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Washington, DC 20463

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AGENDA ITEM
For meeting of December 1, 2022

November 22, 2022

MEMORANDUM

TO: The Commission

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

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Associate General Counsel

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Assistant General Counsel

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Attorney *HF*

Subject: AO 2022-24 (Allen Blue) - Draft A

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 12:00pm (Eastern Time) on November 30, 2022.

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 <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2022-24

2

3 Ezra W. Reese, Esq.

4 Emma R. Anspach, Esq.

5 Elias Law Group

6 10 G Street, NE

7 Suite 600

8 Washington D.C. 20002

DRAFT A

9 Dear Mr. Reese and Ms. Anspach:

10 We are responding to your advisory opinion request on behalf of Allen Blue,
11 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
12 (the “Act”), and Commission regulations to Mr. Blue’s proposal to establish an
13 irrevocable trust during his lifetime that would make contributions to candidates and
14 political committees, among other recipients. The Commission concludes that: (1) the
15 proposed trust may make contributions to federal candidates and political committees; (2)
16 contributions from the trust must be attributed to both the trust and to Mr. Blue if the
17 trustees have discretion over the selection of the recipient of the contribution; and (3)
18 indexed contribution limits in effect at the time that the trust makes a contribution to a
19 candidate or political committee would apply.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter dated
22 October 3, 2022.

23 Allen Blue is a United States citizen. Mr. Blue represents that he is over 18 years
24 old, is not a federal government contractor, and is eligible to make contributions to
25 federal candidates and political committees.¹ As part of his estate planning, Mr. Blue

¹ Advisory Opinion Request (“AOR”) at AOR001.

1 proposes to create an irrevocable trust, a legal form “which prohibits the requestor from
2 amending or terminating the trust after its creation.”² The trust would begin operating
3 during Mr. Blue’s lifetime and is thus a living, *i.e.*, *inter vivos* trust.³ All trust assets
4 would be “personally held” by Mr. Blue until he transfers the assets to the trust; the trust
5 would not receive funds from any source other than Mr. Blue and any investment income
6 from the assets provided by him to the trust.⁴ Mr. Blue would not be a beneficiary of the
7 trust.

8 Mr. Blue represents that the “trust’s major purpose would not be campaign
9 activity. Its major purpose would be supporting nonprofit organizations that align with
10 the requestor’s progressive values.”⁵ According to request, the “majority of the trust’s
11 disbursements would be for the general support of nonprofit organizations that are not
12 registered as political committees under the Act.”⁶ The request also states that “[t]he
13 trust would not earmark any of the funds it distributes to non-profit organizations to be
14 contributed to candidates or political committees or otherwise direct its distributions to
15 non-profits to be used for federal political purposes.”⁷ The trust documents would

² AOR001.

³ A living, *i.e.*, *inter vivos*, trust is a trust created by an individual during his or her lifetime and may be either revocable or irrevocable. See IRS Q&A, “What are testamentary and Inter Vivos trusts?”, <https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-questions-and-answers> (last visited Nov. 1, 2022).

⁴ AOR001.

⁵ AOR004 (emphasis in original).

⁶ AOR002.

⁷ *Id.*

1 prohibit the trust “from engaging in independent expenditures or electioneering
2 communications.”⁸

3 In addition to its contribution to nonprofit organizations, the trust “would also
4 contribute to federal candidates for public office, to federal and state political party
5 committees, and to other federally-registered committees.”⁹ The requestor represents that
6 if the trust makes contributions to federal candidates or political committees during Mr.
7 Blue’s lifetime, the trust will share an aggregate contribution limit with Mr. Blue.¹⁰

8 Disbursements from the trust, including contributions to candidates and political
9 committees, would be administered by trustees. The founding trust documents would
10 name the initial trustees, and the initial trustees would be authorized to appoint additional
11 eligible trustees. All trustees would be natural persons over 18 years old who are U.S.
12 citizens or lawful permanent residents eligible to contribute to federal candidates and
13 political committees.

