



FEDERAL ELECTION COMMISSION
Washington, DC

February 14, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

Amy Rothstein *ALR*
Assistant General Counsel

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Attorney

Subject: Draft AO 2024-02 (Waters) Draft D

Attached is a proposed draft of the subject advisory opinion. We have been asked by one or more Commissioners to make this draft public to enable members of the public to submit written comments on it in advance of a possible tally vote. Public comments on the draft are due by 12:00 p.m. (Eastern Time) on February 15, 2024.

For more information about how to submit comments, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2024-02

2

3 Leilani Beaver, Esq.
4 Beaver Legal Corporation
5 220 S. Pine St, Suite 109
6 Sisters, OR 97759

DRAFT D

7

8 Dear Ms. Beaver:

9

10 We are responding to your advisory opinion request on behalf of Congresswoman
11 Maxine Waters and Citizens for Waters (collectively, “Requestors”), concerning the
12 application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”),
13 and Commission regulations to Requestors’ proposal to solicit and receive reimbursement
14 from non-federal sources of Requestors’ costs to design, print, and mail certain
15 brochures.¹ The Commission concludes that the Act and Commission regulations would
16 not prohibit Requestors from soliciting or receiving reimbursement of funds from the
17 non-federal sources because the reimbursement of funds as proposed would comply with
18 the source prohibitions, amount limitations, and reporting requirements of the Act.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 January 25, 2024, and your email received on February 1, 2024.

22 Congresswoman Maxine Waters represents California’s 43rd District in the
23 United States House of Representatives. Citizens for Waters is her principal campaign
24 committee.

¹ The Commission has adopted the Requestors’ term “brochure” here as a matter of convenience, and notes that it used the same term in Advisory Opinion 2004-37 (Waters). The Commission has not determined, however, whether the Requestors’ publication is a “brochure” as that term is used in the Commission’s regulations. *See, e.g.*, 11 C.F.R. § 100.24(c)(4) (exempting certain communications, including certain brochures, from the definition of “federal election activity”).

1 Requestors intend to design, publish, and mail brochures featuring
2 Congresswoman Waters’s endorsements of federal and non-federal candidates, together
3 with her positions of support for or opposition to ballot measures to be voted on the
4 March 5, 2024, California primary ballot. Citizens for Waters will pay for the costs of
5 designing, publishing, and mailing the brochures. The brochures will use the same
6 design and layout as those described in Advisory Opinion 2004-37 (Waters). The space
7 devoted to each candidate and ballot measure and its prominence on the brochure will be
8 determined by the candidate’s or ballot measure’s prominence on the primary election
9 ballot. As in Advisory Opinion 2004-37 (Waters), Requestors anticipate distributing at
10 least 500 pieces of each version of their proposed brochure by U.S. Mail.

11 Requestors state that they will use only federally permissible funds to pay for the
12 design, publishing, and mailing of the brochures.² Requestors propose to solicit and
13 receive reimbursement from non-federal sources, however, for the portion of the
14 brochures devoted to each non-federal candidate and ballot measure, as determined by
15 the candidate’s or ballot measure’s pro rata share of the costs to design, publish, and mail
16 the brochure.³ The non-federal sources from which Requestors propose to solicit and
17 receive funds are (1) the featured non-federal candidates’ personal funds, (2) the non-
18 federal candidates’ committees; (3) state independent expenditure-only political

² Requestors state that the term “federally permissible funds” as used in their request means “funds that do not exceed the applicable contribution limitations of the Act and from sources that would not be prohibited under the Act from contributing directly to Congresswoman Waters.” Advisory Opinion Request (“AOR”) at AOR002 n.3.

³ Pro rata shares will be determined according to the “space or time” method described in 11 C.F.R. § 106.1(a).

1 committees supporting or opposing the non-federal candidates; and (4) ballot measure
2 committees supporting or opposing the featured ballot measures.

3 Citizens for Waters will invoice the non-federal candidates and committees for
4 their pro rata share of the brochures' costs. Each invoice will state that Requestors are
5 soliciting and will accept only federally permissible funds. The non-federal candidates
6 and committees that reimburse Citizens for Waters will be required to submit signed
7 invoices attesting that their payments are from federally permissible funds. Citizens for
8 Waters will not accept any reimbursements that exceed the non-federal candidate's or
9 committee's pro rata share of the costs. Congresswoman Waters will not establish,
10 finance, maintain, or control any of the non-federal committees reimbursing Citizens for
11 Waters.

