FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF COMMISSIONERS
SHANA M. BROUSSARD AND ELLEN L. WEINTRAUB
REGARDING ADVISORY OPINION 2022-24 (ALLEN BLUE)

On December 1, 2022, the Commission approved an advisory opinion concluding that contributions from a trust established and funded solely by the requestor, Allen Blue, and made subject to specific conditions imposed by Mr. Blue, nonetheless need not be attributed to Mr. Blue.[1] This conclusion ignores the Commission's regulations and precedent and creates a glaring loophole for an individual to make contributions to candidates without disclosing their identity as the source of the contributions and without aggregating such contributions with other contributions by the same individual.

The draft approved by our colleagues imagines that a trust has no relationship to its creator, but of course that is not so. Although a trust is generally a distinct legal entity, the relationship between a trust and the grantor – the person (or persons) who creates and funds the trust – are inherently intertwined.[2] A trustee may distribute trust funds only within the parameters contained in the trust instrument, which in most cases (as is true here) are set by the grantor.[3] Because of this inherent relationship, the Commission has concluded that, in the case of a testamentary trust, the trust is a "successor" to the deceased grantor.[4] Even though testamentary trusts involve contributions that will be made after the grantor's death, such contributions implicate the risk of corruption or the appearance of corruption while the grantor is still living.[5] Thus, contributions

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[1] Certification, Advisory Opinion 2022-24 (Allen Blue) (Dec. 2, 2022).

[2] The request states that "the trust would share the requestor's Social Security number, although at a future point in time the trust may obtain a separate Employer Identification Number." Advisory Opinion Request ("AOR") at AOR001.

[3] *See* IRS Q&A, "Who is a grantor of a trust?", https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-questions-and-answers (last visited Jan. 3, 2023). In this case, the request states that Mr. Blue would be the only source of funds to the trust and the standards in the trust instrument would require the trustees to "support only candidates and committees that further Mr. Blue's support for" progressive candidates and certain causes. AOR001-02.

[4] Advisory Opinion 2004-02 (National Committee for an Effective Congress) ("NCEC") at 2-3; *see also* Advisory Opinion 1996-03 (Breeden-Schmidt Foundation) at 2, 4 (concluding that where a testator "explicitly limited" a foundation, through its trustees, to making contributions only "to persons, entities and causes advancing the principles of Socialism and those causes related to Socialism," such contributions should be attributed to the foundation as the "successor in interest to [the testator]").

[5] *See Libertarian Nat'l Committee v. FEC*, 924 F.3d 533, 542 (D.C. Cir. 2019) ("The risk of quid pro quo corruption does not disappear merely because the transfer of money occurs after a donor's death. Individuals planning to bequeath a large sum to a political party have two points of leverage during their lifetimes: they may tell the party about their intentions, and they may change their minds at any time.").

made through a testamentary trust remain subject to the Act's contribution limits and source prohibitions.[6]

In this case, however, contributions may be made through the trust not only after the grantor's death, but while the grantor is still living.[7] A grantor can create a trust and direct the trustees to use the funds to make contributions to candidates or political committees within guidelines set by the grantor. Under this advisory opinion, so long as the trust instrument gives the trustees some subjective decisionmaking power, the contribution need not be attributed to the grantor. Of course, this doesn't prevent the recipient of the contribution from knowing the source of the funds or the grantor from using the promise of future contributions to wield influence with potential recipients (indeed, the requestor here does not attest that he will not communicate with the trustees informally about his preferred candidates or political committees during his lifetime). All this advisory opinion does is prevent the public from knowing who may be garnering influence with candidates and elected officials.

Crucially, this advisory opinion ignores the Commission's longstanding regulations on how earmarked contributions must be attributed. Commission regulations state that "[a]ll contributions by a person made on behalf of or to a candidate, *including contributions which are in any way earmarked or otherwise directed* to the candidate through an intermediary or conduit, are contributions from the person to the candidate."[8] An earmark is defined as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results 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."[9] In this case, the request states that Mr. Blue would include "standards" in the trust instrument which will require trustees "to support only candidates and committees" that further the causes that Mr. Blue supports.[10] Thus, because the funds – provided by Mr. Blue – are encumbered by these standards – imposed by Mr. Blue – the earmarking provisions instruct that the resulting contributions are contributions from Mr. Blue. The approved advisory opinion implies that any exercise of discretion by the trustee somehow supersedes Mr. Blue's role in making the resulting contribution. But the Commission's regulations acknowledge that an earmark need not be absolute; where the conduit or intermediary exercises "direction or control" over the choice of the recipient candidate, the Commission's regulations require that the entire amount of the contribution is attributed to *both* the original contributor and the intermediary.[11] The Commission's regulations do not allow an earmarked contribution to be attributed *only* to the conduit or intermediary.

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6 *See, e.g.*, Advisory Opinion 2015-05 (Shaber) at 3 (citing Advisory Opinion 2004-02 (NCEC) at 3).

7 AOR001-02.

8 11 C.F.R. § 110.6(a).

9 *Id.* at § 110.6(b).

10 AOR002.

11 11 C.F.R. § 110.6(d)(2).

Notably, the request states and the advisory opinion confirms that if the trust makes contributions to federal candidates or committees during Mr. Blue's lifetime, the trust and Mr. Blue will share a contribution limit.[12] This concession is completely inconsistent with the opinion's conclusion that the contributions need not be publicly attributed to Mr. Blue. We know of no other circumstance where a contribution is subject to a donor's contribution limit but is permitted to be disclosed as having come exclusively from someone else. And, of course, if contributions made through the trust are not attributed to Mr. Blue, then neither the public nor the Commission can verify that Mr. Blue and the trust are adhering to their shared contribution limit (indeed, it would appear that a grantor could make contributions through multiple trusts, none of which would be aggregated, with the public none the wiser).

Under this new interpretation, the public will not be able to verify that the funds being donated through such a trust are derived from lawful sources.[13] The true sources of political contributions matter; otherwise, the core mission of the FEC to ensure that the public is informed as to those sources is hollow. We cannot support providing a new vehicle through which one can influence elected officials while avoiding the statutory and regulatory disclosure requirements. Accordingly, we did not join our colleagues in approving this advisory opinion.

February 1, 2023
Date

Shana M. Broussard
Commissioner

February 1, 2023
Date

Ellen L. Weintraub
Commissioner

[12] AOR002, AOR004, Advisory Opinion 2022-24 at 8.

[13] One could imagine a foreign national funding a U.S.-based trust and hiring a U.S. agent with the general direction to make contributions to candidates who support certain issues that benefit the interests of the foreign national. The fact that the U.S. agent picks the specific candidates to support and reports the contributions in the name of the trust would not make this arrangement legal but would make the illegality substantially harder to detect.