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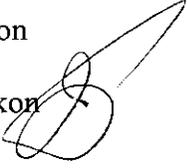
October 20, 2003

## AGENDA ITEM

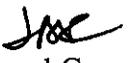
For Meeting of: 11-06-03

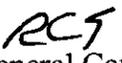
### MEMORANDUM

**TO:** The Commission

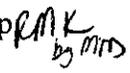
**THROUGH:** James A. Pehrkon   
Staff Director

**FROM:** Lawrence H. Norton   
General Counsel

James Kahl   
Deputy General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

Mai T. Dinh   
Acting Assistant General Counsel

Robert M. Knop   
Attorney

**SUBJECT:** Revised Draft AO 2003-23

Attached is the revised draft of the subject advisory opinion. We request that this draft be placed on a 72-hour tally vote.

Attachment

1 ADVISORY OPINION 2003-23

2  
3 Joseph E. Sandler, Esq.  
4 Neil P. Reiff, Esq.  
5 Sandler, Reiff & Young, P.C.  
6 50 E Street, S.E.  
7 Suite 300  
8 Washington, DC 20003

**DRAFT**

9  
10 Dear Messrs. Sandler and Reiff:

11  
12 This responds to your letter of July 25, 2003, requesting an advisory opinion on  
13 behalf of WE LEAD Women Engaged in Leadership, Education, and Action in  
14 Democracy (“WE LEAD”), concerning the application of the Federal Election Campaign  
15 Act of 1971, as amended (“the Act”), and Commission regulations, to the earmarking,  
16 collection, and forwarding of contributions from individual donors to the presumptive  
17 Democratic Presidential nominee.

18 ***Background***

19 You state that WE LEAD is a non-connected, Federal political committee that has  
20 not been established, financed, maintained, or controlled by any political party  
21 committee, other political committee, or any candidate for any Federal office. WE  
22 LEAD registered with the Commission on July 17, 2003.

23 You indicate that WE LEAD plans to solicit and accept contributions up to \$2,000  
24 from individuals who would earmark such contributions to the “presumptive nominee” of  
25 the Democratic Party (“Party”) for the office of President of the United States. You  
26 define the “presumptive nominee” as the candidate who, no later than 5:00 P.M. Eastern  
27 Daylight Time (“EDT”) on the seventh day prior to the start of the 2004 Democratic  
28 National Convention, has received enough pledged delegates to win nomination on the  
29 first ballot at the 2004 Democratic National Convention. The pledged delegates must be

1 registered with and certified by the Secretary of the Democratic National Committee  
2 (“DNC”).

3           You state that WE LEAD plans to forward all earmarked contributions to the  
4 primary committee of such presumptive nominee as soon as the nominee is identified, but  
5 not later than July 20, 2004, which is the sixth day prior to the scheduled start of the 2004  
6 Democratic National Convention. You indicate that if no presumptive nominee has been  
7 identified by 5:00 P.M. EDT on July 19, 2004, WE LEAD plans to forward the  
8 earmarked contributions to the DNC. You indicate that if the contributions are forwarded  
9 to the DNC, they will not be forwarded to any candidate for President or other Federal  
10 office.

11           You state that, in soliciting the earmarked contributions, WE LEAD plans to  
12 inform prospective contributors that their contributions are being earmarked, pursuant to  
13 11 CFR 110.6(b), and that the presumptive nominee who receives the contribution will be  
14 publicly identified on WE LEAD’s disclosure reports. You also state that prospective  
15 contributors will be informed that any earmarked contributions must be limited to a total  
16 of \$2,000. In addition, you indicate that each prospective contributor will be informed  
17 that if he or she has made other contributions to the committee that receives his or her  
18 earmarked contribution (*e.g.*, the presumptive nominee’s authorized committee or the  
19 DNC), those contributions will be aggregated with his or her earmarked contribution and  
20 any amount exceeding the relevant contribution limit will be refunded by the recipient  
21 committee.

22           You also indicate that all disclaimers required by Commission regulations with  
23 respect to WE LEAD’s solicitation of contributions will be included in all solicitations.

1 You further indicate that WE LEAD understands, and will communicate to the  
2 presumptive nominee's primary committee, that the earmarked contributions would not  
3 qualify for matching funds under the Presidential Primary Matching Payment Account  
4 Act pursuant to 11 CFR 9034.3(f).

5 You state that WE LEAD plans to identify each contribution as earmarked for the  
6 presumptive nominee on its disclosure report for the reporting period in which each such  
7 earmarked contribution was received, in accordance with 11 CFR 110.6(c)(1)(ii). You  
8 also state that, at the time the earmarked contributions are forwarded to the presumptive  
9 nominee's campaign committee, WE LEAD plans to send the recipient committee a  
10 check from WE LEAD for the total amount of all earmarked contributions along with a  
11 report containing all required information with respect to each earmarked contribution in  
12 accordance with 11 CFR 110.6(c)(1)(i), (iii) and (iv). Finally, you indicate that WE  
13 LEAD plans to report the disbursement of the earmarked contributions to the recipient  
14 committee on its disclosure report for the reporting period during which the disbursement  
15 was made.

