FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: **The Commission**

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

DATE: **November 30, 2022**

SUBJECT: **Comment Regarding AOR 2022-24 (Allen Blue) from Brendan Fischer**

Attached is a comment received from Brendan Fischer. This matter is on the December 1, 2022 Open Meeting Agenda.

Attachment

Federal Election Commission
1050 First Street, NE
Washington, DC 20463
ao@fec.gov

RE: Comment on Advisory Opinion Request 2022-24 (Allen Blue)

I write in my personal capacity to comment on the two drafts regarding Advisory Opinion Request 2022-24 (Allen Blue). Specifically, this comment addresses how contributions from an irrevocable trust should be attributed. The Commission has long treated contributions from analogous trusts as attributable to the individual or individuals who actually provided the funds, and it should do so here as well.

The requester, Mr. Blue, seeks to establish an irrevocable trust during his lifetime that would make contributions to candidates, political committees, and other recipients.[1] The trust would make contributions to designated recipients, such as the Democratic nominee in a particular district or state, and also make contributions according to broader standards, such as supporting "candidates and committees that further Mr. Blue's support for progressive candidates."[2] Among other things, Mr. Blue asks how such contributions should be attributed.[3]

Draft A correctly concludes that any contribution made by the trust, and financed by Mr. Blue, be attributed to both the trust and to Mr. Blue. Such a conclusion is consistent with past Commission guidance and protects the public's right to know where political money is coming from.

Over decades of Advisory Opinions, the Commission has concluded that the testamentary estate of a donor is the successor legal entity to the individual donor, and as such, the trust's contributions are considered contributions from the individual who provided the funds, with the trust sharing the individual's contribution limit.[4]

As the Commission explained in Advisory Opinion 2004-02 (NCEC), when a political committee reports contributions made by such a testamentary trust, the committee must disclose the name of "both the trust and the name of the decedent."[5]

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[1] AOR at 1.
[2] AOR at 2.
[3] AOR at 3, 5.
[4] *See, e.g.*, AO 2015-05 (Shaber), AO 2004-02 (NCEC), AO 1999-14 (Council for a Livable World).
[5] AO 2004-02 (NCEC) at 3.

Contributions from other testamentary trusts have similarly been attributed to the decedent who provided the funds.[6]

Although the trust proposed by Mr. Blue is not a testamentary trust because it would be funded and active during his lifetime, both Drafts A and B recognize that the same principles apply to the trust at issue in this request.[7]

Consistent with prior Commission precedent, both Drafts A and B correctly conclude that "the limits that apply to a contribution by the proposed trust to a candidate or political committee are those that would apply to Mr. Blue (whether he is living or deceased at the time of the contribution) at the time that the trust relinquishes control of the funds to the ultimate recipient political committee or candidate."[8]

However, the drafts diverge as to how such a contribution should be attributed.

Draft A correctly concludes that all contributions from the trust be attributed to both the trust and to Mr. Blue.[9] Draft B, in contrast, concludes that only contributions to "designated recipients based on objective criteria set forth in the trust instrument" be attributed to both the trust and to Mr. Blue, whereas contributions made pursuant to "discretionary standards" in the trust document be attributed only to the trust.[10]

If the Commission were to adopt Draft B, it could lead to the odd result where a donor transfers funds to a trust, and shares a contribution limit with that trust, but contributions from the trust might be attributed exclusively to the trust, rather than to the actual source of the funds.

Of greater concern is that Draft B could open a new dark money loophole whereby donors might funnel money through trusts to candidates, political parties, and super PACs while keeping their names off of FEC reports.[11]

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[6] *See, e.g.,* Libertarian National Committee, 2020 February Monthly Report at 52, FEC Form 3X (filed Feb. 20, 2020), https://docquery.fec.gov/cgi-bin/fecimg/?202002209186907419 (bequested contribution from requester in AO 2015-05 attributed to the decedent).
[7] Draft A at 5-6, Draft B at 5-6.
[8] Draft A at 10, Draft B at 11.
[9] Draft A at 6-9.
[10] Draft B at 6-10. I concur with comments from Campaign Legal Center that a trust contribution should also be attributed to trustees when they exercise discretion over the recipient. However, in every instance, a contribution made by such a trust should also be attributed to the donor who provided the funds, and with whom the trust shares a contribution limit.
[11] Under Draft B, a donor would have to give a trustee "discretionary standards" in order to secretly finance candidates and political committees, but this provides little solace. Under Draft B, if a donor directed a trustee to, say, "support candidates who support a deregulated cryptocurrency market," the donor could potentially buy substantial influence while keeping the public in the dark. Such a concern is not unfounded. *See* Marco Quiroz-Gutierrez, *Sam Bankman-Fried says he donated just as*

In many states, trusts are shielded by financial secrecy laws that prohibit the public from knowing where the funds originally came from. Indeed, the 2021 Pandora Papers leak revealed how trusts in U.S. states like South Dakota are harboring billions of dollars of "offshore" wealth in the name of foreign government officials and kleptocrats.[12]

If a contribution is made in the name of a trust without attribution to the true donor, voters would often have no ability to identify where the money had come from, or who had directed it. Very often, a voter could only identify that a trust was registered by a generic registered agent in a state like Delaware or South Dakota.[13] As a result, voters would be deprived of information about who is financing candidates or seeking to influence their vote.

I respectfully ask the Commission to adopt Draft A's requirement that any contribution made by the trust, and financed by Mr. Blue, be attributed to both the trust and to Mr. Blue.

Respectfully submitted,

Brendan Fischer

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many millions to Republicans as Democrats, but didn't publicize it because reporters would 'freak the f–k out', FORTUNE (Nov. 29, 2022), https://fortune.com/crypto/2022/11/29/sam-bankman-fried-political-donations-democrats-republicans-dark-money/.

[12] *See, e.g,* Debbie Cenziper, Will Fitzgibbon & Salwan Georges, *Foreign Money Secretly Floods U.S. Tax Havens. Some of It Is Tainted.,* WASH. POST (Oct. 4, 2021), https://www.washingtonpost.com/business/interactive/2021/booming-us-tax-haven-industry/; David Pegg & Dominic Rushe, *Pandora Papers Reveal South Dakota's Role as $367Bn Tax Haven*, GUARDIAN (Oct. 4, 2021), https://www.theguardian.com/news/2021/oct/04/pandora-papers-reveal-south-dakotas-role-as-367bn-tax-haven.

[13] *See, e.g.,* Institute on Taxation and Economic Policy, *Delaware: An Onshore Tax Haven* (Dec. 10, 2015), https://itep.org/delaware-an-onshore-tax-haven/.