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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 19-33-A
AGENDA ITEM
For meeting of July 25, 2019

July 17, 2019

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by NFS*
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Attorney

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

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 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 2019-10

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Stefan Passantino, Esq.
Nathan Groth, Esq.
Elections, LLC
1000 Maine Avenue, SW
Suite 400
Washington, DC 20024

DRAFT A

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 permit the Committee to donate its funds to the organization as proposed.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 June 5, 2019 and on reports filed with the Commission. Price for Congress is the
21 principal campaign committee of former Congressman Dr. Thomas Price.¹ As of its
22 April 15, 2019 quarterly report, the Committee had \$1,767,729.00 in total assets.
23 Advisory Opinion Request at AOR002.² The Committee now proposes to transfer some,

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>.

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>.

1 but not all, of the Committee’s assets to establish and operate a non-profit organization
2 (the “Organization”) in accordance with section 170(c) of the Internal Revenue Code.
3 AOR001.³ The Organization expects to qualify and register as a tax-exempt social
4 welfare organization under section 501(c)(4) of the Internal Revenue Code. AOR002.
5 Funds donated by the Committee to the Organization and any income generated
6 therefrom will be placed in a separate segregated account and will not be comingled with
7 other assets of the Organization. AOR002. Such funds would be used to advance the
8 Organization’s stated purpose of engaging in research, education, and publications related
9 to health, budget, and public policy matters. AOR001. Research, publications and
10 presentations will likely be distributed under Dr. Price’s name and official titles with the
11 Organization. AOR004. The Organization “will not attempt to influence legislation nor
12 participate or intervene in any political campaign on behalf of, or in opposition to, any
13 candidate for public office.” AOR001. The Organization may promote and organize
14 unpaid opportunities for Dr. Price to speak, write, publish, or otherwise make
15 appearances to present the work of the 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
21 family, former employees of the Committee, and former employees of Dr. Price’s official

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

13 ***Question Presented***

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

15 ***Legal Analysis***

16 Yes, the Committee may donate its funds to the Organization as proposed,
17 because the donation to an entity described in section 170(c) of the Internal Revenue
18 Code will constitute a permissible use of contributions accepted by the Committee, and
19 no Committee funds will be converted to personal use for the benefit of Dr. Price or any
20 other person.

21 The Act identifies six categories of permissible uses of contributions accepted by
22 a federal candidate. They include use “for contributions to an organization described in
23 section 170(c) of the Internal Revenue Code” and “for any other lawful purpose.”

1 52 U.S.C. § 30114(a)(3), (6); *see also* 11 C.F.R. § 113.2(b), (e). Such contributions may
2 not, however, be converted by any person to personal use. 52 U.S.C. § 30114(b)(1); 11
3 C.F.R. § 113.2(e). Conversion to personal use occurs when a contribution or amount is
4 used “to fulfill any commitment, obligation, or expense of a person that would exist
5 irrespective of the candidate’s election campaign or individual’s duties as a holder of
6 Federal office.” 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g).

7 As a threshold matter, the Commission considers whether the donee organization
8 is or will be an entity described in section 170(c) of the Internal Revenue Code.⁴
9 Advisory Opinion 2005-06 (McInnis) at 2. Section 170(c)(2) describes corporations
10 organized or incorporated in the United States under federal or state law that operate
11 exclusively for religious, charitable, scientific, literary, or educational purposes. These
12 organizations are prohibited from attempting to influence legislation and participating or
13 intervening in (including the publishing or distributing of statements) any political
14 campaign on behalf of (or in opposition to) any candidate for public office. 26 U.S.C.
15 § 170(c)(2)(D). Qualifying corporations may not operate for profit (*i.e.*, no part of the net
16 earnings of the corporation may inure to the benefit of any individual). 26 U.S.C.
17 § 170(c)(2)(C).

18 The Committee represents in its request that the Organization will operate and
19 qualify as a tax-exempt, not-for-profit corporation under section 501(c)(4) of the Internal
20 Revenue Code. AOR002. Unlike 501(c)(3) organizations, which the Commission has

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 previously treated as entities described in section 170(c),⁵ 501(c)(4) organizations are not
2 subject to the strict prohibitions on legislative and political activities applicable under
3 section 501(c)(3) and which largely mirror the requirements of section 170(c). *See* 26
4 U.S.C. § 501(c). However, the Committee represents that the Organization will serve an
5 educational purpose related to health, budget and other public policy matters and that it
6 “will not attempt to influence legislation nor participate or intervene in any political
7 campaign on behalf of, or in opposition to, any candidate for public office,” consistent
8 with the limitations set forth in section 170(c). AOR001.⁶ So long as it adheres to the
9 above representations, the Organization will operate “as an organization described in
10 section 170(c) of the Internal Revenue Code” for purposes of the Act and Commission
11 regulations.⁷

