



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

January 31, 2003

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2002-14

William W. Hall  
Warner, Norcross & Judd  
900 Fifth Third Center  
111 Lyon Street, N.W.  
Grand Rapids, Michigan 49503-2487

Dear Mr. Hall:

This responds to your letters dated September 20, October 24, and November 15, 2002, and January 14, 2003, on behalf of the Libertarian National Committee, Inc. ("LNC"), concerning the application of the Federal Election Campaign Act of 1971, the Bipartisan Campaign Reform Act of 2002 ("BCRA") (collectively "the Act"), and Commission regulations to activities of the LNC that entail the sale or lease of committee assets to others.

***Background***

The LNC is the national committee maintained by the Libertarian Party of the United States. The Commission recognized the LNC as a national committee of a political party in Advisory Opinion 1975-129.<sup>1</sup> As a national committee, the LNC may accept contributions in amounts greater than those made to other political party committees; as of January 1, 2003, the calendar year limits are \$15,000 from multicandidate committees and \$25,000 from other persons (other than prohibited entities). 2 U.S.C. 441a(a)(2)(B) and (1)(B); 11 CFR 110.2(c)(1) and 110.1(c)(1).

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<sup>1</sup> The Commission assumes for purposes of this Advisory Opinion that the LNC still engages in support of a sufficient range of Federal candidates and other activities to retain its status as a national committee of a political party under 2 U.S.C. 431(14) and 11 CFR 100.13; *see* Advisory Opinion 2001-13 and opinions cited therein.

You state that currently, and for many years, the LNC has engaged in a number of “business” activities, in addition to its “political” activities. These business activities, which have helped advance the LNC's political interests, have included the sale or lease of items to other organizations, including corporations, political committees under the Act, and entities qualified under 501(c) and 527 of the Internal Revenue Code, made at arms-length and at fair market rates, and you distinguish these transactions from the ordinary contributions and donations the LNC receives from individuals and other persons. In the past, the LNC has deposited receipts from these transactions in its non-Federal (or “soft money”) account and reported those receipts in accordance with Commission regulations regarding non-Federal accounts of national party committees. You are concerned that under recently enacted 11 CFR 300.10 the LNC will no longer be able to maintain a non-Federal account for the receipt of proceeds from transactions where the sources are prohibited from making contributions under the Act or in amounts that exceed the Act’s limitations.

You describe three types of transactions by which the LNC receives funds: (1) rental of the LNC’s mailing list; (2) sale of advertising space in the *Libertarian Party News* (“*LP News*”), a monthly newspaper; and (3) licensing Libertarian Party trademarks to t-shirt vendors and other manufacturers of campaign items. You also describe a fourth type of transaction, list exchanges with outside organizations, which you indicate is a mechanism the LNC has employed over the years to expand the size of its mailing list. You describe the transactions as follows.

#### *Mailing List*

The LNC rents its mailing list of members, contributors, and prospects on a commercial, arms-length basis, either directly or using an incorporated commercial list broker. Typically, the broker locates organizations desiring to rent the list and enters into contracts with them, some of which may be corporations, political committees, or organizations qualified under 26 U.S.C. 501(c) or 527. Those organizations pay a market rate fee per name and address rented.<sup>2</sup>

The mailing list was developed in the course of LNC’s political activities, primarily from: (1) the names and addresses of Libertarian Party members and contributors to the party; (2) direct mail prospecting; (3) inquiries from persons interested in the party; (4) exchanges of lists with other organizations; and (5) names and addresses of interested persons provided by party members. Typically, in the prospecting activities, the LNC rents lists from others at a fair market rate, and, when it receives a positive response to a direct mail solicitation using a name from a list, it adds that name to the LNC mailing list. Similarly, the LNC exchanges its list with other organizations on a limited or one-time basis, and then uses that organization’s list for direct prospecting for new party members. Those who respond positively are added to the LNC list, thereby expanding the size of the LNC's mailing list that can be used for the LNC's political purposes. Generally, the purchases or exchanges by LNC do not involve more than a limited or one time use of another’s mailing list, and that use is for the purpose of generating more names

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<sup>2</sup> You state by phone that prior to the effective date of BCRA, the broker sent you a check for the LNC’s share of the fee, and the LNC deposited the check in its non-Federal account regardless of whether the purchaser was incorporated.

for the LNC list, in the manner described above. Occasionally, the LNC purchases the perpetual use of a voter registration list.

