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VoteDown PAC  
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November 15, 2023

Federal Election Commission  
Office of General Counsel  
1050 First Street, NE  
Washington, DC 20463

**Re: Request for Advisory Opinion from the Federal Election Commission**

VoteDown PAC hereby submits this Advisory Opinion Request pursuant to 52 USC 30108 and 11 CFR 112.6.

## **BACKGROUND**

VoteDown PAC ("VoteDown") is a nonconnected political committee that was formed to promote the election of non-incumbent candidates for Federal office and is registered with the Commission.<sup>1</sup> VoteDown plans to serve as a conduit for contributions earmarked for federal Democratic and Republican candidates and federal party committees. See 52 U.S.C. 30116(a)(8); 52 U.S.C. 30102(b)(1) and (2); 11 CFR 110.6 and 102.8. VoteDown solicits only on its web site, [www.votedown.org](http://www.votedown.org), and accepts contributions made only by credit card.

### **VoteDown's Candidate Selection Process**

VoteDown proposes to solicit and receive earmarked contributions designated for the primary and/or general election campaigns of Leading Prospective Opponent of Office Holders ("Leading Opponent") listed on VoteDown's web site. VoteDown would list the names of the existing office holders and allow donors to choose to fund their Leading Opponent in either the primary or general election campaign. VoteDown would identify each contribution as being designated either for the primary election or the general election of the Leading Opponent in its report to the Commission for the reporting period in which the contribution is received, in accordance with 11 CFR 110.6(c)(1)(ii).

Although VoteDown would like to begin soliciting and receiving contributions earmarked for Leading Opponent "as soon as possible," VoteDown proposes to postpone forwarding the earmarked

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<sup>1</sup> See FEC Statement of Organization (VoteDown PAC), filed September 29, 2023.

contributions until 90 days before the respective election (*i.e.*, the "Closing Date"). At that time, the Leading Opponent, as defined by criteria set up prior to the donation, will be declared.

The criteria for selecting the Leading Opponent will be available to donors on VoteDown's website. On the Closing Date, VoteDown will consult with all published polls of that particular race which have been published within ninety (90) days of the Closing Date by a pollster which has been approved and published on the VoteDown web site list of approved pollsters.<sup>2</sup> VoteDown will average all of the applicable pollsters to determine the candidate in the race, other than the incumbent Office Holder which was donated against, who has the highest polling in the race.<sup>3</sup> That candidate will be declared the Leading Opponent.

If no applicable public polling has been conducted on the race in question, or if multiple candidates are in an exact tie for the race, VoteDown will refer to the latest published FEC filings as of the Closing Date to determine which opposing candidate has the highest Net Cash On Hand (defined as Cash On Hand (Line 8 of FEC Form 3) plus Debts and Obligations owed to the campaign (Line 9 of FEC Form 3), minus outstanding Debts and Obligations (Line 10 of FEC Form 3)). The candidate with the highest Net Cash On Hand will be declared the Leading Opponent. In the event multiple candidates have the exact same Net Cash On Hand, the amounts will be split equally between the Leading Opponents.

Once the Leading Opponent has been declared, VoteDown would send a check to that Leading Opponent's principal campaign committee within ten days for the total amount of the earmarked contributions that VoteDown has received for that candidate.<sup>4</sup>

If no such Leading Opponent can be identified (*e.g.*, if the Office Holder runs unopposed in that election) or if the Leading Opponent cannot or will not accept the donations, then VoteDown proposes to forward the contributions earmarked for that opponent to a federal party committee of the Office Holder, for a primary election, or a federal party committee that opposes the Office Holder for a general election (*i.e.*, if the Office Holder is a Democrat, the funds would be forwarded to the DNC for contributions earmarked for a primary election and the RNC for contributions earmarked for a general election. If the Office Holder is a Republican, the funds would be forwarded to the RNC for a contribution earmarked for a primary election and the DNC for a contribution earmarked for a general election race). If the Office Holder is an independent and is unopposed or the Leading Opponent will not accept the donation, the donation will be split evenly in contributions to the RNC and DNC.

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<sup>2</sup> The list of approved pollsters is available at Appendix A and will be publicly available on VoteDown's website.

<sup>3</sup> In the event that a pollster has conducted multiple polls for that race within 90 days of the Closing Date, only the most recent poll will be used as part of determining the average.

<sup>4</sup> VoteDown proposes to provide the recipient campaign committee, or the DNC or RNC, with a report containing all of the required information with respect to the source of each earmarked contribution as required in 52 U.S.C. 30116(a)(8) or 52 U.S.C. 30102(b)(2) and 11 CFR 110.6(c)(1)(iv) or 11 CFR 102.8, respectively. VoteDown also proposes to disclose the forwarded contributions on VoteDown's next regular report filed with the Commission.



