



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

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SUBJECT: Draft Final Audit Report on Citizens for Waters (LRA 1144)

The Office of the General Counsel has reviewed the Draft Final Audit Report (“DFAR”) on Citizens for Waters (“CFW”). The DFAR contains four findings: Misstatement of Financial Activity (Finding 1), Receipt of Contributions in Excess of the Limit (Finding 2), Cash Disbursements (Finding 3), and Contributions from Unregistered Political Organizations (Finding 4). OGC concurs with the findings, and comments on Findings 3 and 4.

I. CASH DISBURSEMENTS (FINDING 3).

The Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), specifies that “[n]o disbursements may be made (other than petty cash disbursements ...) ... except by check.”¹ The Act further specifies that committees “may maintain a petty cash fund for disbursements not in excess of \$100 to any person in connection with a single purchase or

¹ 52 U.S.C. § 30102(h)(1); *see also* 11 C.F.R. § 102.10.

transaction.”² The Commission has concluded that “checks drawn to make expenditures must be payable to a named person and not simply to ‘cash.’ Checks drawn to the order of cash are payable to the bearer and are equivalent to cash,” further concluding that such checks may not exceed the petty cash disbursement limit.³

Section 30102(h)(2) of the Act further requires that a “record of all petty cash disbursements shall be maintained”⁴ and section 30102(c)(5) states that committee treasurers “shall keep account of ... the name and address of every person to whom any disbursement is made, the date, amount, and purpose of the disbursement ... including a receipt, invoice, or cancelled check for each disbursement in excess of \$200.” Commission regulations further specify that “[i]f a petty cash fund is maintained, it shall be the duty of the treasurer ... to keep and maintain a written journal of all disbursements.”⁵

CFW confirmed with Audit staff that it did not maintain a petty cash fund. Nonetheless, CFW’s bank records indicate that the committee made three cash withdrawals (for \$1,000, \$900, and \$5,000) and its database indicates that, for each of these cash amounts, CFW disbursed the cash to the same recipient, Karen Waters. CFW also made one cash disbursement in the form of a \$500 check payable to “cash,” which CFW’s database indicates was also disbursed to Karen Waters.

In response to the Interim Audit Report (“IAR”), CFW states that “[d]ue to the extending circumstances of the pandemic, [CFW] issued cash ... to distribute payments to canvassers and pay for canvassing costs.”⁶ CFW further represents that “Waters’ constituents are comprised of many low-wage and working-class communities who ... in many instances, cash their checks immediately at check-cashing stores or directly from the banks. During the pandemic, many of these check cashing stores and banks were closed or maintained limited hours” and because it was “difficult for canvassers to cash their checks,” CFW “issued cash to its canvassers rather than checks.”⁷ The Committee further states that the “campaign manager made her best efforts to track all cash expenditures, however, was unable to provide [CFW] with all disbursement records”; CFW offered to provide a declaration from the campaign manager that the cash was used to pay canvassers but CFW has not provided such a declaration.⁸

² 52 U.S.C. § 30102(h)(2); *see also* 11 C.F.R. § 102.11.

³ Advisory Opinion 1975-44 (Socialist Workers 1976 National Campaign Committee) at 3 (superseded on another question by Advisory Opinions: Modification, 41 Fed. Reg. 46,416, 46,417 (Oct. 20, 1976)).

⁴ *See also* 11 C.F.R. § 102.11.

⁵ *Id.*

⁶ Response to IAR at 2 (Feb. 7, 2023) (the date on the response has a typo in the year).

⁷ *Id.*

⁸ *Id.* CFW does not provide details as to what efforts were taken to “track all cash expenditures.”

While the pandemic did present additional challenges for committees in the 2020 election cycle, these challenges do not exempt CFW from complying with the unambiguous restrictions the Act places on cash disbursements. The Commission has chosen to not impose civil penalties in a small number of Administrative Fine cases in which committees showed significant extenuating circumstances arising from the COVID-19 pandemic, despite showing best efforts to meet reporting obligations under the Act,⁹ but has not excused reporting failures in Administrative Fine cases due to more general assertions of difficulties relating to COVID-19.¹⁰ CFW has not shown the type of pandemic limitations for which the Commission has excused non-compliance, such as death or state emergency orders that physically restrict access. Instead, CFW has generally asserted “difficult” circumstances during the pandemic without asserting that its particular canvassers could not cash checks or that those workers requested cash disbursements because of the pandemic. CFW also provides no explanation of the efforts it took to comply with the Act and no documentation in support of its reason for non-compliance. In these details, CFW’s pandemic-related defense is similar to the non-specific, non-emergency ones rejected by the Commission in Administrative Fine cases.

