



June 21, 2019

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

RE: Comment on Advisory Opinion Request 2019-11 (Pro-Life Democratic Candidate PAC)

Dear Ms. Stevenson,

Campaign Legal Center respectfully submits these comments to highlight for your consideration several potential problems with the requestor's proposal in Advisory Opinion Request 2019-11 (Pro-Life Democratic Candidate PAC).

The Pro-Life Democratic Candidate PAC's ("PAC") plan to receive donations as an intermediary for a "pro-life" Democratic candidate for President raises a number of serious concerns. First, the requestor proposes to condition contributions on a subjective and admittedly contested criterion—a candidate's "pro-life" status—which fails to ensure that the PAC will not exercise any direction or control over the selection of the recipient of the earmarked contributions and risks confusion among donors. Second, the proposed solution to the vague and subjective definition of "pro-life" is to outsource the determination of which candidate satisfies that condition to Democrats for Life of America ("DFLA"), a section 501(c)(4) nonprofit corporation. But the relationship between the PAC and DFLA is far from clear, and allowing a 501(c)(4) to dictate which candidate will receive all of a PAC's contributions could create a loophole by which corporate nonprofits can effectively circumvent the corporate contribution ban.

Conditional Donations to Unspecified Candidates

Under the Federal Election Campaign Act, a contribution from a person 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). If an intermediary or conduit "exercises any direction or control

over the choice of the recipient candidate,” then the contribution is attributed to both the original contributor and the conduit, and the conduit is subject to the contribution limits for the full amount of donations for which it acted as an intermediary. 11 C.F.R. 110.6(d).¹ On the other hand, if a 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.*

Consistent with these rules, the FEC has allowed political committees to earmark contributions for as-yet-unidentified candidates using pre-determined criteria that: (1) are objectively determined and outside the control of the committee, (2) time-limited, (3) provide a backup in case no one meets the criteria, and (4) are conveyed to individual donors at the time of the donation. Advisory Opinion 2016-15 (Gary Johnson Victory Fund) at 4. This comment concerns the first condition.

Requestor’s Proposal

The PAC proposes to raise money for a “credible,” “pro-life” Democratic candidate for president to encourage such a candidate to enter the race. Request for Advisory Opinion 2019-11 at 1. The request appears to define “credible” as “having some significant political or military experience.” *Id.* at 2, 4 (suggesting that a “credible” candidate is one who holds one of several, enumerated, political or military titles). The PAC’s definition of “pro-life” is even less clear.

The PAC suggests that it defines pro-life as “hold[ing] positions significantly at odds with the [Democratic] party’s platform on abortion rights.” *Id.* The PAC then suggests that “it can rely on objective criteria, such as endorsement by an outside group like the Democrats for Life of America.” *Id.* However, the request includes a screen shot of a disclaimer that states a candidate must be “pro-life” and receive DFLA’s endorsement, which suggests that in addition to the endorsement, a candidate must satisfy the PAC’s internal definition of “pro-life” as well. *See id.* at 4. Even assuming the PAC will rely on an endorsement by DFLA as determinative, it is entirely unclear what criteria, if any, DFLA will use to determine if a candidate is “pro-life.”

The Proposal Is Inconsistent with the Requirements for Conditional Contributions

The PAC’s proposal is problematic because the PAC’s criteria for determining whether a candidate is “pro-life” are not objective, nor are they clearly outside of the PAC’s control. In addition, the PAC’s proposal to rely on DFLA’s endorsement could

¹ Pro-Life Democratic PAC is a multicandidate political committee subject to a \$5,000 contribution limit. *See* Pro-Life Democratic PAC, Statement of Organization, FEC Form 1 (filed April 29, 2019), <https://docquery.fec.gov/cgi-bin/forms/C00704486/1329025>; “Contribution Limits,” FEC, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/>.

allow the PAC to exert implicit influence over the endorsement process and open the door to future abuse by PACs and section 501(c)(4)s.

“Pro-Life” Is Not an Objective Criterion

The “pro-life” criterion is different from all others previously allowed by the Commission for conditional donations because it is not objective. In the past, the Commission has allowed PACs to serve as conduits for recipients of conditional contributions by using objective, easily-determined criteria such as winning a party’s nomination for a particular election, Advisory Opinion 1982-23 (Westchester Citizens for Good Government); winning enough pledged convention delegates to secure a nomination, Advisory Opinion 2003-23 (WE LEAD); and a party’s nominee for president being a woman, Advisory Opinion 2014-19 (ActBlue). The Commission has also allowed PACs to identify the recipient by name and impose an objective “triggering condition,” such as state recognition of a party committee, Advisory Opinion 2016-15 (Gary Johnson Victory Fund), or when a potential candidate files to run for office, Advisory Opinion 2006-30 (ActBlue).