14 The trust instruments would permit contributions “to designated recipients based
15 on objective criteria set forth in the trust instrument, such as a particular party committee
16 or the Democratic nominee in a particular district or state,” and contributions to
17 candidates and political committees selected by the trustees in their discretion following
18 standards provided in the trust document.¹¹ Those discretionary standards “would require
19 the trustees to support only candidates and committees that further Mr. Blue’s support for

⁸ AOR002.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

1 progressive candidates and/or for his support of action to protect the environment, ensure
2 the equality of all persons under the law, and protect the least-well-off among us.”¹²

3 ***Questions Presented***

4 1. *May the proposed trust contribute to federal candidates, political party*
5 *committees, and other federally registered committees under the Act and Commission*
6 *regulations?*

7 2. *How should contributions from the trust be attributed when the trustee has*
8 *discretion over the recipient of contributions from the trust’s funds?*

9 3. *Do the indexed contribution limits applicable at the time the contribution*
10 *is made by the trust apply?*

11 ***Legal Analysis***

12 1. *May the proposed trust contribute to federal candidates, political party*
13 *committees, and other federally registered committees under the Act and Commission*
14 *regulations?*

15 Yes, the proposed trust may contribute to federal candidates, political party
16 committees, and other federally registered committees under the Act and Commission
17 regulations because the trust would be a “person” under the Act and is not a prohibited
18 source.

19 The Act provides limits on contributions by any “person,” other than a source
20 prohibited from making contributions, to federal candidates and political committees.¹³

¹² AOR002.

¹³ 52 U.S.C. § 30116(a)(1); *see also* 11 C.F.R. § 110.1(a), (b).

1 The term “person” under the Act broadly includes “an individual, partnership, committee,
2 association, corporation, labor organization, or any other organization or group of
3 persons,” subject to exclusions not relevant to this request.¹⁴ The Act and Commission
4 regulations do not expressly list trusts in the definition of “person.” However, the
5 Commission has concluded in previous advisory opinions that, “[b]ecause the Act
6 includes no express or implied prohibitions on contributions” from a testamentary estate,
7 a testamentary estate is within the definition of “person” for purposes of the Act and is
8 treated as the “successor legal entity to the testator” for purposes of the Act’s contribution
9 limits, including where the estate funds are contributed to a political committee through a
10 testamentary trust.^{15, 16}

11 While the trust proposed by Mr. Blue is not a testamentary trust because it would
12 be funded and active during his lifetime, the same principles apply here. The Act
13 provides no express or implied prohibition on contributions by a living trust, and the
14 proposed trust fits within the Act’s broad definition of “person.” As with a testamentary
15 trust, the proposed living trust would serve as a successor entity to Mr. Blue, sharing his

¹⁴ 52 U.S.C. § 30101(11); *see also* 11 C.F.R. § 100.10.

¹⁵ “A testamentary trust is created by a will, which begins its existence upon the death of the person making the will, when property is transferred from the decedent’s estate.” *See* IRS Q&A, “What are testamentary and Inter Vivos trusts?”, <https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-questions-and-answers> (last visited Nov. 1, 2022).

¹⁶ Advisory Opinion 2004-02 (National Committee for an Effective Congress) (“NCEC”) at 2-3; *see also* Advisory Opinion 1988-08 (Nelson) at 2 (“Because the Act includes no express or implied prohibition on contributions from a decedent’s estate, including those distributed through a trust created by the decedent . . . a testamentary estate is the successor legal entity to the testator and qualifies as a person under the Act subject to the same limitations and prohibitions applicable to the decedent in the decedent’s lifetime.”) (superseded in part on other grounds).

1 contribution limit.¹⁷ Because the trust and Mr. Blue would share an aggregate
2 contribution limit, treating the trust as a “person” under the Act would not enable Mr.
3 Blue to use the trust to make excessive contributions. Accordingly, the proposed trust
4 may make contributions to candidates and political committees.^{18, 19}

5 2. *How should contributions from the trust be attributed when the trustee has*
6 *discretion over the recipient of contributions from the trust’s funds?*

7 Contributions from the trust must be attributed to both the trust and to Mr. Blue if
8 the trustees have discretion to select “candidates and committees that further Mr. Blue’s
9 support for progressive candidates and/or for his support of action to protect the
10 environment, ensure the equality of all persons under the law, and protect the least-well-
11 off among us.”²⁰

12 The Commission has addressed a similar question in the context of testamentary
13 trusts. In Advisory Opinion 1996-03 (Breden-Schmidt Foundation), the Commission

¹⁷ AOR002.

