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December 21, 1990

Lawrence M. Noble, Esquire
General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

AOR
1990-29

Dear Mr. Noble:

On behalf of Joseph E. Seagram & Sons, Inc., (Seagram) we hereby file this advisory opinion request (AOR) regarding the proper disposition of funds currently held in escrow which were transferred from a state political committee following the termination of that committee. Specifically, Seagram requests a ruling as to whether the funds, which originally were solicited by Seagram's federal Political Action Committee (JESPAC) may be deposited into the JESPAC federal account.

FACTS

In late 1989, Seagram established JESPAC for Arizona, an affiliated political committee governed by that state's election laws. JESPAC for Arizona was funded by a \$5,000.00 deposit from the JESPAC account. At the time of the transfer of federal funds to the state account, Arizona law permitted deposits of out-of-state funds into state political committee accounts. On August 9, 1990, less than a year from the time JESPAC for Arizona was established, the Arizona Office of the Secretary of State issued an order establishing a new policy precluding the transfer of out-of-state political committee funds into a state political committee account. Notice of the order was included among report forms sent to state committee officials. There was no reference in these materials to an effective date for the new policy or any

guidance as to the most efficient means of ensuring retroactive and/or future compliance with the order.

Upon receiving the order, Seagram officials contacted the Office of the Arizona Secretary of State to inquire as to the effect of the new policy on the funds which had been transferred from JESPAC. Because the Arizona officials were unable to offer any alternative recommendations for the continued operation of the committee, it was agreed that the most prudent and efficient means of assuring compliance with this new policy was to close the JESPAC for Arizona account and seek reimbursement of any contributions. Accordingly, JESPAC for Arizona was terminated and the only contribution made during the approximately nine months that the committee was in operation was reimbursed. The disbursement at issue was a \$2,000.00 check issued to the Arizona Senate Democratic Constituent Communications account. In addition, there was a \$21.00 disbursement for political committee checks made to an Arizona bank.

After terminating JESPAC for Arizona, the funds in the state account were withdrawn and sent to the Seagram headquarters in New York. On December 10, 1990, the funds were deposited in a separate escrow account which was opened under the name of the Seagram Employees Escrow Account. The proper disposition of this sum of \$4,979.00 (the original \$5,000.00 transfer from JESPAC less the disbursement for checks) is the subject of this AOR.^{1/}

At no time during the existence of JESPAC for Arizona were any funds solicited from any source for the JESPAC for Arizona account. The \$4,979.00 at issue which is being held in escrow was solicited by JESPAC officials for the federal PAC in strict compliance with Commission regulations. During the period that JESPAC for Arizona was in operation, there was in fact no commingling of any state and federal funds and the funds which are the subject of this AOR were raised from solicitations governed by federal regulations and intended by the contributors for JESPAC.

^{1/} For a period of less than two weeks these funds were on deposit in the federal JESPAC account. Immediately upon discovery of this condition, Seagram officials unilaterally withdrew the money and deposited it in the newly opened escrow account. This activity is the subject of separate correspondence between Seagram and the Commission.

DISCUSSION

Seagram seeks an expedited review of the unique circumstances presented above in determining how to dispose properly of the funds that continue to be held in escrow in the Seagram Employees Escrow Account. Specifically, Seagram seeks a response to the following questions: (1) Whether all or any of the funds being held in escrow may be deposited in the federal account where they were originally held; and, (2) if the funds may not be deposited in the JESPAC account, what action should be taken by Seagram to ensure ongoing compliance with Commission regulations.

Analysis of the issues presented begins with 11 CFR § 102.5 which governs the conduct of organizations financing political activity in connection with federal and non-federal elections. The regulation includes a provision prohibiting transfers to federal accounts from accounts of affiliated committees which are established to finance activity in connection with non-federal elections. See 11 CFR § 102.5(a)(1)(i).

Seagram officials respectfully submit that under the facts outlined above, the most reasonable resolution to the questions presented would be for the Commission to craft a narrow exception to allow for the transfer of these funds to the JESPAC account. Because Seagram was a victim of circumstances beyond its control, we submit such an action would be justified.

