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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C.

January 25, 2024

ADVISORY OPINION 2023-11

Christopher Siragusa  
VoteDown PAC  
90 Church St. #2356  
New York, NY 10008

Dear Mr. Siragusa:

We are responding to your advisory opinion request on behalf of VoteDown PAC (“Requestor”) concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101–45 (the “Act”), and Commission regulations to Requestor’s proposal to operate as a conduit for contributions earmarked for federal candidates opposing several incumbent federal officeholders. Your advisory opinion request includes five questions about this proposal. The Commission concludes that nothing in the Act or Commission regulations prohibits your proposed activities as described in questions one through four of your request but that Requestor must report any funds it receives to offset the cost of credit-card processing fees as contributions to Requestor.

***Background***

The facts presented in this advisory opinion are based on your letter received November 15, 2023, reports filed with the Commission, and supplemental materials received on January 23 and 24, 2024.

Requestor is a hybrid PAC established in 2023 for the purpose of “promot[ing] the election of non-incumbent candidates for Federal office[.]”<sup>1</sup> Requestor has not yet been required to file any reports disclosing contributions or expenditures, but Requestor proposes to solicit contributions solely through its website and accept contributions made by credit card.<sup>2</sup> Requestor proposes to serve as a conduit for contributions made to candidates it identifies as the leading opponents to certain incumbent federal officeholders 90 days before the relevant primary

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<sup>1</sup> See Statement of Organization (Form 1) 1–2, VoteDown PAC (Sept. 29, 2023); Advisory Opinion Request (“AOR”) at AOR001.

<sup>2</sup> AOR001.

or general election.<sup>3</sup> Requestor plans to designate leading candidates based on its analysis of certain objective criteria, which Requestor will make available to contributors at the time of solicitation.<sup>4</sup> Those criteria include: (1) the candidate with the highest average of polling data published within a relevant period and conducted by preapproved pollsters listed on Requestor's website; (2) if no qualified polling data is available, then the candidate with the highest net cash on hand (defined as cash plus debts receivable minus debts payable) as reported on candidates' FEC Form 3 filings; (3) if all opponent candidates have the same net cash on hand, then Requestor will split the contributions equally between the candidates.<sup>5</sup> If all of the above methods fail to designate a leading opponent in a race for which Requestor has received a contribution, or if the designated candidate refuses to accept the contributions, Requestor proposes to forward the contributions to the incumbent's national party committee in a primary election or the opposing national party committee for a general election as the "default recipient[s]."<sup>6</sup>

To account for credit-card processing fees essential to its solicitation model, Requestor proposes to charge contributors the fee directly on top of the contribution amount, forwarding the contribution to the identified candidate and remitting the fee to the credit card processor.<sup>7</sup> Thus, a contributor giving \$100 would be charged \$100 plus the credit card processing fee.<sup>8</sup> Requestor proposes reporting the receipt of such fees as "Offsets to Operating Expenditures" on Line 15 of its quarterly reports and reporting the remittance of such fees to the credit card processors as "Other Federal Operating Expenditures," on Line 21.<sup>9</sup>

### ***Questions Presented***

- (1) *Will contributions received and forwarded by Requestor be considered earmarked contributions under the Commission's regulations such that the contributions are attributable only to the original contributor and not to Requestor?*
- (2) *May Requestor postpone forwarding the earmarked contributions to the designated candidate until after the designated candidate is identified using external, public criteria, set up and disclosed to the contributor at the time of contribution?*

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<sup>3</sup> AOR001-2.

<sup>4</sup> AOR002.

<sup>5</sup> *Id.*

<sup>6</sup> AOR002, 5.

<sup>7</sup> AOR003.

<sup>8</sup> *Id.*

<sup>9</sup> AOR003, 5.

