



Lisa J. Stevenson
Acting General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463
ao@fec.gov

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

Dear Ms. Stevenson,

Campaign Legal Center (“CLC”) respectfully submits this comment regarding Advisory Opinion Request 2022-24 (Allen Blue). The requestor intends to establish a testamentary trust that will make contributions to federal candidates and committees, and seeks the Commission’s guidance on “how to properly attribute the trust’s contributions if the trustee of the trust has some discretion over the trust’s funds.”¹ Specifically, the requestor asserts that “the terms of the requestor’s trust may include both strict guidelines based on objective criteria as to which candidates for public office receive disbursements and broader guidelines to the trustee of how to ultimately distribute the trust’s funds,” and seeks confirmation “that in both instances, the contribution should be reported in the name of the trust and not in the name of the trustee.”² The Commission’s regulations and prior advisory opinions, however, do not support that conclusion.

The Federal Election Campaign Act (“FECA” or the “Act”) and Commission regulations both specify that any contribution made by a person on behalf of or to a candidate, including a contribution that is earmarked or otherwise directed to the candidate through an intermediary or conduit, is a contribution from that person to the candidate.³ If the intermediary or conduit merely

¹ Advisory Opinion Request 2022-24 (Allen Blue) (“AOR”) at 1.

² AOR at 5.

³ 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(a). An earmark is “a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results

forwards the earmarked contribution to the candidate, then the contribution is only attributed to the original contributor, not the intermediary or conduit; if, however, a “conduit or intermediary exercises any direction or control” over the choice of the recipient of the contribution, then the contribution is attributed to both the original contributor and the intermediary or conduit.⁴

Consistent with these rules, the Commission has previously approved the attribution of a trust’s contributions solely to the trust, rather than its trustees, in the limited circumstances where the trustees were explicitly precluded from exercising discretion over the contributions — *i.e.*, circumstances distinct from those presented by Allen Blue.

For instance, in Advisory Opinion 2004-02, where the request specifically stated that the “testator or executor of the estate will select the trustee, and the trustee would *exercise no discretion* regarding the amount of the contribution” to the recipient committee,⁵ the Commission concluded that the committee receiving the contributions must “disclos[e] the name of the both the trust and the name of the decedent.”⁶

The requestor here asserts that in Advisory Opinion 1996-03, the “Commission implicitly approved the broad discretion of the foundation’s trustees when it determined that contributions should be attributed to the testator and the foundation, rather than the trustees.”⁷ But that advisory opinion is inapposite: the Commission concluded that contributions from a *foundation* created by a testamentary trust should be attributed to the foundation, rather than its trustees.⁸ The Commission explicitly acknowledged that foundations and trusts are “not identical,” and that those forms were entitled to analogous treatment only in “the specific circumstances” of a foundation that is a “successor in interest” to a trust.⁹ No foundation — much less a foundation that is a successor in interest to a trust — is at issue in AOR 2022-24. And in any event, this portion of Advisory Opinion 1996-03 appears to be dicta, as it is legally unrelated to the question presented in that matter, which was whether the foundation qualified for political committee status.¹⁰

in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate’s authorized committee.” 11 C.F.R. § 110.6(b)(1).

⁴ 11 C.F.R. § 110.6(d).

⁵ Advisory Op. 2004-02 (NCEC) at 2 (emphasis added).

⁶ *Id.* at 3. The Commission also stated that the recipient committee could not directly or indirectly exercise control over the trusts. *Id.*

⁷ AOR at 5.

⁸ Advisory Op. 1996-03 (Breedon-Schmidt Foundation) at 3.

⁹ *See id.*

¹⁰ *See id.* at 1, 3.

The requestor also states that in Advisory Opinion 2019-01, “the Commission allowed an entity to earmark contributions for future Democratic candidates who are not yet identified,”¹¹ but leaves out a crucial detail: the Commission specifically delineated four criteria for when an intermediary may lawfully accept a “conditional contribution,” including that “an objective, easily determinable, condition outside the control of the intermediary” triggers the disbursement of funds, and that such condition must be met within a specified timeframe.¹² As such, the Commission’s emphasis was again on the intermediary executing the original contributor’s wishes based on objective conditions, not exercising their own discretion based on guidelines.

The Commission’s rules regarding the reporting of earmarked contributions should therefore guide its response to the question asked here. If, as the request indicates, the trustees have discretion in deciding the amount or recipients of the trust’s contributions, then they are “exercis[ing] direction or control” such that — like an earmarked contribution — the contributions should be attributed both to the trust (the original contributor) as well as the trustees (the conduit or intermediary).

Accordingly, we respectfully urge the Commission to conclude that if trustees can exercise discretion regarding a testamentary trust’s contribution — even if they are provided “broad[] guidelines” of how to do so¹³ — then the trustees have also made that contribution for the purposes of the Act’s contribution limits, source prohibitions, and reporting requirements.

We thank the Commission for the opportunity to submit this comment.

Sincerely,

/s/ Saurav Ghosh

Saurav Ghosh
Campaign Legal Center
1101 14th St. NW, Suite 400
Washington, DC 20005

¹¹ AOR at 5.

¹² Advisory Op. 2019-01 (It Starts Today) at 3.

¹³ AOR at 5.