

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT

MUR 7522

DATE FILED: October 22, 2018

DATE OF NOTIFICATION: October 29, 2018

LAST RESPONSE RECEIVED: Dec. 12, 2018

DATE ACTIVATED: May 8, 2019

EXPIRATION OF SOL: May 25, 2023

ELECTION CYCLE: 2018

COMPLAINANT:Thomas J. Anderson, National Legal and Policy
Center**RESPONDENTS:**Citizens for Waters and David Gould in his official
capacity as treasurer
Maxine Waters
Families & Teachers for Antonio Villaraigosa
for Governor 2018**RELEVANT STATUTES:**

52 U.S.C. § 30116(a)(1)(A)

52 U.S.C. § 30116(f)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that Families & Teachers for Antonio Villaraigosa for Governor 2018 (“Families & Teachers”), a state independent-expenditure committee, made, and Representative Maxine Waters and Citizens for Waters (“Committee”) accepted, an excessive contribution in the form of a \$25,000 payment for the proportionate cost for Villaraigosa’s name to appear on the Committee’s “slate mailer.” For the reasons set forth below, we recommend that the Commission dismiss the allegations pursuant to *Heckler v. Chaney*.¹

¹ 470 U.S. 821 (1985).

1 **II. FACTUAL BACKGROUND**

2 The Committee is the principal campaign committee of Representative Maxine Waters of
3 the 43rd Congressional District in California. Families & Teachers was a state independent-
4 expenditure committee registered in California that disclosed the receipt of corporate donations
5 and individual donations in excess of the federal contribution limits.²

6 In connection with the June 5, 2018, primary election in California, the Committee
7 produced and distributed a “slate mailer” listing federal and nonfederal candidates Waters
8 supported, including Villaraigosa, a candidate for Governor.³ The Committee reported receiving
9 \$25,000 from Families & Teachers on May 25, 2018, for “slate mailer payment,” which the
10 Committee describes in its response as a reimbursement of the mailer costs attributable to

² According to the California Secretary of State's Office, Families & Teachers “terminated” as of September 27, 2018, and it filed its last disclosure report on October 5, 2018. *See* <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1404354>. Individuals and corporations in California are subject to the same contribution limits for state candidates, which in 2018, were \$29,200 to gubernatorial candidates, \$7,300 to other state-wide candidates, and \$4,400 to state legislative candidates. *See* Calif. Gov. Code § 85300 et seq.; <http://www.fppc.ca.gov>.

³ *See* Compl. at 3; Committee and Maxine Waters Resp. (“Committee Resp.”) at 1 (Dec. 8, 2018); Families and Teachers Resp. at 1 (Dec. 12, 2018). We note that the Complaint and responses describe the mailer as a “slate mailer.” Under the Act, the costs incurred to prepare, display, mail or otherwise distribute printed slate cards, sample ballots, or other printed listings of three or more candidates for public office are exempt from the definitions of “contribution” and “expenditure.” 52 U.S.C. § 30101(8)(B)(v), (9)(B)(iv). Though neither the Complaint nor the Responses attach the mailer at issue, as noted in an Advisory Opinion prepared for the Waters Committee in 2004, previous mailers prepared by the Waters Committee featured “certain candidates . . . more prominently than others,” and included “brief commentary by Representative Waters about the candidates listed,” making the mailer “not simply a sample ballot.” Advisory Op. 2004-37 (Waters) at 1 n.1. *See also* Advisory Op. 2008-06 (Virginia Democrats) at 3 (finding that “additional biographical information, descriptions of candidates’ positions on the issues, or statements of party philosophy, do not qualify under the slate card exemption”). Thus, the term “slate mailer” does not appear to apply to the mailer in this matter. Accordingly, we refer to it as a “mailer” throughout this Report.

