office of General Counsel

Jessica Selinkoff
Assistant General Counsel, Compliance Advice
Policy Division, Office of General Counsel