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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 15-47-C
AGENDA ITEM
For meeting of September 17, 2015

SUBMITTED LATE

September 16, 2015

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DAP*
Acting General Counsel

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Acting Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: AO 2015-06 (Waters) Draft C

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on September 17, 2015.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

2
3 Hon. Maxine Waters
4 Member of Congress
5 2221 Rayburn House Office Building
6 Washington, D.C. 20515

7
8 Dear Representative Waters,

9
10 We are responding to your advisory opinion request concerning whether the Federal
11 Election Campaign Act, 52 U.S.C. §§ 30101-30146 (the “Act”), and Commission regulations
12 permit your authorized committee, your leadership PAC, or yourself personally to make
13 donations to candidates for elected office in a foreign country. The Commission concludes that
14 such donations are permissible under the Act and Commission regulations.

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter received on July 14,
17 2015, and a subsequent email received on July 28, 2015.

18 You are a member of the U.S. House of Representatives representing the 43rd
19 Congressional District of California, and you are a candidate for re-election to that office.¹ You
20 intend to donate to campaigns of candidates for office in Haiti. Advisory Opinion Request
21 (“AOR”) at AOR002. You intend to make these donations using your authorized committee’s
22 funds, your leadership PAC’s funds, or your own individual funds. AOR002.

23 ***Questions Presented***

24 (1) *May your authorized committee use committee funds to make a donation to a candidate*
25 *for office in a foreign country?*

26 (2) *May your leadership PAC use PAC funds to make a donation to a candidate for office in*
27 *a foreign country?*

¹ Maxine Waters, FEC Form 2 at 1 (Mar. 19, 2015),
<http://docquery.fec.gov/pdf/080/15950885080/15950885080.pdf>.

1 (3) *May you use your personal funds to make an individual donation to a candidate for office*
2 *in a foreign country?*

3 ***Legal Analysis and Conclusions***

4 (1) *May your authorized committee use committee funds to make a donation to a candidate*
5 *for office in a foreign country?*

6 Yes, your authorized committee may use committee funds to donate to a candidate for
7 office in a foreign country.

8 Under the Act and Commission regulations, an authorized committee may use its funds
9 for several specific purposes — including “donations to state and local candidates” — and for
10 “any other lawful purpose” that does not constitute conversion of campaign funds to “personal
11 use.” 52 U.S.C. § 30114(b); 11 C.F.R. §§ 113.1(g), 113.2(e). The Act provides that campaign
12 funds “shall be considered to be converted to personal use if [the funds are] used to fulfill any
13 commitment, obligation or expense of a person that would exist irrespective of the candidate’s
14 election campaign or individual’s duties as a holder of Federal office.” 52 U.S.C. § 30114(b)(2);
15 *see also* 11 C.F.R. § 113.1(g). The Act and Commission regulations provide a non-exhaustive
16 list of uses of campaign funds that are *per se* personal use. 52 U.S.C. § 30114(b)(2); 11 C.F.R.
17 § 113.1(g)(1)(i). For uses of campaign funds not on this list, the Commission determines, on a
18 case-by-case basis, whether they constitute personal use. 11 C.F.R. § 113.1(g)(1)(ii). *See*
19 *Advisory Opinion 2014-06 (Ryan et al.)* at 4 (purchase of candidate’s book); *see also* *Advisory*
20 *Opinion 2011-17 (Giffords)* (use of campaign funds for home security system). When the
21 Commission engages in a case-by-case determination, it does so in light of its “long-standing
22 opinion that candidates have wide discretion over the use of campaign funds.” Expenditures;

1 Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7867 (Feb. 9,
2 1995).

3 Assuming the proposed donation is lawful,² the Commission must assess whether it
4 would otherwise constitute the conversion of campaign funds to personal use. Donating to
5 candidates for office in a foreign country is not one of the *per se* personal uses listed in the Act
6 and Commission regulations. *See* 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g)(1)(i).
7 Accordingly, the Commission determines on a case-by-case basis whether such a donation by an
8 authorized committee is permissible.

9 As noted above, the Act and Commission regulations explicitly permit authorized
10 committees to donate funds to state and local candidates. *See* 52 U.S.C. § 30114(a)(5); 11
11 C.F.R. § 113.2(d). But even before Congress amended the Act to include donations to state and
12 local candidates in the enumerated list of permissible uses of campaign funds, the Commission
13 consistently determined that such donations were permissible. *See, e.g.*, Advisory Opinion 2000-
14 32 (Martinez) (donation of funds to a state candidate); *see also* Factual and Legal Analysis at 9-
15 10, MUR 6263 (Committee to Re-elect Artur Davis to Congress) (Sept. 27, 2010) (concluding
16 that committee’s spending on U.S. Representative’s “exploratory efforts before becoming a
17 [state] candidate” was akin to permissible donation to state and local candidates).