12 ***Question Presented***

13 *May Citizens for Waters receive reimbursements from individuals, non-federal*
14 *candidate committees, state independent expenditure-only political committees, and*
15 *ballot measure committees to appear in the brochure using funds that do not exceed the*
16 *applicable contribution limitations of the Act and from sources that would not be*
17 *prohibited under the Act from contributing directly to Congresswoman Waters?*

18 ***Legal Analysis***

19 Citizens for Waters may solicit and receive reimbursements from non-federal
20 candidates, non-federal candidate committees, state independent expenditure-only
21 political committees, and ballot measure committees to appear in the proposed brochure
22 only if the non-federal sources' funds comply with the source prohibitions, amount
23 limitations, and reporting requirements of the Act.

1 Under the Act, federal candidates and their committees may not “solicit, receive,
2 direct, transfer, or spend funds in connection with an election for Federal office,
3 including funds for any Federal election activity, unless the funds are subject to the
4 [amount] limitations, [source] prohibitions, and reporting requirements of [the] Act.”⁴
5 The term “federal election activity” includes “a public communication that refers to a
6 clearly identified candidate for Federal office (regardless of whether a candidate for State
7 or local office is also mentioned or identified) and that promotes or supports a candidate
8 for that office, or attacks or opposes a candidate for that office (regardless of whether the
9 communication expressly advocates a vote for or against a candidate).”⁵ The term
10 “public communication” includes a “communication by means of any . . . mass mailing,
11 . . . or any other form of general public political advertising.”⁶ A “mass mailing” is “a
12 mailing by United States mail or facsimile of more than 500 pieces of mail matter of an
13 identical or substantially similar nature within any 30-day period.”⁷

14 Here, Requestors state that they anticipate distributing at least 500 pieces of each
15 version of their proposed brochure by U.S. Mail. Such a distribution would be a “mass
16 mailing” and, therefore, a public communication.⁸ Moreover, the brochures for which
17 Requestors propose to obtain reimbursement would refer to and contain Congresswoman

4 52 U.S.C. § 30125(e)(1)(A) (emphasis added).

5 52 U.S.C. § 30101(20)(A)(iii); *see also* 11 C.F.R. 100.24 (b)(3).

6 11 C.F.R. § 100.26.

7 *Id.* § 100.27.

8 *See* Advisory Opinion 2004-37 (Waters) at 6.

1 Waters’s endorsements of certain clearly identified candidates, including federal
2 candidates.⁹ As such, the brochures would be public communications that refer to and
3 promote or support clearly identified federal candidates. Accordingly, the brochures
4 would be “federal election activity” under the Act and Commission regulations.¹⁰

5 As noted above, federal candidates may solicit, receive or spend funds for federal
6 election activity only if the funds comply with the Act’s contribution limitations, source
7 prohibitions, and reporting requirements.¹¹ Requestors state that Citizens for Waters will
8 invoice the non-federal candidates and committees featured in the brochures for their pro
9 rata shares of the costs to design, publish, and mail the brochures, and that these invoices
10 will state that Congresswoman Waters and Citizens for Waters will accept only “federally
11 permissible funds.” In addition, Requestors propose to require the non-federal candidates
12 and committees reimbursing Citizens for Waters to submit signed invoices attesting that
13 their payments are made with “federally permissible funds.” Requestors explain that the
14 term “federally permissible funds” as used in their request means “funds that do not

⁹ AOR001-2.

¹⁰ Compare Advisory Opinion 2003-25 (Weinzapfel). There, the Commission considered a public communication that referred to both a federal candidate and a non-federal candidate, but only endorsed the non-federal candidate. The Commission concluded that the communication was not federal election activity because it did not promote, support, attack, or oppose the federal candidate. In contrast, here the proposed brochures would both refer to and endorse one or more federal candidates in addition to the non-federal candidates.