### **The flow of funds:**

VoteDown proposes to operate its system in line with the following:

1. Donor wants to donate \$100 against Politician X.
2. Donor is informed that there is a separate credit card fee for each donation, included by VoteDown PAC, and which has been passed through by the credit card processor for the convenience of the donor.
3. Donor is charged \$100, plus the credit card processing fee, as one charge on their credit card.
4. VoteDown PAC receives the full amount charged (\$100 plus fees), \$100 of which is the federal contribution and the remainder which accounts for the credit card processing fee.
5. VoteDown PAC remits the amount of the credit card processing fee to the credit card processor.
6. VoteDown PAC reports the \$100 to the FEC as a contribution. VoteDown PAC plans to report the receipt of such fees on Line 15 as "Offsets to Operating Expenditures" and the remittance of such fees to the credit card processor on Line 21 as "Other Federal Operating Expenditures."

## **QUESTIONS PRESENTED**

***1. Will contributions received and forwarded by VoteDown be considered earmarked contributions under the Commission's regulations such that the contributions are attributable only to the original contributor and not VoteDown?***

The Commission has concluded that an intermediary or conduit who exercised no direction or control over the choice of recipient and, therefore, that earmarked contributions were attributable only to the original contributor — and not the intermediary or conduit — when all of the following conditions were met: (1) the funds were disbursed after an objective, easily determinable condition outside the control of the intermediary or conduit was triggered; (2) the intermediary or conduit specified a date certain by which the condition must be met; (3) the intermediary or conduit would refund or otherwise lawfully distribute the funds if the triggering condition was not met; and (4) the intermediary or conduit clearly communicated all of the information regarding the first three conditions to contributors. Advisory Opinion 2019-01 (It Starts Today) at 2-4; See also AO 2019-11 (Pro-Life Democratic Candidate PAC); AO 2022-09 (Democratic Party of Wisconsin Federal).

VoteDown's proposal meets these four criteria:

1. VoteDown will use objective, easily ascertainable criterion outside of its control for determining which candidate is the Leading Opponent. Primarily, the Leading Opponent will be determined by reference to public polling data available on the Closing Date. Alternatively, if no polling is available, the Leading Opponent will be the non-incumbent candidate whose "Net Cash On Hand" is the highest, based on the latest publicly available FEC reports.<sup>5</sup>

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<sup>5</sup> In Advisory Opinions 2019-01 (It Starts Today) and 2019-11 (Pro-Life Democratic Candidate PAC), the Commission concluded that this first criteria was met when the determination of the recipient candidate was tied to the



2. The contribution will be forwarded within 10 days of the specified date, *i.e.*, 90 days before the primary or general election.
3. VoteDown will either refund or lawfully distribute the funds, whether to a candidate or a “default” committee, as explained above, if the triggering event does not occur.
4. All information regarding the above three factors will be clearly available to potential contributors via the VoteDown donation page and via its Terms & Conditions.

Accordingly, because VoteDown would not exercise any direction or control over these contributions, and the original contributor would have ultimate control over the funds, the contributions would be attributed to the original donor, not VoteDown.

***2. May VoteDown postpone forwarding the earmarked contributions to the designated candidate (i.e., Leading Opponent) until after the designated candidate is identified using external, public criteria, set up and disclosed to the donor at the time of donation?***

In past advisory opinions, the Commission has concluded that the ten-day transfer window does not begin to run until both the identity of the candidate and the status of that candidate is determined. For example, in Advisory Opinion 2003-23 (WeLead) the recipient’s status (presumptive nominee) was known, but the individual’s name was not yet determined, whereas in Advisory Opinion 2006-30 (ActBlue) the recipient’s name was known but the recipient’s status (candidate for the office for the office of the President of the United States) was yet to be determined. In both cases, the regulatory requirement “that earmarked contributions be forwarded within ten days of receipt is tolled until *both* the recipient’s identity and candidacy status are known.” *See id.*

Here, the status of the candidate will likely already be determined at the time the contribution is made because those running for office will likely already have formally declared their candidate status<sup>6</sup>. Regardless of whether the Leading Opponent’s candidate status is known or not, the identity of the Leading Opponent is unknown at the time the contribution is made.

