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November 10, 2003

AOR 2004-02

Mr. Larry Norton  
General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

2003 NOV 10 P 4:07  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF THE FEDERAL  
COUNSEL

**Re: Advisory Opinion Request**

Dear Mr. Norton:

This letter constitutes a request for an advisory opinion on behalf of the National Committee for an Effective Congress ("NCEC"), a multi-candidate political committee for the purposes of the Federal Election Campaign Act ("FECA"). The request relates to the receipt by NCEC of contributions from testamentary trusts.

### **Factual Background**

NCEC is a political committee formed in 1948 for the purpose of supporting progressive candidates. For over a half century NCEC has carried out that purpose with the loyal and regular support of contributors from across the country. Over the years, NCEC received bequests from some of its contributors, which, until Advisory Opinion 1999-14, it processed according to the Commission's instructions on bequests by placing the funds in escrow and drawing down on the escrow in amounts of no more than \$5,000 per year. A number of contributors have indicated their willingness provide funds to NCEC through bequests or other testamentary means. NCEC would like to be able to advise these contributors, or other potential contributors, of an appropriate method to establish testamentary giving to NCEC.

To this end, NCEC seeks an advisory opinion as to the permissibility of donors establishing testamentary trusts for the purpose of making annual contributions to

[04015-0001-000000/DA033020.073]

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NCEC. The trusts would be created and funded only by the estates of individuals who were legally qualified at the time of their deaths to make contributions under FECA. The terms of the trusts would limit the trusts to making the maximum annual contribution permitted under FECA to NCEC. The aggregated contributions from a trust and all other trusts created by the decedent will not exceed the aggregate election cycle limit on contributions from individuals. The trustees would exercise no discretion regarding the amount of the contribution. A contributing trust will set as a condition of its contribution that NCEC may not pledge, assign or otherwise obligate anticipated contributions in order to realize in whole or in part the present value of future contributions. NCEC will expressly agree to abide by this condition on the trust's contribution. NCEC seeks the Commission's advice whether under these facts it may accept contributions from such trusts.

### **Legal Analysis**

The determining issue is whether a testamentary trust is a person for the purposes of FECA. The Federal Election Commission ("Commission") has in a series of advisory opinions concluded that a testamentary trust is appropriately treated as a person for the purposes of FECA. In Advisory Opinion 1986-24, the Commission found that "a testamentary trust is the successor legal entity to the testator and qualifies as a person under the Act subject to the same limitations and prohibitions applicable to the decedent in his or her lifetime."

The Commission relied on this opinion in Advisory Opinion 1988-8 to approve the creation of a testamentary trust through which the trustee would make contributions to a political committee. The trust contemplated in that opinion is similar in all material respects to the testamentary trusts from which NCEC intends to accept contributions. Like the trust in Advisory Opinion 1988-8, any testamentary trust that contributes to NCEC will limit its contributions to \$5000 per calendar year and will not exceed the aggregate election cycle contribution limit. Anticipated future contributions will similarly not be pledged, assigned or otherwise obligated by NCEC until actually received.

These opinions are consistent with the treatment of contributions from trusts in Advisory Opinions 1978-7 and 1983-13. As the Commission noted in these opinions, "person" is defined expansively in FECA to include "an individual, partnership, committee, association, corporation, labor organizations, or any other organization or

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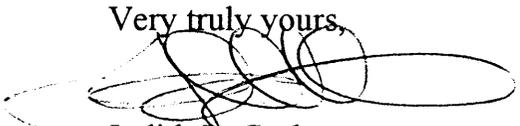
group of persons." 2 U.S.C. §431(a)(11). Nothing in FECA demonstrates an intent to limit this definition. When Congress intended to limit or prohibit contributions from a particular source, it did so expressly. (See 2 U.S.C. §§441b, 441c, 441e and 441f).