The original transfer of the federal account funds to the JESPAC for Arizona account was lawful. Thereafter, for reasons unrelated to and entirely beyond the control of JESPAC for Arizona, the Office of the Secretary of State issued an order which rendered the previously permitted transfer potentially a violation of Arizona campaign law for purposes of future activity. The concern on the part of Seagram officials was that any disbursements from JESPAC for Arizona made after the policy change would be "tainted". As a result, it was determined that it would be in the best interest of JESPAC for Arizona and prospective recipients of contributions from that fund for the Committee to be terminated.

The termination of JESPAC for Arizona left Seagram with \$4,979.00 which was withdrawn from the state account. Every penny of this sum was raised by JESPAC pursuant to FEC regulations governing solicitations of eligible employees. The funds have remained intact with the exception of a disbursement for PAC checks and a \$2,000.00 contribution to the party committee which was reimbursed at the request of JESPAC. Notwithstanding that no funds were commingled and that the money in escrow is the same money that was originally in the JESPAC

account, 11 CFR § 102.5(a)(1)(a) would appear to preclude the transfer of this sum to the account where it originated.

The courses of action authorized by 11 CFR § 102.5(a)(i)(ii) for organizations which seek to finance political activity in connection with federal and non-federal elections are not available to Seagram. Because of the Arizona order, Seagram is barred from establishing another state political committee and re-depositing the funds in question into that account. In essence, Seagram is caught in a regulatory "catch-22" insofar as the escrow funds are concerned; the only conduct which is authorized by federal regulations is foreclosed to Seagram by the Arizona order.

The remaining alternative would be to deposit the funds in question into the corporate treasury account. Although this option would not contravene Commission regulations, it is inequitable from the standpoint of the individuals who contributed the funds to JESPAC. These individuals determined to participate in the JESPAC fundraising effort. They did not authorize the monies contributed to be deposited in the Seagram treasury, or to be used to cover administrative expenses for JESPAC. Because of the injustice this alternative would cause the original contributors, Seagram urges that the Commission consider this solution as one of last resort.

Although approval of the transfer of these funds into the JESPAC account would appear to contravene 11 CFR § 102.5(a)(1)(a), such an action would not be inconsistent with the policy behind the regulation of not allowing commingling of federal funds and funds which are not subject to Commission jurisdiction. Furthermore, approving the transfer under these unique circumstances would not provide unfavorable precedent. A ruling in favor of Seagram would merely establish that a state to federal transfer would be permitted where: (1) the transfer is between affiliated committees; (2) it can be proven that the funds in question were all raised for a federal committee pursuant to federal regulations; (3) it can be established that all funds in the account remained within the exclusive control of the affiliated state committee; and, (4) the funds which were solicited pursuant to Commission regulations were in fact not commingled with funds raised in accordance with state law.

It is the view of Seagram that there is recent precedent for the Commission to allow such a transfer. In AO 1990-16, the Commission approved the transfer of over one million dollars (\$1,000,000) from a state committee of a state candidate to a newly formed federal political action committee. Notwithstanding that the more than one million dollars (\$1,000,000) at issue in

AO 1990-16 was raised pursuant to Illinois election law, and not the laws and regulations of the Commission, the transfer was approved. This large sum of money, which is primarily comprised of contributions solicited in accordance with distinct state laws and regulations, will now be disbursed to candidates for federal office. If the Commission can approve a transfer of this volume where there clearly was commingling of state and federal funds, a compelling case can be made for authorizing a transfer under the unique and very limited set of circumstances outlined above.^{2/}

In conclusion, Seagram officials respectfully request that the Commission approve the proposal to transfer the funds being held in escrow into the federal JESPAC account. Seagram submits that such an action is not without precedent, and can be accomplished by crafting a very narrow exception to the prohibition in the regulations.

On behalf of Seagram, we appreciate your attention to and prompt consideration of this AOR. If you have any questions, or require further information, please do not hesitate to contact the undersigned or Richard J. Connor, Jr., Director, Seagram Federal Affairs at (202) 638-3090.

Very truly yours,



Timothy W. Jenkins

TWJ/vle

^{2/} The fact that the funds in AO 1990-16 originated from a state candidate committee does not significantly distinguish the AO from this case. A transfer of funds from a state campaign committee to a federal political action committee is not authorized by 11 CFR § 110.3(c)(6). Therefore, the commingling issue, which is at the heart of the prohibition against state to federal transfers, would also appear to be implicated in the facts presented in AO 1990-16.