¹¹ Although the Commission concluded in Advisory Opinion 2004-37 (Waters) that reimbursements to Congresswoman Waters’s authorized committee for costs relating to similar brochures were not contributions to the committee, the restrictions of section 30125(e) extend beyond contributions to a federal candidate’s committee, covering all funds that the candidate solicits, receives, directs, transfers, or spends in connection with an election for Federal office, including funds for any Federal election activity.

1 exceed the applicable contribution limitations of the Act and from sources that would not
2 be prohibited under the Act from contributing directly to Congresswoman Waters.”¹²

3 As part of their proposal for obtaining reimbursement from the non-federal
4 candidates and committees, the Requestors have stated that they will “only solicit[] and
5 accept[] funds from federally permissible funds,” and that they will require non-federal
6 candidates and committees to “submit signed invoices attesting that their payment is from
7 federally permissible funds when payment is received.”¹³ Accordingly, the funds used to
8 reimburse the Requestors will comply with the Act’s source prohibitions and amount
9 limitations. The only remaining question, then, is whether such reimbursement is also
10 consistent with the Act’s reporting requirements. The condition in 52 U.S.C.
11 § 30125(e)(1)(A) that any funds solicited or received in connection with a federal
12 election must be subject to the Act’s reporting requirements does not itself impose any
13 standalone duty to report that would not otherwise exist under the Act.¹⁴ Therefore,
14 because the Act does not require non-federal candidates and committees to separately
15 report their reimbursement of a federal candidate for their pro-rata share of federal
16 election activity, and provided that the non-federal committees are not otherwise required
17 to report to the Commission,¹⁵ then such reimbursement is subject to the reporting

¹² AOR002 n.3.

¹³ AOR002. The Requestors further clarify that “[f]ederally permissible funds means funds that do not exceed the applicable contribution limitations of the Act and from sources that would not be prohibited under the Act from contributing directly to Congresswoman Waters.” *Id.* n.3.

¹⁴ See 52 U.S.C. § 30125(e)(1)(A); see also 11 C.F.R. § 300.71.

¹⁵ For example, if one of the non-federal committees received in excess of \$1,000 in contributions or made in excess of \$1,000 in expenditures and had the major purpose of influencing a federal election, then

1 requirements of the Act for the purposes of 52 U.S.C. § 30125(e)(1)(A). Citizens for
2 Waters is separately required to report activity related to the mailer under different
3 provisions of the Act and Commission regulations.¹⁶

4 The Commission does not address the potential application of any state or local
5 laws to Requestors' proposed activities because such matters do not fall within the
6 Commission's jurisdiction.

7 This response constitutes an advisory opinion concerning the application of the
8 Act and Commission regulations to the specific transaction or activity set forth in your
9 request.¹⁷ The Commission emphasizes that, if there is a change in any of the facts or
10 assumptions presented, and such facts or assumptions are material to a conclusion
11 presented in this advisory opinion, then the requestor may not rely on that conclusion as
12 support for its proposed activity. Any person involved in any specific transaction or
13 activity which is indistinguishable in all its material aspects from the transaction or
14 activity with respect to which this advisory opinion is rendered may rely on this advisory
15 opinion.¹⁸ Please note that the analysis or conclusions in this advisory opinion may be

the committee would be required to register and report as a political committee. 52 U.S.C. § 30101(4); 11 C.F.R. § 100.5; *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

¹⁶ In Advisory Opinion 2004-37 (Waters), the Commission held that, under a similar mailer comprised of only federal candidates, the Requestor should report production and distribution costs as operating expenditures and report reimbursements from federal candidates as offsets to operating expenditures. AO 2004-37 (Waters) at 5-6 (citing current 52 U.S.C. § 30104(b)(2)(I); 11 C.F.R. §§ 104.3(a)(2)(vii) and (3)(ix); 11 C.F.R. §§ 104.3(b)(1)(i) and (2)(i)). Further, in certain circumstances, the reimbursements may result in debt reporting obligations. *Id.* (citing current 52 U.S.C. § 30104(b)(8); 11 C.F.R. §§ 104.11(a) and (b)).

¹⁷ See 52 U.S.C. § 30108.

¹⁸ See *id.* § 30108(c)(1)(B).

1 affected by subsequent developments in the law including, but not limited to, statutes,
2 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
3 available on the Commission's website.

4 On behalf of the Commission,

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6 Sean J. Cooksey,

7 Chairman