Further, although the selection of the Leading Opponent may have different permutations depending on the number of challengers, if any, during a primary or general election, the Commission has approved other proposals where multiple candidates could receive funds based on the outcome of

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endorsement of a non-related 501(c)(4) social welfare organization. Here, the criteria for determining the Leading Opponent is based on publicly available polling—the results of which are determined by the responses to the polling questions, and therefore out the hands of VoteDown PAC. Likewise, if FEC fundraising data is used to determine the Leading Opponent because there is not any applicable polling, that information is publicly available and not within the control of VoteDown. In all cases, the criteria will be publicly available and completely transparent to the donor.

<sup>6</sup> Technically, it would still possible that a new, later entrant into a race becomes the Leading Opponent by the deadline for the determination.



a number of contingencies. For example, in Advisory Opinion 2008-10 (VoterVoter.com), the Commission approved draft funds that named a series of potential candidates and the ultimate distribution was contingent on whether the first in the series of candidates met the objective criteria.

**3. If a Leading Opponent is not available (e.g., Office Holder is running unopposed) or is unable or unwilling to accept the funds, may VoteDown forward the contributions earmarked for that individual candidate to the DNC or RNC according to the criteria established above?**

Like in Advisory Opinion 2006-30 (ActBlue), VoteDown will establish a “default recipient” to receive the contribution should the Leading Opponent reject the contribution or if no candidate satisfies the criteria. VoteDown will clearly state on its website how the default recipient will be determined.

**4. If the earmarked funds are held in an interest bearing depository account before they are transferred to the ultimate recipient committee, may VoteDown retain the interest earned on those funds to use for any lawful purpose in accordance with the FECA?**

VoteDown plans to hold earmarked funds in an interest-bearing account at a depository institution pursuant to 11 C.F.R. 103.3(a). *See id.*, (“Funds may be transferred from the depository for investment purposes, but shall be returned to the depository before such funds are used to make expenditures.”). Under Commission regulations, any interest or other investment income of a committee are not contributions, but must be reported. *See id.* 104.3(a)(4)(vi). Consistent with these regulations, VoteDown plans to retain any interest earned by VoteDown while it holds the funds in an interest bearing account at its depository and to use any interest to pay for or offset administrative costs, or other uses permissible under the Federal Election Campaign Act.

**5. How should VoteDown PAC reflect the receipt and subsequent payment of credit card processing fees on its FEC reports?**

VoteDown will use a commercial vendor to process credit card contributions. The vendor will charge a commercially reasonable fee to the user and will process the contribution at the request and for the benefit of the donor. The fee will be a percentage of the contribution and will be added to the amount of the contribution determined by the donor. That aggregate amount will be received by VoteDown PAC. VoteDown PAC will then retain the full amount of the donor’s contribution to be held as detailed above until disbursed to a Leading Opponent or default recipient. Concurrently, VoteDown PAC will remit the entire credit card processing fee to its vendor.

Because the fee is one paid by the donor for the donor’s convenience of using the vendor’s credit card processing service, VoteDown does not plan to report such fees on its FEC reports on Line 11 as a “Contribution.” Rather, VoteDown plans to report the receipt of such fees on Line 15 as “Offsets to Operating Expenditures.” Subsequently, the transfer of the fee to the credit card processor will be reported on Line 21 as “Other Federal Operating Expenditures.”



Does the above proposed reporting comply with the Federal Election Campaign Act? If not, how should VoteDown PAC report the proposed flow of funds?

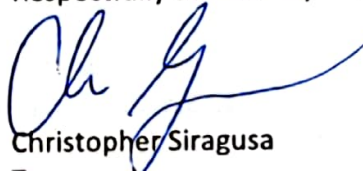
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## **CONCLUSION**

The Commission should issue an Advisory Opinion approving VoteDown's plan to serve as a conduit for contributions earmarked for federal candidates and federal party committees, as described above.

If the Commission has any questions or needs further information or clarification regarding this Request, please contact Christopher Siragusa, Treasurer of VoteDown PAC, or Frederick T. Dombo III and William A. Powers, counsel to VoteDown PAC in this request and copied below.

Respectfully submitted,



Christopher Siragusa  
Treasurer  
VoteDown PAC

cc: Frederick T. Dombo III  
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## APPENDIX A

<b>VoteDown's Approved Pollsters</b>
SurveyUSA
Rasmussen Reports
Zogby Analytics
YouGov
Public Policy Polling
Mason-Dixon Polling & Strategy
American Research Group
SurveyMonkey
Emerson College
Quinnipiac University
Marist College
Harris Insights & Analytics
Insider Advantage
Gravis Marketing/Kaplan Strategies
University of New Hampshire Survey Center
Monmouth University
Trafalgar Group
Ipsos
Change Research
Big Village
Data For Progress
Suffolk University
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ABC News/The Washington Post
Public Opinion Strategies
Mitchell Research & Communications
Morning Consult
CBS News/The New York Times
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