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FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 8, 1999

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *[Signature]*
Staff Director

FROM: Lawrence M. Noble *[Signature]*
General Counsel

N. Bradley Litchfield *[Signature]*
Associate General Counsel

Jonathan Levin *[Signature]*
Senior Attorney

SUBJECT: Draft AO 1999-14 - Alternative Drafts

AGENDA ITEM
For Meeting of: 7-15-99

Attached are two proposed drafts of the subject advisory opinion. We request that both drafts be placed on the agenda for July 15, 1999.

These drafts address a proposal by a political committee to ask its major supporters to include a provision in their wills bequeathing \$100,000 to the committee. The committee would place any amounts exceeding \$5,000 into a separate escrow account and would only draw \$5,000 per year from that account. Draft A relies on three previous advisory opinions permitting such bequests and would permit the proposal to solicit such bequests provided that certain conditions are met. Draft B would supersede those three opinions to the extent they permit the proposed escrow arrangement, but would permit a plan whereby the solicitee establishes a testamentary trust from which the committee could draw \$5,000 per year. The draft also outlines conditions for such an arrangement.

This office is mindful of the previous advisory opinions permitting the type of bequests proposed by the requester but also notes the concerns related to such bequests. In view of these considerations, we present drafts containing the appropriate legal analyses but do not make a recommendation as to which draft should be approved.

Attachments

1 ADVISORY OPINION 1999-14

Draft A

2
3 Elizabeth Kingsley
4 Harmon, Curran, Spielberg & Eisenberg
5 1726 M Street, N.W.
6 Suite 600
7 Washington, D.C. 20036

8
9 Dear Ms. Kingsley:

10
11 This responds to your letter dated May 25, 1999, on behalf of the Council for a
12 Livable World ("the Council"), requesting an advisory opinion concerning the application
13 of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission
14 regulations to the solicitation of supporters for testamentary bequests.

15 The Council, which was originally organized as an unincorporated association in
16 1962, has been registered as a political committee since 1972 and is a non-connected
17 multicandidate committee. In order to provide for long-term financial stability, the
18 Council's Board of Directors has decided to set up a planned giving program soliciting
19 supporters for testamentary bequests. The Council will request that its supporters include
20 in their wills a provision bequeathing an amount up to \$100,000 to the committee.

21 The Council will deposit all funds received from any bequests that exceed \$5,000
22 into an interest-bearing savings or other investment account to be held in escrow. A
23 separate segregated escrow account will be created for each bequest. You state that the
24 Council will not pledge, assign, or otherwise obligate the escrow account balances in any
25 manner to augment other Council funds. The Council will annually withdraw no more
26 than \$5,000 from each escrow account, and these funds will be deposited into its general
27 account to be used for political purposes. If the contribution limit at 2 U.S.C.
28 §441a(a)(1)(C) is raised or lowered in the future, the Council will adjust the transfer
29 amount to conform with the new limit.¹ The Council asks whether its proposal would
30 constitute the solicitation and acceptance of excessive contributions.

¹ You state that the solicitation language will be similar to the following:

Leo Szilard originally funded the Council by asking the directors and key supporters to
pledge two percent of their incomes. This method has given way to periodic appeals for

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1 The Act sets a limit of \$5,000 in a calendar year on contributions by any "person"
2 to a political committee other than an authorized candidate committee or a political
3 committee established and maintained by a national political party. 2 U.S.C.
4 §441a(a)(1)(C). The Act also provides that no political committee shall knowingly
5 accept a contribution in violation of the Act's provisions. 2 U.S.C. §441a(f). The Act
6 defines "person" to include "an individual" but makes no specific reference to an
7 individual's testamentary estate. See 2 U.S.C. §431(11). Because the Act includes no
8 express or implied prohibitions on contributions from a decedent's estate, the
9 Commission has concluded, in previous opinions, that a testamentary estate is the
10 successor legal entity to the testator and qualifies as a person under the Act that would be
11 subject to the same limitations and prohibitions applicable to the decedent in the
12 decedent's lifetime. Advisory Opinions 1988-8, 1986-24, and 1983-13.