16 ***Question Presented***

17 *May WE LEAD accept earmarked contributions from individuals to be forwarded*  
18 *to the Party's presumptive nominee for the office of President of the United States or to*  
19 *the Democratic National Committee?*

20

1 ***Legal Analysis and Conclusions***

2 Yes, as long as WE LEAD complies with the requirements set forth below.

3 1. *Earmarking contributions to the presumptive nominee's authorized committee*

4 The Act provides for the earmarking of contributions "made by a person, either  
5 directly or indirectly, on behalf of a particular candidate." 2 U.S.C. 441a(a)(8). All  
6 contributions by a person that are made on behalf of, or to, a candidate, including  
7 contributions that are in any way earmarked or otherwise directed to the candidate  
8 through an intermediary or conduit, are contributions from the person to the candidate.  
9 2 U.S.C. 441a(a)(8); 11 CFR 110.6(a). If the intermediary or conduit exercises any  
10 direction or control over the choice of the recipient candidate, however, the contributions  
11 are treated as contributions from both the original contributors and from the intermediary  
12 or conduit to the recipient candidate. 11 CFR 110.6(d). The Commission's regulations  
13 define "earmarked" as "a designation, instruction, or encumbrance, whether direct or  
14 indirect, express or implied, oral or written, which results in all or any part of a  
15 contribution or expenditure being made to, or expended on behalf of, a clearly identified  
16 candidate or a candidate's authorized committee." 11 CFR 110.6(b)(1). Earmarked  
17 contributions must be forwarded to the candidate or the candidate's authorized committee  
18 in accordance with 11 CFR 102.8. 11 CFR 110.6(b)(2)(iii).

19 Section 432(b) of the Act and Commission regulations at 11 CFR 102.8(a) require  
20 that persons who receive contributions on behalf of an authorized committee must  
21 forward the contributions to the treasurer no later than 10 days after receiving them. If  
22 the contribution exceeds \$50, the name and address of the contributor and the date of  
23 receipt must be forwarded with the contribution, and, if the contribution exceeds \$200,

1 the contributor's employer and occupation must also be forwarded. The date of receipt of  
2 the contribution is the date that the person receiving the contribution obtains possession.  
3 11 CFR 102.8(a). The Act and Commission regulations also require the intermediary or  
4 conduit to report the original source and the intended recipient of an earmarked  
5 contribution to the Commission and to the intended recipient. 2 U.S.C. 441a(a)(8); 11  
6 CFR 110.6.

7 *A. Unidentified Candidate*

8 As noted above, the Commission's regulations define an earmarked contribution,  
9 in part, as one that is made to a "clearly identified candidate or a candidate's authorized  
10 committee." 11 CFR 110.6(b)(1). The Commission has interpreted this regulation to  
11 allow contributions to be earmarked for an undetermined Federal candidate in certain,  
12 limited circumstances. In Advisory Opinion 1982-23, the Commission concluded that it  
13 was permissible for a local committee to earmark \$1,000 through a local party committee  
14 to the as-yet unknown Republican nominee for New York's 24<sup>th</sup> Congressional District.  
15 In Advisory Opinion 1977-16, the Commission concluded that it was permissible for a  
16 local committee to accept contributions and make expenditures on behalf of an  
17 undetermined Federal candidate. In both instances, the Commission concluded that it  
18 was permissible to earmark contributions to undetermined Federal candidates because the  
19 candidates were identifiable as to specific office, party affiliation, and election cycle,  
20 although the names of the eventual nominees were not known.

21 Under WE LEAD's proposal, because the presumptive nominee is identifiable as  
22 to specific office (President of the United States), party affiliation (Democratic Party),  
23 and election cycle (2004), the Commission concludes that contributors may earmark

1 contributions to the primary committee of the presumptive nominee through WE LEAD,  
2 as long as the earmarked contributions are forwarded to the treasurer of the presumptive  
3 nominee's authorized committee once the presumptive nominee is identified, consistent  
4 with the requirements of 2 U.S.C. 432(b)(2) and 11 CFR 102.8(a).

5 *B. Direction and control*

6 Based on the facts presented in your request, it does not appear that WE LEAD  
7 will exercise direction or control over the choice of the recipient candidate, which will be  
8 the presumptive nominee. 11 CFR 110.6(d). Your request describes a clear method to  
9 identify the presumptive nominee based on a sufficient number of pledged delegates as  
10 certified by the state Democratic Chairs. WE LEAD will not have any role in, or control  
11 over, the selection of the delegates or their certification. Your request also clearly  
12 identifies the entity – the DNC – that will receive the earmarked contributions if no  
13 Presidential candidate receives sufficient delegates to secure the nomination seven days  
14 before the start of the Democratic National Convention. Thus, WE LEAD must forward  
15 the earmarked contributions to the presumptive nominee or the DNC, depending on the  
16 circumstances, within the time periods discussed below.

