

**RECEIVED**

By Office of the Commission Secretary at 4:42 pm, Jul 18, 2019



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA DOCUMENT NO. 19-35-A**  
**AGENDA ITEM**  
**For meeting of July 25, 2019**

July 18, 2019

**MEMORANDUM**

TO: The Commission

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

Neven F. Stipanovic *NFS*  
Acting Associate General Counsel

Joanna S. Waldstreicher *JSW*  
Acting Assistant General Counsel

Heather Filemyr *H/F*  
Attorney

Subject: Draft AO 2019-11 (Pro-Life Democratic Candidate PAC) Draft A

One or more Commissioners have requested that this draft be placed on the Agenda.

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 July 24, 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 2019-11

2

3 Jacob Lupfer

4 Relay Group LLC

5 6400 Baltimore National Pike

6 Suite 170A-312

7 Catonsville, MD 21228

8

9

10 Dear Mr. Lupfer:

**DRAFT A**

11 We are responding to your advisory opinion request on behalf of the Pro-Life  
12 Democratic Candidate PAC (the “Committee”) concerning the application of the Federal  
13 Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations  
14 to a “draft” fund created by the Committee with contributions earmarked for a  
15 Democratic candidate for President who meets experience and endorsement criteria. The  
16 Commission concludes that all contributions to the draft fund would be attributable only  
17 to the original contributor and not to the Committee, because the Committee exercises no  
18 direction or control over the choice of the recipient of funds. The Commission further  
19 concludes that it is permissible for the Committee to designate a specific Congressional  
20 candidate committee to serve as the default recipient, instead of offering refunds, if no  
21 Democratic Presidential candidate meets the criteria to receive the earmarked  
22 contributions.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letter received on  
25 June 10, 2019 and your email received on July 18, 2019.

26 The requestor is a nonconnected political committee that acts as a conduit for  
27 earmarked contributions. Advisory Opinion Request at AOR001. The Committee has

1 created a new type of “draft” fund<sup>1</sup> that aims to encourage what it defines as a “pro-life  
2 Democrat” to seek the party’s 2020 nomination for President. *Id.*

3       The Committee proposes to accept contributions earmarked for a Presidential  
4 candidate who meets the criteria outlined in “Contribution Rules” on the Committee’s  
5 website. AOR001-002, AOR004. To receive earmarked contributions from the draft  
6 fund, a Presidential candidate must be the first Democrat to: 1) meet both the fund’s  
7 experience and endorsement criteria, and 2) file a statement of candidacy with the  
8 Commission. AOR002, AOR004. To meet the experience criterion, the candidate must  
9 be a current or former Member of Congress, a current or former Governor, a retired  
10 General or Admiral, a former cabinet-level administration official, or a state legislator  
11 holding office as of 2019. *Id.* To meet the endorsement criterion, the candidate must  
12 receive the endorsement of Democrats for Life of America.<sup>2</sup> *Id.* Democrats for Life of  
13 America is a political advocacy 501(c)(4) nonprofit organization with a history of  
14 endorsing “pro-life” Democrats in federal races, and the Committee has no role in  
15 Democrats for Life of America’s endorsement process. AOR002. The Committee and  
16 Democrats for Life of America do not have any overlapping board members or paid or  
17 unpaid staff. AOR Supp.

18       If no Democratic Presidential candidate files a statement of candidacy with the  
19 Commission and meets the experience and endorsement criteria by September 29, 2019

---

<sup>1</sup> A “draft” fund is one in which contributions are earmarked for an individual who is not yet, but may become, a candidate. *See* Advisory Opinion 2006-30 (ActBlue).

<sup>2</sup> The requestor acknowledges that the definition of “pro-life” is “contested,” and it states that for purposes of forwarding contributions, the criterion used is whether or not the candidate received the endorsement of Democrats for Life of America. *Id.*

1 (i.e., “before September 30, 2019”), then all contributions will be forwarded to the Dan  
2 Lipinski for Congress political committee. AOR003-004. The draft fund’s “Contribution  
3 Rules” inform contributors of the criteria and the default recipient on the same webpage  
4 where a contribution is made. AOR004; Pro-Life 2020 Democrat Contribution Page,  
5 available at <https://secure.anedot.com/prolifedem/donate> (last visited July 18, 2019).

6 ***Questions Presented***

7 1. *May the Committee accept contributions earmarked for a Democratic*  
8 *Presidential 2020 candidate who meets the experience and endorsement criteria in the*  
9 *draft fund’s “Contribution Rules” without making a contribution to the recipient of the*  
10 *funds?*

11 2. *Is it permissible for the Committee to designate a specific Congressional*  
12 *candidate committee as the default recipient in the event that no Presidential candidate*  
13 *meets the criteria to receive the contributed funds?*

14 3. *If no Presidential candidate meets the criteria to receive the contributed*  
15 *funds, must the Committee offer to refund contributions?*

16 ***Legal Analysis***

17 1. *May the Committee accept contributions earmarked for a Democratic*  
18 *Presidential 2020 candidate who meets the experience and endorsement criteria in the*  
19 *draft fund’s “Contribution Rules” without making a contribution to the recipient of the*  
20 *funds?*

1           Yes. All contributions made through the draft fund would be attributable only to  
2 the original contributor and not to the Committee because the Committee does not  
3 exercise any direction or control over the choice of the recipient of the contributions.

