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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 15-44-A
AGENDA ITEM
For meeting of August 11, 2015
SUBMITTED LATE

August 5, 2015

MEMORANDUM

TO: The Commission

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

Adav Noti *AN*
Acting Associate General Counsel

Amy L. Rothstein *ALR by AN*
Assistant General Counsel

Esther D. Gyory *EDG by AN*
Attorney

Subject: AO 2015-05 (Shaber) 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 August 10, 2015.

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 <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2015-05

2

3 John C. Lincoln, Esq.

4 Michelle M. Lauer, Esq.

5 John C. Lincoln Law Offices

6 3514 E. Indian School Road

7 Phoenix, AZ 85018

8

9 Dear Mr. Lincoln and Ms. Lauer:

DRAFT A

10 We are responding to your advisory opinion request on behalf of Alexina Shaber
11 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the
12 “Act”), and Commission regulations to Ms. Shaber’s proposal to engage an independent third-
13 party escrow agent to receive certain funds bequeathed to the Libertarian National Committee
14 (the “Committee”) under the terms of a trust for which Ms. Shaber is the trustee. The
15 Commission concludes that the proposal as described in the request is permissible.

16 ***Background***

17 The facts presented in this advisory opinion are based on your advisory opinion request,
18 consisting of letters received on May 20 and June 22, 2015.

19 Alexina Shaber is the trustee of a trust established by Joseph Shaber, the settlor and
20 original trustee, on February 11, 2010. Upon the death of the settlor on August 23, 2014, the
21 trust became irrevocable and Ms. Shaber became the successor trustee.

22 Under the terms of the trust, the trustee is to distribute to the Committee upon the
23 settlor’s death a specific monetary gift of \$50,000, plus fifty percent of the residue of the trust
24 estate. In February 2015, Ms. Shaber distributed to the Committee a portion of the specific
25 monetary gift, in the amount of \$33,400, “in compliance with the federal election law
26 contribution limit.” Advisory Opinion Request at AOR002. Half of the residue of the trust
27 estate is valued at approximately \$175,000. Thus, the amount remaining to be distributed to the

1 Committee under the trust is approximately \$191,600, comprising \$16,600 remaining from the
2 \$50,000 specific gift and the \$175,000 residual distribution.

3 The Committee has declined to accept any of the remaining distribution into a segregated
4 account established pursuant to the Consolidated and Further Continuing Appropriations Act,
5 2015.¹ AOR002. The request states that Ms. Shaber, as trustee, “has no power to require that
6 the [Committee] accept [its] share in a way not required by the Settlor.” *Id.* (emphasis in
7 original). Instead, because the settlor “directed that the distribution be made to the [Committee]
8 outright,” the request states that it is “entirely up to the [Committee] how it wishes to apply the
9 distribution.” *Id.*

10 Given the annual limit on contributions to national party committees, Ms. Shaber
11 estimates that she will need to administer the trust for a period of six years to distribute the
12 Committee’s full share into its general account. The request states that this continued
13 administration will require the trust to incur ongoing fees and other expenses, including for
14 annual tax filings, and adversely impact the Committee’s share amount. To avoid extending the
15 trust administration and incurring related expenses, Ms. Shaber proposes to make a final
16 distribution of the Committee’s full share under the trust to an independent third-party escrow
17 agent. The Committee will have “no control over the escrow agent or the funds maintained by
18 the escrow agent,” and the escrow agent will not be an officer, director, employee, member,
19 agent, or associated organization of the Committee. AOR004. Ms. Shaber will instruct the

¹ The Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772 (2014), amended the Act by establishing separate limits on contributions to three types of segregated accounts of national party committees. 52 U.S.C. § 30116(a)(1)(B), (2)(B), (9). For 2015, the limit on contributions by individuals to each segregated account is \$100,200. Contribution Limits for 2015-2016 Federal Elections, http://www.fec.gov/ans/answers_general.shtml#How_much_can_I_contribute (last visited July 9, 2015).

1 escrow agent to distribute annually to the Committee’s general account the full amount
2 permissible under the relevant contribution limit until the funds are exhausted.

3 ***Question Presented***

4 *May Ms. Shaber engage an independent third-party escrow agent to receive the funds*
5 *designated for the Committee under the trust and to disburse annually to the Committee the*
6 *maximum amount permissible under the Act and Commission regulations?*

7 ***Legal Analysis and Conclusion***

8 Yes, under the Act and Commission regulations, Ms. Shaber may engage an independent
9 third-party escrow agent to receive the funds designated for the Committee under the trust and to
10 disburse annually to the Committee’s general account the maximum amount permissible under
11 the Act, as described in the request.

