



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 28, 2019

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2019-01

Jonathan Zucker, Esq.
It Starts Today
237 Florida Avenue, N.W.
Washington, D.C. 20001

Dear Mr. Zucker:

We are responding to your advisory opinion request on behalf of It Starts Today (the “Committee”) concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to the Committee’s proposal to establish nominee and presumptive nominee funds that would accept contributions earmarked for candidates who receive the public endorsement of a specified endorsing organization. The Commission concludes that the proposed nominee and presumptive nominee funds would be consistent with the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on December 21, 2018, and your email received on February 5, 2019.

The requestor is a non-connected political committee that acts as an intermediary for earmarked contributions to specific candidates. Advisory Opinion Request at AOR001. Currently, the Committee offers both “nominee funds,” in which contributions are earmarked for Democratic nominees for Congress who are not yet identified, and “presumptive nominee funds,” in which contributions are earmarked for the eventual presumptive Democratic nominee for President in 2020.¹ *Id.*

¹ A “presumptive nominee” for President is a candidate who receives a sufficient number of pledged delegates to secure a party’s nomination for President by a date identified in the solicitation. *See, e.g.*, Advisory Opinion 2003-23 (WE LEAD) at 1.

Now, the Committee proposes to offer new forms of nominee and presumptive nominee funds, which it refers to as “Endorsement Conditioned Nominee Funds” and “Endorsement Conditioned Presumptive Nominee Funds.” AOR002. Under the proposed Endorsement Conditioned Nominee Funds, the Committee’s users would make contributions earmarked for a particular political office, party affiliation, and election cycle. *Id.* In an Endorsement Conditioned Presumptive Nominee Fund, users would earmark contributions for a candidate who receives a sufficient number of pledged delegates to the Presidential nominating convention to secure the party’s nomination. AOR002, AOR006. In addition, contributions to both proposed types of funds would be conditioned on the nominee also receiving a “public endorsement” by a specific “endorsing organization” no later than a date provided in the solicitation. AOR002, AOR006.

For each solicitation, the Committee would select a single endorsing organization, which would be one of the following: (1) an organization registered with the Internal Revenue Service under sections 501(c)(4) or 527 of the Internal Revenue Code, (2) an organization registered with the Commission as a political committee, or (3) a “media outlet with a history of electoral endorsements.” *Id.* The Committee would have no role in the endorsement process of any selected endorsing organization. AOR002. Further, a public endorsement must be “a formal statement made on behalf of an endorsing organization that encourages voters to support a single, specific candidate for a specific office” that appears in “a newspaper or magazine article, a transcript from a television show, a press release, or any publicly available website.” AOR002, AOR006.

The Committee would implement the endorsement-conditioned funds in the following manner. The Committee would disclose in the solicitation both the identity of the endorsing organization and the condition that the Committee would forward the contribution to the nominee only if the nominee or presumptive nominee receives a public endorsement issued on behalf of the selected endorsing organization by a specified date. AOR006. If all conditions for forwarding the contribution are not satisfied by the date identified in the solicitation, the Committee would instead forward the contribution to a default recipient selected by the Committee and identified in the solicitation. AOR006-007. The Committee would comply with “all of the requirements related to . . . nominee funds and presumptive nominee funds,” including source and amount prohibitions, disclosure requirements, and requirements for timely forwarding of contributions. AOR001.

Question Presented

May the Committee establish traditional nominee and presumptive nominee funds with the additional criterion that a specified endorsing organization must publicly endorse the nominee or presumptive nominee by a specified date in order for the nominee or presumptive nominee to receive the contributions?

Legal Analysis and Conclusion

Yes, the Committee may establish traditional nominee and presumptive nominee funds with the additional criterion that a specified endorsing organization must publicly endorse the nominee or presumptive nominee by a specified date in order for the nominee or presumptive nominee to receive the contributions.

