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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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

August 9, 2019

MEMORANDUM

TO: The Commission

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

Neven F. Stipanovic *NFS*
Associate General Counsel

Joanna S. Waldstreicher *JSW*
Attorney

Kevin M. Paulsen *KMP*
Attorney

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

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 C

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 will result in 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
19 Organization’s bylaws would prohibit Dr. Price from receiving any compensation from
20 the Organization. *Id.* This restriction would also apply to any members of Dr. Price’s

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

14 ***Question Presented***

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

16 ***Legal Analysis***

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

19 The Act identifies six categories of permissible uses of contributions accepted by
20 a federal candidate. They include use "for contributions to an organization described in
21 section 170(c) of the Internal Revenue Code" and "for any other lawful purpose." 52
22 U.S.C. § 30114(a)(3), (6); *see also* 11 C.F.R. § 113.2(b), (e).

1 As a threshold matter, the Commission considers whether the donee organization
2 is or will be an entity described in section 170(c) of the Internal Revenue Code.⁴
3 Advisory Opinion 2005-06 (McInnis) at 2. Section 170(c)(2) describes non-profit entities
4 that operate exclusively for religious, charitable, scientific, literary, or educational
5 purposes. In prior advisory opinions, the Commission has permitted the donation of
6 campaign funds to 501(c)(3) organizations under 52 U.S.C. § 30114(a)(3) and 11 C.F.R.
7 § 113.2(b) because it determined that 501(c)(3) entities qualify as entities described in
8 section 170(c). *See e.g.*, Advisory Opinion 2012-05 (Lantos) at 3; Advisory Opinion
9 2005-06 (McInnis) at 2-3; Advisory Opinion 1997-01 (Bevill) at 2-3. The Commission
10 has not, however, applied these provisions to 501(c)(4) entities, which are not subject to
11 the same restrictions as 501(c)(3) entities, and it declines to do so here. Accordingly—
12 notwithstanding the Committee’s representation that the Organization will operate
13 subject to certain self-imposed restrictions consistent with those applicable to 501(c)(3)
14 entities—the donation of Committee funds to the Organization is not permissible under
15 52 U.S.C. § 30114(a)(3) and 11 C.F.R. § 113.2(b) because the Organization will be
16 registered as a 501(c)(4) and not a 501(c)(3) entity, and therefore will not be subject to
17 the same legal restrictions on its activities.

18 Such contributions may still be permissible under the “any other lawful purpose”
19 clause of section 30114(a), provided that none of the donated funds are converted by any
20 person to personal use. *See* Advisory Opinion 1993-10 (Colorado) at 3 (“The

⁴ Sections 170(c) and 501(c) of the Internal Revenue Code contain overlapping qualifications. Section 170(c) describes the types of recipient organizations for which charitable donations by individuals are tax deductible. Section 501(c) describes the types of organizations that are exempt from paying federal taxes.

1 Commission has found that transfers and donations to other recipients where section
2 170[(c)] does not apply may still be permissible under the “any other lawful purpose”
3 clause of section [30114(a)] as long as it did not involve conferring a personal benefit on
4 the former candidate.”). Conversion to personal use occurs when a contribution or
5 amount is used “to fulfill any commitment, obligation, or expense of a person that would
6 exist irrespective of the candidate’s election campaign or individual’s duties as a holder
7 of [f]ederal office.” 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g).

8 The Act and Commission regulations provide a non-exhaustive list of uses of
9 campaign funds that are *per se* personal use. 52 U.S.C. § 30114(b)(2); 11 C.F.R.
10 § 113.1(g)(1)(i). For uses of campaign funds not included on this list, such as the
11 donation of funds to a 501(c)(4) organization at issue here, the Commission determines
12 on a case-by-case basis whether the use is a prohibited “personal use,” *i.e.*, whether
13 campaign funds are used to pay expenses that would exist irrespective of the candidate’s
14 campaign or federal officeholder duties. 11 C.F.R. § 113.1(g)(1)(ii).⁵ The Commission’s
15 decision consequently turns on whether the Committee’s donation of funds to the
16 Organization constitute the personal use of such funds by Dr. Price.

17 The Committee has stated that the Organization will function as a social welfare
18 organization engaging in research, education, and publications related to health, budget,
19 and public policy matters. AOR001, AOR004. The Organization will present
20 publications and research under Dr. Price’s name and official titles (as both its president

⁵ Because this advisory opinion addresses the donation of campaign funds to a 501(c)(4) organization, 11 C.F.R. § 113.1(g)(2) and the prior advisory opinions applying this provision 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 and CEO) and promote opportunities for Dr. Price to speak or otherwise make
2 appearances to present the Organization’s work. AOR001-002. The Committee has
3 further represented that the Organization “will not attempt to influence legislation nor
4 participate or intervene in any political campaign on behalf of, or in opposition to, any
5 candidate for public office.” AOR001. These objectives are wholly unrelated to
6 Dr. Price’s congressional campaigns or duties as a former federal officeholder. Rather,
7 the Organization proposes to act as a personal vehicle for Dr. Price to promote his ideas,
8 personal brand, and reputation using campaign funds. Although the Organization will not
9 compensate Dr. Price for his services on its behalf so long as Committee funds remain in
10 the Organization’s accounts, it will reimburse Dr. Price for his out-of-pocket expenses
11 incurred in connection with his official Organization-related duties and pay to promote
12 his speaking engagements and publications. AOR001-002. These appearances and
13 publications will enhance Dr. Price’s professional reputation and his ability to
14 independently earn substantial fees for speaking engagements, notwithstanding the
15 Organization’s pledge to only organize unpaid speaking opportunities for Dr. Price.

16 As a former Congressman and cabinet secretary, it is Dr. Price’s prerogative and
17 right to form an organization to promote his ideas and professional reputation. However,
18 neither the Act nor Commission regulations permit the use of Committee funds to do so.
19 Accordingly, the Commission concludes that the use of campaign funds to fund a
20 501(c)(4) think-tank inextricably linked to and controlled by a former federal
21 officeholder as proposed would result in conversion to personal use of the Committee’s
22 funds.

23

1 ***Conclusion***

2 The Committee may not donate its funds to the Organization because the donation
3 will result in conversion of Committee funds to personal use by Dr. Price.

4 This response constitutes an advisory opinion concerning the application of the
5 Act and Commission regulations to the specific transaction or activity set forth in your
6 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
7 in any of the facts or assumptions presented, and such facts or assumptions are material to
8 a conclusion presented in this advisory opinion, then the requestor may not rely on that
9 conclusion as support for its proposed activity. Any person involved in any specific
10 transaction or activity which is indistinguishable in all its material aspects from the
11 transaction or activity with respect to which this advisory opinion is rendered may rely on
12 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or
13 conclusions in this advisory opinion may be affected by subsequent developments in the
14 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
15 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