13 In those opinions, the Commission addressed a lump sum bequest in excess of
14 \$5,000 to a political committee from the estate of a decedent individual, either by direct
15 gift from the estate or through a testamentary trust. In each opinion, the Commission
16 concluded that the distribution of the funds would not constitute an excessive
17 contribution provided that the committee placed the funds in a separate escrow account
18 from which it withdrew no more than \$5,000 in any calendar year until the escrow
19 account balance was reduced to zero. The account would have to be administered and
20 drawn upon only in a manner whereby the committee would not realize any augmentation
21 of, or benefit to, its other funds by reason of any funds on deposit in the escrow account.
22 For example, the committee could not pledge, assign, or otherwise obligate the escrow
23 funds to provide anything of value to the committee, its connected organization, or any
24 affiliated entities. Moreover, although interest may be earned on the escrow funds, that

funds. In order to continue Leo Szilard's vision for the Council and to endow the organization as a permanent institution, we respectfully call upon all members of Council for a Livable World's Board of Directors -- and all friends of the Council -- to place in their wills a provision to bequeath \$100,000 to the Council. Should your estate not be sufficient to sustain this level, please choose an alternative amount. Your estate contribution will be placed in a special escrow account from which the Council can withdraw \$5,000 annually under present law.

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1 interest would become part of the principal for purposes of the \$5,000 annual limit on
2 withdrawals by the committee's general account.

3 The Commission also delineated the recipient committee's reporting requirements
4 with respect to such an arrangement. The bank where the escrow account is maintained
5 would have to be disclosed as a committee depository on the committee's amended
6 statement of organization. 2 U.S.C. §433(b)(6); 11 CFR 102.2(a)(1)(vi). The amounts in
7 the escrow account would be treated as analogous to an obligation owed to the committee
8 for reporting purposes, and thus the balance (including interest) would be included on line
9 9 of FEC Form 3X for each reporting period during which funds remained in the account,
10 with a supporting Schedule D identifying the account and briefly describing the nature of
11 the escrow account "debt." 11 CFR 104.3(d) and 104.11(a). As escrow withdrawals and
12 deposits were made into the general account, the amount withdrawn would be reported as
13 a contribution from the estate on line 11(a) of Form 3X and Schedule A, with
14 corresponding reductions on line 9 and Schedule D.

15 The Commission concludes that the Council may implement its proposal, subject
16 to the conditions set out in the above-described opinions and subject to other conditions,
17 discussed below, that did not arise in the previous opinions. The fact that this proposal,
18 unlike previous proposals, entails the solicitation of a number of bequests in advance of
19 the death of the solicitees does not negate the permissibility of the arrangement. There is
20 no specific prohibition in the Act on the solicitation of individuals who can lawfully
21 contribute, other than the prohibitions at 2 U.S.C. §441b(b)(4) which do not apply here.
22 Moreover, the inclusion by the living solicitee of such a bequest in his or her will is
23 merely a promise that is revocable at any time before death. A promise to make a
24 contribution does not constitute a "contribution" under the Act. See 2 U.S.C. §431(8)(A);
25 11 CFR 100.7(b)(1).²

² Prior to January 8, 1980, the Act defined "contribution" to include "a written contract, promise, or agreement, whether or not legally enforceable, to make a contribution for [the purpose of influencing a Federal election]." However, the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, repealed that portion of the contribution definition while retaining similar definitional language for the definition of "expenditure." See 2 U.S.C. §431(9)(A)(ii).