12 The Act and Commission regulations limit contributions from any “person” to the general
13 account of a national party committee to \$25,000 per calendar year, indexed for inflation.² 52
14 U.S.C. § 30116(a)(1)(B), (c); 11 C.F.R. § 110.1(c)(1). The Act defines a “person” to include “an
15 individual,” 52 U.S.C. § 30101(11); *see also* 11 C.F.R. § 100.10, and the Commission has
16 previously concluded that the testamentary estate of a decedent is the successor legal entity to the
17 individual testator. *See, e.g.*, Advisory Opinion 2004-02 (National Committee for an Effective
18 Congress) (“NCEC”) at 3; Advisory Opinion 1999-14 (Council for a Livable World) at 2. As
19 such, the testamentary estate qualifies as a “person” under the Act and is subject to the same
20 limitations and prohibitions as the decedent would be subject to if he were still living and making

² For 2015, the limit on contributions by an individual to a national party committee’s general account is \$33,400 annually. Contribution Limits for 2015-2016 Federal Elections, http://www.fec.gov/ans/answers_general.shtml#How_much_can_I_contribute (last visited July 6, 2015).

1 the contributions directly.³ *See, e.g.*, Advisory Opinion 2004-02 (National Committee for an
2 Effective Congress) (“NCEC”) at 3; Advisory Opinion 1999-14 (Council for a Livable World) at
3 2; *see also* Advisory Opinion 1983-13 (National Maritime Union Political and Legislative
4 Organization on Watch) (explaining that Commission “will apply the Act and its limits to [the
5 testamentary estate of a decedent] as the alter ego of the living testator”). Thus, an estate may
6 distribute a decedent’s bequeathed contributions but may not exceed the relevant contribution
7 limits in doing so. *See* Advisory Opinion 1999-14 (Council for a Livable World) at 3
8 (superseding prior opinions that had permitted lump-sum distributions of bequeathed
9 contributions in excess of contribution limits); *see also* Advisory Opinion 2004-02 (NCEC).

10 The proposal presented here, in which Ms. Shaber would place into escrow the sums
11 remaining to be distributed to the Committee from the decedent’s estate, is similar to a proposal
12 approved by the Commission in Advisory Opinion 2004-02 (NCEC). In that advisory opinion, a
13 nonconnected political committee proposed to accept bequests from testamentary trusts that were
14 created and funded through the estates of individuals who were legally qualified at the time of
15 their deaths to make contributions under the Act. *Id.* at 1. The terms of the trusts would limit
16 each trust to making the maximum annual contribution permitted under the Act. *Id.* The
17 testators or executors of the estates would select the trustees, and the trustees would exercise no
18 discretion regarding the amount of the contributions. *Id.* at 2. The recipient political committee
19 would have no involvement in the administration of the trusts, and the trusts would include as a

³ The Commission has previously articulated this principle as subjecting a testamentary estate to the same limitations and prohibitions “applicable to the decedent in the decedent’s lifetime.” *See, e.g.*, Advisory Opinion 2004-02 (NCEC) at 3. The Commission clarifies that this means that a contribution made by a testamentary estate is subject to the limitations and prohibitions that would apply to the decedent if he were alive when the estate makes the contribution. For example, if an individual were to die in 2016 and bequeath to a committee a contribution that his estate were to disburse in 2018, the 2018 contribution limit would apply to that contribution. Regarding the Act’s prohibitions, nothing in the instant request suggests that the decedent, Joseph Shaber, was a foreign national or otherwise prohibited from making contributions during his lifetime.

1 condition of their contributions that the recipient political committee could not pledge, assign, or
2 otherwise obligate anticipated contributions. *Id.* The Commission found that the political
3 committee could “accept contributions under [these terms] because the testamentary trust . . .
4 [was] beyond [the political committee’s] control.” *Id.* at 3.

5 Here, likewise, Ms. Shaber will deliver the full amount of the remaining bequest to an
6 independent third-party escrow agent, and the Committee will have no control over the funds
7 maintained in the escrow account.⁴ Ms. Shaber will direct the escrow agent to disburse annually
8 to the Committee the maximum amount permissible under the Act and Commission regulations
9 until the funds are exhausted.⁵ The Commission, therefore, determines that the proposed method
10 of disbursing the bequest to the Committee through an independent third-party escrow agent is
11 permissible under the Act and Commission regulations.

12 The Commission expresses no opinion regarding the potential application of tax law or
13 trust and estate law to the proposed activities because those questions are not within the
14 Commission’s jurisdiction.

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

⁴ The Commission assumes that the fiduciary relationship between the escrow agent and the Committee, and the final terms of the Escrow Agreement, will not be such as to enable the Committee to exercise control over the undisbursed funds.

⁵ The Commission notes that the Committee may not pledge, assign, or otherwise obligate the anticipated contributions before they are disbursed. *See* Advisory Opinion 2004-02 (NCEC) at 2

1 for her proposed activity. Any person involved in any specific transaction or activity which is
2 indistinguishable in all its material aspects from the transaction or activity with respect to which
3 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
4 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
5 affected by subsequent developments in the law including, but not limited to, statutes,
6 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
7 on the Commission's website.

8 On behalf of the Commission,

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12 Ann M. Ravel
13 Chair
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