1 Villaraigosa.⁴ On December 6, 2018, the Committee disbursed \$13,000 to Families & Teachers
2 as a partial refund.⁵

3 Complainant alleges that the Committee and Waters accepted an excessive contribution
4 from Families & Teachers when the Committee accepted the \$25,000 payment.⁶ Complainant
5 bases the allegation on the Committee's purported failure to comply with Advisory Opinion
6 2004-37 (Citizens for Waters), concerning a "brochure" that the Committee proposed to produce
7 and distribute expressly advocating the election of clearly identified federal and nonfederal
8 candidates in the 2004 general election.⁷ The advisory opinion request, however, was expressly
9 limited to "the arrangements with, and payments by, any Federal candidates who will be
10 included in the proposed brochure," and explicitly excluded the application of the Act and
11 Commission regulations to arrangements with and payments by non-federal candidates or their
12 committees.⁸ The Commission concluded the Committee's brochure would not constitute
13 support of, or be an in-kind contribution to, the federal candidates listed in the brochure,
14 provided the candidates made reimbursements for attributable costs of the brochure in a timely
15 manner.⁹ Further, the Commission concluded that reimbursements by federal candidates for

⁴ See Citizens for Waters 2018 July Quarterly Report (July 13, 2018) at 76 (attach. to Compl. at Ex. A); Committee Resp. at 1-2. The Complaint cites a \$1 million contribution to Families and Teachers from Michael Bloomberg shortly before Families & Teachers disbursed \$25,000 to the Committee. Compl. at 3, Ex. D.

⁵ See Citizens for Waters 2018 Year- End Report (Jan. 15, 2019) at 8. The Committee made this payment to Families & Teachers after the Complaint was filed in this matter.

⁶ Compl. at 3.

⁷ *Id.* at 2.

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1 their attributable portion of the costs would not constitute support of, or be contributions to, the
2 Committee.¹⁰

3 The Complaint alleges that the \$25,000 payment is not a valid reimbursement to the
4 Committee under AO 2004-37 because the payment came from Families & Teachers, not
5 Villaraigosa or his committee.¹¹ Respondents assert that Families & Teachers' reimbursement to
6 the Committee complied with AO 2004-37, and that the advisory opinion does not require the
7 candidate make the reimbursement, only that the reimbursement be made in an amount equal to
8 the proportionate share of the costs attributable to the candidate.¹²

9 **III. LEGAL ANALYSIS**

10 During the 2018 election cycle, persons were limited to making a contribution to a
11 candidate or his or her authorized committee that did not exceed \$2,700 per election.¹³ No
12 candidate or political committee shall knowingly accept any contribution or make any
13 expenditure in violation of the provisions of 52 U.S.C. § 30116.¹⁴ A Commission advisory
14 opinion may be relied upon by any person involved in any specific transaction which is
15

¹⁰ *Id.* The advisory opinion also states that to the extent any reimbursement by a candidate's authorized committee exceeds the costs attributed to that candidate, such excess reimbursement would constitute a contribution and would be subject to the Act's applicable contribution limits. *Id.* at 4. The Committee states that it issued partial refunds to Families & Teachers and other committees for the portion of their initial payments that exceeded their proportionate share of the costs. Committee Resp. at 3, n.1. As noted, the Committee refunded \$13,000 to Families & Teachers.

¹¹ Compl. at 3.

¹² Families & Teachers Resp. at 2, 3; Committee Resp. at 3.

¹³ *See* 52 U.S.C. § 30116(a); 11 C.F.R. § 110.1(b).

¹⁴ *See* 52 U.S.C. § 30116(f).

1 indistinguishable in all material aspects from the transaction or activity with respect to which
2 such advisory opinion was rendered.¹⁵

3 The Committee and Waters's reliance on AO 2004-37 is misplaced because that opinion
4 was specifically limited to reimbursements by federal candidates to appear in Waters's brochure,
5 and thus, the activity identified in the Complaint is not indistinguishable in all material respects
6 from the activity in that advisory opinion.¹⁶ By the same token, the Complainant's suggestion
7 that this activity necessarily violates the Act's contribution limits because the activity differs
8 from the AO 2004-37 activity is not persuasive.

9 In a recent matter, MUR 7448, the Commission found that the California Democratic
10 Party's ("CDP's") payment of \$35,000 to the Committee for the cost of U.S. Senate candidate
11 Kamala Harris's appearance in the Committee's October 2016 mailer was not an excessive
12 contribution to Harris's committee, Kamala Harris for Senate. Because CDP's \$35,000 payment
13 was permissible under the CDP's coordinated party expenditure authority, and because it
14 promptly reimbursed the Committee for the cost of Harris's appearance in the mailer, the
15 Commission found no reason to believe the Committee and CDP made, and Kamala Harris for
16 Senate accepted, an excessive contribution.¹⁷ It does not appear, however, that the Commission
17 has considered whether a state IEOPC can pay the cost for a state candidate to appear in a mailer
18 like the Committee's. Nonetheless, it appears that the net amount paid, subtracting the \$13,000
19 refund, to include Villaraigosa's name in the mailer was \$12,000, a somewhat modest amount.

