FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

From: Mary W. Dove
Acting Secretary of the Commission

DATE: July 14, 1999

SUBJECT: COMMENT: PROPOSED AO 1999-14

Transmitted herewith is a timely submitted comment for the Council for a Livable World, by counsel, Elizabeth Kingsley.

Proposed Advisory Opinion 1999-14 is on the agenda for Thursday, July 15, 1999.

Attachment:

4 pages

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July 13, 1999

Mary Dove
Acting Commission Secretary
Federal Election Commission
999 E Street NW
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Dear Ms. Dove:

Thank you for the opportunity to comment on the two draft advisory opinions prepared in response to the Council for a Livable World's request. We urge the Commission to adopt Draft A because any concerns about the simpler procedure of escrow accounts approved in Draft A are not sufficiently substantial to warrant reversing existing precedent and require the use of testamentary trusts.

The Control a Recipient Exercises Over an Escrow Account As Opposed to a Trust is a Distinction Without a Difference

Draft B would approve testamentary trust arrangements where an independent trustee exercises control over the investment and distribution of trust funds. It would find that the use of an escrow account to accept these bequests would result in a prohibited excess contribution. The focus of the reasoning supporting this distinction is control over the management of the funds while they are held in escrow.

The regulations cited to support this conclusion do state that "a contribution shall be considered to be made when the contributor relinquishes control over the contribution." 11 C.F.R. § 110.1(b)(6). However, these regulations were not drafted to address a decedent's bequest, and they go on to make clear that the test is not merely relinquishment of control by the contributor but transfer of that control to the candidate or committee. The regulations do not envision a two-step process as occurs with a testamentary bequest, but focus rather on a direct transfer from the contributor to the committee, with all the rights of ownership vesting at the same time that the donor relinquishes control.

The question in this case, then, should be whether the control an organization may exercise over an escrow account is sufficient to cause the entire amount to be treated as a contribution to the organization at the time it is deposited in the account. When an escrow account is established,

the nominal owner of the account retains few of the traditional incidents of ownership. The funds held in escrow are legally restricted according to the provisions of the escrow agreement.[1]

The arrangement described in the Council's ruling request requires the Council not to enjoy most of the rights usually associated with owning and controlling funds. It would be unable to pledge, assign, or otherwise obligate the funds; interest accrued would remain part of the escrow account, subject to the $5000 annual limitation. The existing Advisory Opinions on this subject and the Council's ruling request are all predicated on the condition that the organization is unable to derive any financial benefit from the escrow account until funds are transferred for the committee's use.

The General Counsel's Draft B focuses on the one right of ownership that the Council might have, the ability to control the investment and financial management of funds held in escrow. It is not clear, however, how this limited ability to manage these funds would undermine the policy concerns of the Federal Election Campaign Act ("the Act"). Permitting the simpler mechanism of escrow accounts rather than trusts does not taint the political process; the Council's ability to manage investments is unlikely to lead to any actual or perceived corruption. Indeed, investment authority is not considered pernicious under the Act, and hence there are no restrictions on the ability of political committees to invest their own funds. As a practical matter, the two approaches are indistinguishable in all material respects; the trust arrangement favored by Draft B serves only to enrich individuals or institutions who serve as trustees by generating fees for them.

True, a testamentary trust is a legal person, while an escrow account is not. However, this is a purely technical distinction. For some legal purposes the fact that title to an asset rests with an entity with independent legal personhood may be important, but in the scheme of federal election law this particular technical distinction is generally not otherwise accorded significance. For instance, a corporation's SSF is controlled by the corporation, and need not be separately incorporated. Nonetheless, an SSF is treated as a separate entity for purposes of applying the Act's restrictions. The Act generally looks at pools of money, sources of money, and uses of money, rather than technicalities of legal personhood. When a beneficiary gives up most of the rights of property ownership, it is appropriate to treat an escrow account as sufficiently distinct that a contribution is not made to the committee when testamentary bequests are placed in the account.

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[1] For instance, when an attorney holds client funds in an escrow account, those funds are protected from the attorney's creditors. Even though one person controls the investment of the funds, they are not legally treated as belonging to her.

Serious Concerns of Public Policy Weigh Against Overturning Existing Precedent Without Good Cause

We recognize that Advisory Opinions are not precedential authority the way regulations or court decisions are. However, for people and organizations making good-faith efforts to comply with the law, Advisory Opinions are an invaluable source of guidance as to the proper interpretation of legal requirements. Significant public policy concerns of fairness, consistency, and stability weigh against superseding existing rulings in the absence of substantial legal or policy concerns. A system based on the rule of law requires certainty as to the law. Unless subsequent analysis demonstrates clearly that the original rulings were decided wrongly, or further developments indicate that they were based on faulty assumptions, the rules should not be arbitrarily changed.

As indicated by the fact that the General Counsel has provided two alternative rulings and been unable to recommend one over the other, the Act and regulations do not require a clear answer to the permissibility of testamentary escrow relationships. Experience in the years since the earlier rulings were issued does not suggest that continuing to allow these bequests will have any negative effects on the federal election process.

Furthermore, in addition to concerns of fairness, superseding Advisory Opinions 1988-8, 1986-24, and 1983-13 could cause tremendous practical problems. Draft B acknowledges this by "grandfathering" existing escrow accounts established based on the three existing Advisory Opinions. Unfortunately, this concession addresses only a portion of the problem, because it does not take into account the possibility of bequests in existing wills of individuals not yet deceased that also relied upon those rulings. Unless they follow developments in the law very closely, it is likely that many of these individuals will not revise their wills to change a bequest into a trust, so that it is quite possible that beneficiary committees will subsequently be faced with a bequest they would be unable to accept under the rules set out in Draft B. The executor of the estate would then be in an awkward position, and possibly be forced to undertake a probate court action to reform the will by providing for a trust to comply with the new FEC practice. To avoid such a costly and burdensome process, executors might rather choose to seek FEC approval to develop a novel, compromise approach, thus continuing and multiplying the problem of inconsistencies in the law.

In addition, the approach of Draft B would have the unintended effect of favoring wealthy contributors rather than encouraging wider participation by citizens in the political process. Such a result is inconsistent with a fundamental goal of the Act -- to use contribution limits to level the playing field so that wealthy donors cannot distort the political process. The expenses and administrative efforts involved in establishing a testamentary trust are significantly more burdensome than making a simple bequest that will be held in escrow. Thus, a wealthy individual who has retained sophisticated estate planning advisors will have little difficulty in adding a testamentary trust, and the resulting trust could be large enough to bear the administrative expenses of trustees' fees without depleting the trust corpus, but a contributor of more modest means would be unable to leave a simple bequest of ten of fifteen thousand dollars.

The Trust Structure Required by Draft B is Unnecessarily Restrictive in Addressing the Concerns Raised

The sole concern raised by Draft B in concluding that a testamentary bequest is permissible, but a bequest put into an escrow account is not, relates to the ability to invest and manage funds. If the Commission is similarly disturbed by these concerns, we would suggest that requiring use of a trust is not the only way to address them. As a less restrictive alternative, the testator could impose conditions on her bequest specifying, for instance, specific types of investments (such as government bonds, or a specific money market fund) in which the escrow amount may be held, and requiring the beneficiary to withdraw the entire $5000 amount annually. The Council would thus be unable to exercise control over investments without going through the technical step of creating a trust.

Again, thank you for the opportunity to provide these comments. We look forward to receiving your decision in this matter.

Sincerely,

Elizabeth Kingsley

cc: N. Bradley Litchfield, Associate General Counsel