¹⁸ However, the trust may not make contributions to a political committee if the trust’s trustees also serve as officers, directors, employees, members, or agents of the political committee receiving the contribution. Advisory Opinion 2004-02 (NCEC) at 3 (concluding that requestor, a political committee, “may accept contributions only from trusts for which neither [the political committee] nor an officer, director, employee, member, agent, or affiliated organization of [the political committee] serves as trustee”). This limitation on permissible recipients ensures that the recipient political committee does not control trust funds that exceed the Act’s limits on contributions to that committee. *See id.* (explaining that, to avoid an excessive contribution, a political committee may not “exercise any control over the undistributed trust corpus or interest amounts”).

¹⁹ The requestor does not ask the Commission to determine whether the proposed trust would be a political committee under the Act and Commission regulations. Accordingly, this advisory opinion does not reach that issue. The requestor represents that “[t]he trust’s major purpose would not be campaign activity. Its major purpose would be supporting nonprofit organizations that align with the requestor’s progressive values.” AOR004 (emphasis in original). The Commission’s conclusions in this advisory opinion rely upon that representation.

²⁰ AOR002.

1 considered political contributions made by a foundation established by a testamentary
2 trust. In that advisory opinion, the declaration of trust under which the foundation was
3 established stated that foundation funds were to be used “to pay out such sums as
4 contributions and subsidies and for conducting operations themselves to persons, entities
5 and causes of Socialism and those causes related to Socialism,” including by “supporting
6 . . . candidates for public office.”²¹ The Commission concluded that because political
7 contributions authorized by the foundation’s trustees were “explicitly limited by the
8 purposes and conditions set forth” by the testator, contributions made by the foundation
9 “should be attributed to the successor in interest to [the testator] and his estate, the
10 Foundation, rather than to the Foundation’s trustees.”²² The Commission reached this
11 conclusion even though the foundation’s trustees had broad discretion to make political
12 contributions that would advance the cause of Socialism.²³ The Commission further
13 explained in Advisory Opinion 2004-02 (NCEC) that, when a political committee reports
14 contributions by a testamentary trust, the committee must disclose the name of “both the
15 trust and the name of the decedent.”²⁴

16 By contrast, in Advisory Opinion 1999-19 (Ellis), the Commission considered a
17 proposal by an individual who had established a living trust for which he served as the
18 sole beneficiary, trustee, and trustor, to make a contribution to a candidate committee
19 using funds held in trust. In that circumstance, the Commission determined that the

²¹ Advisory Opinion 1996-03 (Breedon-Schmidt Foundation) at 2.

²² *Id.* at 3.

²³ *Id.*

²⁴ Advisory Opinion 2004-02 (NCEC) at 3.

1 contribution was a contribution from that individual only, and not the trust, because the
2 individual was “the beneficial owner and . . . retained complete control over use of the
3 funds in the trust.”²⁵

4 Here, Mr. Blue’s proposal more closely resembles the circumstances described in
5 Advisory Opinions 1996-03 (Breedon-Schmidt Foundation) and 2004-02 (NCEC) than
6 the living trust in Advisory Opinion 1999-19 (Ellis). The trust would be established by
7 Mr. Blue as part of his estate plan as an irrevocable trust, and so Mr. Blue would have no
8 authority to amend or terminate the trust or withdraw funds from the trust after its
9 creation. In addition, unlike in Advisory Opinion 1999-19 (Ellis), Mr. Blue would not be
10 a beneficiary of the trust.²⁶

11 The trust documents would provide discretion to the trustees to support
12 progressive candidates and make contributions to “candidates and committees that further
13 Mr. Blue’s support for progressive candidates and/or for his support of action to protect
14 the environment, ensure the equality of all persons under the law, and protect the least-
15 well-off among us.”²⁷ These discretionary standards are similar to those governing the
16 foundation in Advisory Opinion 1996-03 (Breedon-Schmidt Foundation), which
17 authorized political contributions to promote Socialism. Accordingly, the contributions

²⁵ Advisory Opinion 1999-19 (Ellis) at 2.