More importantly, CFW disbursed the funds not to canvassers, but to Karen Waters. The four disbursements to Karen Waters exceeded the petty cash disbursement limit by \$400, \$800, \$900, and \$4,900, which is up to 49 times the \$100 limit. Even assuming, *arguendo*, that CFW’s cash disbursements to Karen Waters created a *de facto* petty cash fund, CFW failed to keep the required records for a petty cash fund, including a written journal of cash disbursements. In response to Audit’s request for documentation about the ultimate distribution of the cash, CFW provided 18 signed contracts between CFW and independent contract workers, but CFW has not provided records to document cash payments to those workers or to associate payments to individual contract workers with the four cash withdrawals and disbursements to Karen Waters. Additionally, the total amounts due under the contracts is less than the total cash disbursed. In a relatively recent MUR, the Commission conciliated a violation of section 30102(h), among other violations, for a committee’s prohibited cash disbursements to staff working at a bingo fundraiser¹¹ in which the committee had not maintained a “comprehensive record of all cash

⁹ See, e.g., AF #4086 (Nevada County Republican Party) (terminating case on showing of death of treasurer’s spouse from COVID-19 with no other campaign staff available); AF #3816 (Friends of Michael Weinstock) (terminating case on showing that treasurer could not access records for brief period during state’s lock-down order but filed report immediately upon lifting of order); see also 11 C.F.R. § 111.35 (best efforts requirements in Administrative Fine cases).

¹⁰ See, e.g., AF #4288 (Dr. Laura Cisneros for Congress) (COVID-19 illness of candidate, not treasurer, did not excuse); AF #4240 (Mises PAC) (problems accessing equipment and records in pandemic not excused, in light of lack of best efforts); AF #4094 (Tarrant County Republican Victory Fund) (same).

¹¹ Conciliation Agreement ¶¶ IV.3, IV.16, V.5, MUR 7126 (Michigan Democratic State Central Committee) (May 11, 2017).

disbursements.”¹² CFW, like the committee in that MUR, neither established a petty cash fund nor kept adequate records to document disbursements of cash.

For all these reasons, OGC concurs in the finding that CFW made \$7,000 in excessive cash disbursements.

II. CONTRIBUTIONS FROM UNREGISTERED POLITICAL ORGANIZATIONS (FINDING 4).

CFW received 47 payments totaling \$568,000 from unregistered non-federal organizations for a brochure mailer program, for which it made an aggregate of \$567,230 in disbursements. In response to the IAR, CFW provided documentation demonstrating that \$110,500 of these receipts were made using permissible federal funds. The DFAR finding concerns the remaining \$457,500 in receipts that CFW has not demonstrated were federally permissible.

CFW primarily relies upon Advisory Opinion 2004-37 (Waters) as support for its position that the receipts from non-federal committees that paid to be included in the 2020 cycle mailers were not “contributions” from those committees but, rather, were “reimbursements for costs” and therefore not “anything of value” and “not for the purpose of influencing any election for Federal office,” as explained in that advisory opinion.¹³ Advisory Opinion 2004-37 addressed the question of whether receipts and disbursements associated with the production and distribution of a brochure would constitute contributions from or to federal candidates included in the brochure; the Advisory Opinion Request explicitly asked that the Commission not address the question of receipts from non-federal committees, although the brochure would feature both federal and non-federal candidates.¹⁴

Here, because Finding 4 addresses receipts from non-federal candidates and committees, the facts in this audit are materially distinguishable from the facts presented in Advisory Opinion 2004-37. Furthermore, in the 2020 brochure program that is the subject of Finding 4, CFW received funds from non-federal committees starting months in advance of the first disbursements it made for the associated brochures, a fact that is materially distinguishable from the facts presented in Advisory Opinion 2004-37, which addressed reimbursements (rather than advances)¹⁵ from federal (rather than non-federal) committees. Therefore, CFW cannot rely on

¹² Factual and Legal Analysis at 11, MUR 7126 (Michigan Democratic State Central Committee).