These conditions left no room for ambiguity: either they occurred, or they did not. Either Missouri would recognize the Missouri State Libertarian Party, or it would not. *See Advisory Opinion 2016-15* at 2. Either the 2016 Democratic presidential nominee would be a woman, or not. *See Advisory Opinion 2014-19*. Only one person could win the 1982 Republican nomination for Congress for the 24th Congressional District of New York. *See Advisory Opinion 1982-23*.

But the condition proposed here—being “pro-life”—is neither objective nor easily defined. The PAC even admits that, “[o]bviously, the definition of ‘pro-life’ is contested.” Request for Advisory Opinion 2019-11 at 2. As discussed above, it provides multiple definitions for pro-life, including having a position on abortion rights “significantly at odds” with the Democratic Party. (How significantly? In what way?) It then suggests that, to make this criteria objective, it “can” rely on the endorsement of DFLA, a section 501(c)(4) nonprofit corporation.

But nowhere does the PAC say it will rely *solely* on DFLA’s endorsement. In its disclaimer to donors, it says the money will go to “the first *pro-life* Democrat” who is credible “and who receives the endorsement of the Democrats for Life of America.” Request for Advisory Opinion 2019-11 at 4 (emphasis added). This suggests that winning the endorsement is not enough—a candidate must also be “pro-life” in the eyes of the PAC.

It is unclear what would happen if DFLA endorses a candidate who has crusaded against the death penalty (another of its priorities²) but has a more moderate stance on abortion. Furthermore, donors may be surprised to learn that if DFLA endorses a candidate that the PAC deems to be non-credible, the donors’ contributions would go

² See “About Democrats for Life of America,” Democrats for Life of America, <https://www.democratsforlife.org/index.php/about-us>.

to a Congressman from Illinois, even if a different, “credible,” “pro-life” Democratic presidential candidate emerged.

The Proposal Presents Other Opportunities for Abuse

Another key difference between the “pro-life” condition proposed here and other conditions previously approved by the Commission is that the PAC is effectively fundraising for the winner of a nonprofit corporation’s endorsement. This creates at least three potential problems.

First, the relationship between the PAC and DFLA is far from clear. The request merely states that the PAC “has no *formal* relationship with the DFLA and no influence over its endorsement process.” Request for Advisory Opinion 2019-11 at 2 (emphasis added). Does it have an informal relationship with DFLA? Does it exercise influence over DFLA in other ways? Unlike PACs, section 501(c)(4) nonprofit corporations are not required to disclose their donors,³ which means that neither the FEC nor the public would know if the same group of donors is behind a 501(c)(4) and a PAC that is raising money for its endorsee. Such a scenario could enable the PAC to evade the restrictions that ensure a PAC acting as a conduit does not exercise any direction or control over earmarked contributions, and circumvent the contribution limits that should apply to its contributions for its chosen candidate. Even in good faith, a group of activists or donors could effectively control both groups by encouraging the PAC to raise money for the 501(c)(4)’s endorsee and encouraging the 501(c)(4) to endorse a particular candidate.

Second, the fact that a PAC has raised money for a candidate endorsed by a 501(c)(4) will inherently affect the endorsement process. Candidates may seek an endorsement for the sole purpose of getting the money, or they may change their policy positions to make an endorsement more likely. Furthermore, the 501(c)(4) may choose to endorse the candidate who it thinks is favored by the PAC to encourage the same mutually-beneficial arrangement in future elections.

In this case, DFLA may be influenced by the PAC’s “credibility” requirement and endorse a different candidate than it otherwise would, so that in future election cycles, DFLA’s endorsement is seen as (literally) more valuable. This possibility creates an opportunity for the PAC to exercise a level of implicit control over DFLA’s endorsement process that is absent in the nomination of a candidate for president (which has far broader implications and many more stakeholders), *see Advisory Opinion 2014-19* (ActBlue), or a state’s decision to recognize a party committee (where the state receives no benefit from the money), *see Advisory Opinion 2016-15* (Gary Johnson Victory Fund).

This is another way in which the PAC could evade the requirements that ensure a conduit does not exercise any direction or control over earmarked contributions, by using financial incentives to influence the endorsement process of a 501(c)(4).

³ “Treasury Department and IRS Announce Significant Reform to Protect Personal Donor Information to Certain Tax-Exempt Organizations,” U.S. Department of the Treasury (July 16, 2018), <https://home.treasury.gov/news/press-releases/sm426>.

Third, the proposal invites the FEC to create a loophole by which 501(c)(4) nonprofits could effectively make prohibited contributions to federal candidates. An ally of a 501(c)(4) could create a PAC that raises money for candidates who are endorsed by the 501(c)(4). The PAC could lawfully donate up to \$5,000 to each endorsee,⁴ but under the proposal here, it could raise and donate an unlimited sum, under the pretext of the funds being “earmarked.”

Respectfully submitted,

/s/ Adav Noti _____

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⁴ “Contribution Limits,” FEC, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/>.