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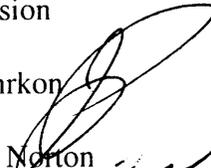
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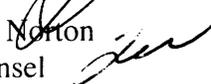
February 19, 2004

MEMORANDUM

AGENDA ITEM

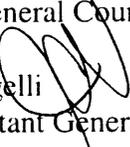
To: The Commission

THROUGH: James A. Pehrkon 

FROM: Lawrence H. Norton
General Counsel 

James A. Kahl 
Deputy General Counsel

Rosemary C. Smith 
Associate General Counsel

John C. Vergelli 
Acting Assistant General Counsel

Esa L. Sferra 
Attorney

Subject: AO 2004-02

For Meeting of: 02-26-04

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 26, 2004.

Attachment

1 ADVISORY OPINION 2004-02

2 Judith L. Corley, Esq.
3 Perkins Coie, LLP
4 607 Fourteenth Street, NW
5 Washington, DC 20005-2011

DRAFT

6
7 Dear Ms. Corley:

8 This responds to your letters dated November 10, 2003, and January 13, 2004,
9 requesting an advisory opinion on behalf of the National Committee for an Effective
10 Congress (“NCEC”), concerning the application of the Federal Election Campaign Act of
11 1971, as amended (“the Act”), and Commission regulations to the receipt of contributions
12 from testamentary trusts.

13 ***Background***

14 You state that a number of NCEC contributors wish to provide funds to NCEC
15 through bequests or other testamentary means. NCEC wants to accept contributions from
16 testamentary trusts, and would like to advise these contributors, or other potential
17 contributors, of an appropriate method to establish testamentary giving to NCEC.¹ NCEC
18 is registered as a non-connected committee.

19 You state that the trusts from which NCEC would accept contributions would be
20 created and funded only through the estates of individuals who were legally qualified at the
21 time of their deaths to make contributions under the Act. The terms of the trusts would
22 limit the trusts to making the maximum annual contribution permitted under the Act. The
23 aggregated contributions from a trust and all other trusts created by the testator would not

¹ You note that NCEC has accepted bequests from contributors, which it processed according to Commission instructions by placing bequests in escrow and drawing no more than \$5,000 per year, until Advisory Opinion 1999-14 made such practice unlawful under the Act.

1 exceed the aggregate bi-annual limit on contributions from individuals. The testator or
2 executor of the estate will select the trustee, and the trustee would exercise no discretion
3 regarding the amount of the contribution. A contributing testamentary trust will set as a
4 condition of its contribution that NCEC may not pledge, assign, or otherwise obligate
5 anticipated contributions in order to realize in whole or in part the present value of future
6 contributions.

7 NCEC will expressly agree to abide by these conditions on such a trust's
8 contribution. In addition, NCEC will not knowingly accept contributions from any
9 testamentary trust where the trustee exercises any discretion over whether a contribution is
10 made or over the amount of a contribution. Further, NCEC will have no involvement in
11 the administration of the testamentary trust.

12 You have not planned any campaign for the purpose of soliciting contributions
13 through testamentary trusts. You have not planned a program of providing legal assistance
14 to contributors wishing to set up such testamentary trusts. You would be willing to
15 provide assistance when asked, including providing information and sample forms about
16 how to set up such a testamentary trust with NCEC as a one of the beneficiaries,² and
17 referring a contributor to a lawyer or trustee familiar with legal requirements governing
18 contributions from testamentary trusts.

19 ***Question Presented***

² In a phone conversation on January 12, 2004, Counsel for NCEC specifically described what types of activities as part of providing "legal advice" NCEC might undertake.

1 *Under the facts and circumstances described above, may NCEC accept*
2 *contributions from testamentary trusts established by individuals for the purpose of making*
3 *contributions to NCEC?*

4 ***Legal Analysis and Conclusions***

5 Yes, NCEC may accept contributions from testamentary trusts under the facts and
6 circumstances described above, provided that NCEC satisfies the condition set forth below.

