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July 25, 2003

AOR 2003-23

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

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Re: **WE LEAD Women Engaged in Leadership, Education, and Action in
Democracy**
Committee ID: C00388561
Request for Advisory Opinion

Dear Mr. Norton:

Pursuant to 2 U.S.C. §437f and the Commission's rules, 11 C.F.R. § 112.1, this letter requests an advisory opinion on behalf of WE LEAD Women Engaged in Leadership Education and Action in Democracy (the "WE LEAD Committee" or the "Committee"), a non-connected federal political committee which registered with the Commission on July 17, 2003.

The Committee asks whether individual donors may earmark contributions, through the Committee, to the presumptive nominee of the Democratic Party for the office of President of the United States, before the name of that nominee has been determined, with the contributions to be forwarded to the primary committee of such presumptive nominee as soon as the presumptive nominee has been identified, but no later than a week before the beginning of the 2004 Democratic National Convention. In the event that no presumptive nominee has been identified by that time, the earmarked contributions will be forwarded to the Democratic National Committee.

The Committee understands that, if the answer to this question is affirmative, any such contributions received by the authorized primary committee of the presumptive nominee would not qualify for matching funds under the Presidential Primary Matching Payment Account Act.



FACTUAL BACKGROUND

The Committee has not been established, maintained, financed or controlled by any political party committee or other political committee, or any candidate for any federal office. The Committee is a federal political committee, non-connected, formed to promote the involvement and empowerment of women in the political process. The Committee registered with the Commission on July 17, 2003.

The Committee proposes to solicit and accept contributions from individual members of the public, up to \$2,000, earmarked for the presumptive nominee of the Democratic Party of the U.S. for the office of President of the U.S. The Committee proposes to begin soliciting such earmarked contributions as soon as possible, contingent upon receiving an affirmative response to this AOR.

The "presumptive nominee" will be defined to mean the candidate, if any, who has received enough pledged delegates (currently 2,163), as registered with and certified by the Secretary of the Democratic National Committee, to win the nomination on the first ballot at the 2004 Democratic National Convention. Under the Final Call to the 2004 Democratic National Convention, of the 4,325 delegates to the National Convention, 3,520 will be formally pledged to a presidential candidate. Under the DNC's Delegate Selection Rules for the 2004 Democratic National Convention, the pledged delegate positions in each state are divided into various levels and allocated among presidential candidates based on either a primary or caucus/convention system. The delegate positions so allocated are then filled, with individual delegates, through procedures permitted by the Delegate Selection Rules and adopted by each state Democratic Party.

As each individual person is selected to fill a pledged delegate position, her name is certified in writing by the state Democratic Chair, to the Secretary of the DNC, within three days of her selection. Final Call, section IV(A). All steps required for the selection of all delegates to the convention must be completed by all state parties no later than June 19, 2004. *Id.* § III. The 2004 Democratic National Convention will convene in Boston, Massachusetts beginning on Monday, July 26, 2004

The WE LEAD Committee will publicly identify the "presumptive nominee" based on such information, as soon as information publicly available from the Office of the Secretary of the DNC allows such nominee to be identified.

In soliciting the earmarked contributions, the Committee will inform prospective donors that their contributions are being earmarked, within the meaning of the Commission's regulations, 11 C.F.R. §110.6(b); and that the "presumptive nominee" who will receive the contribution will be ultimately identified as described above. Donors will be informed that any earmarked contribution must be limited to \$2,000.

Each donor will also be informed that:

(i) in the event that she has made any contribution other than the earmarked contribution, to a presidential candidate who becomes the "presumptive nominee," and the amount of that other contribution, when added to the earmarked contribution, exceeds \$2,000, an excessive contribution will have resulted and the excess will be immediately refunded by the recipient presidential campaign; and

(ii) in the event that no "presumptive nominee" has been determined, under the above-described procedure, prior to 5:00 p.m. EDT on the seventh day prior to the first day of the 2004 Democratic National Convention, the earmarked contribution will be contributed to the Democratic National Committee; provided that, in the event that the donor has made any contribution other than the earmarked contribution to the DNC which, when added to the earmarked contribution, causes the aggregate amount of the donor's contributions to the DNC to exceed \$25,000 in calendar year 2004, the Committee will refund such excess within thirty (30) days of such seventh day. In the event that any of the contributions are ultimately transmitted to the DNC, such contributions will not be earmarked for any candidate.

All other disclaimers required by the Commission's regulations, 11 C.F.R. §110.11, with respect to the solicitations of funds as described above, will be included in all solicitations.