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1 In order to ensure that nothing of value is provided to the Council prior to the
2 death of the individual, the Commission further conditions its approval on the assumption
3 that the Council will not use such bequest promises to augment or otherwise add to the
4 funds in the committee's general or other accounts, e.g., through pledging, assigning or
5 otherwise obligating such prospective funds. The approval is also conditioned upon your
6 representation that a separate account will be established for each bequest. A
7 combination or commingling of the proceeds from multiple bequests in the same account
8 will compromise the concept of using the funds from a bequest only until the escrow
9 balance from that bequest is zero (particularly when interest is also included). Moreover,
10 the combination of bequests in one account may result in benefits to the account, because
11 of the enhanced balance, that would not occur if the proceeds from each bequest were in
12 separate accounts. See, by analogy, Advisory Opinions 1985-19, 1981-20, and 1981-19
13 (where the Commission addressed joint investments of funds from "hard" dollar and
14 "soft" dollar accounts and a joint purchase of equipment by a political committee and a
15 corporation and based its determinations on whether the Federal political committee had
16 sufficient funds to make the investment or purchase on its own and whether it would
17 receive any additional preference or benefit that it could not receive without the funds of
18 the other entity).

19 The Commission cautions that this opinion relates only to testamentary bequests
20 and should not be viewed as expressing any opinion on other estate planning procedures
21 such as *inter vivos* trusts, guardianships, or powers of appointment or attorney, or any
22 other methods by which a person may make gifts to a political committee. Advisory
23 Opinions 1988-8, 1986-24, and 1983-13. The Commission also expresses no opinion
24 regarding any tax ramifications of the proposal since such issues are outside its
25 jurisdiction.

1 ADVISORY OPINION 1999-14

2
3 Elizabeth Kingsley
4 Harmon, Curran, Spielberg & Eisenberg
5 1726 M Street, N.W.
6 Suite 600
7 Washington, D.C. 20036

Draft B

8
9 Dear Ms. Kingsley:

10
11 This responds to your letter dated May 25, 1999, on behalf of the Council for a
12 Livable World ("the Council"), requesting an advisory opinion concerning the application
13 of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission
14 regulations to the solicitation of supporters for testamentary bequests.

15 The Council, which was originally organized as an unincorporated association in
16 1962, has been registered as a political committee since 1972 and is a non-connected
17 multicandidate committee. In order to provide for long-term financial stability, the
18 Council's Board of Directors has decided to set up a planned giving program soliciting
19 supporters for testamentary bequests. The Council will request that its supporters include
20 in their wills a provision bequeathing an amount up to \$100,000 to the committee.

21 The Council will deposit all funds received from any bequests that exceed \$5,000
22 into an interest-bearing savings or other investment account to be held in escrow. A
23 separate segregated escrow account will be created for each bequest. You state that the
24 Council will not pledge, assign, or otherwise obligate the escrow account balances in any
25 manner to augment other Council funds. The Council will annually withdraw no more
26 than \$5,000 from each escrow account, and these funds will be deposited into its general
27 account to be used for political purposes. If the contribution limit at 2 U.S.C.
28 §441a(a)(1)(C) is raised or lowered in the future, the Council will adjust the transfer
29 amount to conform with the new limit.¹ The Council asks whether its proposal would
30 constitute the solicitation and acceptance of excessive contributions.

¹ You state that the solicitation language will be similar to the following:

Leo Szilard originally funded the Council by asking the directors and key supporters to pledge two percent of their incomes. This method has given way to periodic appeals for funds. In order to continue Leo Szilard's vision for the Council and to endow the

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2 to a political committee other than an authorized candidate committee or a political
3 committee established and maintained by a national political party. 2 U.S.C.
4 §441a(a)(1)(C). The Act also provides that no political committee shall knowingly
5 accept a contribution in violation of the Act's provisions. 2 U.S.C. §441a(f). The Act
6 defines "person" to include "an individual" but makes no specific reference to an
7 individual's testamentary estate. See 2 U.S.C. §431(11). Because the Act includes no
8 express or implied prohibitions on contributions from a decedent's estate, the
9 Commission has concluded, in previous opinions, that a testamentary estate is the
10 successor legal entity to the testator and qualifies as a person under the Act that would be
11 subject to the same limitations and prohibitions applicable to the decedent in the
12 decedent's lifetime. Advisory Opinions 1988-8, 1986-24, and 1983-13.