You state that the mailing list was developed primarily for use by the LNC for its own campaign purposes and “is primarily and substantially used for those purposes.” Approximately once a month, the LNC rents or exchanges a portion of the mailing list with another organization for non-campaign purposes. Approximately once every two months in non-election years and more often in election years, the LNC rents or provides free or at a reduced rate a portion of the list to a Libertarian Party candidate or ballot initiative committee for political or campaign purposes. Approximately three times a month, the LNC or one of its affiliates will use the list for Libertarian Party political or campaign purposes. For example, the LNC uses the mailing list to send the *LP News* to party members and a relatively small number of subscribers who are not members.

### *Advertising Space*

The *LP News*, which is published by the party, has a substantial circulation and, as a consequence, Libertarian Party candidates and organizations, some of which are affiliated with the party, have purchased advertising space in the newspaper. These organizations include for-profit corporations, political committees, and organizations qualified under 26 U.S.C. 501(c) or 527. You state that the advertising is sold on an arms-length basis at a fair market rate. You enclose a sample issue (September 2001) that includes advertisements for the sale of goods and services, political candidates, ballot initiatives, and other causes.

### *Trademarks*

The LNC owns the trademarks Libertarian Party® and Party of Principle®. From time to time, the LNC has granted limited licenses to use the trademarks to t-shirt vendors and other manufacturers of campaign items, for consideration. The LNC desires to continue and expand this practice, offering licenses on an arms-length, fair market rate basis as a business transaction. (You state that the LNC has licensed its trademarks less than a dozen times over the past ten years.) You state that much of your description of the development and uses of your mailing list applies also to the trademarks. You assert that the trademarks were developed for the LNC’s political campaign activities and “are used primarily and substantially” for those activities, and that the licensing activities “are merely incidental to the uses for political purposes.”

The LNC asserts that its temporary cessation of renting its mailing list and selling advertising space in the *LP News* to corporate advertisers, pending the issuance of this opinion, “has already resulted in a material loss of revenues to the LNC, and hampered its abilities to engage in political activities.”

### *Question Presented*

The LNC asks the Commission to conclude that the receipts from these transactions are not “contributions” or “donations,” and may be deposited in the LNC’s Federal account because

they are received in return for “goods and services” provided at customary market rates. There is also the question of whether the LNC may continue to enter into list exchange agreements with outside organizations, which you indicate has been integral to the LNC's list development efforts over the years and, if so, whether BCRA creates any new rules or restrictions on such activity. The LNC wishes to continue these activities after BCRA and proposes to report the receipts as “other federal receipts” on its reports filed with the Commission.

## *Analysis*

### *Statutory Provisions and Commission Regulations*

As indicated above, before BCRA, national party committees were able to raise and spend non-Federal funds (i.e., funds not subject to the limitations, prohibitions, and reporting requirements of the Act) from separate, non-Federal accounts. Under BCRA, however, “a national committee of a political party may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.” 2 U.S.C. 441i(a); 11 CFR 300.10(a). Under BCRA’s transition rules, the national party committee may not receive non-Federal funds after November 5, 2002, and any such funds received on or before that date - which, of course, would have been deposited in a non-Federal account - must have been used before January 1, 2003. 11 CFR 300.12(a).

### *Application to lists*

Whether the LNC may lease the list to others for payment depends upon the nature of the list development and use, and on the nature of the lease transaction. The LNC’s mailing list appears to have been developed by the LNC over a period of time, and does not constitute merely a list or lists that were purchased from other sources. The list was developed primarily for the LNC’s use for its own political or campaign purposes, and not for sale or lease of the names on the list to others. The Commission notes that the lease of the list by the LNC was only a small percentage of the overall use of the list by the LNC.