Each earmarked contribution will be identified as earmarked for the "presumptive nominee" in the Committee's report for the reporting period in which each such earmarked contribution was received, 11 C.F.R. §110.6(c)(1)(ii).

If and when a "presumptive nominee" has been identified, the Committee will issue a check to the authorized committee of such nominee in the total amount of the earmarked contributions received by the Committee. The earmarked contributions will be forwarded no later than the 6th day prior to the beginning of the Convention; otherwise, the contributions will be forwarded to the DNC, as described above.

At the time the earmarked contributions are forwarded to the recipient presidential campaign committee, in accordance with 11 C.F.R. §110.6(c)(1)(i) & (iii), the Committee will send to the recipient presidential candidate committee a report containing all required information with respect to each earmarked contribution, as set forth in 11 C.F.R. §110.6(c)(1)(iv). The disbursement of the earmarked contributions will also be reported on the Committee's next report.

It is understood (and will be communicated to the recipient presidential campaign committee) that by virtue of 11 C.F.R. §9034.3(f), none of the earmarked contributions,

as received by the recipient presidential candidate committee, will qualify for matching funds.

DISCUSSION

Based on the above facts, it seems clear that the contributions earmarked for the "presumptive nominee" will be earmarked through the Committee in such a way that they will constitute contributions from the individual donors to the "presumptive nominee", but not from the Committee to such nominee. 11 C.F.R. §110.6. It also seems clear that the Committee, as conduit, will not exercise any direction or control over the choice of the recipient candidate or the ultimate recipient of the funds, under and for purposes of 11 C.F.R. §100.6(d).

In these circumstances, the earmarking process should be permissible notwithstanding that the identity of the recipient presidential candidate committee will not be determined until after most of the earmarked contributions are received. In Advisory Opinion 1977-16, CCH FED. ELEC. CAMP. FIN. GUIDE TRANS. BINDER ¶5258, the Commission approved formation and operation of a committee formed to search for "the best Republican candidate" for the 1980 Senate election in Iowa. The committee would eventually select the candidate it planned to support in the Republican Senate primary and, upon that selection, the committee would begin to function as the candidate's principal campaign committee. Prior to that selection the committee was to receive contributions and regard itself as subject to the same limits of FECA applied to a candidate and his or her principal campaign committee. The committee indicated that, when the 1980 candidate to be supported was selected, all contributions previously received would be reviewed and refunds would be made in any case where a contributor exceeded the relevant limits because of contributions made to the selected candidate prior to his selection by the committee.

In Advisory Opinion 1982-23, CCH FED. ELEC. CAMP. FIN. GUIDE TRANS. BINDER ¶ 5662, a federal political committee asked whether it could earmark a contribution through a local party committee to a congressional candidate. The federal committee was terminating and wanted to contribute its excess funds, prior to the congressional primary, to an unregistered local party committee to be used by whoever ultimately won the Republican primary for U.S. House for the 24th CD in New York. The Commission ruled that the federal committee could indeed earmark a maximum of \$1,000 in this way, noting that the Commission had "allowed a contribution to be earmarked for an undetermined Federal candidate where the facts indicated that the candidate was identifiable as to specific office, party affiliation and election cycle." *Id.* at p. 10,863.

In the program to be conducted by the WE LEAD Committee, the candidate—the "presumptive nominee"—is also identifiable as to office, party affiliation and election cycle, and there is an objective, predetermined process to identify the actual candidate to

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receive the earmarked funds. Further, as in A.O. 1977-16 and A.O. 1982-23, the Committee plans to put in place procedures to ensure that all applicable contribution limits are met with respect to the earmarked contributions received by the WE LEAD Committee, and ultimately forwarded to the recipient presidential campaign (or the DNC, in the event there is no "presumptive nominee" prior to the Convention).

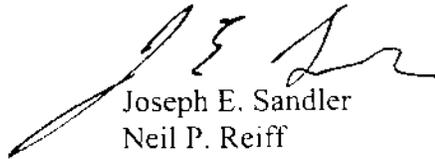
CONCLUSION

For the reasons set forth above, the Commission should issue an advisory opinion holding that the WE LEAD Committee may accept contributions earmarked for the "presumptive nominee" of the Democratic Party for the office of President, prior to the identification of such nominee, and forward such earmarked contributions to the presumptive nominee so identified as soon as he or she is identified, but no later than six days prior to the beginning of the 2004 Democratic National Convention.

If the Commission has any questions or needs any further information concerning this request, please contact the undersigned.

Thank you for your time and attention to this matter.

Sincerely yours,



Joseph E. Sandler
Neil P. Reiff

Attorneys for WE LEAD Political Action

Committee