Under the Act and Commission regulations, any contribution made by a person on behalf of or to a candidate, including a contribution that is earmarked or otherwise directed to the candidate through an intermediary or conduit, is a contribution from that person to the candidate. 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(a). An earmark is “a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate’s authorized committee.” 11 C.F.R. § 110.6(b)(1). If an intermediary or conduit “exercises any direction or control” over the choice of the recipient of an earmarked contribution, then the contribution is by both the original contributor and the intermediary or conduit. 11 C.F.R. § 110.6(d). On the other hand, if the intermediary or conduit merely forwards the earmarked contribution to the candidate without exercising any direction or control, then the contribution is considered a contribution only by the original contributor and not the intermediary or conduit. *Id.*

The Commission has concluded that an intermediary may accept conditional contributions on behalf of an as-yet unidentified candidate under the following conditions: (1) the funds were disbursed after triggering an objective, easily determinable, condition outside the control of the intermediary; (2) the intermediary specified a date certain by which the condition must be met; (3) the intermediary would refund or otherwise lawfully distribute the funds if the triggering condition was not met; and (4) the intermediary clearly communicated all of the information in the first three conditions to contributors. Advisory Opinion 2016-15 (Gary Johnson Victory Fund) at 4 (determining that joint fundraising committee meeting these four conditions could accept and hold in escrow contributions pending Commission’s recognition of recipient committees’ status as state party committees); *see also* Advisory Opinion 2014-19 (ActBlue) at 4 (concluding that earmarked contribution could be conditioned on requirement that nominee be a woman because gender is an “objective, easily determinable fact outside of [the requestor’s] discretion or control” and a default recipient was identified and disclosed to contributors in advance); Advisory Opinion 2003-23 (WE LEAD) at 4-6 (permitting contributions earmarked for “presumptive nominee” where default recipient was specified in advance and non-connected committee had no control over selection of delegates or their certification); Advisory Opinion 1982-23 (Westchester Citizens for Good Government) at 2 (concluding that intermediary exercised no direction or control in forwarding contributions earmarked for yet-to-be-determined candidate identified by “specific office, party affiliation, and election cycle”). In each of these circumstances, the Commission determined that the contribution would be attributed only to the original contributor and not the intermediary.

The Committee's proposal meets all four of these conditions. First, under the facts presented in the request, the criterion of a public endorsement by an endorsing organization is an objective, easily determinable fact outside of the Committee's control, similar to the gender of the nominee in Advisory Opinion 2014-19 (ActBlue). The Committee would identify a single endorsing organization in the solicitation and would not have any role in the endorsement process. AOR002, AOR006. Moreover, the proposal describes an "endorsement" as "a formal statement made on behalf of an endorsing organization that encourages voters to support a single, specific candidate for a specific office" and appears in "a newspaper or magazine article, a transcript from a television show, a press release, or any publicly available website" — this description provides a set of objective criteria that deprive the Committee of discretion in determining whether the endorsement criteria are met. AOR002, AOR006.² Second, the Committee would specify a date in the solicitation by which a candidate must meet all criteria in order for the Committee to forward the contribution. AOR006. Third, the Committee would lawfully distribute the funds to a default recipient if all triggering conditions were not met by that date. AOR006-007. Finally, the Committee would clearly disclose the above information to contributors in the solicitation. AOR001, AOR006-007. As a result, in the circumstances described, the proposed endorsement-conditioned nominee and presumptive nominee funds are consistent with the Act and Commission regulations, and contributions to those funds are attributable only to the original contributor and not to the Committee.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or

² The Commission assumes that, to prevent the requestor from exercising any direction or control over earmarked contributions, the requestor will use only the objective description of "endorsement" set out in the request and will not apply its subjective judgment in determining whether a given statement qualifies as an endorsement. *See* AOR002, AOR006.

conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

A handwritten signature in blue ink that reads "Ellen L. Weintraub". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Ellen L. Weintraub
Chair