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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 19-33-B
AGENDA ITEM
For meeting of August 22, 2019

August 9, 2019

MEMORANDUM

TO: The Commission

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

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Associate General Counsel

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Attorney

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Attorney

Subject: Draft AO 2019-10 (Price for Congress) Draft B

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 August 21, 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 2019-10

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Stefan Passantino, Esq.
Nathan Groth, Esq.
Elections, LLC
1000 Maine Avenue, SW
Suite 400
Washington, DC 20024

DRAFT B

11 Dear Messrs. Passantino and Groth:

12 We are responding to your advisory opinion request on behalf of Price for
13 Congress (the “Committee”), concerning the application of the Federal Election
14 Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to the
15 Committee’s proposal to contribute funds to establish and operate a non-profit
16 organization. The Commission concludes that the Act and Commission regulations
17 prohibit the Committee from donating its funds to the organization as proposed because
18 the donation would constitute the conversion of Committee funds to personal use.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 June 5, 2019, and on reports filed with the Commission. Price for Congress is the
22 principal campaign committee of former Congressman Dr. Thomas Price.¹ As of its
23 April 15, 2019, quarterly report, the Committee had \$1,767,729.00 in total assets.

¹ Price for Congress, Statement of Organization, Amend., FEC Form 1 (Dec. 14, 2018), <https://docquery.fec.gov/pdf/255/201812149143521255/201812149143521255.pdf>. Dr. Price is also a former chairman of the House Budget Committee and most recently served as Secretary of the Department of Health and Human Services. See Robert Pear and Thomas Kaplan, *Tom Price Is Confirmed as Health Secretary*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/us/politics/tom-price-health-and-human-services.html>.

1 Advisory Opinion Request at AOR002.² The Committee now proposes to transfer some,
2 but not all, of the Committee’s assets to establish and operate a non-profit organization
3 (the “Organization”) that will register as a tax-exempt social welfare organization under
4 section 501(c)(4) of the Internal Revenue Code.³ AOR002. Funds donated by the
5 Committee to the Organization and any income generated therefrom will be placed in a
6 separate segregated account and will not be comingled with other assets of the
7 Organization. AOR002. Such funds would be used to advance the Organization’s stated
8 purpose of engaging in research, education, and publications related to health, budget,
9 and public policy matters. AOR001. Research, publications and presentations will likely
10 be distributed under Dr. Price’s name and official titles with the Organization. AOR004.
11 The Organization “will not attempt to influence legislation nor participate or intervene in
12 any political campaign on behalf of, or in opposition to, any candidate for public office.”
13 AOR001. The Organization may promote and organize unpaid opportunities for Dr.
14 Price to speak, write, publish, or otherwise make appearances to present the work of the
15 Organization. AOR001-002.

16 Dr. Price will serve as the Organization’s president and chief executive officer.
17 AOR001. In these capacities, Dr. Price would have authority to make staffing decisions,
18 including hiring and firing decisions and setting compensation for employees. *Id.* The

² See also Price for Congress, April Quarterly Report, FEC Form 3 at 2 (April 15, 2019), <https://docquery.fec.gov/pdf/546/201904159146141546/201904159146141546.pdf>.

³ The Committee also notes that “[i]t is contemplated that the Committee may also transfer funds to the Organization at a future time.” AOR002.

1 Organization's bylaws would prohibit Dr. Price from receiving any compensation from
2 the Organization. *Id.* This restriction would also apply to any members of Dr. Price's
3 family, former employees of the Committee, and former employees of Dr. Price's official
4 public offices, if any, who serve the Organization in any capacity. *Id.* The Organization
5 may, however, decide to amend its bylaws and compensate such individuals or Dr. Price
6 in the future if permitted by applicable law (as further described below). AOR002.
7 Additionally, the Organization may reimburse Dr. Price for out-of-pocket expenses
8 incurred on behalf of the Organization in his role as president and CEO. AOR001.
9 Notwithstanding the foregoing, the Request states that until such time as all funds
10 donated by the Committee have been expended by the Organization, neither Dr. Price,
11 members of his family, former employees of the Committee nor any former employees of
12 Dr. Price's official public offices shall be eligible for any form of compensation, gift or
13 grant, or materials or reimbursement for any expenses that would constitute a "personal
14 use" described in 52 U.S.C. § 30114(b)(2)(A)-(I) and section 113.1(g)(1)(i)(A)-(J) of
15 Commission regulations. AOR002.