13 In those opinions, the Commission addressed a lump sum bequest in excess of
14 \$5,000 to a political committee from the estate of a decedent individual, either by direct
15 gift from the estate or through a testamentary trust. In each opinion, the Commission
16 concluded that the distribution of the funds would not constitute an excessive
17 contribution provided that the committee placed the funds in a separate escrow account
18 from which it withdrew no more than \$5,000 in any calendar year until the escrow
19 account balance was reduced to zero. The opinions also provided that the account would
20 have to be administered and drawn upon only in a manner whereby the committee would
21 not realize any augmentation of, or benefit to, its other funds by reason of any funds on
22 deposit in the escrow account. For example, the committee could not pledge, assign, or
23 otherwise obligate the escrow funds to provide anything of value to the committee, its
24 connected organization, or any affiliated entities. Moreover, although interest could be

organization as a permanent institution, we respectfully call upon all members of Council
for a Livable World's Board of Directors -- and all friends of the Council -- to place in
their wills a provision to bequeath \$100,000 to the Council. Should your estate not be
sufficient to sustain this level, please choose an alternative amount. Your estate
contribution will be placed in a special escrow account from which the Council can
withdraw \$5,000 annually under present law.

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1 earned on the escrow funds, that interest would become part of the principal for purposes
2 of the \$5,000 annual limit on withdrawals by the committee's general account.²

3 Upon further review of the concepts underlying bequests from decedent's estates,
4 the Commission has determined that the committee escrow plan as described above
5 would not be permissible under the Act. Although actual withdrawals for deposit into the
6 general account would be limited to \$5,000 per year, the entire amount of the bequest
7 would constitute a contribution at the time the funds were distributed by the estate.

8 Commission regulations provide that, for the purposes of the limits, a contribution is
9 considered to be made when the contributor relinquishes control over the contribution;
10 this would be when it is delivered to the political committee or its agent. 11 CFR
11 110.1(b)(6). Not only would the estate relinquish control of all the funds at the time of
12 the delivery or distribution, but the committee would exercise control over the funds upon
13 its receipt, and this control would not be negated by placing the funds in an escrow
14 account. The committee would have the power to decide which investments were best
15 for the escrowed funds and to modify these investments in order to maximize growth.
16 The committee could also decide to withdraw less than \$5,000 in a particular year as part
17 of an investment strategy. The Commission concludes, therefore, that the Council's
18 proposal may be implemented only to the extent that the solicitee's bequest is no more
19 than \$5,000 and not more than \$5,000 is deposited in any committee accounts. To the
20 extent that Advisory Opinions 1988-8, 1986-24, and 1983-13 would permit the
21 implementation of the Council's plan for amounts exceeding \$5,000, those opinions are
22 hereby superseded.

23 The Commission understands that other political committees or other individuals
24 may have made arrangements, based on the above three opinions, for the deposit of
25 bequested funds, in excess of the Act's limits, into committee escrow accounts. The
26 Commission concludes that if a committee is already drawing bequested funds from such
27 an escrow account, or an individual has already died and the bequested funds will be
28 distributed to the committee pursuant to a will, such arrangements may continue so long

² In those opinions, the Commission also delineated the recipient committee's reporting requirements based on such an arrangement. The amounts remaining in the escrow account were to be treated as

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1 as there is no material distinction from the situations presented in the three opinions.
2 See 2 U.S.C. §437f(c)(1)(B) and 11 CFR 112.5(a)(2).

3 The Commission notes, however, that its response to this proposal does not
4 preclude the establishment of another estate plan whereby the proceeds of an estate, in
5 excess of \$5,000, may be set aside by the bequester for future contributions to the
6 Council. In Advisory Opinion 1988-8, the Commission concluded that a testamentary
7 trust which had several beneficiaries, including a political committee, could contribute up
8 to \$5,000 per year to that political committee. See also Advisory Opinion 1983-13. The
9 Commission based its conclusion upon the previous opinions that had also permitted
10 bequests in excess of \$5,000 to a committee and the distribution of those amounts to
11 committee escrow account.³ Nevertheless, the Commission concludes that the Council
12 may ask its individual supporters to create testamentary trusts for the distribution of funds
13 to it, even if the funds in the trust exceed \$5,000, provided that certain conditions are met.