12 Next, the Commission must consider whether the proposed donation will result in
13 the conversion of any of the donated funds to personal use. Commission regulations
14 provide that “[d]onations of campaign funds or assets to an organization described in
15 section 170(c) of Title 26 of the United States Code [the Internal Revenue Code] are not
16 personal use, unless the candidate receives compensation from the organization before

⁵ *See e.g.*, Advisory Opinion 2012-05 (Lantos); Advisory Opinion 2005-06 (McInnis) at 2 n.1; *see also* Advisory Opinion 1993-06 (Panetta) at 7-8 n.6 (noting that although some of the proposed recipients of campaign funds may not qualify as 501(c)(3) organizations, donations to such recipients “may still qualify as transfers to [section] 170(c) organizations.”).

⁶ Although the Organization has yet to be established, the Committee further represents that it will obtain recognition as a tax-exempt entity from the Internal Revenue Service. AOR002. The Commission has previously approved the donation of campaign funds from a former congressman’s campaign committee to a non-profit organization with a pending application for tax-exempt status under section 501(c) of the Internal Revenue Code. *See* Advisory Opinion 2005-06 (McInnis) at 2.

⁷ The Commission expresses no opinion regarding the application of the Internal Revenue Code or any other law outside of the Commission’s jurisdiction.

1 the organization has expended the entire amount donated for purposes unrelated to his or
2 her personal benefit.” 11 C.F.R. § 113.1(g)(2).

3 According to the request, Dr. Price will serve as both the president and CEO of
4 the Organization, with the authority to make staffing decisions, including hiring and
5 firing of employees and determining employee compensation. AOR001. However, Dr.
6 Price will receive no compensation from the Organization. *Id.* This proposal is
7 consistent with practices approved by the Commission in prior advisory opinions. In
8 Advisory Opinion 1996-40 (Hancock), the Commission approved the donation of funds
9 from a retiring congressman’s campaign committee to a 501(c)(3) organization for which
10 the congressman served as president and chairman of the board of directors. *See*
11 Advisory Opinion 1996-40 (Hancock) at 2; *see also* Advisory Opinion 1983-27
12 (McDaniel) (approving donation of campaign committee funds to 501(c)(3) organization
13 for which the donor-candidate served as chairman of the board of directors); Advisory
14 Opinion 1997-01 (Bevill) (approving donation of campaign committee funds to
15 foundation for which the donor-former congressman, his wife and daughter would serve
16 as board directors). In each of the aforementioned advisory opinions, the donor-
17 candidates or officeholders retained significant authority over the donee organization
18 after the committee funds were contributed; nevertheless, the Commission found that the
19 contributed funds would not accrue to their personal benefit because they would not
20 receive compensation from the donee organization until such time as the organization had
21 expended the donated funds. *See* Advisory Opinion 1996-40 (Hancock) at 2; Advisory
22 Opinion 1983-27 (McDaniel) at 2; Advisory Opinion 1997-01 (Bevill) at 3. Similarly,
23 because he will receive no compensation from the Organization, Dr. Price’s role as

1 president and CEO of the Organization will not result in his personal use of the donated
2 funds.

3 The request also states that, although the Organization’s bylaws will prohibit Dr.
4 Price, his family members, former Committee employees, and the former employees of
5 Dr. Price’s official public offices from receiving compensation, the Organization will
6 leave open the possibility that in the future, after all Committee funds have been
7 expended by the Organization, these individuals could become eligible for compensation.
8 AOR001-002. Similarly, Dr. Price will be eligible for reimbursement of out-of-pocket
9 expenses incurred in connection with his official Organization-related duties; however,
10 he will not receive any reimbursement for expenses that would constitute “personal use”
11 under the Act or Commission regulations until such time as the Organization has
12 exhausted all funds donated by the Committee. *Id.*

13 This compensation and reimbursement arrangement is consistent with the
14 Commission’s conclusion in Advisory Opinion 2012-05 (Lantos), where the Commission
15 approved the donation of a former congressman’s campaign funds to a non-profit
16 foundation that employed and paid salaries to several of the congressman’s family
17 members, including his daughter who served as the foundation’s president. Advisory
18 Opinion 2012-05 (Lantos) at 2.⁸ Because the Committee has represented that it and the