16 ***Question Presented***

17 *May the Committee donate its funds to establish and operate the Organization?*

18 ***Legal Analysis***

19 No, the Committee may not donate its funds to the Organization because the
20 donation will result in the conversion of Committee funds to personal use of Dr. Price.

21 The Act identifies six categories of permissible uses of contributions accepted by
22 a federal candidate. They include use "for contributions to an organization described in

1 section 170(c) of the Internal Revenue Code” and “for any other lawful purpose” except
2 personal use of the funds. 52 U.S.C. § 30114(a)(3), (6), (b); *see also* 11 C.F.R. §
3 113.2(b), (e).

4 As a threshold matter, the Commission considers whether the proposed
5 contribution is being made to an entity described in section 170(c) of the Internal
6 Revenue Code. Advisory Opinion 2005-06 (McInnis) at 2. Section 170(c) defines
7 “charitable contributions,” including contributions to non-profit entities that are
8 “organized and operated exclusively for religious, charitable, scientific, literary, or
9 educational purposes,” which describes section 501(c)(3) organizations.

10 The Commission has long considered “an organization described in section 170(c)
11 of the Internal Revenue Code” to be equivalent to a charitable organization organized
12 pursuant to section 501(c)(3).⁴ *See, e.g.,* Advisory Opinion 2005-06 (McInnis) at 2, n.1
13 (“Charities that qualify for tax exempt status under section 501(c)(3) of the IRC are
14 described in section 170(c) of the IRC”); Advisory Opinion 1997-01 (Bevill) at 2, n.6
15 (“26 U.S.C. §§ 170(c) and 501(c)(3) contain overlapping qualifications and
16 classifications for tax-exempt status. Therefore, as applied to the [requestor], these
17 sections are used interchangeably.”).

18 Accordingly, in prior advisory opinions, the Commission has permitted the
19 donation of campaign funds to 501(c)(3) organizations under 52 U.S.C. § 30114(a)(3)

⁴ Section 501(c) describes the types of organizations that are exempt from paying federal taxes.

1 and 11 C.F.R. § 113.2(b) because it determined that 501(c)(3) organizations qualify as
2 entities described in section 170(c). *See, e.g.*, Advisory Opinion 2012-05 (Lantos) at 3;
3 Advisory Opinion 2005-06 (McInnis) at 2-3; Advisory Opinion 1997-01 (Bevill) at 2-3.⁵
4 By contrast, the Organization represents that it will “be registered as a social welfare non-
5 profit organization pursuant to section 501(c)(4) of the Internal Revenue [Code].”
6 AOR002. While 501(c)(4) organizations are tax-exempt, donations to them are not tax-
7 deductible under section 170(c).⁶ The Commission has never applied section 30114(a)(3)
8 to contributions to 501(c)(4) entities, which are not subject to the same restrictions as
9 501(c)(3) entities, and it declines to do so here. Notwithstanding the Committee’s
10 representation that the Organization will operate subject to certain self-imposed
11 restrictions consistent with those applicable to 501(c)(3) entities, the donation of
12 Committee funds to the Organization is not permissible under 52 U.S.C. § 30114(a)(3)
13 and 11 C.F.R. § 113.2(b) because the Organization will be organized and registered as a
14 501(c)(4) and not a 501(c)(3), contributions to the Organization will not be charitable
15 contributions as described in section 170(c), and it is therefore not an organization

⁵ The law on “personal use” of campaign funds has evolved over the years, and the Commission’s earlier Advisory Opinions on this topic date back to an era when former Members of Congress were permitted to keep their excess campaign funds upon retirement. *See, e.g.*, Advisory Opinion 1983-27 (McDaniel); *see also* 2 U.S.C. § 439a (1982).

⁶ The Commission is aware of only one circumstance whereby a contribution to a 501(c)(4) organization was considered charitable under section 170(c). IRS Rev. Rul. 71-47 (holding that contributions to a 501(c)(4) volunteer fire company were charitable under section 170(c)(1) because they were deemed to be for “the use of a political subdivision of a state for exclusively public purposes” and “lessen the burdens of government”). The proposed donation of Committee funds to the Organization does not satisfy these criteria.

1 described under section 170(c) of the Internal Revenue Code. Accordingly, the donation
2 from the Requestor to the Organization would not qualify as a permitted use under
3 section 30114(a)(3) of the Act.