18 For example, in Advisory Opinion 1993-10 (Colorado), the Commission permitted a
19 former federal candidate to transfer his excess federal campaign funds to two separate election
20 efforts: his campaign for President of the Popular Democratic Party, and his campaign for

² Because 52 U.S.C. § 30114(a)(6) permits only “lawful” uses of campaign funds, the Commission’s conclusion in this advisory opinion assumes that the proposed donations would be permissible. If the proposed donation is not lawful under a law outside the Commission’s jurisdiction, then it would not be permissible under section 30114(a)(6) of the Act. *See, e.g.*, Advisory Opinion 2007-29 (Jackson Jr.) at 2, n.3; Advisory Opinion 1993-10 (Colorado) at 2-3; Advisory Opinion 1986-05 (Barnes) at 1; Advisory Opinion 1980-113 (Miller) at 2.

1 Governor of Puerto Rico. In permitting the transfer of funds to the campaign for office in Puerto
2 Rico, the Commission relied on what is now 52 U.S.C. § 30114(a)(6), stating that permissibility
3 of this transfer “follow[ed]” from the Commission’s precedents allowing transfers to state and
4 local campaigns. *See id.* at 2.

5 For purposes of the analysis under section 30114(a)(6), foreign candidates and nonfederal
6 domestic candidates are similarly situated with regard to receiving donations of federal campaign
7 funds. *Cf. id.* at 2; *see also* Advisory Opinion 2012-34 (Freedom PAC) (concluding that a
8 contribution to an independent expenditure-only political committee was a permissible use of
9 campaign funds under “any other lawful purpose” provision). Accordingly, consistent with
10 Commission precedent, the proposed contribution to a candidate for office in a foreign country is
11 permissible pursuant to 52 U.S.C. § 30114(a)(6) and 11 CFR § 113.2(e).

12 (2) *May your leadership PAC use PAC funds to make a donation to a candidate for office in*
13 *a foreign country?*

14 Yes, your leadership PAC may use PAC funds to make a contribution to a candidate for
15 office in a foreign country because the personal use restrictions do not apply to leadership PACs.

16 A leadership PAC is “a political committee that is directly or indirectly established,
17 financed, maintained or controlled by [a federal candidate or officeholder] but which is not an
18 authorized committee of the candidate or individual and which is not affiliated with an
19 authorized committee of the candidate or individual.” 52 U.S.C. § 30104(i)(8)(B); *see also* 11
20 C.F.R. § 100.5(e)(6). The Act’s personal use prohibition, as implemented in Commission
21 regulations, applies only to “use of funds in a campaign account,” *i.e.*, to authorized committees.
22 *See* 11 C.F.R. § 113.1(g). A leadership PAC is not an authorized committee and therefore is not
23 subject to the personal use prohibition. Accordingly, the Commission concludes that your

1 leadership PAC may use PAC funds to make a contribution to a candidate for office in a foreign
2 country.

3 (3) *May you use your personal funds to make an individual contribution to a candidate for*
4 *office in a foreign country?*

5 Yes, you may use your personal funds to make an individual contribution to a candidate
6 for office in a foreign country. As discussed above, the Act’s personal use prohibition, as
7 implemented in Commission regulations, applies only to “use of funds in a campaign account,”
8 *i.e.*, to authorized committees. An individual is not an authorized committee and therefore is not
9 subject to the personal use prohibition.

10 Moreover, the proposed contribution would not implicate the Act’s prohibition on
11 contributions *from* foreign nationals. 52 U.S.C. § 30121(a)(1)(A); 11 C.F.R. § 110.20(b); *see*
12 *also* Advisory Opinion 2015-02 (Grand Trunk Western Railroad – Illinois Central Railroad
13 PAC) at 3 n.2 (noting that foreign entity’s “*receiving* of donations does not implicate the Act’s
14 prohibition on foreign nationals *making* any contribution or donation in connection with an
15 election” (emphasis in original)).

16 The Commission expresses no opinion as to any other relevant federal or foreign laws or
17 regulations or as to any potential tax ramifications of the described activity because such matters
18 are not within the Commission’s jurisdiction. For the same reason, the Commission expresses no
19 opinion regarding any aspects of your proposal that are within the jurisdiction of the House
20 Ethics Committee, the General Counsel of the House of Representatives, or the Department of
21 State. *See* AOR001.

22 This response constitutes an advisory opinion concerning the application of the Act and
23 Commission regulations to the specific transaction or activity set forth in your request. *See*

1 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
2 assumptions presented, and such facts or assumptions are material to a conclusion presented in
3 this advisory opinion, then the requestor may not rely on that conclusion as support for its
4 proposed activity. Any person involved in any specific transaction or activity which is
5 indistinguishable in all its material aspects from the transaction or activity with respect to which
6 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
7 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
8 affected by subsequent developments in the law including, but not limited to, statutes,
9 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
10 on the Commission's website.

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On behalf of the Commission,

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Ann M. Ravel

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Chair