- (3) *If a designated candidate is not available or is unable or unwilling to accept Requestor's earmarked contributions, may Requestor forward the contributions to a national party committee according to the proposed criteria?*
- (4) *If the earmarked contributions are held in an interest-bearing depository account before they are transferred to the ultimate recipient, may Requestor retain the interest earned on those funds to use for any lawful purpose in accordance with the Act?*
- (5) *How should Requestor reflect the receipt and subsequent payment of credit card processing fees on its reports to the Commission?*

### ***Legal Analysis***

- (1) *Will contributions received and forwarded by Requestor be considered earmarked contributions under the Commission's regulations such that the contributions are attributable only to the original contributor and not to Requestor?*
- (2) *May Requestor postpone forwarding the earmarked contributions to the designated candidate until after the designated candidate is identified using external, public criteria, set up and disclosed to the contributor at the time of contribution?*
- (3) *If a designated candidate is not available or is unable or unwilling to accept Requestor's earmarked contributions, may Requestor forward the contributions to a national party committee according to the proposed criteria?*

Yes, the contributions received and forwarded by Requestor as proposed in the request will be considered earmarked contributions attributable only to the original contributor and not the Requestor; and the Requestor may forward the earmarked contributions to the designated candidate, or to a national party committee if the designated candidate is unable or unwilling to accept the earmarked contribution, as proposed.

The Act and Commission regulations provide that contributions earmarked for a specific candidate or committee but "directed through an intermediary or conduit" are attributable as contributions from the contributor to the candidate or committee.<sup>10</sup> Contributions thus made are attributable neither to nor from the conduit as long as the conduit solely "receives and forwards" the earmarked contributions without "exercis[ing] any direction or control over the choice of the recipient[.]"<sup>11</sup>

The Commission has authored a series of advisory opinions applying the conduit rules to committees who have proposed soliciting and forwarding contributions "after a predetermined

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<sup>10</sup> See 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(a).

<sup>11</sup> See 11 C.F.R. § 110.6(b)(2), (d).

event . . . where the ultimate recipient was not yet identified at the time of the solicitation” for the contribution.<sup>12</sup> The Commission has approved proposals where:

- (1) the condition that would trigger the disbursement of the funds was objectively determinable and outside the control of the committee forwarding the contributions;
- (2) the committee forwarding the contributions specified a date certain by which the condition would or would not be met; (3) the committee forwarding the contributions would refund or otherwise lawfully distribute the funds if the triggering condition was not met; and (4) all of the foregoing were clearly communicated to contributors.<sup>13</sup>

The Commission has determined that the proposed conduit activities that comply with the above conditions “ensure that the contributors have ultimate control over their contributions and that the intermediary political committee exercises no direction with regard to the disposition of the conditional funds.”<sup>14</sup>

Requestor’s proposal meets all four of the aforementioned conditions. First, the identification criteria Requestor describes — starting with polling data from previously selected pollsters and moving on to publicly available and verified campaign-finance data — are objective, easily determinable facts that are outside of Requestor’s control, similar to the public endorsements from preselected organizations proposed in Advisory Opinion 2019-01 (It Starts Today) and the stated gender of the nominee proposed in Advisory Opinion 2014-19 (ActBlue). Second, Requestor has specified a date certain by which the candidate must meet the objective criteria before Requestor forwards the contribution: 90 days before the general or primary election for which the contribution was earmarked. Third, Requestor’s proposal of either the Democratic National Committee or the Republican National Committee serving as a “default recipient” of contributions that Requestor cannot forward to a candidate is a lawful distribution of those funds, provided those contributions are forwarded under the timelines in 11 C.F.R. § 102.8(b)(1).<sup>15</sup> Finally, Requestor has proposed clearly disclosing the above information to contributors in its solicitations. As a result, the proposed activities satisfy the four criteria necessary to ensure Requestor acts as a conduit and does not direct or control any contributions it receives and forwards.

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<sup>12</sup> Advisory Opinion 2022-09 (Democratic Party of Wisconsin Federal) at 5; *see also* Advisory Opinion 2019- 01 (It Starts Today) at 3-4; Advisory Opinion 2014-19 (ActBlue) at 3-4; Advisory Opinion 2006-30 (ActBlue) at 4-5; Advisory Opinion 2003-23 (WE LEAD) at 3-6; Advisory Opinion 1982-23 (Westchester Citizens for Good Government) at 2.

<sup>13</sup> Advisory Opinion 2022-09 (Democratic Party of Wisconsin Federal) at 5.

<sup>14</sup> *Id.* (citing Advisory Opinion 2016-15 (Gary Johnson Victory Fund)); *see also* 11 C.F.R. § 110.6(d)(2).