¹⁵ 52 U.S.C. § 30108(c)(1)(B).

¹⁶ *See* AO 2004-37 at 3; 52 U.S.C. § 30108(c)(1)(B). *Cf.* MUR 7101 (Senate Majority PAC, *et al.*) (contributions described in the Complaint fall within the Act's protection for persons entitled to rely on an advisory opinion).

¹⁷ MUR 7448 Certification (July 23, 2019) and Factual and Legal Analysis at 4.

1 Under these specific circumstances, we recommend that the Commission exercise its
 2 prosecutorial discretion and dismiss the allegations in this matter.¹⁸

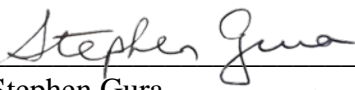
3 **IV. RECOMMENDATIONS**

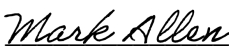
- 4 1. Dismiss the allegation that Maxine Waters and Citizens for Waters and David
 5 Gould in his official capacity as treasurer violated 52 U.S.C. § 30116(f);
 6
 7 2. Dismiss the allegation that Families & Teachers for Antonio Villaraigosa for
 8 Governor 2018 violated 52 U.S.C. § 30116(a)(1)(A);
 9
 10 3. Approve the attached Factual and Legal Analysis;
 11
 12 4. Approve the appropriate letters; and
 13
 14 5. Close the file.

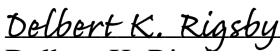
15
 16 Lisa J. Stevenson
 17 Acting General Counsel
 18

19 Charles Kitcher
 20 Acting Associate General Counsel for Enforcement
 21

22
 23 8.6.19
 24 Date

25 
 26 _____
 27 Stephen Gura
 28 Deputy Associate General Counsel for Enforcement

29 
 30 _____
 31 Mark Allen
 32 Assistant General Counsel

33 
 34 _____
 35 Delbert K. Rigsby
 36 Attorney
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¹⁸ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 RESPONDENTS: Citizens for Waters and David Gould
6 in his official capacity as treasurer
7 Maxine Waters
8 Families & Teachers for Antonio Villaraigosa
9 for Governor 2018

MUR 7522

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11 **I. INTRODUCTION**

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13 2018 (“Families & Teachers”), a state independent-expenditure committee, made, and
14 Representative Maxine Waters and Citizens for Waters (“Committee”) accepted, an excessive
15 contribution in the form of a \$25,000 payment for the proportionate cost for Villaraigosa’s name
16 to appear on the Committee’s “slate mailer.” For the reasons set forth below, the Commission
17 dismisses the allegations pursuant to *Heckler v. Chaney*.¹

18 **II. FACTUAL BACKGROUND**

19 The Committee is the principal campaign committee of Representative Maxine Waters of
20 the 43rd Congressional District in California. Families & Teachers was a state political
21 committee registered in California that disclosed the receipt of corporate donations and
22 individual donations in excess of the federal contribution limits.²

23 In connection with the June 5, 2018, primary election in California, the Committee
24 produced and distributed a “slate mailer” listing federal and nonfederal candidates Waters

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4 Villaraigosa.⁴ On December 6, 2018, the Committee disbursed \$13,000 to Families & Teachers
5 as a partial refund.⁵

6 Complainant alleges that the Committee accepted an excessive contribution from Families
7 & Teachers when the Committee accepted the \$25,000 payment.⁶ Complainant bases the
8 allegation on the Committee’s purported failure to comply with Advisory Opinion 2004-37
9 (Citizens for Waters), concerning a “brochure” that the Committee proposed to produce and
10 distribute expressly advocating the election of clearly identified federal and nonfederal
11 candidates in the 2004 general election.⁷ The advisory opinion request, however, was expressly
12 limited to “the arrangements with, and payments by, any Federal candidates who will be