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

22           The Commission has concluded that an intermediary or conduit exercised no  
23 direction or control over the choice of recipient and, therefore, that earmarked

1 contributions were attributable only to the original contributor — and not the  
2 intermediary or conduit — when all of the following conditions were met: (1) the funds  
3 were disbursed after an objective, easily determinable condition outside the control of the  
4 intermediary or conduit was triggered; (2) the intermediary or conduit specified a date  
5 certain by which the condition must be met; (3) the intermediary or conduit would refund  
6 or otherwise lawfully distribute the funds if the triggering condition was not met; and (4)  
7 the intermediary or conduit clearly communicated all of the information regarding the  
8 first three conditions to contributors. Advisory Opinion 2019-01 (It Starts Today) at 2-4  
9 (determining that contributions earmarked for a nominee who received the public  
10 endorsement of a specified endorsing organization, which could be a 501(c)(4) non-profit  
11 organization, were attributable only to original contributor and not intermediary because  
12 contributions would be forwarded if the nominee received the endorsement by a date  
13 certain, intermediary had no role in the endorsement process, and default recipient was  
14 identified and disclosed to contributors in advance); *see also* Advisory Opinion 2014-19  
15 (ActBlue) at 4 (concluding earmarked contribution could be conditioned on requirement  
16 that nominee be a woman because gender is an “objective, easily determined fact outside  
17 of [the intermediary’s] discretion or control” and a default recipient was identified and  
18 disclosed to contributors in advance); Advisory Opinion 2006-30 (ActBlue) at 4-5  
19 (finding draft fund for prospective candidates was permissible when intermediary would  
20 forward contributions to candidate within 10 days of candidate registering with the  
21 Commission or would forward contributions to the Democratic National Committee if the  
22 candidate did not register by specified date); Advisory Opinion 2003-23 (WE LEAD) at  
23 4-6 (permitting contributions earmarked for “presumptive nominee” who received a

1 sufficient number of pledged delegates to secure party's nomination where default  
2 recipient was specified in advance and nonconnected committee had no control over  
3 selection of delegates or their certification). In each of the previous advisory opinions  
4 where these conditions were met, the contribution was attributed only to the original  
5 contributor and not the intermediary or conduit.

6         The Commission concludes that, under the facts of the request, all contributions  
7 would be attributable only to the original contributor and not to the Committee because  
8 the draft fund meets the four conditions outlined in previous advisory opinions, such that  
9 the Committee exercises no direction or control over the choice of the recipient of the  
10 funds. First, the Committee would disburse the funds after the occurrence of objective,  
11 easily determinable conditions outside the control of the Committee. The requirement  
12 that a candidate must receive the endorsement of Democrats for Life of America,  
13 AOR002, AOR004, is consistent with the requirement in Advisory Opinion 2019-01 (It  
14 Starts Today) of a public endorsement by a specified endorsing organization, which the  
15 Commission determined was an objective, easily determinable criterion outside of an  
16 intermediary's control.<sup>3</sup> The Commission reaches the same conclusion here as in that  
17 advisory opinion because the Committee has no role in the endorsement process of  
18 Democrats for Life of America<sup>4</sup> and they have no overlapping board members or staff.

---

<sup>3</sup> In that advisory opinion, the requestor proposed to condition the forwarding of funds on the endorsement of "an organization registered with the Internal Revenue Service under sections 501(c)(4) or 527 of the Internal Revenue Code," among other types of endorsing organizations, and the Commission determined that the proposal was permissible and all contributions would be made only by the original contributor. Advisory Opinion 2019-01 (It Starts Today) at 2-4. Here, as in that advisory opinion, Democrats for Life of America is organized as a political advocacy 501(c)(4) nonprofit organization. AOR002.