¹³ Response to IAR at 2 (also asserting that “the circumstances [in AO 2004-37] are *exactly* the same”) (emphasis in original).

¹⁴ See Advisory Opinion Request Supplement, AO 2004-37 (Waters) (Oct. 8, 2004) (representing that CFW would not get reimbursements from non-federal candidates and that it was “not seeking an opinion from [sic] the Commission related to any portion of the sample ballot as it pertains to non-federal candidates (whether they reimburse or not)”; see also Advisory Opinion 2004-37 (Waters) at 3, 5.

¹⁵ See 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52 (defining contribution to include advances for the purpose of influencing any election for federal office).

Advisory Opinion 2004-37 as it pertains to funds received from non-federal committees and spent on the mailers included in Finding 4.¹⁶

The fact that the mailers in Finding 4 constitute federal election activity¹⁷ helps to explain why the receipt of funds from non-federal committees is materially distinguishable from the receipt of funds from federal committees considered in Advisory Opinion 2004-37. As relevant here, “federal election activity” includes a “PASO” communication, *i.e.*, a public communication that refers to a clearly identified candidate for federal office (regardless of whether a candidate for state or local office is also mentioned or identified) and that *promotes or supports* a candidate for that office, or *attacks or opposes* a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).¹⁸ Funds received, spent, or disbursed in connection with an election for federal office, including for federal election activity, must be “federal funds,” *i.e.*, they must comply with the amount limitations, source prohibitions, and reporting requirements of the Act.¹⁹ Thus, while Advisory Opinion 2004-37 focused on “contributions” from and to federal candidates “for the purpose of influencing” any election for federal office, the focus here is on whether CFW received and spent non-federal funds “in connection with an election for federal office,” including federal election activity such as PASO communications. In its response to the IAR, CFW states that it “agrees with OGC and the audit staff that the slate mailer brochures constitute Federal Election Activity and are, therefore, subject to the limitations, prohibitions, and reporting requirements of the Act.”²⁰

In Advisory Opinion 2004-37, receipts from the federal committees that paid CFW for inclusion in the brochure were receipts of funds subject to (and in presumed compliance with) the limitations, prohibitions, and reporting requirements of the Act and were, therefore, receipts of federal funds. In contrast, here, CFW spent funds that it received from non-federal, unregistered organizations whose funds cannot be presumed to be federal funds for the PASO communications in Finding 4. A committee “may only use funds that are subject to the limits, prohibitions, and reporting requirements of the Act to pay for public communications that promote, support, attack, or oppose a clearly identified federal candidate.”²¹

¹⁶ See 11 C.F.R. § 112.5 (setting out who may rely on an advisory opinion).

¹⁷ See OGC’s Legal Analysis of the IAR in this audit for a more thorough explanation of this conclusion. CFW was provided a copy of this analysis prior to its response to the IAR.

¹⁸ 52 U.S.C. § 30101(20)(iii); 11 C.F.R. § 100.24(b)(3).

¹⁹ 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.61; *and see* 11 C.F.R. § 300.2(g) (defining federal funds).

²⁰ IAR Response at 3 (citing 52 U.S.C. § 30125(e)(1)(A)).

²¹ Advisory Opinion 2018-07 (Mace) at 5 (concluding that a SuperPAC established by a non-federal candidate governed by the rules in section 30125 may accept funds outside the Act’s amount limitations but cannot spend those funds to pay for a PASO communication that must be paid for with federal funds).

Although CFW has not demonstrated that \$457,500 it received from non-federal committees that it spent to pay for the mailers were federal funds, CFW asserts that it “did not ‘solicit, receive, direct, transfer, or spend’” non-federal funds.²² It specifically asserts that it “is in the process of reviewing and confirming that funds received from the unregistered political organizations were from federally permissible funds.”²³ Until CFW submits documentation demonstrating that these funds were permissible, OGC concurs in the finding.

²² IAR Response at 3.

²³ *Id.*