³ See Compl. at 3; Committee and Maxine Waters Resp. (“Committee Resp.”) at 1 (Dec. 8, 2018); Families and Teachers Resp. at 1 (Dec. 12, 2018). The Commission notes that the Complaint and responses describe the mailer as a “slate mailer.” Under the Act, the costs incurred to prepare, display, mail or otherwise distribute printed slate cards, sample ballots, or other printed listings of three or more candidates for public office are exempt from the definitions of “contribution” and “expenditure.” 52 U.S.C. § 30101(8)(B)(v), (9)(B)(iv). Though neither the Complaint nor the Responses attach the mailer at issue, as noted in an Advisory Opinion prepared for the Waters Committee in 2004, previous mailers prepared by the Waters Committee featured “certain candidates . . . more prominently than others,” and included “brief commentary by Representative Waters about the candidates listed,” making the mailer “not simply a sample ballot.” Advisory Op. 2004-37 (Waters) at 1 n.1. See also Advisory Op. 2008-06 (Virginia Democrats) at 3 (finding that “additional biographical information, descriptions of candidates’ positions on the issues, or statements of party philosophy, do not qualify under the slate card exemption”). In the absence of a copy of the mailer in this matter, the Commission does not opine on whether it qualifies for the exemptions under 52 U.S.C. § 30101(8)(B)(v), (9)(B)(iv).

⁴ See Citizens for Waters 2018 July Quarterly Report (July 13, 2018) at 76 (attach. to Compl. at Ex. A); Committee Resp. at 1-2. The Complaint cites a \$1 million contribution to Families and Teachers from Michael Bloomberg shortly before Families & Teachers disbursed \$25,000 to the Committee. Compl. at 3, Ex. D.

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2 Commission regulations to arrangements with and payments by non-federal candidates or their
3 committees.⁸ The Commission concluded the Committee’s brochure would not constitute
4 support of, or be an in-kind contribution to, the federal candidates listed in the brochure,
5 provided the candidates’ committees made reimbursements for attributable costs of the brochure
6 in a timely manner.⁹ Further, the Commission concluded that reimbursements by federal
7 candidates for their attributable portion of the costs would not constitute support of, or be
8 contributions to, the Committee.¹⁰

9 The Complaint alleges that the \$25,000 payment is not a valid reimbursement to the
10 Committee under AO 2004-37 because the payment came from Families & Teachers, not
11 Villaraigosa or his committee.¹¹ Respondents assert that Families & Teachers’ reimbursement to
12 the Committee complied with AO 2004-37, and that the advisory opinion does not require the
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14 the proportionate share of the costs attributable to the candidate.¹²

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1 **III. LEGAL ANALYSIS**

2
3 **a. Use of Nonfederal Funds for Federal Election Activity**

4
5 The Act prohibits a federal candidate or officeholder or an entity established, financed,
6 maintained, or controlled by a federal candidate or officeholder from soliciting, receiving,
7 directing, transferring, or spending funds “in connection with an election for Federal office,
8 including funds for any Federal election activity, unless the funds are subject to the limitations,
9 prohibitions, and reporting requirements of the Act.”¹³ “Federal election activity” includes “a
10 public communication that refers to a clearly identified candidate for Federal office (regardless
11 of whether a candidate for State or local office is also mentioned or identified) and that promotes
12 or supports a candidate for that office.”¹⁴

13 The mailer produced by the Committee included both federal and nonfederal candidates
14 and promoted or supported those candidates. Accordingly, the mailer constituted federal election
15 activity. As such, the Committee was prohibited from receiving or spending funds for the
16 mailer, unless the funds were subject to the limitations, prohibitions, and reporting requirements
17 of the Act. Families & Teachers, as a state political committee, had received individual
18 contributions that were above the federal contribution limits and corporate contributions that are
19 prohibited by the Act; in addition, the funds were not subject to the reporting requirements of the
20 Act. Thus, the Committee appears to have violated 52 U.S.C. § 30125(e)(1)(A) by receiving and
21 spending nonfederal funds from Families & Teachers that were used in connection with a federal
22 election.

¹³ 52 U.S.C. § 30125(e)(1)(A); *see also* 11 C.F.R. § 300.61.

¹⁴ 52 U.S.C. § 30101(20)(A)(iii).

1 The Committee’s reliance on AO 2004-37 is misplaced because that opinion was
2 specifically limited to reimbursements by federal candidates to appear in the proposed brochure,
3 and thus, the activity identified in the Complaint is not indistinguishable in all material respects
4 from the activity in that advisory opinion.¹⁵ Importantly, for the purposes of analyzing this
5 matter under 52 U.S.C. § 30125(e)(1)(A), federal candidate committees are limited to raising and
6 spending funds subject to the Act’s amount limitations, source prohibitions, and reporting
7 requirements. By contrast, as a California political committee, Families & Teachers could
8 legally accept contributions in excess of the Act’s amount limitations and from sources
9 prohibited under the Act.