²⁶ AOR002. The Commission also assumes that Mr. Blue would not serve as a trustee of the trust.

²⁷ AOR002.

1 here should be attributed to both the trust and Mr. Blue and should not be attributed to the
2 trustees.²⁸

3 3. *Do the indexed contribution limits applicable at the time the contribution*
4 *is made by the trust apply?*

5 The indexed contribution limits in effect at the time that the trust makes a
6 contribution to a candidate or political committee, not those in effect at the time Mr. Blue
7 provides assets to the trust, would apply to contributions from the trust's funds.

8 Under Commission regulations, a contribution is made "when the contributor
9 relinquishes control over the contribution," which occurs "when it is delivered by the
10 contributor to the candidate, to the political committee, or to an agent of the political
11 committee."²⁹ In the context of a testamentary estate, the Commission has previously
12 determined that this occurs when the estate relinquishes control of the funds to the
13 candidate or political committee.³⁰ A testamentary estate "is subject to the same
14 limitations and prohibitions as the decedent would be subject to if he were still living and

²⁸ The Commission's regulation at 11 C.F.R. § 110.6(d) provides that an earmarked contribution to a candidate is treated as both a contribution by the original contributor and a conduit or intermediary if the conduit or intermediary "exercises any direction or control over the choice of the recipient candidate." 11 C.F.R. § 110.6(d). While the trustees would exercise control over the ultimate recipient of a contribution, they would do so as agents acting on behalf of the trust, with the contribution attributed to both Mr. Blue and the trust, consistent with 11 C.F.R. § 110.6(d). The contribution should not be attributed to the individual trustees.

²⁹ 11 C.F.R. § 110.1(b)(6).

³⁰ Advisory Opinion 2015-05 (Shaber) at 3, n.3; *see also* Advisory Opinion 1999-14 (Council for a Livable World) at 3 (concluding that contributions made by testamentary bequest to political committee were made "at the time the funds were distributed by the estate" to committee).

1 making the contributions directly,” and the applicable limits are those that “would apply
2 to the decedent if he were alive when the estate makes the contribution.”³¹

3 Similarly, here, the limits that apply to a contribution by the proposed trust to a
4 candidate or political committee are those that would apply to Mr. Blue (whether he is
5 living or deceased at the time of the contribution) at the time that the trust relinquishes
6 control of the funds to the ultimate recipient political committee or candidate. Because
7 the trust may make political contributions while Mr. Blue is still living, the requestor
8 acknowledges that “the trust would share its aggregate contribution limits with the
9 requestor” during his lifetime.³²

10 The Commission expresses no opinion regarding the potential application of tax
11 law or trust and estate law to the proposed activities because those questions are not
12 within the Commission’s jurisdiction.

13 This response constitutes an advisory opinion concerning the application of the
14 Act and Commission regulations to the specific transaction or activity set forth in your
15 request.³³ The Commission emphasizes that, if there is a change in any of the facts or
16 assumptions presented, and such facts or assumptions are material to a conclusion
17 presented in this advisory opinion, then the requestor may not rely on that conclusion as
18 support for its proposed activity. Any person involved in any specific transaction or
19 activity that is indistinguishable in all its material aspects from the transaction or activity

³¹ Advisory Opinion 2015-05 (Shaber) at 3, n.3 (explaining “if an individual were to die in 2016 and bequeath to a committee a contribution that his estate were to disburse in 2018, the 2018 contribution limit would apply to that contribution”).

³² AOR002.

³³ See 52 U.S.C. § 30108.

1 with respect to which this advisory opinion is rendered may rely on this advisory
2 opinion.³⁴ Please note that the analysis or conclusions in this advisory opinion may be
3 affected by subsequent developments in the law including, but not limited to, statutes,
4 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
5 available on the Commission's website.

6 On behalf of the Commission,

7 Allen J. Dickerson
8 Chairman

³⁴ See 52 U.S.C. § 30108 (c)(1)(B).