⁸ The Commission’s approval of the donation was conditioned upon several representations, including the foundation’s pledges to: (1) deposit donated funds into a separate account segregated from other foundation assets, (2) not use donated funds or any income generated therefrom to provide compensation, gifts or grants, or any materials or reimbursement for any expenses within the scope of 52 U.S.C. § 30114(b)(2)(A)-(I) or 11 C.F.R. § 113.1(g)(1)(i)(A)-(J) to any member of the late congressman’s family, or former campaign committee or congressional office employees, and (3) not use the donated funds or any income generated therefrom to influence any election. *See* Advisory Opinion 2012-05 (Lantos) at 2. *See also* Expenditures; Reports by Political Committees; Personal Use of Campaign Funds,

1 Organization will adhere to the conditions approved by the Commission in Advisory
2 Opinion 2012-05 (Lantos) until such time as all Committee funds have been expended by
3 the Organization, the proposed compensation and reimbursement framework are
4 permissible under the Act and Commission regulations.⁹

5 The only facts that distinguish the present request from prior advisory opinions
6 addressing the donation of campaign funds to non-profit entities pursuant to 52 U.S.C.
7 § 30114(a)(3) and 11 C.F.R. § 113.1(g) are the Organization's intention to publish
8 research, presentations and publications under Dr. Price's name and promote or organize
9 unpaid opportunities for Dr. Price to speak, write, publish, or otherwise make
10 appearances to present the Organization's work. AOR001-002. None of these activities
11 would result in the personal use of Committee funds by Dr. Price or any other person.

12 Because Dr. Price will not be compensated for these activities, and the
13 Organization has already pledged not to provide compensation to Dr. Price while
14 Committee funds remain in the Organization's accounts, no personal financial benefit
15 will directly accrue to Dr. Price, his family or former employees as a result of the
16 Organization's publication of research, presentations, or other publications under Dr.
17 Price's name, or Dr. Price's appearances on behalf of the Organization. Although these
18 publications or appearances may enhance Dr. Price's professional reputation, the

60 Fed. Reg. 7862, 7869 (Feb. 9, 1995) (noting that for purposes of 11 C.F.R. § 113.1(g)(2), candidates or officeholders may be reimbursed for "expenses ordinarily and necessarily incurred on behalf of [the recipient] organization" by the candidate or officeholder).

⁹ The Advisory Opinion Request notes that the Committee will initially transfer only some of its assets to the Organization and may transfer additional remaining funds at a later date. AOR002. In the event that, after the initial funds contributed to the Organization by the Committee have been expended by the Organization, the Committee then contributes additional funds to the Organization, the conditions and limitations regarding the use of donated funds described herein will apply to any later donated funds until such time as all funds donated by the Committee have been expended by the Organization.

1 potential financial benefit to Dr. Price, his family or former employees derived from any
2 such reputational enhancement is speculative and highly attenuated, and only indirectly
3 related to the donation of Committee funds. Further, any reputational benefit to Dr. Price
4 resulting from the donation of Committee funds would be incremental at most, as he has
5 already cultivated a national profile as a former congressman, committee chairman and
6 cabinet secretary. Consequently, the Organization's intention to publish research,
7 presentations and publications under Dr. Price's name and promote or organize unpaid
8 opportunities for Dr. Price to speak, write, publish or otherwise make appearances to
9 present the Organization's work do not alter the Commission's conclusion that the
10 proposed donation of Committee funds to the Organization is a permissible use of
11 contributions accepted by the Committee.

12 ***Conclusion***

13 The Commission concludes that the Act and Commission regulations permit the
14 Committee to donate its funds to the Organization as proposed because the Organization
15 will operate as an entity described in section 170(c) of the Internal Revenue Code and no
16 Committee funds will be converted to personal use for the benefit of Dr. Price or any
17 other person.

18 This response constitutes an advisory opinion concerning the application of the
19 Act and Commission regulations to the specific transaction or activity set forth in your
20 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
21 in any of the facts or assumptions presented, and such facts or assumptions are material to
22 a conclusion presented in this advisory opinion, then the requestor may not rely on that
23 conclusion as support for its proposed activity. Any person involved in any specific

1 transaction or activity which is indistinguishable in all its material aspects from the
2 transaction or activity with respect to which this advisory opinion is rendered may rely on
3 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or
4 conclusions in this advisory opinion may be affected by subsequent developments in the
5 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

6 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