FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

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

DATE: **February 12, 2024**

SUBJECT: **AOR 2024-02 (Waters) – Comment on Drafts A and B**

Attached is a comment received on Advisory Opinion Request 2024-02.

Attachment

SANDLER REIFF
SANDLER REIFF LAMB
ROSENSTEIN & BIRKENSTOCK, P.C.

1090 Vermont Ave NW, Suite 750
Washington, DC 20005
www.sandlerreiff.com
T: 202-479-1111
F: 202-479-1115

February 9, 2024

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
Office of General Counsel
1050 First Street, NE
Washington, DC 20463
ao@fec.gov

COMMENT ON ADVISORY OPINION 2024-02
(WATERS) DRAFTS A&B

Ms. Stevenson:

I write to provide my thoughts on Drafts A & B in the above referenced Advisory Opinion Request. The opinions stated herein are my own and do not reflect the opinion of any firm client or other attorney in my office. Rather, they stem from my keen interest in Commission actions related the Bipartisan Campaign Reform Act ("BCRA"), for which I have advised clients since its passage in 2002 and my desire to assist the Commission in its deliberations related to this Request. I commend the Commission for tackling such a thorny issue of likely first impression on such an expedited basis.

As a threshold matter, I believe that each draft may start from the wrong analytical framework. Each draft concludes that direct mail communications disseminated by Citizens for Waters ("Waters Committee") qualify as a "federal election activity" and thus, the analysis in each draft flows from this assumption.[1] While my analysis below may not lead to a desired normative conclusion, I believe there is a highly plausible alternative legal approach to the BCRA as it pertains to this Request. Although each draft properly cites the rule defining "federal election activity" there is a plausible argument that it incorrectly applies the scope of the provision. It is my belief that the concept of "federal election activity" was not intended to be applicable to communications disseminated directly by and paid for by an authorized committee of a federal candidate. Unlike the definition of "contribution" and "expenditure", the definition of "federal election activity" was created solely to define activities undertaken by a specific universe of groups. Specifically, activities undertaken directly by a state or local political party

[1] In addition, I would like to point out that the requestor described their mailings as "brochures," and this term is used throughout both drafts. As you know, the term "brochure" is described elsewhere by the Commission as a grassroots item that is exempt from the definition of "federal election activity." 11 C.F.R. § 100.24(c)(4); *see also,* 11 C.F.R. §§ 100.87; 100.147; To avoid confusion between grassroots exempt brochures and direct mail communications, I would suggest adding an explanation that the use of the term "brochure" in the draft should not be given the same meaning as is used elsewhere in Commission regulations.

committees and, in certain circumstances, activities undertaken by other outside non-party, non-federal groups and candidates.[2] It is my understanding and belief that the purpose of the inclusion of "federal election activities" in Section 30125(e)(1)(A) was intended to clarify that donations that were solicited by a federal candidate or officeholder to a state or local party committee's non-federal account were not eligible to be used in connection with a "federal election activity." Stated another way, a state or local party committee could not use non-federal funds solicited, transferred, or otherwise "bundled" by a federal candidate or officeholder, as "Levin Funds."[3]

Furthermore, it is unnecessary to apply the "federal election activity" language found in section 30125(e)(1)(a) to communications paid for directly by a candidate from their own campaign funds as such activities are already covered by other provisions of the Act, including an earlier portion of the same sub-section of the statute that requires that all contributions and disbursements "in connection with a Federal office" must derive from funds that comply with the prohibitions, limitations and reporting requirements of the Act. To be sure, all contributions received into the account of an authorized committee of a candidate must comply with all three of these requirements. Thus, as a matter of statutory construction, I believe there is a plausible argument that the application of "federal election activities" as used in section 30125(e)(1) is superfluous and redundant as applied to the facts in this Request and that this language was not intended to cover communications paid for directly by the authorized committee of a federal candidate. Indeed, the title of Section 30125 is "Soft money of political parties" further emphasizing that the section applies primarily to the raising and spending of money by party committees. Rather, the concept of "federal election activities" was introduced in the BCRA to prevent the circumvention of the law by the direct spending of non-regulated funds by organizations, parties and state and local candidates in connection with federal elections.

Draft B identifies a separate provision of the BCRA that could be applicable to the activity described in the Request. Specifically, the BCRA requires that the payment by a state or local candidate that disseminates a "public communication that "promotes, supports, attacks or opposes" a federal candidate must derive from funds that meet the limitations, prohibitions and reporting requirements of the Act.[4] However, it is not clear whether this provision is applicable to this Request since each state or local candidate would not be directly disseminating the communication and would only be reimbursing the Waters Committee for a pro-rata share of the communication that references their own campaign, Therefore, the non-federal candidates would not be paying for, or otherwise subsidizing, any portion of the communication that references a federal candidate. Nevertheless, based upon the above analysis, it is my belief that there is a plausible argument that this provision would not apply to this Request because the underlying "federal election activity" rules do not apply to the mailing being undertaken by the Waters Committee.

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[2] 52 U.S.C. § 30101(b)(2) (regulating how state and local party committees may engage in "federal election activities"); 52 U.S.C § 30125(4)(B) (restricting certain solicitations by a federal candidate or officeholder to groups that engage in certain "federal election activities").
[3] 52 U.S.C. § 30125(b)(2)(C); 11 C.F.R. § 300.31(e).
[4] 52 U.S.C. § 30125(f)(1).