17 *C. Timing*

18 Generally, contributions earmarked for a candidate must be forwarded to the  
19 authorized committee's treasurer within 10 days of receipt. 2 U.S.C. 432(b)(2) and  
20 11 CFR 102.8(a). In Advisory Opinion 1982-23, however, the Commission suspended  
21 the timing requirements of 11 CFR 102.8(a) until such time that the Republican  
22 congressional candidate for the 24<sup>th</sup> Congressional District of New York was determined.  
23 Like the requestor in that advisory opinion, WE LEAD will most likely not know the

1 name of the presumptive nominee when it solicits and receives some earmarked  
2 contributions from individuals. Thus, the timing requirements of 2 U.S.C. 432(b)(2) and  
3 11 CFR 102.8(a) will not be triggered until the presumptive nominee is chosen by the  
4 method described in your request. Once the presumptive nominee is known, WE LEAD  
5 must forward the earmarked contributions to the presumptive nominee's authorized  
6 committee within ten days.

7 WE LEAD must report the original source of each earmarked contribution on its  
8 reports for the reporting period in which the earmarked contributions were received. 11  
9 CFR 110.6(c)(1). The reports must identify each earmarked contribution as earmarked  
10 for the presumptive Presidential nominee of the Democratic Party. For the reporting  
11 period in which the earmarked contributions are forwarded to the presumptive nominee,  
12 WE LEAD must report the disbursement in accordance with 11 CFR 110.6(c)(1). In  
13 addition, at the time WE LEAD forwards the earmarked contributions to the presumptive  
14 nominee's primary committee, it must also send the committee a report containing all  
15 required information with respect to each earmarked contribution pursuant to 11 CFR  
16 110.6(c)(1)(i), (iii), and (iv). The solicitations must also include the appropriate  
17 disclaimers pursuant to 11 CFR 110.11. WE LEAD's plan to address excessive  
18 contributions is acceptable.

19 You do not ask about the treatment of the direct costs of solicitation incurred by  
20 WE LEAD as part of this earmarking program. It is acceptable for WE LEAD to treat the  
21 direct costs of solicitation as in-kind contributions by WE LEAD to the presumptive  
22 nominee. *See* Advisory Opinion 1980-46.

1    2.     *Earmarking contributions to the DNC*

2           In the event that the presumptive nominee cannot be determined within seven  
3 days of the Democratic National Convention, WE LEAD intends to forward the  
4 contributions to the DNC. Neither the Act nor Commission regulations specifically  
5 address contributions earmarked to political committees that are not authorized  
6 committees of candidates. *See* 2 U.S.C. 441a(a)(8) and 432(b); 11 CFR 110.6. The  
7 Commission has held that this omission does not bar such earmarking, but that it would  
8 be subject to other regulations concerning the receipt of contributions by any person on  
9 behalf of a political committee. Advisory Opinions 1983-18 and 1981-57. Section  
10 432(b) of the Act and Commission regulations at 11 CFR 102.8(b) require persons who  
11 receive a contribution in excess of \$50 on behalf of an unauthorized committee to  
12 forward the contribution, as well as the contributor's name, address, and receipt date, to  
13 the treasurer no later than 10 days after receipt. 2 U.S.C. 432(b)(2)(B); 11 CFR  
14 102.8(b)(2). If the contribution exceeds \$200, the contributor's employer and occupation  
15 must also be forwarded. 11 CFR 102.8(b)(2). Contributions of \$50 or under to  
16 unauthorized committees must be forwarded within thirty days (with no information  
17 forwarding requirement). 2 U.S.C. 432(b)(2)(A); 11 CFR 102.8(b)(1).

18           Because the DNC is not an authorized committee of any candidate, if WE LEAD  
19 forwards the contributions to the DNC, then the time period in which WE LEAD must  
20 forward each earmarked contribution would depend on the amount of the contribution:  
21 (1) contributions of \$50 or less must be forwarded to the treasurer of the DNC within 30  
22 days of receipt; and (2) contributions over \$50 must be forwarded to the treasurer of the

1 DNC within 10 days of receipt. For purposes of WE LEAD's program, the date of  
2 receipt is the date on which the presumptive nominee is determined.

3 The requirements set forth above regarding solicitation and reporting of  
4 earmarked contributions and handling of excessive contributions also apply to  
5 contributions forwarded to the DNC. The only difference is that the contribution limit for  
6 individuals is \$25,000 per calendar year rather than \$2,000 per election because the  
7 contribution is made to a national political party rather than a Federal candidate. 2  
8 U.S.C. 441a(a)(1).

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

15  
16 Sincerely,  
17

18  
19  
20 Ellen L. Weintraub  
21 Chair  
22

23  
24 Enclosures (AOs 1983-18, 1982-23, 1981-60, 1981-57, 1980-109, 1980-46 and 1977-16)  
25  
26