It is also difficult to identify a policy reason for prohibiting contributions from testamentary trusts. To the extent that the contribution limitations and prohibitions are intended to prevent corruption or the appearance of corruption, the purpose would be attenuated or non-existent when applied to contributions from testamentary trusts.

For the above reasons, the Commission's past treatment of contributions from testamentary trusts is sound. In light of the Commission's decision in Advisory Opinion 1999-14, NCEC nevertheless seeks to confirm the continued viability of the earlier advisory opinions on this subject. In Advisory Opinion 1999-14, the Commission superseded those earlier advisory opinions to the extent that those opinions permitted direct bequests from decedents to political committees that exceeded the contribution limitation. The facts of this request are clearly distinguishable from those of Advisory Opinion 1999-14. Unlike the requester in that opinion, NCEC does not intend to accept any direct bequest over the contribution limit (unless the Commission should expressly supersede Advisory Opinion 1999-14 either through a regulation or an advisory opinion.) NCEC only intends to accept contributions for testamentary trusts operating consistently with the facts outlined above. NCEC asks, notwithstanding the Commission's decision in Advisory Opinion 1999-14, whether under the facts given, it may accept contributions from testamentary trusts.

Please do not hesitate to call me should you have any questions regarding this request.

Very truly yours,



Judith L. Corley  
Counsel to NCEC

JLC:mjs



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 18, 2003

Ms. Judith L. Corley  
Perkins Coie, LLP  
607 Fourteenth Street, NW  
Washington, DC 20005-2011

Dear Ms. Corley,

This refers to your letter dated November 10, 2003, on behalf of the National Committee for an Effective Congress ("NCEC"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to NCEC's receipt of contributions from testamentary trusts.

You seek an advisory opinion on the permissibility of NCEC's contributors establishing testamentary trusts for the purpose of making annual contributions to NCEC. You state that the trusts would be created and funded only by the estates of individuals who were legally qualified at the time of their deaths to make contributions under the Act. The terms of the trusts would limit the trusts to making the maximum annual contribution permitted under the Act to NCEC. The aggregated contributions from a trust and all other trusts created by a single decedent will not exceed the aggregate election cycle limit on contributions from individuals.

You state that trustees would exercise no discretion regarding the amount of the contribution. A contributing trust will set as a condition of its contributions that NCEC may not pledge, assign, or otherwise obligate anticipated contributions in order to realize in whole or in part the present value of future contributions. You state NCEC will expressly agree to abide by this condition on the trust's contributions.

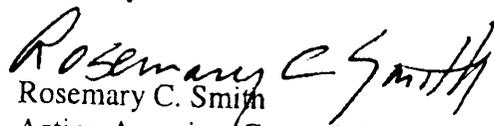
The Act authorizes the Commission to issue an advisory opinion in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. § 437f(a). Commission regulations explain that such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). The Office of General Counsel shall determine if a request is incomplete or otherwise not qualified as an advisory opinion request. *See* 11 CFR 112.1(d).

In view of the above requirements, this Office will need further detail regarding the testamentary trusts set up to make contributions to NCEC. Specifically:

- (1) Would NCEC solicit the creation of the trusts as part of a planned giving campaign in which NCEC would request that its contributors and supporters set up testamentary trusts for the benefit of NCEC?
  - a. How would NCEC make such requests?
  - b. What would NCEC communicate to contributors as part of the request?
- (2) Would NCEC provide contributors with legal assistance and advice, or other types of assistance in setting up the trusts?
- (3) What types of entities will serve as trustees for any of the trusts? Will this include a corporation or national bank? Would any officer, director, employee, member, agent, or affiliated organization of NCEC serve as a trustee of any of the trusts?
- (4) Please confirm that a trustee will have no discretion over whether or not a contribution is made, or whether a contribution will be less than the maximum annual contribution permitted to be given to NCEC under the Act.
- (5) What kind of involvement, if any, would NCEC have in the administration of the trusts? Your response should include, but not be limited to, what type of input into, or control over, decision-making NCEC will have for the investment of the corpus and disbursements of the corpus to recipients other than NCEC.