Based upon the analysis above, I believe that a better framework to properly analyze this request would be to apply the same analysis as Advisory Opinion 2004-37. In Advisory Opinion 2004-37, the Commission advised Congresswoman Waters that she could include federal candidates in similar mailings and that the pro-rata payment by other federal candidates would not be considered a "contribution" by the reimbursing committee as long as the committee only paid for their pro-rata share of the communication. Applying the same analysis to the facts in this request, each non-federal committee who provided funds for their pro-rata share of a mailing would not make a "contribution" to the Waters committee.

Assuming *arguendo* that Sections 30125(e)(1) or (f)(1) are applicable to the activities contemplated by the Waters Committee, I have a few comments related to the discussion of federal reporting requirements in Draft B. First, the Draft concludes that the payments are not permissible because "the Requestors do not represent that the funds solicited and received from non-federal sources will have been reported to the Commission."[5] To the extent that Draft B has enough support to issue an opinion, rather than ascribe the requestor with a presumptive negative conclusion, the Commission should go back to the requestor and seek clarification on this point. If so instructed, the Waters Committee can develop a procedure to require the reimbursing committee to comply with Section 30125(f)(1) which would allow the Commission to provide the requestor with an affirmative conclusion.[6]

Second, it would be useful to include a discussion in Draft B as to what it means to be in compliance with the reporting requirements of the Act. For example, if a state or local candidate's portion of a mailing does not exceed $1,000 (assuming they have not made any other disbursements related to Federal elections), it appears to me that no triggering event to comply with the Act would occur since the candidate did not reach the $1,000 threshold for registration as a federal political committee.[7]

Third, I have concerns as to the failure of Draft B to address the "major purpose" test as it relates to the facts in this matter. The "major purpose" test is a constitutionally mandated exemption such that the Act's reporting requirements (for those organizations that trigger political committee status under the Act) only apply to organizations under the control of federal candidates or whose major purpose is engaging Federal campaign

[5] Draft B at p.9.

[6] Notwithstanding, if the Draft B has sufficient support of the Commission, I do not believe that it should be incumbent on the Federal candidate to enforce compliance with Section 30125(f)(1) and the fact as to whether the Waters Committee does or does not have a policy to require compliance with the reporting requirements should be immaterial to the consideration of their Request.

[7] 52 U.S.C. § 30101(4). Since the requestor is a federal candidate, I suppose this Opinion would not be the proper forum to discuss the actual reporting requirements that apply to the reimbursing committee. That said, the Commission must consider the practical implications of those requirements. Surely those committees should not be required to disclose all receipts and disbursements made by the committee in connection with their state or local election if the reimbursement is made directly from a state campaign committee? Would they be required to establish a separate bank account and committee to comply with Sections 30125(e) or (f)? With the exception of Advisory Opinion 2018-07, these are questions that the Commission has not (to my knowledge) addressed since the passage of the BCRA. Any guidance on this point in the Commission's response would be useful to the regulated community if Draft B has the support of a sufficient number of Commissioners.

activity.[8] Presumably, the payments made by the non-federal organizations or candidates to reimburse the Waters Committee will constitute a relatively small portion of the organization's or candidate's political spending. Assuming this is the case, my belief is that the Commission would be prohibited from requiring the non-federal candidates or committees to register as political committees with the Commission and thus constitutionally nullifying the statutory requirement that the reimbursements or underlying contributions to the non-federal committees must comply with the reporting requirements of the Act.[9]

Finally, I would like to provide my thoughts regarding a question raised, but not answered, by Commissioner Weintraub during Thursday's hearing regarding the Draft Opinions. Commissioner Weintraub posed the question as to whether reimbursements to the Waters Committee would be subject to the prohibitions and limitations of the Act. For purposes of this Request, the issue has been mooted by the representations of the Waters Committee that they would not accept any reimbursements from a state or local candidate unless the funds used for such reimbursements meet the prohibitions and limitations of the Act. That said, if the Commission applies the analysis of Advisory Opinion 2004-37 (concluding that reimbursements were not contributions) and not the analysis provided for in either Draft Opinion, the answer to this question could be found in Advisory Opinion 2002-14. In this Opinion, the Commission opined that the sale of a list by a national party (subsequent to the enactment of the BCRA) at fair market value was not a contribution to the national party committee. Consequently, the Commission found that the revenue realized by the national party committee would not be subject to the prohibitions and limitations of the Act.[10] Under the framework of Advisory Opinion 2004-37, the answer to this question therefore would be consistent with that of AO 2002-14 since the national party committee was likewise prohibited from accepting any contributions that did not meet the limitations, prohibitions and reporting requirements of the Act at the time of the Request.[11] Thus, an argument can be made that the reimbursements would not be subject to the prohibitions and limitations of the Act. This analysis can be squared with Section 30125(e) because the reimbursements will only cover the share of the communication that references only state and local candidates and will not subsidize any speech directly in connection with a Federal election.

[8] Buckley v. Valeo, 424 U.S. 1, 79 (1976).
[9] I have briefly reviewed McConnell v. FEC and I could not locate any discussion of the applicability of the "major purpose" test to either Sections 30125(e) or (f).
[10] FEC Advisory Opinion 2002-14, p.p. 4-5.
[11] See 52 U.S.C. §30125(a). Notwithstanding the analysis in this paragraph, I would concede that a state or local party committee likely could not be reimbursed with funds that are not subject to the prohibitions, limitations and reporting requirements of the Act since the mailing would be clearly covered by 52 U.S.C. § 30125(b)(1).

I hope that my comments have been helpful to your consideration of this Request. If you have any questions or need additional information in connection with this comment, I can be reached at (202) 479-1111 or reiff@sandlerreiff.com.

Sincerely,

Neil P. Reiff