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For meeting of March 28, 2019

March 21, 2019

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
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Subject: Draft AO 2019-01 (It Starts Today) 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 12:00 pm (Eastern Time) on March, 27, 2019.

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 2019-01

2

3 Jonathan Zucker, Esq.

4 It Starts Today

5 237 Florida Avenue, N.W.

6 Washington, D.C. 20001

7

8 Dear Mr. Zucker:

DRAFT A

9 We are responding to your advisory opinion request on behalf of It Starts Today
10 (the “Committee”) concerning the application of the Federal Election Campaign Act,
11 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to the Committee’s
12 proposal to establish nominee and prospective nominee funds that would accept
13 contributions earmarked for candidates who receive the public endorsement of a specified
14 endorsing organization. The Commission concludes that the proposed nominee and
15 prospective nominee funds would be consistent with the Act and Commission
16 regulations.

17 ***Background***

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

20 The requestor is a non-connected political committee that acts as an intermediary
21 for earmarked contributions to specific candidates. Advisory Opinion Request at
22 AOR001. Currently, the Committee offers both “nominee funds,” in which contributions
23 are earmarked for Democratic nominees for Congress who are not yet identified, and
24 “presumptive nominee funds,” in which contributions are earmarked for the eventual
25 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.

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

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

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

13 ***Question Presented***

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

18 ***Legal Analysis and Conclusion***

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

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

15 The Commission has concluded that an intermediary may accept conditional
16 contributions on behalf of an as-yet unidentified candidate under the following
17 conditions: (1) the funds were disbursed after triggering an objective, easily
18 determinable, condition outside the control of the intermediary; (2) the intermediary
19 specified a date certain by which the condition must be met; (3) the intermediary would
20 refund or otherwise lawfully distribute the funds if the triggering condition was not met;
21 and (4) the intermediary clearly communicated all of the information in the first three
22 conditions to contributors. Advisory Opinion 2016-15 (Gary Johnson Victory Fund) at 4
23 (determining that joint fundraising committee meeting these four conditions could accept

1 and hold in escrow contributions pending Commission’s recognition of recipient
2 committees’ status as state party committees); *see also* Advisory Opinion 2014-19
3 (ActBlue) at 4 (concluding that earmarked contribution could be conditioned on
4 requirement that nominee be a woman because gender is an “objective, easily
5 determinable fact outside of [the requestor’s] discretion or control” and a default recipient
6 was identified and disclosed to contributors in advance); Advisory Opinion 2003-23 (WE
7 LEAD) at 4-6 (permitting contributions earmarked for “presumptive nominee” where
8 default recipient was specified in advance and non-connected committee had no control
9 over selection of delegates or their certification); Advisory Opinion 1982-23
10 (Westchester Citizens for Good Government) at 2 (concluding that intermediary
11 exercised no direction or control in forwarding contributions earmarked for yet-to-be-
12 determined candidate identified by “specific office, party affiliation, and election cycle”).
13 In each of these circumstances, the Commission determined that the contribution would
14 be attributed only to the original contributor and not the intermediary.

15 The Committee’s proposal meets all four of these conditions. First, under the
16 facts presented in the request, the criterion of a public endorsement by an endorsing
17 organization is an objective, easily determinable fact outside of the Committee’s control,
18 similar to the gender of the nominee in Advisory Opinion 2014-19 (ActBlue). The
19 Committee would identify a single endorsing organization in the solicitation and would
20 not have any role in the endorsement process. AOR002, AOR006. Moreover, the
21 proposal describes an “endorsement” as “a formal statement made on behalf of an
22 endorsing organization that encourages voters to support a single, specific candidate for a
23 specific office” and appear in “a newspaper or magazine article, a transcript from a

1 television show, a press release, or any publicly available website” — this description
2 provides a set of objective criteria that deprive the Committee of discretion in
3 determining whether the endorsement criteria are met. AOR002, AOR006.² Second, the
4 Committee would specify a date in the solicitation by which a candidate must meet all
5 criteria in order for the Committee to forward the contribution. AOR006. Third, the
6 Committee would lawfully distribute the funds to a default recipient if all triggering
7 conditions were not met by that date. AOR006-007. Finally, the Committee would
8 clearly disclose the above information to contributors in the solicitation. AOR001,
9 AOR006-007. As a result, in the circumstances described, the proposed endorsement-
10 conditioned nominee and presumptive nominee funds are consistent with the Act and
11 Commission regulations, and contributions to those funds are attributable only to the
12 original contributor and not to the Committee.

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. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
16 in any of the facts or assumptions presented, and such facts or assumptions are material to
17 a conclusion presented in this advisory opinion, then the requestor may not rely on that
18 conclusion as support for its proposed activity. Any person involved in any specific
19 transaction or activity which is indistinguishable in all its material aspects from the
20 transaction or activity with respect to which this advisory opinion is rendered may rely on
21 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.

1 conclusions in this advisory opinion may be affected by subsequent developments in the

2 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

3 Any advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

Ellen L. Weintraub
Chair