Upon receiving your responses to the above questions, this Office and the Commission will give further consideration to your inquiry as an advisory opinion request. If you have any questions concerning the advisory opinion process or this letter, please contact Esa Sferra, an attorney in this Office, at 202-694-1650.

Sincerely,

  
Rosemary C. Smith  
Acting Associate General Counsel

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January 13, 2004

VIA FACSIMILE AND 1<sup>ST</sup> CLASS MAIL

Ms. Rosemary C. Smith  
Acting Associate General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

Re: Advisory Opinion Request from NCEC

Dear Ms. Smith:

I am responding to your request for additional information relating to the request for an advisory opinion submitted by the National Committee for an Effective Congress ("NCEC"). Your request is in the form of a series of questions and I will provide answers to those questions in the order in which they were asked.

Question 1. *Would NCEC solicit the creation of the trusts as part of a planned giving campaign in which NCEC would request that its contributors and supporters set up testamentary trusts for the benefit for NCEC?*

NCEC has not planned any giving campaign for the purpose of soliciting contributions through testamentary trusts. If the advisory opinion request is approved, NCEC anticipates that it will advise contributors that properly structured contributions through testamentary trusts are permissible. NCEC has not developed any plans in this regard. At this time, NCEC only intends to advise contributors who have inquired about this option.

Question 2. *Would NCEC provide contributors with legal assistance and advice or other types of assistance in setting up the trusts?*

Again NCEC has not planned a program of providing legal assistance to contributors. Nevertheless because NCEC has an interest independent from the contributor in assuring that any contribution that it receives is permissible, NCEC would want to have adequately discussed the matter with potential contributors or their counsel to assure any contribution that is forthcoming meets the Commission's

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FEDERAL ELECTION COMMISSION  
OFFICE OF GENERAL COUNSEL

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January 13, 2004  
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requirements for such contributions. Consequently, NCEC will be willing to provide advice when asked. Unless legally constrained from doing so, NCEC may desire to refer a contributor to a lawyer or trustee that is familiar with the legal requirements governing contributions from testamentary trusts.

Question 3. *What types of entities will serve as trustees for any of the trust? Will this include a corporation or national bank? Would any officer, director, employee, agent or affiliated organization of NCEC serve as a trustee of any of the trusts?*

The testator or the executor of the estate will select the trustee. NCEC expects that testator or executor will select a financial institution such as a bank including possibly a national bank to serve as the trustee. Since NCEC will not select the trustee, NCEC cannot assure the Commission that the testator or executor will not select an officer, director, employee, agent or affiliated organization to be a trustee. If necessary to have the request approved, NCEC will instruct any such person should they be appointed to decline the position. As noted in NCEC's request, the trustee will exercise no discretion over the amount, timing, or recipient of the contribution. Therefore the Commission may conclude that identity of the trustee is immaterial to its decision.

Question 4. *Please confirm that a trustee will have no discretion over whether or not a contribution is made, or whether a contribution will be less than the maximum annual permitted to be given to NCEC under the ACT.*

NCEC confirms that it will not knowingly accept contributions from any testator trust that the trustee exercises any discretion over whether a contribution is made or over the amount of the contribution. NCEC is willing to inform contributors of its policy in this regard.

Question 5. *What kind of involvement, if any, would NCEC have in the administration of the trusts? Your response should include, but not be limited to, what type of input into, or control over, decision-making NCEC will have for the investment of the corpus and disbursements of the corpus to recipients other than NCEC?*

NCEC will have no involvement in the administration of the trust.

Mr. Larry Norton  
January 13, 2004  
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I hope these responses adequately answer your questions but should the Commission need additional information please do not hesitate to get in touch with me.

Very truly yours,



Judith L. Corley

JLC:kjs