<sup>15</sup> *See* Advisory Opinion 2003-23 (WE LEAD) (concluding that the 10-day window of 11 C.F.R. § 102.8(a) does not begin until the triggering condition is satisfied). Here, the triggering condition is meeting certain polling or campaign-finance benchmarks at 90 days before a given election. AOR002. Thus, Requestor would have until 80 days before a given election to forward contributions to the designated candidate; if there is no designated candidate or the contributions cannot be forward to the designated candidate, Requestor must forward any contributions to the relevant national party committee no later than 60 days before the election. *See* 11 C.F.R. § 102.8(b)(1) (political committees must forward contributions made to committees other than authorized committees within 30 days).

- (4) *If the earmarked contributions are held in an interest-bearing depository account before they are transferred to the ultimate recipient, may Requestor retain the interest earned on those funds to use for any lawful purpose in accordance with the Act?*

Yes, the Requestor may retain interest earned on the earmarked contributions held in an interest-bearing depository account.

The Act and Commission regulations do not bar political committees from earning income from the investment of contributions made to the political committee.<sup>16</sup> Funds earned as income on investments of committee assets are not contributions under the Act or Commission regulations because they are not a deposit of money “made . . . for the purpose of influencing any election for Federal office[.]”<sup>17</sup>

The Commission concludes that nothing in the Act or Commission regulations prevents Requestor from retaining income earned as interest on contributions Requestor has received, provided, as Requestor acknowledges, that Requestor reports the interest income as set forth in Commission regulations.

- (5) *How should Requestor reflect the receipt and subsequent payment of credit card processing fees on its reports to the Commission?*

Requestor should reflect the receipt of credit card processing fees as contributions to Requestor on its reports to the Commission. A contribution includes any “deposit of money . . . made by any person for the purpose of influencing any election for Federal office[.]”<sup>18</sup> The Commission has long considered the cost of processing a contribution made by credit card to be an operating expenditure of the committee that received the contribution, the payment of which is itself a contribution to that committee.<sup>19</sup>

Here, Requestor is soliciting the contributions and is thus incurring the cost of paying a credit-card processor to process the payments; payment of that expense by someone other than Requestor — in this case, the contributor — constitutes a contribution to Requestor. This is true where the contributor pays the fee directly to the processor through a deduction from the total amount and where, as Requestor proposes, the committee collects the fee from the contributor

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<sup>16</sup> See generally Advisory Opinion 1999-08 (Specter).

<sup>17</sup> 11 C.F.R. § 100.52(a).

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., Advisory Opinion 2019-15 (NORPAC); Advisory Opinion 2007-04 (Atlatl); Advisory Opinion 1999-08 (Specter); Advisory Opinion 1995-34 (Politechs); Advisory Opinion 1995-09 (NewtWatch); Advisory Opinion 1994-33 (VITEL International); Advisory Opinion 1991-01 (Deloitte & Touche). Cf. Advisory Opinion 2015-15 at 4 (WeSupportThat.com) (“The Commission has previously concluded that entities that process contributions as a service to contributors, and not to the recipient political committees, are not making contributions to those committees.”)

and remits it to the processor.<sup>20</sup> Requestor’s proposal is materially similar to that in Advisory Opinion 2019-15 (NORPAC), in which the Commission concluded that the convenience fee that NORPAC proposed charging contributors to offset processing and administrative costs — the amount of which was based on the underlying contribution — was itself a contribution to NORPAC.<sup>21</sup> The same is true here. The total amount of the contribution is “the entire amount authorized by the contributor.”<sup>22</sup> The portion of the contribution attributable to the credit-card processing fee is a contribution to Requestor, while the remainder is a contribution to the designated candidate or national party committee that is its ultimate recipient. As a result, Requestor should report its receipt of the former group of funds as “contributions” on Line 11 of its quarterly reports. In addition, the Commission concludes that Requestor’s proposal to report its remittances to credit-card processors as “Other Federal Operating Expenditures” on Line 21 of its quarterly reports accords with Commission regulations.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transactions or activities set forth in the instant advisory opinion request.<sup>23</sup> The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed transactions or activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion.<sup>24</sup> Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission’s website.

On behalf of the Commission,



Sean J. Cooksey,  
Chairman

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<sup>20</sup> Compare Advisory Opinion 2007-04 (Atlatl) with Advisory Opinion 2019-15 (NORPAC).

<sup>21</sup> See Advisory Opinion 2019-15 (NORPAC) at 3–5.

<sup>22</sup> Advisory Opinion 2007-04 (Atlatl) at 4.

<sup>23</sup> See 52 U.S.C. § 30108.

<sup>24</sup> See *id.* § 30108(c)(1)(B).