7 The Act sets a limit of \$5,000 per calendar year on contributions by any “person”
8 to a political committee other than an authorized committee of a candidate or a political
9 committee established and maintained by a national or State political party. 2 U.S.C.
10 441a(a)(1)(C), 11 CFR 110.1(d). Under the Act, no political committee shall knowingly
11 accept a contribution in violation of the Act’s contribution limits. 2 U.S.C. 441a(f). The
12 Act defines a “person” to include “an individual,” but makes no specific reference to an
13 individual’s testamentary estate. *See* 2 U.S.C. 431(11) and 11 CFR 100.10.

14 Because the Act includes no express or implied prohibitions on contributions from
15 a decedent’s estate, the Commission has concluded that the testamentary estate of a
16 decedent is the successor legal entity to the testator and qualifies as a “person” under the
17 Act that is subject to the same limitations and prohibitions applicable to the decedent in the
18 decedent’s lifetime. Advisory Opinion 1999-14 and advisory opinions cited therein. A
19 political committee may accept contributions from an individual’s estate made through a
20 testamentary trust, which in aggregate do not exceed \$5,000 per calendar year. Advisory
21 Opinion 1988-8; *see also* Advisory Opinion 1983-13.

1 In Advisory Opinion 1999-14, the Commission overturned its previous
2 determination that a political committee may receive a lump sum testamentary gift in
3 excess of \$5,000 per calendar year.³ In that opinion, the Commission concluded that such
4 a testamentary gift would amount to a contribution for the entire bequest at the time the
5 funds were distributed from the estate and into the political committee's escrow account,
6 and therefore would be an excessive contribution. Under the Commission's regulations a
7 contribution is made "when the contributor relinquishes control over the contribution. A
8 contributor shall be considered to relinquish control over the contribution when it is
9 delivered by the contributor to the . . . political committee." 11 CFR 110.1(b)(6). The
10 Commission's determination that a testamentary gift in the form of a lump sum bequest is
11 unlawful under the Act hinged on the fact that the political committee would control the
12 entire amount of the testamentary gift, even when placed in escrow.

13 Advisory Opinion 1999-14 superseded Advisory Opinions 1988-8 and 1983-13 to
14 the extent that those advisory opinions permitted the acceptance of excessive contributions
15 into an escrow account, but left intact portions of those advisory opinions permitting a
16 testamentary trust to make, and a political committee to accept, a contribution not
17 exceeding the contribution limits in 2 U.S.C. 441a(a)(1).

18 NCEC may accept contributions under the facts and circumstances described above
19 because the testamentary trust, unlike the escrow account in Advisory Opinion 1999-14, is
20 beyond NCEC's control. However, NCEC may accept contributions only from trusts for

³ The Commission had previously permitted a political committee to receive the total amount of a bequest into escrow, provided that the political committee did not withdraw more than \$5,000 (including principal and interest) in any calendar year, and did not pledge, assign, or otherwise obligate the escrow account balance in any manner to augment its funds. Advisory Opinions 1988-8, 1986-24, and 1983-13.

1 which neither NCEC nor an officer, director, employee, member, agent, or affiliated
2 organization of NCEC serves as trustee. Under the facts and circumstances described
3 above, this condition will ensure that NCEC does not exercise any control over the
4 undistributed trust corpus or interest amounts.

5 NCEC must report contributions accepted from testamentary trusts at the time of
6 receipt, in accordance with 11 CFR 104.3, disclosing the name of the both the trust and the
7 name of the decedent. Advisory Opinion 1988-8.

8 This response constitutes an advisory opinion concerning the application of the Act
9 and Commission regulations to the specific transaction or activity set forth in your request.
10 *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the
11 facts or assumptions presented, and such facts or assumptions are material to a conclusion
12 presented in this advisory opinion, then the requestor may not rely on that conclusion as
13 support for its proposed activity.

14

15

16

Sincerely,

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18

Bradley A. Smith

19

Chairman

20

21 Enclosures (AOs 1999-14, 1988-8, 1986-24, 1983-13)

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23