10 It does not appear, however, that the Commission has considered whether a state
11 nonconnected committee can pay the cost for a state candidate to appear in a mailer like the
12 Committee’s. Under these specific circumstances, the Commission exercises its prosecutorial
13 discretion and dismisses the allegation that Families & Teachers payment of the share of the
14 mailer attributable to Villaraigosa was impermissible.¹⁶

15 b. Excessive Contribution

16 During the 2018 election cycle, persons were limited to making a contribution to a
17 candidate or his or her authorized committee that did not exceed \$2,700 per election.¹⁷ No
18 candidate or political committee shall knowingly accept any contribution or make any

¹⁵ See AO 2004-37 at 3; 52 U.S.C. § 30108(c)(1)(B). *Cf.* MUR 7101 (Senate Majority PAC, *et al.*) (contributions described in the Complaint fall within the Act’s protection for persons entitled to rely on an advisory opinion).

¹⁶ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

¹⁷ See 52 U.S.C. § 30116(a); 11 C.F.R. § 110.1(b).

1 expenditure in violation of the provisions of 52 U.S.C. § 30116.¹⁸ When a committee receives
2 an excessive contribution, the committee must, within 60 days of the contribution's receipt,
3 either refund the excessive portion of the contribution or obtain a redesignation or reattribution
4 from the contributor.¹⁹ Even if Families & Teachers' payment of the costs of the mailer
5 attributable to Villaraigosa was not prohibited under 52 U.S.C. § 30125(e)(1)(A), the available
6 information indicates that the attributable cost was only \$12,000. Thus, any portion of the
7 payment in excess of the attributable cost would be a contribution to the Committee.²⁰ Although
8 Families & Teachers made the \$25,000 payment to the Committee on May 25, 2018 and the
9 mailer was distributed on June 5, 2018, the Committee did not refund Families & Teachers for
10 the excessive \$13,000 until December 6, 2018. Accordingly, it appears that the Committee
11 failed to timely refund an excessive and prohibited contribution from Families & Teachers.

12 However, given the somewhat modest amount in violation, the Commission exercises its
13 prosecutorial discretion and dismisses the allegation that Families & Teachers made, and Maxine
14 Waters and Citizens for Waters received, an excessive contribution.

15

¹⁸ See 52 U.S.C. § 30116(f).

¹⁹ See 11 C.F.R. § 103.3(b)(1).

²⁰ See Advisory Op. 2004-37 (Waters) at 4 (concluding that to the extent that a reimbursement by an authorized committee exceeds the costs attributed to that candidate, such excess reimbursement would constitute a contribution to the recipient committee); see also 11 C.F.R. § 106.1(a) (providing for attribution of expenditures and disbursements on behalf of one or more clearly identified candidates, including nonfederal candidates).

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FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

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in his official capacity as treasurer
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I. INTRODUCTION

The Complaint alleges that Families & Teachers for Antonio Villaraigosa for Governor 2018 (“Families & Teachers”), a state independent-expenditure committee, made, and Representative Maxine Waters and Citizens for Waters (“Committee”) accepted, an excessive contribution in the form of a \$25,000 payment for the proportionate cost for Villaraigosa’s name to appear on the Committee’s “slate mailer.” For the reasons set forth below, the Commission dismisses the allegations pursuant to *Heckler v. Chaney*.¹

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1 promptly reimbursed the Committee for the cost of Harris’s appearance in the mailer, the
2 Commission found no reason to believe the Committee and CDP made, and Kamala Harris for
3 Senate accepted, an excessive contribution.¹⁷ It does not appear, however, that the Commission
4 has considered whether a state IEOPC can pay the cost for a state candidate to appear in a mailer
5 like the Committee’s. Nonetheless, it appears that the net amount paid, subtracting the \$13,000
6 refund, to include Villaraigosa’s name in the mailer was \$12,000, a somewhat modest amount.
7 Under these specific circumstances, the Commission exercises its prosecutorial discretion and
8 dismisses the allegations in this matter.¹⁸

¹⁷ MUR 7448 Certification (July 23, 2019) and Factual and Legal Analysis at 4.

¹⁸ *See Heckler v. Chaney*, 470 U.S. 821 (1985).