<sup>4</sup> As in Advisory Opinion 2019-01, the Commission assumes that the requestor will not use subjective judgement to determine whether a statement from Democrats for Life of America is an

1 The criteria that a candidate must have held one of the public offices listed in the  
2 “Contribution Rules” and must file a statement of candidacy with the Commission,  
3 AOR002, AOR004, are similarly objectively verifiable and not within the Committee’s  
4 control. *See* Advisory Opinion 2006-30 (ActBlue) at 4 (finding registration with the  
5 Commission to be an “easily verifiable act[]”). Second, the Committee’s “Contribution  
6 Rules” identify a date certain by which all conditions must be met: September 29, 2019  
7 (*i.e.*, “before September 30, 2019”). AOR004. Third, as discussed further below, the  
8 Committee would lawfully distribute the contributions to a specified default recipient, the  
9 Dan Lipinski for Congress committee, if all of the conditions for forwarding funds to a  
10 Presidential candidate are not met. AOR003-004. Fourth, all of this information is  
11 communicated to contributors in the “Contribution Rules” on the Committee’s donation  
12 page at the time of contribution. AOR004.<sup>5</sup>

13       2.       *Is it permissible for the Committee to designate a Congressional candidate*  
14 *committee as the default recipient in the event that no Presidential candidate meets the*  
15 *criteria to receive the contributed funds?*

16       3.       *If no Presidential candidate meets the criteria to receive the contributed*  
17 *funds, must the Committee offer to refund contributions?*

---

endorsement. Advisory Opinion 2019-01 (It Starts Today) at 4 n.2. Previous candidate endorsements by Democrats for Life of America have been unambiguous and used the word “endorsement” or “endorse.” *See, e.g.*, Press Release: Democrats For Life Proud to Endorse Dana Outlaw for NC-3 (Apr. 22, 2019), available at: <https://www.democratsforlife.org/index.php/articles-and-op-eds/press-releases/1032-democrats-for-life-proud-to-endorse-dana-outlaw-for-nc-3> (last visited July 1, 2019).

<sup>5</sup> The Committee notes in the “Contribution Rules” that any contributions in excess of \$2,800 per contributor will be considered contributions to the Committee because such amounts would exceed the current per-election limit on contributions to candidates. AOR004; *see* 11 C.F.R. §§ 110.1(b)(1), 110.17(b). The Committee would not act as an intermediary of such excess funds, and those funds must be reported as contributions to the Committee.

1           Yes, it is permissible for the Committee to designate a Congressional candidate  
2 committee to serve as the default recipient if no Presidential candidate meets the criteria  
3 in the “Contribution Rules.” Because distribution to the default recipient is permissible,  
4 the Committee need not offer refunds.

5           An intermediary or conduit who accepts funds for an as-yet unidentified candidate  
6 may refund or otherwise lawfully distribute the contributions if the triggering condition is  
7 not met. *See, e.g.*, Advisory Opinion 2019-01 (It Starts Today) at 3 (listing  
8 circumstances under which an earmarked contribution is made only by the original  
9 contributor and not an intermediary or conduit). The Commission has previously  
10 determined that, in the event no candidate qualifies under objective criteria to receive  
11 earmarked contributions, it is lawful for an intermediary or conduit to forward  
12 contributions to a default recipient that the intermediary identifies to contributors at the  
13 time the contribution is made. *Id.* at 4 (approving a proposal that an intermediary “would  
14 lawfully distribute the funds to a default recipient if all triggering conditions were not  
15 met”); Advisory Opinion 2014-19 (ActBlue) at 5-6 (approving a proposed draft fund with  
16 a “series of potential candidates as default recipients” before ultimately defaulting to a  
17 political committee already in existence if none of those potential candidates became  
18 candidates).

19           Here, consistent with past advisory opinions, the Committee will disclose at the  
20 time of a contribution that the Dan Lipinski for Congress committee is the default  
21 recipient in the event that the objective criteria for the Committee to forward the funds to  
22 a Democratic Presidential candidate are not met, AOR003-004, and so the Committee has  
23 no direction or control over the choice of the funds’ recipient. Accordingly, it is

1 permissible for the Committee to forward those funds to the Dan Lipinski for Congress  
2 committee as stated in the “Contribution Rules” without the Committee making a  
3 contribution to the Dan Lipinski for Congress committee, and the Committee need not  
4 offer refunds. Funds forwarded to the Dan Lipinski for Congress committee remain  
5 attributable to the original contributors and will count against the contributors’ per-  
6 election limit on contributions to Dan Lipinski for Congress.

7 ***Conclusion***

8         The Commission concludes that all contributions to the draft fund would be  
9 attributable only to the original contributor and not to the Committee because the  
10 Committee exercises no direction or control over the choice of the recipient. The  
11 Commission further concludes that it is permissible for the Committee to designate a  
12 specific Congressional candidate committee to serve as the default recipient if no  
13 Democratic Presidential candidate meets the criteria to receive the earmarked  
14 contributions, instead of offering refunds.

15         This response constitutes an advisory opinion concerning the application of the  
16 Act and Commission regulations to the specific transaction or activity set forth in your  
17 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change  
18 in any of the facts or assumptions presented, and such facts or assumptions are material to  
19 a conclusion presented in this advisory opinion, then the requestor may not rely on that  
20 conclusion as support for its proposed activity. Any person involved in any specific  
21 transaction or activity which is indistinguishable in all its material aspects from the  
22 transaction or activity with respect to which this advisory opinion is rendered may rely on  
23 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or

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.

4

5

6

7

8

9

10

11

On behalf of the Commission,

Ellen L. Weintraub

Chair