14 As stated in Advisory Opinion 1988-8, the Act and Commission regulations have
15 no express or implied prohibition on contributions from a decedent's estate, including
16 those distributed through a trust created by the decedent. As in that opinion, the
17 Commission would construe the testamentary trust as the successor legal entity of the
18 decedent, and subject to the same limitations and prohibitions applicable to the decedent
19 in his lifetime. Because the committee would be the beneficiary of the trust⁴ and because
20 of the concerns, expressed above, as to any control over the funds by the committee, any
21 bequester must impose the following conditions for the trust. The trustee must exercise
22 exclusive control over the trust, and there can be no committee control at all. This means
23 that the trustee may not be a person who is an officer, director, or employee of the
24 Council. Neither the Council nor any Council officer, director, or employee may provide
25 any directions as to where the funds in the trust should be invested. Any Council

analogous to an obligation owed to the committee.

³ Advisory Opinion 1988-8 also permitted the alternative of the distribution by the trust of an amount greater than \$5,000 to the committee provided the committee establish the escrow account. That portion of the opinion has been expressly superseded, as stated above.

⁴ See, e.g., 11 CFR 9034.2(c)(2) (checks drawn on a trust account are matchable provided the contributor has equitable ownership of the account); 11 CFR 110.1(i)(2) (child may use proceeds of a trust to make a contribution to the extent the child is a beneficiary).

15

1 solicitation for such testamentary arrangements must explicitly state the foregoing
2 conditions.

3 The Commission recognizes that the Council may receive information that it has
4 been designated by a living person as the beneficiary of a trust that will provide the
5 Council with funds over a period of years. The inclusion by the living solicitee of such a
6 trust arrangement in his or her will, however, merely constitutes a promise that is
7 revocable at any time before death. A promise to make a contribution does not constitute
8 a "contribution" under the Act. See 2 U.S.C. §431(8)(A); 11 CFR 100.7(b)(1).⁵
9 Nevertheless, in order to ensure that nothing of value is provided to the Council prior to
10 the death of the individual, the Commission further conditions its allowance of the
11 foregoing testamentary trust arrangement on the assumption that the Council will not use
12 such bequest promises to augment or otherwise add to the funds in the committee's
13 accounts, e.g., through pledging, assigning or otherwise obligating such prospective
14 funds. Once the bequester has died and the testamentary trust has been established, the
15 receipt of funds from the trust is somewhat more assured. The Commission, therefore,
16 further bases its allowance of the arrangement on the condition that the Council will not
17 have access to the funds remaining in the trust to augment or add to the funds in the
18 committee accounts in the manner described just above.

19 The Council should report the contributions from the testamentary trust as
20 received at the time of the actual receipt of the funds, and should disclose the name of the
21 trust, with the name of the decedent. Unlike the requirements set out in previous opinions
22 addressing funds held in a committee escrow account, the Council should not report the
23 remainder of the trust funds as an obligation owed to the committee. See footnote 2.

24 The Commission cautions that this opinion relates only to testamentary bequests
25 and should not be viewed as expressing any opinion on other estate planning procedures
26 such as *inter vivos* trusts, guardianships, or powers of appointment or attorney, or any
27 other methods by which a person may make gifts to a political committee. The

⁵ Prior to January 8, 1980, the Act defined "contribution" to include "a written contract, promise, or agreement, whether or not legally enforceable, to make a contribution for [the purpose of influencing a Federal election]." However, the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-

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1 Commission also expresses no opinion regarding any tax ramifications of the proposal
2 since such issues are outside its jurisdiction.

3 This response constitutes an advisory opinion concerning application of the Act
4 and Commission regulations to the specific transaction or activity set forth in your
5 request. 2 U.S.C. §437f.

6 Sincerely,

7
8 Scott E. Thomas
9 Chairman

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11 Enclosures (AOs 1988-8, 1986-24, and 1983-13)
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187, repealed that portion of the contribution definition while retaining similar definitional language for the definition of "expenditure." See 2 U.S.C. §431(9)(A)(ii).