Under the factual circumstances described above, the LNC may lease its mailing list to any person, including political committees under the Act, Section 527 political organizations that are not political committees under the Act (such as state and local candidate campaign organizations, PACs, and party organizations), organizations qualified under 26 U.S.C. 501(c)(3) and (c)(4), non-profit groups, for-profit corporations, and labor organizations, without a contribution resulting if the following conditions are met. First, the list, or the leased portion thereof, must have an ascertainable fair market value. Second, the list must be leased at the usual and normal charge in a bona fide, arm’s length transaction, and the list must be used in a commercially reasonable manner consistent with such an arms-length agreement.<sup>3</sup>

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<sup>3</sup> For example, ordinarily the person using the list would be expected to use the list within a reasonable period of time and in the ordinary course of the lessee's business or operation.

Under the facts and conditions described above, the Commission would not view list rental payments to be a "contribution, donation, or transfer of any funds or any other thing of value...subject to the limitations [and] prohibitions . . . of [the] Act." Accordingly, such payments would not be subject to the Act's contribution limits and may come from sources that are prohibited from making contributions to the LNC, including for-profit corporations and labor organizations. The rental payments would be considered to be Federal funds usable by the LNC for federal election purposes and for any other purpose permitted under the Act and the Commission's regulations. They are to be reported in the category of "Other Receipts."

Likewise, the LNC may exchange its mailing lists or portions of its mailing lists of equal value with any outside organization, including political committees under the Act, Section 527 organizations (including state and local campaign, PAC, and party organizations), 501(c)(3) and (c)(4) groups, non-profit and for-profit corporations, and labor organizations, provided that the lists or the portions of the lists that are exchanged are of equal value. When such exchanges of equal value occur, which are non-reportable events under the Act, no "contribution, donation, or transfer of funds or any other thing of value" takes place under 2 U.S.C 441i(a), 11 CFR 300.10(a), or any other provision of the Act or the Commission's regulations.

#### *Application to advertising and trademarks*

Unlike lists, for which a broad and open market exists and for which a fair market value may usually be ascertained, the Commission finds the fair-market value of the proposed sale of advertising space in the LP News and the licensing of Libertarian party trademarks to be difficult if not impossible to determine at this time. In addition, the sale of advertising space in a political committee's newsletter is inherently susceptible to use for political fundraising rather than commercial purposes. Thus, with the exceptions discussed below, a payment for either advertising space or trademark licensing would be treated as a contribution in its full amount and subject to the limitations (by itself or when aggregated with other such payments and with other contributions) and prohibitions of the Act. *See* 2 U.S.C. 441a(a)(1)(B) and (2)(B), 441b, 441c, 441e, and 441f.

#### *Exceptions*

A principal campaign committee of a Federal candidate ("PCC") may purchase advertising space in the LP News and may acquire a limited trademark license from the LNC without making a contribution to the LNC. Under 2 U.S.C. 439a(a)(4) and 11 CFR 113.2(c), funds of a PCC may be transferred without limit to a national, State, or local committee of a political party. In view of the ability of a PCC to make unlimited transfers to the LNC, the Commission views a payment by a PCC in the context of one of the transactions covered by this opinion to be a transfer permitted under 2 U.S.C. 439a. If the PCC pays less than the usual and normal charge, however, for such an item, the difference between the amount paid and the usual and normal charge would be a contribution by the LNC to the PCC and subject to the per election limit at 2 U.S.C. 441a(a)(2)(A), or to the limit at 2 U.S.C. 441a(h) with respect to a Senate candidate. *See* 11 CFR 100.52(d).

Subject to certain restrictions, transfers of Federal funds unlimited in amount are permitted between a national party committee and a State party committee, and/or any subordinate party committee. 2 USC 441a(a)(4); 11 CFR 102.6(a)(1)(ii). A purchase of an advertisement or trademark license by a State, or subordinate Libertarian Party committee may be categorized as a transfer, and the amount of the payments themselves would not be subject to the Act's limits. Nonetheless, the funds making up the transfer are subject to the limitations, prohibitions, and (if applicable) reporting requirements of the Act. 2 U.S.C. 441i(a); 11 CFR 300.10(a).

The Commission expresses no opinion regarding any tax ramifications of the proposed activities because those issues are not within its jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this opinion, then the requester may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Ellen L. Weintraub  
Chair

Enclosures (AOs 2001-13 and 1975-129)