4 The Commission also considers here whether the donation of excess campaign
5 funds would be otherwise permissible under a “personal use” analysis. Put another way,
6 may contributions of political committee funds to a 501(c)(4) organization still be
7 permissible under section 30114(a)(6) (“any other lawful purpose”) provided that none of
8 the donated funds are converted by any person to personal use? *See* Advisory Opinion
9 1993-10 (Colorado) at 3 (“The Commission has found that transfers and donations to
10 other recipients where section 170[(c)] does not apply may still be permissible under the
11 ‘any other lawful purpose’ clause of section [30114(a)] as long as it did not involve
12 conferring a personal benefit on the former candidate.”). Conversion to personal use
13 occurs when a contribution or amount is used “to fulfill any commitment, obligation, or
14 expense of a person that would exist irrespective of the candidate’s election campaign or
15 individual’s duties as a holder of Federal office.” 52 U.S.C. § 30114(b)(2); *see also* 11
16 C.F.R. § 113.1(g).

17 The Act and Commission regulations provide a non-exhaustive list of uses of
18 campaign funds that are *per se* personal use. 52 U.S.C. § 30114(b)(2); 11 C.F.R.
19 § 113.1(g)(1)(i). For uses of campaign funds not included on this list, such as the
20 donation of funds to the 501(c)(4) organization at issue here, the Commission determines
21 on a case-by-case basis whether the use is a prohibited “personal use,” that is, whether

1 campaign funds are used to pay expenses that would exist irrespective of the candidate's
2 campaign or federal officeholder duties. 11 C.F.R. § 113.1(g)(1)(ii).⁷

3 First, the Commission notes that as a former officeholder, Dr. Price no longer has
4 any campaign or officeholder duties. The Request does not identify any campaign or
5 officeholder expenses that remain from his House service, which ended in February 2017.
6 All of his expenses in relation to the Organization would exist “irrespective of [his]
7 election campaign or . . . duties as a holder of Federal office.” 52 U.S.C. 30114(b)(2); 11
8 C.F.R. § 113.1(g)(ii).

9 Moreover, the Committee has stated that the Organization will present
10 publications and research under Dr. Price's name and official titles (as both its president
11 and CEO) and promote opportunities for Dr. Price to speak or otherwise make
12 appearances to present the Organization's work. AOR001-002. The Organization
13 proposes to act as a personal vehicle for Dr. Price to promote his ideas, personal brand,
14 and reputation using campaign funds. Although the Organization will not compensate
15 Dr. Price for his services on its behalf so long as Committee funds remain in the
16 Organization's accounts, it will reimburse Dr. Price for his out-of-pocket expenses
17 incurred in connection with his official Organization-related duties and will pay to
18 promote his unpaid speaking engagements and publications. AOR001-002. The Request

⁷ Because this advisory opinion addresses the donation of campaign funds to a 501(c)(4) organization, prior advisory opinions applying 11 C.F.R. § 113.1(g)(2) to the donation of campaign funds to section 170(c) organizations (*i.e.*, 501(c)(3) entities) are inapplicable to the present analysis. *See, e.g.*, Advisory Opinion 2012-05 (Lantos); Advisory Opinion 2005-06 (McInnis); Advisory Opinion 1997-01 (Bevill).

1 proposes no oversight or financial controls over Dr. Price's reimbursement decisions; he
2 appears to have unilateral control over this area of the Organization's finances.

3 These appearances and publications will enhance Dr. Price's professional
4 reputation and his earning ability, notwithstanding the Organization's pledge to only
5 organize unpaid speaking opportunities for Dr. Price.

6 Like anyone else, Dr. Price is free to promote his ideas and professional
7 reputation. However, neither the Act nor Commission regulations permit the use of
8 Committee funds to do so. Dr. Price would be barred from directly using Committee
9 funds to pay for such speaking, writing, publishing, and travel expenses; using an alter-
10 ego organization to reimburse him for these expenses is likewise prohibited. Accordingly,
11 the Commission concludes that the proposed transfer of Committee funds to an
12 organization inextricably linked to, controlled by, and promoting a former federal
13 officeholder would constitute the conversion to personal use of the Committee's funds.

14 ***Conclusion***

15 The Committee may not donate its funds to the Organization because the donation
16 would constitute the conversion of Committee funds to personal use by Dr. Price.

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in your
19 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
20 in any of the facts or assumptions presented, and such facts or assumptions are material to
21 a conclusion presented in this advisory opinion, then the requestor may not rely on that
22 conclusion as support for its proposed activity. Any person involved in any specific

1 transaction or activity which is indistinguishable in all its material aspects from the
2 transaction or activity with respect to which this advisory opinion is rendered may rely on
3 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or
4 conclusions in this advisory opinion may be affected by subsequent developments in the
5 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
6 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